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PERSPECTIVE

Court to weigh CGL ‘occurrences’ and third-party claims

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Over a year after the 9th U.S. Circuit Court of Appeals certified its question to the California Supreme Court, oral argument has finally been set in *Liberty Surplus Insurance Co. Ledesma and Meyer Construction Co., Inc.*, 834 F. 3d 998 (9th Cir. 2016). The hearing is scheduled for March 6.

Back in August 2016, the 9th Circuit certified the following question to the state high court: whether there is an “occurrence” under an employer’s commercial general liability policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party.

In 2002, Ledesma and Meyer (L&M) entered into a contract to perform construction work at Cesar Chavez Middle School. In 2010, a student sued L&M, Darold Hecht, L&M’s assistant superintendent for the project, L&M’s principals and the school district for negligence and negligent hiring/ retention and supervision, among other claims. The lawsuit arose out of allegations that Hecht committed sexual acts on a 13-year-old student at the school.

During the relevant time period, Liberty Surplus Insurance Co. issued L&M a commercial general liability policy providing coverage for “bodily injury” caused by an “occurrence.” “Occurrence” was defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

Relying on cases such as *Foremost Insurance Co. Eanes*, 134 Cal. App. 3d 566 (1982), *Merced Mutual Insurance Co. Mendez*, 213 Cal. App. 3d 31 (1989), and *Delgado Interinsurance Exchange of the Automobile Club of Southern California*, 47 Cal. 4th 302 (2009), the U.S. District Court for the Central District of California granted summary judgment in Liberty’s favor. The district court held that L&M’s negligent hiring, retention and supervision of Hecht was too attenuated from Hecht’s injury- causing conduct to constitute an “occurrence.”

With no fewer than a half dozen amicus curiae briefs filed, and with oral arguments still pending, it is difficult to predict the outcome in *Liberty*.

Taken up on appeal, the 9th Circuit eventually certified its question to the state Supreme Court. In doing so, it recognized a deep division in California’s federal court districts on this matter. For example, in *Fireman’s Fund Insurance Co. National Bank for Cooperatives*, the district court found liability under a policy that provided coverage for damages resulting from an “occurrence” where the plaintiff asserted a claim of negligent supervision of employees that made false and misleading statements. 849 F. Supp. 1347, 1367-68 (N. D. Cal. 1994). Similarly, negligent supervision may have constituted an “occurrence” under the insurance policy at issue in *Westfield Insurance Co. TWT, Inc.*, 723 F. Supp. 492, 495 (N. D. Cal. 1989).

On the other hand, the Central District was “inclined to find” that the insured’s negligent supervision of her husband, who sexually battered a child while attending the insured’s home day care, did not qualify as an “occurrence” in *Farmer ex rel. Hansen Allstate Insurance Co.*, 311 F. Supp. 2d 884, 893 (C. D. Cal. 2004). The Hansen court, however, declined to rule on this issue “because other provisions of the [policy] unequivocally preclude coverage.”

Perhaps most similarly, in *American Empire Surplus Lines Insurance Co. Bay Area Cab Lease, Inc.*, the Northern District found that the negligent hiring of a cab driver who sexually molested a child was not an “accident” under an owner’s landlord’s and tenant’s liability policy. 756 F. Supp. 1287, 1290 (N. D. Cal. 1991). The district court reasoned that hiring the cab driver “merely created the potential for injury … but was not itself the cause of the injury.” The *Bay Area* court reiterated that: “Courts have consistently drawn a distinction between the immediate circumstances which inflict bodily injury and the antecedent negligence which sets in motion a chain of events leading to that injury.”

Given the inconsistency in the lower court rulings, insurers and insureds alike seek certainty on the scope of insurance coverage that they have purchased for this type of claim. The California Supreme Court, however, now has the opportunity to provide some guidance.

On “request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory or commonwealth,” California Rules of Court Rule 8.548(a) authorizes the state Supreme Court to decide a question of California law if: (1) “[t]he decision could determine the outcome of a matter pending in the requesting court”; and (2) [t] here is no controlling precedent.”

Certification is rare, given the very narrow circumstances under which it can be requested and granted. This reflects the Supreme Court’s primary focus, which is to decide important legal questions, clarify public policy issues, and maintain state wide harmony and uniformity of decision (rather than to correct errors by the Court of Appeal in a particular case).

Though uncommon, the California Supreme Court agreed in 2010 to answer a different question of insurance law in *Minkler Safeco Insurance Co. of America*, perhaps reflecting the general thorniness (and public policy impact) of such coverage-related disputes. There, the Supreme Court held that an exclusion barring coverage for intentional acts did not bar coverage for negligently failing to prevent another insured’s intentional acts where insurance applied “separately to each insured.” 49 Cal. 4th 315, 319 (2010).

With no fewer than a half dozen amicus curiae briefs filed, and with oral arguments still pending, it is difficult to predict the outcome in *Liberty*. If the Supreme Court agrees with the Central District that there was no “occurrence,” then how insurance policies are written will largely remain the same. However, even if it decides that coverage exists, the ramifications will likely be short-lived. While there may initially be a flood of new claims for coverage, insurers will simply rewrite policies to specifically exclude coverage, or include the “new” coverage by endorsement for additional premium.

Regardless of what the California Supreme Court decides, the state’s lower and federal courts, along with insurers and consumers alike, will welcome whatever certainty and guidance the state’s highest court can provide.

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