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The Timeless Question of "How many occurrences?"

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Port Consol., Inc. v. Int'l Ins. Co. of Hannover, PLC, 826 F. App'x 822 (11th Cir. Sept. 8, 2020).

In *Port Consolidated, Inc. v. International Insurance Co. of Hannover, PLC, 826 F. App'x 822* (11th Cir. Sept. 8, 2020), the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's holding that no insurance coverage was available to the insured because none of the multiple occurrences of gasoline theft exceeded the per occurrence deductible, nor could those thefts be considered one occurrence to exceed the per occurrence deductible. In *Port Consolidated* the insured fuel distribution company made a coding error that incorrectly programmed its gasoline pumps to allow gasoline to be dispensed in excess of a trucking company customer's card limit of 75 gallons, with the excess amount not being billed to the trucking company. Word got around, and the drivers of the company took advantage of the insured's mistake to steal gasoline over the course of a year. The insured billed the trucking company for the excess fuel, and it refused to pay. The insured then sought coverage from its insurer, International Insurance Company of Hannover, PLC ("Hannover").

At issue was whether there was a single occurrence relating to the coding error or whether there were multiple occurrences related to each theft of gasoline by a driver under the property coverage of the Hannover policy. The policy did not define "occurrence" in its general definitions, but rather, defined the term in three supplemental coverages: "Terminal Access Card," "Money and Securities," and "Employee Dishonesty." For example, the "Terminal Access Card" coverage defined "occurrence" as "an unauthorized use or series of related unauthorized uses involving one or more persons."

Relying upon the holding in the Florida Supreme Court's decision in *Koikos v. Travelers Insurance Co., 849 So.2d 263* (Fla. 2003), the district court found that "absent contrary language in the policy, each act of fuel theft was a discrete occurrence for insurance purposes." 826 F. App'x at 825. (In *Koikos* in the context of a negligent security claim, the court had held that each shooting of a separate victim in a confrontation at a private event at a restaurant was a separate occurrence, resulting in two per occurrence policy limits being triggered.) Noting that it was undisputed that

the Port's losses from each individual act of theft did not exceed the policy's deductible, the district court found that Hannover was not required to cover the insured's losses and granted summary judgment in favor of Hannover on Port's breach of contract claim. *Id.* Port appealed.

On appeal, the Eleventh Circuit gave the undefined term "occurrence" its plain and ordinary meaning. The court relied upon the "cause theory" discussed in *Koikos*, which looks to the cause of an injury in determining the number of occurrences under an insurance policy. In *Koikos*, the Florida Supreme Court concluded that consistent with the cause theory, in the absence of clear language to the contrary, "occurrence" is defined by the immediate injury-producing act.

Applying those standards, the Eleventh Circuit viewed each of the alleged fuel thefts by drivers from different fuel dispensers on different days over the course of a year as the "immediate injury producing acts." Since each alleged fuel theft was an act separate and distinct in time and space, the court found that each such act constituted a separate occurrence under the policy. In so holding, the Eleventh Circuit rejected an argument that the definitions of occurrence in the supplemental coverages should apply to the policy generally, or that those definitions created an ambiguity in the meaning of "occurrence." As a result, the insured did not meet the $1,000 deductible as required in the policy, and there was no coverage.

EOTT Energy Corp. v. Storebrand Int'l Ins. Co., 52 Cal. Rptr. 2d 894 (Cal. Ct. App. 1996).

A different result was found in *EOTT Energy Corp. v. Storebrand International Insurance Co., 52 Cal. Rptr. 2d 894* (Cal. Ct. App. 1996). *EOTT* involved the issue of whether several hundred thefts of petroleum products were one "occurrence" or separate occurrences. As in *Port Consolidated,* if the court found that there was one occurrence, then the insured would be covered in excess of the deductible. If, however, the court found that there were multiple occurrences, then there would be no coverage for each occurrence that did not exceed the deductible.

In *EOTT*, the insured, EOTT Energy Corporation, suffered a $1.5 million loss as a result of 653 thefts of the petroleum products it marketed. Specifically, drivers after pumping a partial truckload of fuel, would disable or disengage the meter, fill the truck, then re-enable or reengage the meter. EOTT's insurer, Storebrand International Insurance, denied coverage on the basis that the loss was not covered under the policy when the value of the property taken in any single theft did not exceed the $100,000 deductible under the policy. The insurer contended that the term "occurrence" had a clear and explicit meaning. Specifically, Storebrand relied on Webster's Dictionary and Black's Law Dictionary to argue that the term's plain meaning was "incident" or "event," and that, as a result, the 673 thefts were separate occurrences. The trial court agreed and found the term "occurrence" to be unambiguous and applied its plain meaning. Viewing the 653 thefts by different individuals at different times, the trial court held that Storebrand was not liable because no single theft loss exceeded the $100,000 per claim deductible applicable to each "occurrence." EOTT appealed.

California's appellate court reached the opposite conclusion. The court relied upon the policy language, which provided that "all claims for loss, damage, or expense arising out of any one occurrence . . . shall be adjusted as one claim . . . ." *Id. at 896*.

The court, in interpreting the party's intentions at the time the policy was drafted, found that in the context of the policy's promise to insure against all risks of loss occurring during the policy period, the term occurrence could reasonably embrace more than one discrete event. The court also cited the umbrella liability portion of Storebrand's policy which defined "occurrence" as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. *All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence." Id.* at 896 n.3 (emphasis in original).

In concluding that there may have been one occurrence, the court relied on *PECO Energy Co. v. Boden, 64 F.3d 852* (3d Cir. 1995). In *PECO Energy*, the court found that thefts by one trucking company over a period of six years constituted a single occurrence. The Third Circuit affirmed the jury's finding that each theft was a part of a larger scheme to steal PECO's products and that the scheme to steal was the proximate cause of each theft. The court concluded that when a scheme to steal property is the proximate and continuing cause of a series or combination of thefts, the losses for liability insurance purposes constitute a single occurrence.

Accordingly, the court remanded the case, stating: "If EOTT can establish that its loss resulted from the operation of such a scheme, then Storebrand can only assert a single deductible and thus would not be absolved of liability." *Id.* at 902.

Reconciling *Port Consolidated* and *EOTT*

Both *Port Consolidated* and *EOTT* used the "cause test" or "cause theory" to determine the number of occurrences. So what distinguishes *EOTT* from *Port Consolidated*? It appears that the "single conspiracy" theory relied upon by the *EOTT* court was the determining factor between finding coverage and denying coverage. But *Port Consolidated* involved no scheme or conspiracy on the part of the drivers to steal fuel. In concluding that the acts of the drivers were separate occurrences, the *Port Consolidated* court focused on that fact that the fuel thefts were committed by several drivers from different fuel dispensers on different days over the course of a year. Thus, separate thefts are likely to constitute separate occurrences, unless they are committed as part of an organized and systematic scheme to steal, whereby they are likely to constitute one occurrence subject to one deductible.

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