

## No Occurrence When Insured's Deliberate Act Results in Highly Probable Injury

### *Insurance Law Update*

December 2011

By: **Tonya Hunt**

### *U.S. Court of Appeals for the Fifth Circuit*

In *National Union Fire Ins. Co. of Pittsburgh PA v. Puget Plastics Corp.*, 2011 WL 5984751 (5th Cir. (Tex.) Nov. 28, 2011), the U.S. Court of Appeals for the Fifth Circuit, applying an objective standard, held that there was no "occurrence" under a commercial umbrella liability policy when an insured's deliberate actions were "highly probable" to result in the damages alleged.

The insured, Puget Plastics, manufactured 5,000 plastic water chambers for use in another manufacturer's tankless water heaters. The plastic was made by DuPont. About 800 of the plastic water chambers ruptured due to Puget Plastic's knowing disregard of DuPont's recommended temperature guidelines for the plastic. The tankless water heater manufacturer prevailed against Puget Plastics in an underlying action alleging violations of the Texas Deceptive Trade Practices Act (DTPA). Puget Plastics sought coverage for the damages under its commercial umbrella liability policy issued by National Union. National Union denied coverage on the grounds that there was no occurrence because the jury in the underlying action found that Puget had knowingly violated the DTPA by molding the water chambers at a lower melt temperature than that recommended by DuPont. A coverage action ensued.

In an earlier interlocutory appeal in the coverage action, the Fifth Circuit held that the Puget Plastics' DTPA violation, although it involved the finding of a deliberate act, did not determine whether the event was an occurrence under National Union's policy. The Fifth Circuit ruled that a deliberate act is not an occurrence under an insurance policy if: (1) the resulting injury was highly probable, (2) the insured intended or expected the resulting injury, or (3) the insured committed an intentional tort.

Using the Fifth Circuit's test, the District Court stated that whether an injury was "highly probable" must be objectively determined. The District Court then held that a reasonable plastic molder would have known that it was highly probable that molding plastic at a temperature lower than recommended by the maker of the plastic would result in damage to the tankless water heaters in which the plastic was incorporated. As such, the District Court concluded that there was no "occurrence" under the National Union policy.

The Fifth Circuit affirmed. The court agreed that the use of an objective standard was proper for determining whether the alleged resulting injury was a "highly probable" result of Puget Plastic's deliberate disregard of DuPont's temperature recommendations, and that, therefore, there was no occurrence under National Union's policy.

## **Related Practices:**

[Insurance Practices](#)