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Insurance Update

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Sixth Circuit Finds Peanut Butter Recall Across 225 Production Lots Was One Occurrence

J.M. Smucker Co. recalled peanut butter from a Kentucky facility in 2022 due to salmonella contamination. Thousands of consumer claims for bodily injury and property damage followed the recall.

Smucker was insured by ACE. The ACE insurance policies had a $250,000 retained limit per occurrence. The policies defined an "occurrence" as an "accident including continuous exposure to substantially same general harmful conditions." The policy also had a Lot Endorsement stating that any damage that "arises out of any one 'lot'" of "your product" is a single occurrence. The endorsement further stated that such "occurrence" is deemed to occur when the damage occurs for the first claim arising from such "lot."

ACE claimed there were 225 separate occurrences based on the number of production lots involved, thus requiring Smucker to pay $112.5 million in retained limits. Smucker disagreed and filed a complaint in Ohio federal district court for breach of contract. The district court granted Smucker's motion, reasoning that salmonella contamination was the lone occurrence and that the Lot Endorsement was ambiguous.

The Sixth Circuit affirmed. Applying Ohio law, the court reasoned that the only identifiable accident was the alleged salmonella outbreak that led to the production of potentially contaminated peanut butter. The court added that, under Ohio law, the accident is viewed from the insured's perspective. The relevant accident was the event that contaminated the peanut butter, not the claimants' consumption of the peanut butter. This result was also consistent with Ohio law, which focuses on the cause of the contamination, not the effects.

The court found the Lot Endorsement to be ambiguous and thus interpreted the language in favor of the insured. According to the court, the Endorsement was unclear as to whether it was supposed to refine the term "occurrence." The Endorsement could be read, as Smucker argued, to suggest that multiple injuries caused by the same condition within one lot are one occurrence. Or it could be read to suggest, as ACE argued, that injuries caused by the same condition are aggregated on a per-lot basis when there are multiple defective lots. Given the ambiguity, the court construed it in favor of coverage and found a single occurrence. Smucker had to pay only one SIR.

The case is *J.M. Smucker Co. v. Ace Am. Ins. Co.*, No. 25-3799 (6th Cir. July 1, 2026).

Arizona Federal Court Applies Bacterial Exclusion to Legionnaire's Claim at Health Club

Karen Hebert was a member of Chuze Fitness, a health club and fitness center. She was diagnosed with Legionnaires' Disease and claimed that she got it from the water system at Chuze Fitness.

Hebert and Chuze Fitness entered into an Agreement and Covenant Not to Execute that resolved her claim against Chuze Fitness for $3.5 million. Hebert then brought a declaratory judgment suit against Chuze Fitness's insurer, American Zurich Insurance Company, in Arizona federal district court.

The American Zurich policy contained a bacteria or fungi exclusion that barred coverage for "[b]odily injury' . . . caused directly or indirectly by the actual, alleged or threatened inhalation of, ingestion of, contact with, [or] exposure to" any "bacteria." The exclusion further expressly applied to all diseases contracted by contact with . . . 'bacteria' in water, water vapor or water droplets, including but not limited to Legionnaire's Disease."

Finding that the fungi or bacteria exclusion unambiguously precluded coverage, the magistrate judge recommended that the suit be dismissed. The court rejected Hebert's argument that the real cause of her injury was Chuze Fitness's negligence rather than the bacteria. The exclusion barred coverage for bodily injury "caused directly or indirectly" by contact with bacteria. Thus, the bacteria did not have to be the sole cause of the injury. Chuze Fitness's negligence may have been the reason for the bacteria's presence, but that did not change the fact that Hebert's disease was caused by her contact with bacteria.

The exclusion had an exception for bacteria in edible form. The exception, however, did not apply to "water, water vapor or water droplets." Hebert argued that American Zurich could not assert the qualification because it failed to include this language in its disclaimer. The court disagreed. There was no evidence that Chuze Fitness acted or refrained from acting in reliance on the "water" omission. Nor was the omission material. American Zurich did not mislead Chuze Fitness into believing there was coverage; it disclaimed coverage. American Zurich was therefore not estopped from asserting the qualifying language.

Nor could the insured say that these inaccurate statements created a reasonable expectation of coverage. The reasonable expectations doctrine only applies to events at the time coverage is purchased, not after. And, again, American Zurich never hinted that coverage existed.

Finally, the court found that the exception didn't apply for another foundational reason: water in a sauna, hot tub, or swimming pool is not commonly understood to be fit to be eaten and thus was not "edible."

The case is *Hebert v. Am. Zurich Ins.* Co., No. CV-25-00557-TUC-AMM (D. Ariz July 6, 2026).

North Carolina Court Finds No Coverage for Opioid Settlement Because Insured Was Not Legally Obligated to Pay Damages

Harris Teeter is a grocery store chain that operates more than 250 stores in North Carolina and surrounding states. Many of its stores have retail pharmacies that dispense prescription opioids.

Harris Teeter is subsidiary of Kroger Co., having been acquired in 2014. Since 2017, more than 800 opioid suits have been brought against Kroger and some of its subsidiaries. Most of the opioid suits were brought by governmental entities for public nuisance. They assert that Kroger and its subsidiaries oversupplied prescription opioids and failed to maintain effective procedures to prevent opioids from being diverted. Many of these suits were consolidated in a multidistrict litigation in Ohio federal court.

Harris Teeter was named in only one of these suits, a lawsuit filed by Durham County, North Carolina in 2021. Durham County sought damages for economic losses resulting from Harris Teeter's dispensing of prescription opioids but expressly stated that it did not seek damages for personal injury, death, or physical injury to property.

In December 2024, Kroger entered into a global settlement with participating governmental entities. Harris Teeter was included as one of the entities released from liability. Kroger was required to make eleven annual payments into a settlement fund. So far, Kroger has made two payments. Harris Teeter has not paid into the fund.

After the agreement in principle, Kroger considered the appropriate allocation of the global settlement liability to Harris Teeter and another subsidiary based on their percentage of opioids dispensed by Kroger entities in locations where they sold opioids. This allocation was not made under any requirement in the global settlement but rather as part of Kroger's own practice, as the parent company, of allocating settlement liability to its subsidiaries.

Harris Teeter sought coverage from its commercial general liability insurers who issued policies to Harris Teeter from 1995 to 2014. The insurers contested coverage. Harris Teeter sued them in North Carolina state court.

The insurers argued that Harris Teeter was not entitled to coverage because it was sued in only one case, and that action was dismissed as part of the global settlement without any legal liability imposed on Harris Teeter. The insurers contended that the global settlement agreement imposed payment obligations on Kroger alone and that Harris Teeter had no legal obligation to pay damages.

Harris Teeter argued that even though Kroger transmitted the global settlement payments from a centralized treasury fund, such payments were still made in satisfaction of Haris Teeter's legal obligation to pay damages for its alleged opioid-related tort liability.

The court considered the ordinary meaning of the phrase "legally obligated to pay" in the context of the CGL policies. Based on North Carolina precedent, the court determined that "legally obligated to pay" requires that a third party have a cause of action and a remedy that can be reduced to a judgment. As an insurance company's liability is derivative, its liability depends on whether its insured is liable to the plaintiff.

Applying these principles, the court agreed with the insurers. The global settlement did not bind Harris Teeter to pay any portion of the settlement amount. And once the settlement was executed, Harris Teeter no longer had any binding legal or contractual obligation to pay damages to the governmental plaintiffs. The court thus concluded that Harris Teeter was not "legally obligated to pay" any damages under the global settlement agreement. Any obligation that the insurers might have had to indemnify Harris Teeter has been extinguished.

The insurers also argued that there was no coverage for the public nuisance suits because the governmental plaintiffs did not seek damages because of bodily injury. But the court never reached this argument because the first issue was dispositive. The court awarded the insurers summary judgment.

The case is *Harris Teeter Supermarkets, Inc. v. Ace Am. Ins. Co.*, No. 22CVS005279-330 (N.C. Super. Ct. July 24, 2026).

Missouri Appellate Court Holds That Unbranded Marketing of Opioids Falls within Products Liability Exclusion

Mallinckrodt and its affiliates were sued in over 3,000 lawsuits by local governments and others alleging harm caused by opioids. Plaintiffs claimed that Mallinckrodt engaged in unbranded marketing—

promoting opioid products generally without directly associating their brand name with it—to increase sales of its products.

The plaintiffs alleged that unbranded marketing was designed to understate the risk of opioid use, encourage the overprescribing of opioids, and increase the use of opioids. Plaintiffs allege that Mallinckrodt strategically used physicians, professional societies, publications, targeted communications by sales representatives, and patient advocacy groups to disseminate misinformation about the risk of opioid addiction, safety of opioids to treat chronic pain, and appropriate dosage information, and to avoid the regulations on branded marketing enforced by the Food and Drug Administration.

Mallinckrodt filed for bankruptcy and a trust was created to administer the settlement for opioid claims. Mallinckrodt assigned its insurance rights to the Trust, who then sued Mallinckrodt's primary and excess liability insurers in Missouri state court for a declaration of coverage.

The suit centered on the products-completed operations hazard exclusion (PCOH Exclusion). Under the PCOH Exclusion, coverage is excluded for claims of "'bodily injury' ... occurring away from premises you own or rent and arising out of 'your product.'" The policies defined "your product" to include "[a]ny goods or products ... manufactured, sold, handled, distributed or disposed of by you ... and [w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product'; and [t]he providing of or failure to provide warnings or instructions."

The Trust argued that the PCOH Exclusion did not apply because bodily injury did not arise out of Mallinckrodt's specific products.

The insurers, on the other hand, contended that the contractual definition of the term "your product" is not limited to statements regarding the Mallinckrodt's branded products. It unambiguously includes warranties and representations, as well as a failure to provide warnings or instructions about opioids generally.

The Missouri Court of Appeals agreed with the insurers. It rejected the Trust's argument that the PCOH Exclusion applied only to Mallinckrodt's branded products, representations, or warranties. The court reasoned that the bodily injuries suffered by the victims of the opioid crisis allegedly arose out of, flowed from, or had its origins in Mallinckrodt intentionally orchestrating a fundamental shift in the medical community's and public's understanding of opioids. As this presented an issue of first impression under Missouri law, the court looked to cases in other jurisdictions. It noted that those courts found a sufficient causal connection between unbranded marketing statements and the bodily injuries pled in the underlying opioid lawsuits. This was so, even though the unbranded marketing did not specifically mention the insured's products.

The Missouri Court of Appeals thus affirmed summary judgment for the insurers.

The case is *Opioid Master Disbursement Trust II v. Ace Am. Ins. Co.,* No. ED113635 (Mo. Ct. App. July 21, 2026).

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