Is an Occurrence the Bodily Injury or Property Damage?

December 2011

Several national insurers have included wording in their excess liability policy forms making clear that no payment will be made if the limits of the underlying policies are exhausted by payment of losses arising out of *occurrences* that took place *before* or *after* the policy period. For coverage to apply, the underlying limits must be exhausted by payment of losses arising solely out of *occurrences* that first take place during the excess insurers' policy period.

by Craig F. Stanovich
Austin & Stanovich Risk Managers, LLC

These excess liability policies fail to define "occurrences," but the insurers generally insist that their excess policies follow the terms and conditions of the underlying policies—except when they don't.

"Occurrence" in the underlying commercial general liability (CGL) policies has its usual meaning "… an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Of course, the CGL policy is not triggered when the "occurrence" takes place but rather when the bodily injury or property damage *caused by* the "occurrence" takes place. Stated differently, *when* the "occurrence" takes place is entirely irrelevant to the CGL coverage trigger. There simply is no mention in the CGL insuring agreement as to timing of the "occurrence," only the timing of the bodily injury or property damage.

The presupposition is clear—the occurrence and the resulting bodily injury or property damage *are one and the same*—and are thus indivisible. This view is at times held so strongly that any attempt to point out the distinction between the occurrence and its result is often met with utter disbelief—never heard such a thing (which means it can't be true), and the challenge is this—show me one instance in which the occurrence was *not* the bodily injury or property damage!

Limits and Deductibles

Despite such convictions, it is undeniable that the *same definition* of "occurrence" is also used to govern how the limits and deductibles apply in the CGL policy. For example, Section III—Limits of Insurance, in pertinent part states:

> … the Each Occurrence Limit is the most we will pay for the sum of: Damages ... because of "bodily injury" or "property damage" arising out of one "occurrence."

If the occurrence and the resulting bodily injury or property damage were *indivisible* as assumed, then each person who is injured or every incidence of property damage *would at all times be considered a separate occurrence*. This is simply not the case.

While this may be a desirable conclusion if the question is related to the policy limit, the opposite may be true if the issue is how a "per occurrence" deductible would apply.

The Bad Gas Example

The local filling station has a problem—it has inadvertently deposited the diesel fuel in the underground gasoline storage tank and the gasoline in the underground diesel fuel tank. Several motorists purchase motor fuel and direct the attendant to pump (unknown to both the attendant and motorist) the wrong motor fuel into their vehicles and attempt to drive away, only to find out that the motor fuel has damaged their engines, requiring, on the average, about $800 in repair work.

Before the problem is discovered and corrected, two dozen motorists have damaged their engines because of the mistake by the filling station. Each motorist makes a claim against the filling station for property damage ($800 per motorist or $19,600 in total damages) to their respective vehicles.

The filling station is subject to a $1,000 per occurrence property damage deductible on its CGL policy. The insurer, consistent with the notion that an incidence of property damage is the occurrence, deems each motorist's property damage to be a separate occurrence, leaving the filling station to pay more than $19,000 for the damages instead of the filling station paying one $1,000 deductible, with the balance of the damages (more than $18,000) paid by the insurer. Is the insurer correct?

Cause or Effect Approach

In most (but by no means all) instances, the insurer would not be correct. The property damage to the motorists' vehicles would be considered one occurrence, despite the fact that, in this example, there were two dozen separate incidents of property damage.

> In general, courts nationally have adopted two approaches for determining number of occurrences. Under the "effect" test, number of occurrences is determined by examining the effect that an event had, i.e., how many individual claims or injuries resulted from it. Conversely, under the "cause" test, number of occurrences is determined by examining the cause or causes of the damage. The "cause" test is the majority rule nationwide.[1]

In the above "Bad Gas" example, the "cause" test would likely focus on the *underlying* cause—the motor fuels being placed into the wrong underground storage tanks. That cause is the "occurrence"; the resulting property damage to each motorist's vehicle is not the "occurrence." The majority of courts, however, appear to answer this question based on the "underlying cause" of the property damage alleged. Under this majority approach,

> the calculation of the number of occurrences must focus on the underlying circumstances which resulted in the personal injury and claims for damage rather than each individual claimant's injury.
>
> *Addison Ins. Co. v. Fay*, 905 N.E.2d 747 (Ill. 2009)

Even in the situations where the courts have found multiple occurrences, such as in a recent New York Court of Appeals case, *Appalachian Ins. Co. v. General Elec. Co.*, 863 N.E.2d 994 (N.Y. 2007), the focus is still on the event causing liability. New York and the majority of other courts fix the "occurrence" by looking to the injury-causing event that allegedly establishes liability—in other words, the conduct of the policyholder.

Whether the jurisdiction adopts a "cause" or "effect" test (or something in between), the critical issue is that courts generally consider the "occurrence" to be the *event or cause* that resulted in the bodily injury or property damage.

> The effect theory, as its name implies, determines the number of accidents or occurrences by looking at the effect *an event* had, i.e., how many individual claims or injuries resulted from it. Under the cause theory, on the other hand, the number of occurrences is determined by referring to the *cause or causes* of the damages.
>
> *Nicor v. Associated Elec. & Gas Ins. Servs. Ltd.*, 860 N.E.2d 280 (Ill. 2006) [Emphasis added.]

This is true even if the "occurrence" is deemed to be either the "immediate" injury-producing act (in our example, the attendant pumping the wrong motor fuel into each motorist's vehicle) or the act that "gave rise" to the liability (in our example, the underlying cause—the filling station putting the diesel fuel into the gasoline underground storage tank and vice versa); the court is still focusing on the *actions* that caused the bodily injury or property damage.

> Therefore, the court concluded that Baumhammers' independent acts of shooting each of his victims constituted the immediate injury-producing act and that the alleged negligence of Parents resulted in six distinct attacks on six individuals. We disagree with the application of the cause approach adopted by the Superior Court in the instant case and the Florida court in *Koikos*, and conclude instead that to determine the number of "occurrences" for which an insurance company is to provide coverage, the more appropriate application of the cause approach is to focus on the act of the insured that gave rise to their liability.
>
> *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 298 (Pa. 2007)

At least one court, *RLI Ins. Co. v. Simon's Rock Early Coll.*, 765 N.E.2d 247 (Mass. App. Ct. 2002), has concluded that it is the negligence of the insured that constitutes the "occurrence" for the purposes of determining coverage under the CGL policy.

When reviewing the meaning of "occurrence" in a broader context—that is, the number of occurrences when applied to limits or deductibles—it becomes abundantly clear that the "occurrence" is not considered synonymous with the resulting bodily injury or property damage.

Implications for Timing

If the "occurrence" is the injury-producing act, the underlying circumstances giving rise to the liability, the negligence of the insured, or the event that results in individual claims, it follows that the "occurrence" may take place months or even years prior to the resulting bodily injury or property damage.

Consider defective products sold or otherwise placed into the stream of commerce by any business—if bodily injury or property damage results from the sale of these defective products, it may be months if not years between the "occurrence" (the sale of the defective product[2]) and the resulting bodily injury or property damage. The need for appreciating the difference between the "occurrence" and the resulting bodily injury or property damage is unmistakable.

Conclusion

Back to our excess liability insurers whose policies *expressly state* that they will have no obligation to pay if the underlying insurance is exhausted by payment of losses arising from *occurrences* taking place *before* the policy period; the excess insurers' obligation to pay arises *only if* underlying limits are exhausted by the payment of loss that arises from *occurrences* taking place *during* the excess policy period.

In light of the defective products example, if the occurrences (the sale of the defective products) take place months or years *prior* to the excess insurers' policy period—how will the excess insurers respond when the resulting bodily injury or property damage occurs *during the excess insurers' policy period* and the underlying CGL insurer fittingly pays its limit during that policy period?

By their policy wording, the excess insurers have no obligation to pay in this rather common claim scenario because payment of the losses arose out of *occurrences* that took place *prior* to the excess insurers' policy period rather than because of payment of losses arising out of occurrences taking place *during* the excess insurers' policy period.

This would undoubtedly be an unwelcome surprise to the policyholder and seems to thwart the very reason for purchasing the excess liability insurance in the first instance. But, absent a judicial finding of ambiguity in the excess insurers' liability policies wording (or other judicial construction that interprets the wording differently), the policyholder will likely be without excess liability coverage.

A simple solution would be to revise the excess insurers' policy wording to more closely match the trigger of the CGL policy. However, that would require getting past the "bodily injury or property damage *is* the occurrence" debate—an argument that ought to be taken up and resolved before, rather than after, the large liability loss in which millions of dollars are at stake.

Put another way, obtaining an excess liability insurance policy with wording that clearly grants coverage is always preferable to relying on the insurers' oral representations (contrary to the policies' wording) that the excess liability coverage completely follows the underlying insurance or hoping for the favorable result of litigation.

---

[1]Maniloff, Randy and Jeffrey Stempel. *General Liability Insurance Coverage – Key Issues in Every State.* Oxford University Press, 2010, pg. 154.

[2]"… we conclude under this policy definition that placing a defective product into the stream of commerce is one occurrence." *Owners Ins. Co. v. Salmonsen*, 622 S.E.2d 525 (S.C. 2005).

Craig F. Stanovich is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based "rent-a-risk manager" outsourcing, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com.

This article was first published on IRMI.com and is reproduced with permission. Copyright 2011, International Risk Management Institute, Inc.
http://www.irmi.com/expert/articles/2011/stanovich12-cgl-general-liability-insurance.aspx