UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

21st Annual Insurance Law Institute

November 10-11, 2016
Houston, Texas

Number of Occurrences in Construction Defect Litigation

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NUMBER OF OCCURRENCES IN CONSTRUCTION DEFECT LITIGATION

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One topic that has not received a lot of attention in Texas is the number of occurrences in construction defect litigation. At first glance, one might think this is an academic exercise for only those who have an abnormal interest in coverage. This is not true. This issue is critical for plaintiffs in construction defect litigation as well as for insureds and insurers involved in the ensuing coverage litigation. One critical aspect of construction defect litigation that affects the number of occurrences under a commercial general liability (CGL) policy is where there is continuing injury. Under Texas law, where there is a continuing injury, the insured is entitled to select a single policy period that provides the insured with the most favorable treatment based upon the per occurrence limits. If there is only one occurrence, the insured is limited to one per occurrence limit. On the other hand, if there is more than one occurrence, then the insured may be entitled to select per occurrence limits under more than one policy. A second important way in which the number of occurrences influences coverage involves the per occurrence and aggregate limits under a single policy. Most CGL policies will have a $1,000,000 per occurrence limit and a $2,000,000 aggregate limit. If there is only one occurrence, then the per occurrence limits will control. However, if there is more than one occurrence, then the aggregate limit will apply in most cases. This can be critical for both insureds and insurers alike because it can serve to limit an excess insurer's indemnity obligations by requiring a primary insurer to pay more under a single policy. A third significant area of coverage affected by the number of occurrences is the number of deductibles or self-insured retentions (SIR) that may apply. Many CGL policies for larger contracting entities will have sizable SIRs, such as $250,000, before the policy coverage applies. Typically, these SIRs are written on a per occurrence basis. In some cases, if the number of occurrences is large enough, it may shift the entire loss to the insured, with the insurer not being required to pay under its policy or policies.

This paper will examine case law in Texas and across the country as to how courts have addressed the number of occurrences issue. The paper will address the rules that have been applied by the various courts and attempt to distill those holdings into practical rules that can be used to advise one's client. It should be noted that the law in this area is not firmly crystalized, and until the Texas Supreme Court finally addresses this issue head on, there may be no hard and fast rule to be applied.

A. RULES APPLIED BY COURTS ACROSS THE UNITED STATES

Courts generally have taken three approaches to making a determination as to the number of occurrences: the "cause" test; the "effects" test; and the "unfortunate event" test. *Pennzoil-Quaker State Co. v. Am. Int'l Specialty Lines Ins. Co.*, 653 F.Supp.2d 690, 703 (S.D. Tex. 2009).

The majority of courts, including those in Texas, apply the "cause" test, under which the number of occurrences is determined by reference to the underlying cause or causes of the injury or damage, rather than by reference to the number of resulting injuries or damage claims. *Id.* at 703-04. The courts do not focus on the overarching cause, but rather focus on the event or events

that give rise to the insurer's liability under the policy. *Id.* at 704. Under the "cause" test, courts consider the cause of the insured's liability as opposed to an injury sustained by a claimant or the number of claims in determining the number of occurrences. *Id.* As we shall see later on, even in those states where the "cause" test has been adopted, there is still room for debate as to what the cause of the insured's liability is.

The "effects" test focuses on the effects of the event, in that if different parties are damaged by a series of events, the damage to each party is considered a separate occurrence. *Id.* at 704. *See also Lombard v. Sewerage & Water Bd. of New Orleans*, 284 So. 2d 905 (La. 1973); *Kuhn's of Brownsville v. Bituminous Cas. Co.*, 270 S.W.2d 358 (Tenn. 1954).

Still, a very small number of other jurisdictions apply the "unfortunate event" test, holding that the number of occurrences corresponds to the "event of unfortunate character." *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1213 (2d Cir. 1995). *See also Harleysville Worcester Ins. Co. v. Paramount Concrete, Inc.*, 10 F. Supp. 3d 252, 271 (D. Conn. 2014) (applying Connecticut law); *Arthur A. Johnson Corp. v. Indem. Ins. Co. of N. Am.*, 164 N.E.2d 704, 707 (N.Y. 1959). Typically, these cases focus on the number of occurrences for deductible purposes.

And in some jurisdictions, the courts have declined to adopt a particular test, instead opting to focus primarily on the policy language in determining the number of occurrences.

Nevertheless, whether or not a court is applying any one of the foregoing tests, the court will generally consider the type of case, the policy language, and the type of damages in analyzing the number of occurrences.

1. Texas

The seminal case applying the "cause" test under Texas law is *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.*, 447 F.2d 201 (5th Cir. 1971). However, the court in *Maurice Pincoffs* took a somewhat different approach to the "cause" test, concluding that an occurrence is determined by reference to the event triggering liability on the part of the insured. This approach has been referred to by other courts as the "liability triggering event" theory. *See, e.g.*, *Dow Chem. Co. v. Associated Indem. Corp.*, 727 F. Supp. 1524, 1528-29 (E.D. Mich. 1989). In *Maurice Pincoffs*, the insured imported contaminated bird seed and sold it to eight different dealers who, in turn, resold it to bird owners whose birds were killed. *Maurice Pincoffs Co.*, 447 F.2d at 205. The court noted that it was not the contamination of the seed that subjected the insured to liability because the insured did not contaminate the seed itself, but rather had "received the seed in a contaminated condition." *Id.* at 206. Therefore, each sale was the event that triggered the insured's liability. *See id.* The court held that:

> It is true that the damage to the birds resulted from the contamination of the bird seed. But Pincoff's liability resulted from the event of its sale of the seed. Thus, it is the sale of the contaminated seed, not the contamination, that must be compared with the collision, the fire and the running water faucet in following the precedent of the above cases.

Id. at 207.

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First appeared as part of the conference materials for the
21st Annual Insurance Law Institute session
"When One is Many: Occurrences, Insurance Towers, and Exhaustion"