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Determining the Available Insurance Coverage Limits: Number of Occurrences

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Whether dealing with auto claims, mass torts, or product liability claims, one universal constant in determining the amount of insurance coverage available is determining the applicable number of occurrences. This is true for policyholders, insurers, and third-party claimants. The factors that generally control determining the most favorable position to assert as to the number of occurrences include: (1) whether the claim or suit arises from a single event or a series of events and, if a series, how the events are related; (2) the applicable deductible; (3) the applicable limits per occurrence or per accident; (4) the applicable general aggregate limit; (5) the existence of umbrella or excess coverage; and (6) the definition of occurrence, accident, or any other terms used to define limits, if the policy contains such definitions. Performing this analysis early is key to maximizing recovery or minimizing exposure. An analysis of these issues can focus discovery as well as indicate the most logical and advantageous legal position to advocate on behalf of one's client.

Insurance policies often define applicable coverage limits in terms of an "occurrence" or an "accident," with continuous or repeated exposure to the same general harmful conditions being defined as constituting a single "occurrence" or "accident." Generally, insurance policies define an "occurrence" as an "accident"; often, the term "accident" is not itself further defined. Because the terms "occurrence" and "accident" are often defined to include one another and often discussed interchangeably by courts, we will use the term "occurrence" to generally encompass both terms for the purposes of this discussion. In any event, coverage limits are usually defined with lower "per occurrence" limits and separate, higher "general aggregate limits," which cap the total coverage available in the event of multiple occurrences. However, some insurance policies have no general aggregate limits. In other words, the per occurrence limits apply if there is one occurrence. If there are two or more occurrences, the per occurrence limit applies to each occurrence. If, for instance there are three occurrences, three per occurrence limits apply. Coverage is exhausted when the total amount incurred for all three occurrences reaches the general aggregate limit. The general aggregate limit is the ultimate ceiling on the amount of coverage available.

Deductibles also come into play. The deductible usually applies separately to each occurrence. For instance, there may be no coverage available at all for a series of small claims, none of which individually exceed the deductible, if they are all deemed to be separate occurrences. By asserting that the series of claims is a single occurrence, however, the insured might avoid the deductible but also limit coverage to the single per occurrence limit. In some instances, it might be more advantageous for an insured to assert multiple occurrences even if some may not exceed the deductible where the larger claims, if aggregated as a single occurrence, might exceed the per occurrence limits. Each factual scenario should be carefully considered by not only taking into account the current claims but also any anticipated future claims or losses. Only by considering all the factors together can the most desirable position be determined. Two illustrative examples at what might be considered opposite ends of the spectrum follow.

In a multiple car accident, there will often be more than one impact while, at the same time, all the events flow in relatively quick temporal succession, with each impact arguably being one of the causes of the next impact. Under the generally used definition of "occurrence" and facts presented, there can often be legitimate grounds for disagreement as to the number of occurrences and, thus, the available limits. Courts will look to a variety of factors to determine the number of occurrences, including: the number of separate impacts; the length of time between impacts; whether one impact flowed from another or whether each had a separate cause; whether multiple drivers/vehicles were involved; whether the accident was a chain reaction; and whether there are multiple proximate causes, i.e., whether more than one tortfeasor is liable based on each tortfeasor's independent conduct. See, e.g., *Sarrough v. Budzar*, 8th Dist. Cuyahoga No. 102422, 2015-Ohio-3674; *Miller v. Motorists Mut. Ins. Co.*, 196 Ohio App.3d 753, 2011-Ohio-6099 (11th Dist.). While none of these factors is necessarily determinative alone, taken together, they will often point toward either single or multiple occurrences.

The facts presented will often be such that the parties will be able to advocate the positions which most benefit their interests. For instance, an auto liability policy generally has no deductible and general aggregate limits which are two or three times the per occurrence limits. Thus, both the injured third-party and the insured will often think it to their advantage to argue in favor of multiple occurrences so as to maximize available coverage both to compensate the injured third-party and to protect the insured from personal liability exposure. On the other hand, it will often be most advantageous for an insurer if there is only one occurrence, because the per occurrence coverage limits would limit the insurer's potential exposure to a lower level.

The situation outlined above can, however, rapidly change depending on the deductibles, coverage limits, and number of claims involved. Where there are many claims or suits arising out of the same or similar conduct over the course of many years, there are often potential arguments supporting both single and multiple occurrences. If the claims

are small and the deductible appears to exceed them individually, it may be advantageous for the insured (or claimants) to advocate a single occurrence. In that way, the aggregated claims will exceed the deductible.

On the other hand, if the claims are large and, if aggregated, would quickly exceed the per occurrence limit, it may be advantageous to assert multiple occurrences. In that way, the insured can tap into multiple per occurrence limits and only be capped at the general aggregate limit, which is generally a multiple of the per occurrence limit. This changes, of course, when there are layers of umbrella and excess coverage available above the primary limits. In that case, a single occurrence theory may be most advantageous to a party seeking to maximize coverage by avoiding the application of multiple deductibles.

While the ultimate resolution of the issue will invariably turn on the specific facts and policy language, courts often examine the fact pattern at issue. Thus, courts will consider whether a single product or multiple products allegedly caused injury, whether claimed injuries occurred at multiple locations, whether the injuries alleged resulted from the same circumstances, and whether the decision to manufacture a certain product is considered the occurrence resulting in multiple injuries. For instance, it has been stated that the "manufacture or sale of an allegedly defective product constitutes a single occurrence, regardless of the number of injured individuals." *International Surplus Lines Ins. Co. v. Certain Underwriters & Underwriting Syndicates at Lloyd's of London*, 868 F.Supp. 917, 922 (S.D.Ohio 1994). On the other hand, in *Babcock & Wilcox Co. v. Arkwright-Bos. Mfg. Mut. Ins. Co.*, 53 F.3d 762, 768 (6th Cir.1995), quoting *Norfolk & W. Ry. v. Accident & Cas. Ins. Co.*, 796 F.Supp. 929, 937 (W.D.Va.1992), the Sixth Circuit reasoned that "a wide variety of machines in a number of different locations created a variety of sounds over the course of a number of years. Railroad employees working near these machines suffered injury to their hearing as a result of exposure to these sounds. ... While the railroad's negligence may indeed have been a cause of the injuries, calling that negligence the single occurrence out of which the claims arose is nonsensical." See *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 175 Ohio App.3d 266, 2007-Ohio-5576, ¶ 45-53 (1st Dist.). Further, if finding numerous small claims to be multiple occurrences would result in no claim ever exceeding the deductible, courts will often consider that as part of their analysis and potentially as a factor favorable to a single occurrence theory. See, e.g., *Owens-Ill., Inc. v. Aetna Cas. & Sur. Co.*, 597 F.Supp. 1515, 1525 (D.D.C.1984).

Overall, on the policyholder/claimant side, the number of occurrences is an important practical consideration, often along with the per occurrence deductible and the aggregate limits, in obtaining the maximum insurance coverage available. The same is true for insurers in advocating against providing more coverage than was agreed to or intended based on the premiums charged. Both sides can benefit from an early analysis of these issues as well as focusing on the facts and policy language that will ultimately be determinative.

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