SINGLE AND MULTIPLE OCCURRENCES: THE WHYS AND WHEREFORES

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There are occasions and causes why and wherefore in all things.

Wm. Shakespeare, *Henry V*, i, 3

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I. INTRODUCTION

Liability policies cover "occurrences" that take place during the policy period. "Occurrence" is typically defined as:

> an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Although the definition of "occurrence" includes ongoing or repeated events, comprehensive general liability ("CGL") policies do not provide much guidance for determining when one occurrence ends and another begins. If an insured faces numerous claims and has policies without aggregate limits or deductibles, a finding that claims are the result of multiple occurrences will yield much greater protection than a finding that multiple claims flow from a single occurrence. On the other hand, the insured that has policies with large deductibles or retrospective premium agreements may receive greater protection if multiple claims are found to be the result of a single occurrence.

Courts have attempted to determine the number of occurrences by applying a "cause" or "effect" analysis. Under the "effect" approach, courts examine the number of injuries ("effects") to determine the number of occurrences. *See, e.g., Lombard v. Sewerage & Water Board of New Orleans*, 284 So. 2d 905, 915–16 (La. 1973); *South Staffordshire Tramways G., Ltd. v. Sickness & Acc. Assur. Assn.*, 1 Q.B. 402 (Court of Appeals 1891). Under the "cause" approach, courts determine the number of occurrences by examining the number of "causes," "causal factors" or "unfortunate events" leading to injury or damage. *See, e.g., Northern States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994) (environmental property damage); *Worcester Ins. Co. v. Fells Acres Day School, Inc.*, 408 Mass. 393 (1990) (child molestation); *Kansas Fire & Cas. Co. v. Koelling*, 729 S.W.2d 251 (Mo. Ct. App. 1987) (multiple vehicle car crash); *Champion Int'l Corp. v. Continental Casualty Co.*, 546 F.2d 502 (2d Cir. 1976) (product claims); *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3rd Cir. 1982) (employment practices); *Barrett v. Iowa Nat'l. Mut. Ins. Co.*, 264 F.2d 224 (9th Cir. 1959) (fire damage); *Saint Paul-Mercury Indem. Co. v. Rutland*, 225 F.2d 689 (5th Cir. 1955) (truck collision with freight train).

The great majority of courts now endorse the "cause" approach. However, the determination of "cause" has proved to be a slippery endeavor. Nearly any action, event or circumstance can be described as having a multitude of interdependent contributory causes. Even "proximate cause" assessments often depend less on external events than upon who is being sued and for what. Courts have tried to stake out further rules and directions for applying the "cause" standard but these rules, including prescriptions that "occurrence must be viewed from the perspective of the insured," or "the definition of occurrence must be viewed in light of the subject matter or purposes the parties intended to be served by the policies," are also susceptible to varying interpretations. This article attempts to set out a conceptual framework for

analyzing the "number of occurrences" issue and identifies some common judicial trends and a few countervailing influences.

II. THE "CAUSE" APPROACH

A. *The Relationship Between Trigger (When An Occurrence Takes Place) and the Number of Occurrences*

In the vast majority of jurisdictions, courts look at the time of bodily injury or property damage in order to determine when an occurrence takes place, e.g., when coverage is triggered. *See, e.g., Hercules Inc. v. AIU Ins. Co.*, 784 A.2d 481 (Del. 2001); *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 913 P.2d 878 (1995); *Owens-Illinois v. United Ins. Co.*, 138 N.J. 437, 650 A.2d 974 (1994); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29 626 A.2d 502 (1993); *Trustees of Tufts University v. Commercial Union Ins. Co.*, 415 Mass. 844, 616 N.E.2d 68 (1993); *Keene Corp. v. Insurance Co. of N.A.*, 667 F.2d 1034 (D.C. Cir. 1981).

Most courts, including the same jurisdictions that look at injury to determine whether an occurrence has taken place and when an occurrence begins, look at the *causes* of injury to determine *how many* occurrences have taken place. *See, e.g., Appalachian Ins. Co. v. Liberty Mutual Ins. Co.*, 676 F.2d 56 (3rd Cir. 1982) (the cause test is appropriate for determining whether there is a single occurrence or multiple occurrences, it is not applicable in determining when an occurrence takes place ... the determination of when an occurrence happens must be made by reference to the time when injurious effects of the occurrence took place); *Michigan Chemical Corp. v. American Home Assur. Co.*, 728 F.2d 374 (6th Cir. 1984) (the number of occurrences is determined by referring to the cause or causes of damage but the cause standard is irrelevant for determining when and where an occurrence happens). Although it may seem counter-intuitive or logically inconsistent to determine when an occurrence begins by looking at when injury begins and to determine when one occurrence ends and the next one begins by looking at the events that lead to injury, the rationale for this difference in focus lies in the policy language. A typical definition of occurrence is:

> *an accident*, including *continuous or repeated exposure to conditions* which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. (Emphasis added.)

Because bodily injury or property damage is necessary to have an occurrence within the meaning of most general liability policies, courts look at the time of injury in order to determine the time of an occurrence. In other words, an act without bodily injury or property damage is not an occurrence. When courts focus on the number of occurrences that have taken place, their attention is drawn to a different part of the definition. Specifically, occurrence is defined as "*an accident*...." In other words an occurrence is a single accident, not multiple accidents. At the same time, "*an accident*" can include continuous or repeated exposure to conditions. The combination of the words "an accident" in the singular and the words "continuous" or "repeated"

exposure which are collective or plural descriptors creates conceptual or linguistic tension in situations involving multiple injuries and multiple claimants.

This cumbersome definition of "occurrence" is the product of years of consideration by insurance industry trade associations. Before 1966, comprehensive general liability ("CGL") policies typically covered liability "caused by accident" and contained an insuring agreement that stated, "The insurer agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including loss of use thereof, *caused by accident*." *Moffat v. Metropolitan Casualty Ins. Co. of N.Y.*, 238 F. Supp. 165, 167 (M.D. Pa. 1964) (emphasis added). The "accident" policy did not define the word "accident." Many, but not all, courts found that an accident included ongoing events. *See, e.g., Anchor Casualty Co. v. McCaleb*, 178 F.2d 322 (5th Cir. 1949) (when oil blew from well onto surrounding properties over a fifty-hour period, damage was covered accident); *Moffat*, 238 F. Supp. 165 (liability resulting from long-term burning of coal mining wastes not excluded from accident policy); *Employers Ins. Co. of Ala. v. Rives*, 264 Ala. 310, 87 So.2d 653 (1955) (continuous act not exempt from classification as accident because it extends for long period of time); *White v. Smith*, 440 S.W.2d 497, 510 (Mo. Ct. App. 1969) ("[t]he accident mentioned in the policy need not be a blow but may be a process," (quoting *Travelers v. Humming Bird Coal Co.*, 371 S.W.2d 35, 38 (Ky. 1963). In 1966, the "accident" policy was revised to cover the insured's liability for injuries caused by an "occurrence."[1] The 1966 CGL revision explicitly recognized that coverage was provided for all accidents, including ongoing accidents that led to ongoing damage or injury, so long as the insureds did not expect or intend to cause damage.[2] The industry-wide organizations drafting the new "occurrence" language apparently believed that the new language would simplify and standardize coverage decisions and claims handling procedures. *See Norman Nachman, The New Policy Provisions for General Liability Insurance*, 18 The Annals 197, 199-200 (1965); Roland J. Wendorff, *The New Standard Comprehensive General Liability Insurance Policy*, 1965-1966 A.B.A. Sec. Inc., Negligence & Compensation Law 250.

Although the insurance industry accomplished its goal of making clear that "an accident" could include multiple injuries and repeated exposures to conditions, it did not provide any clear guidance for differentiating between repeated exposure to conditions and multiple accidents.

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1 In 1966, "occurrence" was defined as: "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The word "injurious" was replaced by the words "continuous or repeated" in most policies issued after 1971.

2 The 1966 definition of occurrence also made clear that to be covered, bodily injury or property damage had to be "neither expected or intended from the standpoint of the insured" since a number of earlier court decisions had held that "accidental" should be construed from the perspective of the insured party. *See, e.g., Anchor Casualty Co. v. McCaleb*, 178 F.2d 322, 324 (5th Cir. 1949); *Maryland Casualty Co. v. Pioneer Seafoods Co.*, 116 F.2d 38, 40 (9th Cir. 1940); *Moore v. Fidelity & Casualty Co. of N.Y.*, 140 Cal. App.2d 967, 972, 295 P.2d 154, 158 (App. Ct. 1956).

Subsequent attempts by insurers to limit an accident/occurrence to repeated exposure to "the *same general conditions*" or to broaden the definition of occurrence with "batch clauses"[3] have not been sufficient to ameliorate the problems associated with using singular, collective and plural nouns in a definition of covered events, circumstances and injuries.

B. *Courts Struggle to Find a Coherent Causation Standard*

To determine whether there has been "*an accident* including continuous or repeated exposures to conditions" or more than one accident, most jurisdictions look at the causal elements of injury rather than at the number of injuries or the number of claimants. In assessing the number of accidents/occurrences courts evaluate whether, from the insured's perspective, the injuries are the product of more than one uninterrupted proximate cause or unfortunate liability-producing event.[4] *See, e.g., Appalachian Ins. Co. v. Liberty Mutual Ins. Co.*, 676 F.2d 56 (3rd Cir. 1982) (discrimination against class of employees constituted one accident from insured's standpoint); *Travelers Indemnity Co. v. Olive's Sporting Goods, Inc.*, 297 Ark. 516, 764 S.W.2d 596 (1989) (shooting spree constituted one occurrence from standpoint of sporting goods store accused of negligently selling firearm); *Murice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971) (insured's liability was caused by eight sales of contaminated bird seed, not single importation of contaminated seed).

In the earliest reported New York case to analyze the question of whether events constituted a single accident or multiple accidents, *Arthur A. Johnson Corp. v. Indemnity Insurance Company of North America*, 7 N.Y.2d 222, 164 N.E.2d 704 (1959), the insured was hired to construct platform extensions on the Lexington Avenue Subway. As part of that work, the insured's employees excavated a trench on Fourth Avenue that ran in front of several buildings, including two adjoining buildings at 300 and 304 Fourth Avenue. Workers removed the underground vault walls in front of each building and constructed in their places "two entirely separate, temporary cinder block walls, six inches thick, enclosing the front of the sub-basement of each building." *Id.* at 225. On August 26, 1947, a heavy rain flooded the excavation trench, overpowering the capacity of the pumps. At 5:10 p.m. a section of cinder block wall in front of 300 Fourth Avenue gave way allowing the sub-basement to flood and causing property damage to that building's owner and occupants. At 6:00 p.m., the wall protecting 304 Fourth Avenue gave way, causing similar flooding and property damage. *Id.* at 225–26. Arthur A. Johnson Corporation's insurance company claimed that there was one proximate cause, the heavy and unprecedented rainfall, and thus only one "accident" under the

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3 "Batch" or "deemer" clauses can be used to broaden the definition of accident or occurrence. *See, e.g., Home Ins. Co. v. Aetna Cas. & Sur. Co.*, 528 F.2d 1388 (2nd Cir. 1976) (discussing disagreement by three insurance companies over the application of a batch clause that provided that all damage arising out of lot of goods shall be considered as arising under one occurrence).

4 As previously noted, the definition of an occurrence expressly directs the parties to view the occurrence from the insured's perspective rather than the point of view of the victims or some third-party tortfeasor.

insurance policy. The insured took the position that there had been an accident at each location and that the insurer was liable for two "per accident" limits, not one. *Id.* at 226.

In examining the number of accidents and policy limits available, the New York Court of Appeals reviewed the approaches used by other courts:

> The authorities in this area...may be divided into three classes. In one class of cases upon which the carrier heavily relies, the courts utilize the approach that "where...one negligent act or omission is the sole proximate cause...there is...but one accident, even though there be several resultant injuries or losses.
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> ...
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> Another approach is to hold that each person who has suffered a loss has suffered an accident. Thus, the number of accidents is determined by the number of persons damaged. ... The rationale appears to be that, inasmuch as the purpose of the policy is to afford protection against claims for injuries, it is more appropriate to equate "accident" with an "accident to one any one claimant."
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> Finally, there is the approach, which we consider the soundest, that the term is to be used in its common sense of "an event of an unfortunate character that takes place without one's foresight or expectation." ... That is, an unexpected, unfortunate occurrence. ... People use the word "accident" to describe the event, no matter how many persons or things are involved.... This approach of determining simply whether there was one unfortunate event or occurrence seems to us to be the most practical of the three methods of construction which have been advanced because it corresponds most with what the average person anticipates when he buys insurance and reads the "accident" limitation in the policy.

Id. at 227–229 (citations omitted). Thus, the court rejected the possibility of counting the number of claimants or injuries to determine the number of accidents and also rejected the insurer's argument that some general motivating force should determine the insured's protection. In rejecting the insurer's argument that the rainfall was the single proximate cause of the damage, the court noted that:

> [I]f the walls were located blocks away from each other on different job sites but subject to the same rainfall, no one could contest that there were two accidents. ... Here the proximate cause cannot be said to be the heavy rainfall but separate negligent acts in preparing and constructing separate walls which, for all we know, may have been built at separate times by separate groups of workmen.

Id. at 230.

In *Slater v. United States Fidelity & Guar. Co.*, 379 Mass. 801, 400 N.E.2d 1256 (1980) the Massachusetts Supreme Judicial Court analyzed decisional law dealing with single versus multiple occurrences and noted that the decisions focusing on "cause" turn on an analysis of three factors: (1) causation, (2) the resulting event or events (particularly the time and distance which separate them), and (3) the subject matter or purpose the parties intended to be served by the insurance policy. With respect to the first factor, the Court stated:

> If there is one, uninterrupted proximate cause which results almost immediately in more than one impact or event, courts generally find there is one "accident" or "occurrence." ... Where one impact or event causes immediate damage to several persons or properties, courts also generally find one accident or occurrence. ... On the other hand, when the cause is interrupted, either by an independent cause, or by the actor regaining control over the causing factor, *courts usually find that there is more than one "occurrence" or* "accident."

Id. at 805-807. In *Slater*, the insured sought coverage under a physicians and surgeons policy which provided coverage for currency losses "for an amount not exceeding $250 in any one occurrence."[5] *Id.* at 802. Over a period of fifteen months, Slater's receptionist embezzled a total of $9,000, but no individual theft involved over $250. In analyzing the number of occurrences that had taken place the SJC rejected the insurer's argument that all of the thefts were the result of a single cause—*e.g.*, the receptionist's scheme to steal from her employer—and therefore constituted a single occurrence. The court noted that the scheme by itself did not cause the losses, rather it was the multiple discrete decisions and acts of stealing (*e.g.*, acts separated in time and space) that caused the insured's losses.

> [T]he "occurrence" which occasioned Dr. Slater's losses was not the common scheme [of the receptionist], and the subject matter of *the policy was losses, not schemes. Although the receptionist may* have taken the money pursuant to a common scheme, each act of appropriating money for her own use necessarily was preceded by a decision to adhere to and effectuate that scheme, which could have been interrupted at any time before the $9,000 was taken. The scheme, without more, could not have caused the losses. Had these losses been the result of independent acts by different parties, undiscovered until the $9,000 was missing, USF&G probably

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[5] The Slater policy unlike most general liability policies did not define "occurrence." 379 Mass. at 803. However, the topology set forth in this case has been adopted by numerous courts in and out of Massachusetts construing general liability policies that contain the standard form definition of occurrence.

> would not contest payment (and of course could apply the $250 liability limit to each act of theft).

Id.

These two oft-quoted and often cited cases illustrate some of the difficulties courts have faced in articulating a methodology for determining "cause" or the difference between an ongoing accident and two or more accidents. The Massachusetts court moved from a proximate cause analysis to looking at whether there were discrete acts undertaken by a third party. The New York Court rejected proximate cause in favor of an "unfortunate event" theory of causation but then went on to reject the insurer's argument that the rain was the cause on the ground that the rain could not be said to be the proximate cause of the insured's liability. In both cases the courts seem to be trying to navigate their way toward the most intuitively reasonable view of the accident/event(s) that led to the insured's liability. The following five subsections describe the major rationales that courts have used or relied upon in trying to further articulate the nuances of a "cause" standard.

C. *Where Multiple Independent Causes Bring About Multiple Harms or Where the Original Cause is Interrupted and the Insured Actor Regains Control Over the Causing Factor, Courts Tend to Find Multiple Accidents or Occurrences*

In *Worcester Insurance Company v. Fells Acres Day School, Inc.*, 408 Mass. 393, 558 N.E.2d 958 (1990), the Massachusetts Supreme Judicial Court addressed causation in the context of a case involving allegations of multiple incidents of child sexual abuse. Violet and Gerald Amirault and Cheryl Amirault LeFave, employees of Fells Acres Day School and insureds under the school's policy, had been convicted of multiple counts of rape and indecent assault and battery of several children who had attended the school. Thereafter, civil suits were brought on behalf of the children against each of the defendants and the school. The civil complaints alleged acts of abuse, negligence, and breach of duty by different defendants, at different times and locations. *Id.* at 417. The complaints also alleged that each insured knew or should have known of the assault, rape and sexual molestation of children by the others, *e.g.*, that there was a common plan or common understanding of what was happening. *Id.* at 410. The insurer argued that the intentional acts were not accidents and that the negligent acts were not covered because they were part of a common plan or understanding to commit injury excluded by the policy. *Id.* In rejecting the insurer's argument that all of the alleged acts and injuries constituted a single ongoing or repeated accident, the court focused on the fact that the claims alleged many independent tortious acts that were separated by both time and space and that each act required independent conscious or negligent decision-making.

> The tort plaintiffs allege numerous discrete acts of abuse, negligence, and breach of duty by several different defendants, some individual and one corporate, at different locations. These allegations preclude the possibility that there was but a "single, ongoing cause" of the injuries alleged. Further, we have rejected

> attempts by insurers to characterize seemingly discrete events as emanating from a single, ongoing cause.

Id. at 417. *See also Insurance Co. of America v. Weston*, 107 Nev. 610, 818 P.2d 389 (1991) (where physician failed to diagnose brain tumor on five separate visits in which patient complained of similar but different symptoms and physician made independent evaluation of patient's condition on each occasion, each of patient's five visits was a separate occurrence for purposes of determining limits available under physicians medical liability policy); *American Indemnity Co. v. McQuaig*, 435 So.2d 414 (Fla. Dist. Ct. App. 1983) (each of three shotgun blasts fired by insane homeowner within period of less than two minutes was a separate occurrence since there was not one proximate uninterrupted and continuous cause of injury but rather three separate causes of injury). *See also Liberty Mutual Ins. Co. v. Rawls*, 404 F.2d 880 (5th Cir. 1968) (finding two occurrences where insured--while being pursued by policemen--hit one automobile, regained control of his vehicle, proceeded in the same direction for several seconds, and then hit a second vehicle); *Continental Casualty Co. v. Gilbane Building Co.*, 391 Mass. 143, 461 N.E.2d 209 (1984) (finding that glass panels failing before and after completion of sky scraper were two occurrences because negligence that led to failure prior to completion of construction differed from that which led to post-construction failures); *United States Liability Insurance Co. v. Selman*, 882 F. Supp. 1163 (D. Mass. 1995), (where medical records submitted by the parties indicated that child had suffered discrete incidents of lead poisoning in two policy periods there had been multiple occurrences).

Where the alleged tortious acts are based on omissions—*e.g.*, a failure to act, failure to properly supervise, or failure to discover a defect, the difference between separate independent omissions and an ongoing omission can be hard to discern. Some courts find multiple failures to discover a problem to be multiple acts. For example, in *Michigan Chemical Corporation v. American Home Assurance Co.*, 728 F.2d 374 (6th Cir. 1984) the Sixth Circuit held that an importer's shipments of contaminated livestock feed to eight distributors constituted eight occurrences because the shipment of the substance (which was not known to be contaminated) was the liability-producing event, not the importation of the contaminated birdseed. *See also Murice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971) (sale of contaminated bird seed to eight distributors constituted eight occurrences although contamination was not known at the time of sales); *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178 (2nd Cir. 1995) (finding manufacturer's sale and installation of asbestos-containing products to be multiple occurrences). Other courts view a failure to discover a problem or defect as a single ongoing accident. *See, e.g., Colonial Gas Co. v. Aetna Casualty & Surety Co.*, 823 F. Supp. 975 (D. Mass. 1993) (decision to sell urea formaldehyde installation to multiple homeowners constituted a single occurrence); *E.B. Michaels v. Mutual Marine Office, Inc.*, 472 F. Supp. 26 (S.D.N.Y. 1979) (unloading procedure involving repeatedly dropping grab bucket into ship causing 200 dents in hold constituted single occurrence).

D. *Related Acts Relatively Close in Time and Proximity Can Give Rise to Multiple Occurrences*

When discrete injuries can be linked to discrete independent acts, courts have found there to be more than one accident/occurrence even though the acts and/or the resulting injuries may occur in rapid succession or in close proximity to one another. For example, in *Richardson v. Liberty Mutual Fire Insurance Co.*, 47 Mass. App. Ct. 698, 716 N.E.2d 117 (1999) the Massachusetts Court of Appeals found that there had been two accidents when a seventeen-year old died during a covert liaison with the insured and then, subsequently, the insured dumped the deceased's body in front of his parents' house. In determining that these events constituted two accidents/occurrences rather than one ongoing accident, the court noted that the decision to dump the body in front of the deceased parents' home had occurred an hour after the death and involved independent reflection and decision-making by the insured. Similarly, in *Continental Casualty Co. v. Gilbane Building Co.*, 391 Mass. 143, 461 N.E.2d 209 (1984) the Massachusetts Supreme Judicial Court examined an insured's claim that glass falling out of a building before and after the completion of construction constituted two occurrences where the first instances of falling glass occurred before the building was completed and the insured received assurances that once the building was complete no further incidents would take place. The court found that:

> The [policyholders] complaint is "reasonably susceptible" of the interpretation that stresses to which the curtain wall was subjected as part of the Tower differed significantly from the stresses which were placed on the individual glass panels during construction.... Thus, the complaint fairly read suggests an interpretation that pre-completion and post-completion property damage did not arise "out of continuous or repeated exposure to substantially the same condition [so as to] be considered as arising out of one occurrence."

Id. at 152. *See also Insurance Co. of America v. Weston*, 107 Nev. 610, 818 P.2d 389 (1991) (each of patient's five visits to physician constituted a separate occurrence where patient complained of similar but distinct symptoms on each occasion and physician conducted independent evaluation of patient's condition during each visit).

E. *Where a Single Act or Event Automatically Produces Multiple Injuries, Courts Usually Find a Single Occurrence*

In *Allied Grand Doll Manufacturing Co. v. Globe Indemnity Co.*, 15 A.D.2d 901, 225 N.Y.S.2d 595 (N.Y. App. Div. 1962), the New York Appellate Division addressed a case involving multiple claimants whose premises had been damaged when a faucet in the insured's premises was left on over the weekend. The Appellate Division noted:

> These were not separable events, but flowed from one continuous cause, a single fault, *i.e.*, the leaving on of the faucet. The fact that areas of demarcation existed in the building premises for the

> several claimants...is not dispositive of the issue. Had the physical partitions not existed and the flow of water been continuous and uninterrupted, as in the present case, it would be obvious that there was only a single accident. Diversion of the flow or its division into streamlets, so long as it remained continuous and not interrupted by other independent cause, will not change the nature of the occurrence. There was a single accident with separate consequences.

Id. at 901. The court distinguished its finding of a single occurrence from the multiple occurrences in *Arthur A. Johnson Corp.* (the New York Court of Appeals case involving the collapse of two adjoining sub-basement walls after a heavy rain) noting that in *Arthur A. Johnson* it was not the rainstorm and flood which created the liability and determined the number of accidents, it was the "several and separate acts done by the [insured] in attempted fulfillment of certain duties which were inadequately done." *Id.*

A number of automobile cases also support the proposition that an event which without interruption leads to multiple damages constitutes a single accident/occurrence. For example, in *Hartford Accident & Indemnity Co. v. Wesolowski*, 33 N.Y.2d 169, 305 N.E.2d 907 (N.Y. 1973), the New York Court of Appeals applied the "number of unfortunate events" test when an automobile struck an oncoming car, ricocheted off the oncoming car and struck a second car approximately 130 feet away and held that the multiple car crash constituted one "occurrence." In comparing the multiple car accident before the court with the collapse of adjoining basements in *Arthur A. Johnson Corp,* the court noted:

> The continuum between the two impacts was unbroken, with no intervening agent or operative factor. We think in common understanding and parlance there was here but a single, inseparable "three-car accident." For what significance it may have we note that the police at the time drew up but a single accident report.

Id. at 174. *See also Saint Paul-Mercury Indem. Co. v. Rutland*, 225 F.2d 689 (5th Cir. 1955) (insured truck that collided with freight train causing damage to sixteen cars held to be one occurrence); *Kansas Fire & Cas. Co. v. Koelling*, 729 S.W.2d 251 (Mo. Ct. App. 1987) (insured's attempt to pass car which resulted in collision with two vehicles was a single occurrence).

F. *Where Injury May Have Been Caused by Multiple Events, but the Causative Factors or Events Cannot be Differentiated in Time and Space, Courts Have Looked at Whether the Resulting Events can be Differentiated in Time and Space*

Where neither the causative acts nor the resulting events can be differentiated in time or space, courts have concluded that there was a single accident that may include repeated or continuous exposure to conditions. For example, in *Northern State Power Co. v. Fidelity & Casualty Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994), an environmental property damage case,

the court concluded that "the discharge or escape of coal tar and oxide contaminants has been so continuous and repetitive that the unidentifiable individual instances have merged into one continuing occurrence."[6] *Id.* Similarly in *Rubenstein v. Liberty Mutual*, 1995 WL 873786 (Mass. Super. Ct.), a Massachusetts Superior Court found that environmental property damage caused by an undetected oil tank leak over a twenty-year period was a single accident/occurrence where the cause of the damage was believed to be multiple small but undifferentiated leaks on unidentifiable occasions resulting in undifferentiated oil contamination. *Id.* at *4.

In *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176 (N.D.N.Y. 1996) the United States District Court for the Northern District of New York held that multiple instances of waste disposal at two sites constituted two "occurrences." In that case, Endicott Johnson Corp. had sent hazardous materials to the Village of Endicott's landfill from 1957 to the 1970s when leachate from the landfill was discovered to be causing contamination of the village's municipal water supply. Between 1955 and 1983 the company also sent used barrels to the Tri-Cities Barrels Company in Port Crane, New York and Tri-Cities' barrel cleaning processes had also led to soil and groundwater contamination. In considering whether each instance of disposal constituted a separate occurrence, the court noted that the policy provided that, "all ... property damage arising out of continuous or repeated exposure to substantially the same general conditions ... shall be considered as arising out of one occurrence" and held that repeated disposals at each site were one occurrence. The court noted that the Federal Environmental Protection Agency had ordered Endicott Johnson to clean up the waste sites based on the fact that substances were dumped at two sites rather than on the specific number of deliveries made to the sites. In other words, the property damage for which Endicott was allegedly liable at a specific site could not be differentiated or correlated to a specific incident of disposal and Endicott could have been held jointly and severally liable under the Comprehensive Environmental Response Compensation Liability Act for all property damage based on any number of deliveries to the site. *See also Allstate Ins. Co. v. Dana Corp.*, 59 N.E.2d 1049 (Ind. 2001) (finding hazardous waste dumped into stripmine over five-month period to be a single occurrence); *O-I Brockway Glass Container, Inc. v. Liberty Mut. Ins. Co.*, 1994 WL 910935 (D.N.J.) (finding one occurrence per site in multi-site environmental case).

G. *When Injuries are the Inevitable Product of a Single Decision, Program or Policy of the Insured Some Courts Have Found a Single Occurrence*

In *Colonial Gas Co. v. Aetna Casualty & Surety Co.*, 823 F. Supp. 975 (D. Mass. 1993) the United States District Court of Massachusetts considered the question of what constitutes multiple occurrences in the context of a company faced with liability for multiple small defective product claims. Specifically, the Massachusetts Commissioner of Public Health banned all uses of urea-formaldehyde foamed-in-place insulation ("UFFI") in 1979 and issued regulations creating liability for UFFI removal. Colonial notified its insurer of claims by more than 100 homeowners against it and its opportunity to discharge those claims by contributing to the UFFI Fund. After settlement discussions with the Department of Public Health, Colonial paid

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[6] The court then found one occurrence during each policy period. *Id.*

$600,000 to the UFFI Trust Fund to discharge its liability under the Repurchase Regulations. Colonial's insurer disclaimed coverage for the company's payment to the UFFI Trust Fund on the grounds that the payment was not compensation for damages from bodily injury or property damage, *i.e.*, that there had been no "occurrence." Colonial argued that there had been property damage and that all of the damages were the result of a single accident/occurrence the predecessor's decision to provide UFFI insulation. The court found that there had been property damage to homes upon installation of the hazardous UFFI material. In order to determine the amount that the insurer owed its insured once various per occurrence deductibles and retrospective rating formulas were applied, the court addressed how many occurrences had taken place and found:

> consistent with the rule in the majority of states ... the number of occurrences turns on the underlying cause of the property damage. Where, as here, there is a single cause — Colonial's use of UFFI in its insulation program — there is a single occurrence.

Id. at 983. In other words the court found that once Colonial's predecessor decided to offer UFFI insulation to its customers, injury to each of the customers that purchased insulation was inevitable. From the insured's standpoint, the single decision to offer UFFI insulation had inexorably led to the resulting property damage and liability.[7]

Similarly, in *E.B. Michaels v. Mutual Marine Office, Inc.*, 472 F. Supp. 26 (S.D.N.Y. 1979) the United States District Court for the Southern District of New York held that an insured's decision to use a particular method of unloading a ship which caused repeated injury over a period of days was a single accident/occurrence. In that case, the insured's unloading procedure involved dropping grab buckets into the hold of a cargo ship. The grab buckets caused at least 200 holes or dents in the hold of the ship. The insured contended that because the damages were the result of a single operation to unload the ship, there was "one loss, accident or disaster" under the insurance policy. The insurer contended that each dropping of the grab bucket was a separate act of negligence resulting in a separate accident and that because the policy had $10,000 per accident deductible it had no coverage obligations. In applying the "unfortunate event test" the court examined the cause of loss from the insured's perspective and considered a policyholder's reasonable understanding of the coverage the boat charterer had purchased.

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[7] The policies included a per occurrence retrospective premium and a $100,000 per occurrence deductible. Had each installation of UFFI constituted a separate "occurrence," Colonial would have recovered nothing from its insurer since the average cost of removing UFFI from a residence was only $15,000. 823 F. Supp. at 978 n.1, 984. The court may have viewed a construction of the policy that yielded no coverage for a sizable property damage liability as contrary to the purpose that the insured purchased the policy or construed uncertainties in policy construction against the insurer.

> [T]he issue presented to this Court is whether a purchaser of insurance might reasonably and naturally have expected that damage done to a ship's deck by repetitive grab bucket contacts during the unloading would constitute a single insurable event or occurrence under the policy.
>
> ...
>
> Here the unloading of heavy steel scrap obviously could not have been accomplished in a single lifting. ... Unloading the cargo was a unified and continuous function until completion. The "event" or "occurrence" was thus a continuous process which extended over a period of days; the "accident" was the repetitive use of the hoisting machinery that damaged the tank tops of the ship during unloading; the "single loss" was the total charge for repairs. The same negligent act [of] the constant use of the grab buckets during the continuous process of unloading was the proximate cause of all the damage.

472 F. Supp. at 29. Thus, the court focused on whether the damages flowed from a single decision and whether, without knowledge of its negligence or a damage-producing event, the insured had an opportunity to regain control or commit a second negligent accident. Because the insured was not aware that the unloading method was causing damage and the damages flowed from a continuation of the same procedure, the losses were held to arise from one accident. *See also Bethpage Water District v. S. Zara & Sons Contracting Co.*, 154 A.D.2d 637, 546 N.Y.S. 645 (N.Y. App. Div. 1989) (damage to over 250 acres of water mains constituted a single occurrence because "these damages arose out of continuous or repeated exposure to substantially the same general conditions," i.e., the negligence of Zara & Sons in backfilling the sewer trenches during construction of a single sewer system).

Other courts have used similar logic in cases involving multiple injuries resulting from a single product design defect. In *Champion International Corp. v. Continental Casualty Co.*, 400 F. Supp. 978 (S.D.N.Y. 1975), *aff'd on other grounds*, 546 F.2d 502 (2nd Cir. 1976), the United States District Court for the Southern District of New York considered whether the resale of defective vinyl covered plywood panels to twenty-six different manufacturers that installed them in the interiors of more than 400 houseboats, house trailers, motor homes, and campers, constituted a single occurrence or, as Champion's insurer contended, 1,400 separate occurrences. After reviewing the insuring agreement and definition of occurrence in Champion's policies, the court concluded that the "occurrence" language could be construed to mean either the practice of reselling the panels or each installation of a defective panel. The court then noted that ambiguities in insurance policies are construed against the insurers. Because the amount of per-vehicle damage was less than the $5,000 deductible in Champion's primary policy, the insured would recover only if the individual sales of defective panels were found to be a single occurrence. Finding the insured's "one occurrence" interpretation to be a reasonable one, the court ruled in Champion's favor, and held that its sales of defective panels were single a occurrence.

On appeal, the Second Circuit did not find the policy language ambiguous. The court examined the policies in light of the business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes. *Champion International Corp. v. Continental Casualty Corp.*, 546 F.2d 502, 505 (2d Cir. 1976). The Second Circuit noted that Champion had elected to have the primary policy's deductible apply on a "per occurrence" basis, and not a "per claim" basis, and found that, "[t]his indicates that the policy was not intended to gauge coverage on the basis of individual accidents giving rise to claims, but rather on the underlying circumstances which resulted in the claim for damages." 546 F.2d at 505–506.

In 1988, Champion again sought coverage from its insurers, this time for claims by homeowners for damages resulting from the delaminating of Malaysian plywood manufactured and distributed by Champion. *Champion International Corp. v. Liberty Mutual Insurance Co.*, 701 F. Supp. 409 (S.D.N.Y. 1988). Relying heavily on the Second Circuit's decision in the earlier Champion case, the court found that the language of the policy was not ambiguous, and that all of the individual claims of property damage arose from a single occurrence. In reviewing the Second Circuit's earlier *Champion* decision and other caselaw, the court found that "individual instances of damage compromise one 'occurrence' where the underlying cause of harm is the same." *Id.* at 413.

However, in 1995 the Second Circuit rejected an insured's contention that property damage caused by the installation of asbestos-containing materials over a 50-year period constituted a single occurrence. In *Stonewall Ins. Co. v. Asbestos Claim Management Corp.*, 73 F.3d 1178 (2d Cir. 1995) the insured, National Gypsum Company ("NGC") later renamed Asbestos Claim Management Corporation, had manufactured asbestos-containing materials ("ACMs") from 1930 until 1981. By 1995, NGC faced several thousand claims for property damage by owners of buildings containing those materials. *Id.* at 1187. Most of NGC's primary insurance policies contained per occurrence deductibles. The insured contended that all of its alleged liability arose from a single accident—its decision to manufacture asbestos-containing materials. In a Consolidated Appeal involving New York and Texas law, the Second Circuit analyzed the number of occurrences of property damage for which NGC was potentially liable, by "looking to the event for which the insured is held liable." The court reasoned that "[T]he "accident" resulting in property damage is most reasonably understood not as NGC's general decision to manufacture asbestos but rather as the installation of ACMs." *Id.* at 1213. In other words, the court reasoned, the decision to manufacture asbestos did not by itself create liability. Rather it was

> the installation [that] created exposure to "a condition which resulted in property damage neither expected nor intended from the standpoint of the insured," and for each installation, there was a new exposure and another occurrence. Notwithstanding the broad reading of "occurrence" in *Champion*, our holding in that case does not require a single-occurrence reading here. In

> *Champion*, the insured was...the wholesaler who delivered the product to 26 manufacturers who in turn distributed the product to consumers. We declined to consider the possibility that each delivery of the product to a manufacturer might constitute a separate occurrence, because the 26 manufacturers had not [brought claims against] Champion.
>
> [W]e limited our analysis to two possibilities: the 1,400 vehicles in which the products were installed, and what we viewed as a single delivery of products.... In *Champion*, the insured was exposed to liability merely because it delivered the defective product; in this case, by contrast, NGC's liability, as reflected in the underlying complaints, results not from its delivery of asbestos-containing products, but rather from...the presence of ACMs each time the products were installed in the property of third parties.

Id. at 1213–14. Thus, the court focused on the events for which NGC was being held liable and concluded that its liability was based on individual installations even though there was no evidence that individual installations involved independent product manufacturing decision-making.

In *Uniroyal, Inc. v. Home Insurance Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988) the United States District Court for the Eastern District of New York considered whether the manufacturer of "Agent Orange" defoliant over approximately one and one-half years and 110 deliveries to the military was a single "occurrence." The determination of the number of occurrences was critical to whether Uniroyal would receive any insurance coverage. If, as its insurer asserted, each incident of spraying Agent Orange in Vietnam was a separate occurrence then the $100,000 per occurrence deductible in Uniroyal's policy would result in there being little or no coverage. Uniroyal asserted that the alleged negligent manufacture and failure to warn for which Uniroyal was being sued by exposed military personnel and their families constituted one occurrence. *Id.* at 1379–80. Judge Weinstein found that the policy's definition of "occurrence" as "an accident or happening or event or a continuous or repeated exposure to conditions which ... *results in personal injury*" meant that an occurrence was not defined to be an injury, injury was the *result* of an occurrence. The court then noted that Uniroyal had undertaken a routine, repetitive manufacturing and delivery process in supplying the United States Air Force with virtually identical shipments of defoliant over the course of seventeen months. The court also observed that once Uniroyal delivered the Agent Orange to the Air Force, the company had no further control over the herbicides or their application, no role in the formulation of the final herbicide mixtures, no say in the choice of spray methods or warnings to users, safety procedures, selection of spray sites, and no ability to supervise spray sorties. In other words, after its single initial decision to manufacture Agent Orange, Uniroyal was "walled off from all influence over its product after it made delivery in the United States." *Id.* at 1371. The *Uniroyal* court then made the following observations on the "cause" test:

> The "unfortunate event" test is not a category wholly different from the "cause" test. Neither the *Johnson* nor the *Wesolowski* court provided any guidance, apart from the "average man" aphorism, on how to identify the "unfortunate event" or on how to distinguish among several plausible such events. All that can surely be drawn from those two cases is that the "unfortunate event" is not the "negligent act or omission" and it is not the injury to each victim. The "unfortunate event" is evidently one of the several happenings, with the exception of the negligent act or omission, which precedes and contributes to the resulting injury. ...
>
> The conception of the "unfortunate event" as one of several possible events contributing to the injury comports well with modern understandings of the scientific causation process. Whereas causes were once imagined as discrete, sequential "but-for" incidents proceeding linearly like billiard balls toward the ultimate injury, it is now believed that a variety of interrelated and intermingled events combine to affect the probability of other happenings. ... Where human observers ascribe causal linkages they do so based on their theories of interactions, not because the "causes" are self-evident. ...
>
> The "unfortunate event" in the *Agent Orange* context could hence be one of several interrelated causally contributing events; among those are the defective manufacture of dioxin-contaminated herbicides, the delivery of those herbicides to the military, the spraying of the herbicides in Vietnam, and the touching of herbicide molecules to a particular serviceman's skin. Merely identifying the "causation chain" does not help choose among these events. ...
>
> In this sense, the terms of the definition of "occurrence" are partly ambiguous: they identify a set of possible occurrences, but give little assistance in selecting the proper item from the set.

Id. at 1381–82.

The *Stonewall* and the *Murice Pincoffs Co.* cases finding multiple sales to be multiple occurrences and the *Uniroyal*, *Champion* and *Colonial Gas* cases finding multiple sales of a single product to be one occurrence highlight the potential tension between focusing on the insured's decision-making process and focusing on the number of events for which the insured is allegedly liable.

H. *Injuries That are The Result of Independent Actions and Decisions Making do not Become a Single Occurrence Simply Because They Were Undertaken to Implement Some General Management Policy*

Courts have been reluctant to find that multiple independent decisions and events constitute a single occurrence simply because the insured was acting in accordance with some general business mission or corporate policy. For instance courts have, by and large, rejected claims that environmental contamination at more than one site constitute a single occurrence. For example, in *Douglas Oil v. Allianz ("Conoco")*, No. B.C. 064046 (Cal. Super. Ct., L.A. Cty.), the insured claimed that all of its environmental damage at thousands of different sites constituted a single occurrence defined as "Conoco's worldwide ownership, operation and conduct of business." Alternatively, Conoco argued that five general activities constituted occurrences from which its alleged liability arose, namely: (1) manufacture of refined petroleum products; (2) storage, handling and distribution of refined petroleum products; (3) development of petroleum products; (4) chemical manufacturing; and (5) other engineering manufacturing. The trial court rejected Conoco's "one or five occurrence" theory, noting

> Conoco's complaint does not allege any accident, happening or event" as the proximate cause of its damages, but merely attempts to define its existence and operations a continuous exposure to substantially the same general conditions. This phrase simply does not bear the weight of such an expansive definition, and is not supported by law. Conoco's existence is neither "one" nor "five" occurrence(s).

Similarly, in *Southern Pacific Rail Corp. v. Certain Underwriters at Lloyds,* No. BC-154722, (Cal. Super. Ct. Los Angeles Cty.) an insured argued that its liability at 63 separate sites might be only one occurrence and urged the court to submit the issue to the jury. The court rejected the "single occurrence for multiple sites" theory stating:

> Plaintiffs' theory as to the "one occurrence" is that the actual occurrence involved is a corporate policy or decision, such as a decision to use solvents or their waste disposal practices.... There were several major problems with this theory. First, the damages alleged by plaintiffs as to each of the sites are not identical; there is no one policy implicated, unless it is the corporate policy to engage in business of transportation... Most importantly, the language of the policy at issue is unambiguous as to what an occurrence is, and it is not a corporate decision.

See also Indiana Gas Co. v. Aetna Casualty and Surety Co., No. 1-95-CV-101 (N.D. Ind. Oct. 15, 1996) (rejecting policyholders motion for summary adjudication that environmental claims from nine gas plans represented only one occurrence). *But see Hartford Acc. & Indem. Co. v. Employers Ins. of Wausau*, 1995 WL 870851 (Cal. Super. Ct.) ("*Syntex*") (rejecting both insurer's argument that spraying of dioxin at 27 different locations constituted a single

occurrence and policyholder's argument that the spraying constituted 27 occurrences, finding that the number of occurrences was a matter for the jury to decide.)[8]

In the non-environmental context courts have also been reluctant to find that a corporate policy creates an umbrella "occurrence" encompassing numerous acts and separately identifiable injuries. For example, in *American Red Cross v. Travelers Indemnity Company of Rhode Island*, 816 F. Supp. 755, 761 (D.D.C. 1993) the United States District Court for the District of Columbia found that claims arising from deliveries of HIV contaminated blood over a three-year period were the result of numerous blood-handling decisions and did not constitute a single occurrence arising from the insured's general, blood handling practices.

> [The Red Cross] made many decisions with regard to its handling of blood – whether to screen the donor, whether to test the blood, and whether to provide warnings to the recipient hospital. Each of these decisions independently may have affected whether bodily injury would result from a transfusion. Moreover, negligence with regard to screening, testing, or notification could not result in injury until a particular unit of contaminated blood was provided to an entity which would administer the transfusion. ... The Court finds that cases holding that all injuries resulting from sales of a uniformly defective product constitute continuous and repeated exposure to a general condition are inapposite here. ... Such cases are inapplicable because the plaintiff did not distribute a uniformly defective or hazardous product; only a portion of the distributed blood was contaminated.

Id. at 761 & & n.8 (citations omitted).

III. WHERE THE FACTS ARE SUSCEPTIBLE OF A FINDING OF EITHER ONE OCCURRENCE OR MULTIPLE OCCURRENCES, AMBIGUITIES IN POLICY LANGUAGE OR ITS APPLICATION ARE CONSTRUED IN FAVOR OF COVERAGE.

Where the number of occurrences is not clear cut, the principle of construing ambiguities in favor of the insured requires courts to choose a policy interpretation that maximizes coverage for the insured. *See, e.g., Slater v. United States Fidelity & Guar. Co.*, 379 Mass. 801, 808-809, 400 N.E.2d 1256 (1980) (ambiguities in policy language are constructed in favor of coverage); *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 305 N.E.2d 907 (1973) (ambiguities in the language or construction of a policy must be construed in favor of coverage unless extrinsic evidence unequivocally demonstrates that at the time of execution of the

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[8] After pre-trial settlements with a number of its insurers, Syntex perceived a one occurrence theory to be to its advantage and argued to the jury that the spraying constituted one occurrence. The jury agreed with Syntex.

insurance contract the parties intended to adopt a particular meaning). *See also, e.g., Stonewall Ins. Co. v. National Gypsum Co.*, 1992 WL 123144 at *12 (S.D.N.Y. 1992); *Weissblum v. Glens Falls Ins. Co.*, 31 Misc. 2d 132, 219 N.Y.S.2d 711 (N.Y. Ct. 1961) *rev'd on other grounds* 40 Misc. 2d 964, 244 N.Y.S.2d 689 (N.Y. Sup. Ct. 1963); *Transamerica Ins. Co. v. Keown*, 451 F. Supp. 397 (D.N.J. 1978).

This principle of *contra proferendum* is particularly important to policyholders involved in "number of occurrences" disputes because the use of the singular word "accident" in the beginning of the definition of occurrence and the use of collective and plural descriptors create uncertainty or multiple reasonable interpretation in a great many cases. However, it is important that policyholders be able to articulate a rationale for their position that takes into account caselaw decisions on multiple and single occurrences in the relevant jurisdictions. Although courts sometimes explicitly recognize that *other* courts appear to be result-oriented, they do not like to be accused of being so themselves.