INSURANCE LAW

The Importance Of the Noncumulation Clause

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There have, in recent years, been several cases dealing with exposure to physical conditions, such as lead paint, asbestos or pollutants, over extended periods of time, and the issue of whether one, or more than one, coverage limit was or could be applicable under the particular circumstances. As will be seen, the results in these cases are highly dependent upon the specific language of the policies at issue. More specifically, as will be demonstrated, in those decisions that have held that the coverage was limited—either to the per occurrence limit, rather than the aggregate limit, or to a single policy, rather than multiple successive policies—the policies contained specific noncumulation or anti-stacking clauses, or provisions clearly and specifically defining all bodily injury and property damage resulting from continuous or repeated exposure to the same general conditions to be the result of one occurrence. Where such provisions are absent from the policy, the opposite result may obtain, as was the case in a recent Court of Appeals decision discussed later.

Early Case Law

In *In re Liquidation of Midland Ins.*, 269 AD2d 50 (1st Dept. 2000), abrogated on other grounds, 16 NY3d 536 (2011), the Appellate Division, First Department, was presented with several coverage questions, including whether the definition of "occurrence" within successive excess policies required the court to treat the excess coverage as one policy or to permit the coverage to be aggregated. The coverage form at issue defined an "occurrence" as "an event, including continuous or repeated exposure to conditions, which result in personal injury...," and included the following provision: "All such exposure to substantially the same general conditions shall be deemed one occurrence." The court reasoned that this policy language was intended to restrict the liability of an insurer to one coverage limit in a case where there had been continuous exposure to a condition or set of conditions. And, as stated by the court, "Our reading of the policy at issue indicates that the purpose of defining all exposure as one occurrence is to make clear that only one deductible will apply, and that the limit of liability where an insurer has issued renewal policies shall be the policy limits for one policy, rather than the aggregate for all policies issued. Otherwise, an insurer that issues a $1 million liability policy renewed 20 times could find itself liable for $20 million in damage claims for the same injury." 269 AD2d at 59.

> Whether a specific policy provision, such as a noncumulation clause, is in or out of a policy can make all the difference in the world.

In *Greenidge v. Allstate Ins.*, 312 F.Supp.2d 430 (S.D.N.Y. 2004), affd., 446 F.3d 356 (2d Cir. 2006), the policy stated that "Regardless of the number of insured persons, injured persons, claims, claimants or policies involved," the "total liability...for damages resulting from one accidental loss will not exceed the [policy limits]," and specifically defined injuries caused by continuous exposure, such as exposure to lead paint, as "one accidental loss." Accordingly, the district court, noting that the specification that any injury resulting from continuous exposure to certain conditions is deemed a single injury appears to contemplate a situation in which the harm occurs over a period of time that may span more than one policy, held that coverage for one accidental loss was limited to a single policy notwithstanding that the lead poisoning injury might continue into a second policy period.

In *Hiraldo v. Allstate Ins.*, 8 AD3d 230 (2d Dept. 2004), affd., 5 NY3d 508 (2005), the Appellate Division, Second Department, similarly found that a claim for lead poisoning to one plaintiff, where the exposure occurred over three consecutive policy periods, was limited to the single per occurrence limit of $300,000. There, as in *Greenidge*, supra, the policy expressly provided that "Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability... for damages resulting from one loss will not exceed the limit of liability for Coverage X shown on the declarations page," and that "All bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one loss."

The court held that these provisions were clear and unambiguous, and that pursuant thereto, "the infant plaintiff's injuries from exposure to lead paint while residing at the insured premises arose out of a single occurrence, and constituted one loss, and Allstate clearly intended to limit the number of policies that would be available to satisfy a judgment in a continuous exposure case."

In affirming the decision of the Second Department, the Court of Appeals observed that "But for the noncumulation clause in the policies, this would be a difficult case." The court also noted that the result of finding that the limit of liability, where an insurer has issued renewal policies, is the policy limit for one policy is "counterintuitive" because "If each of the successive policies had been written by a different insurance

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company, presumably each insurer would be liable up to the limits of its policy. Why should Plaintiffs recover less money because the same insurer wrote them all?" The court went on to note, "Some courts have held that successive policy limits may be cumulatively applied to a single loss, where the policies do not clearly provide otherwise [citing, inter alia, *National Union Fire Ins. of Pittsburgh, PA. v. Farmington Cas.*, 1 Misc.3d 671 (Sup. Ct. N.Y. Co. 2003)]." The court then specifically noted that the different result in this case was based upon the fact that the policies did, in fact, provide otherwise, via the noncumulation clause.[1]

Ramirez v. Allstate Ins., 26 AD3d 266 (1st Dept. 2006), involved two infants injured as a result of exposure to lead in their apartment. They sued the building's insurer to recover damages under a homeowner's liability policy with a coverage limit of $200,000 "per occurrence." The policy included in its limit of liability section a provision that "All bodily injury and property damage resulting from continuous or repeated exposure to the same general conditions is considered the result of one occurrence." The court held that "*by reason of this clause*, and notwithstanding that each plaintiff may have ingested the lead at different times, both Plaintiffs' exposure to the same lead hazard in the same apartment constituted only one occurrence subject to the $200,000 policy limit [emphasis added]."

In *International Flavors & Fragrances v. Royal Ins. of America*, 46 AD3d 224 (1st Dept. 2007), the issue was whether personal injury sustained by workers employed at the same manufacturing plant resulting from exposure to a toxic substance found in butter flavoring should be considered a single "occurrence" for the purpose of applying a deductible under insurance policies affording products liability coverage. The term "occurrence" was defined in the applicable policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The Supreme Court held that each of the personal injury claims constituted a separate occurrence subject to a separate deductible or self-insured retention, reasoning that the event precipitating coverage under the policies is the occurrence resulting in injury, not the actual injury itself, and, that, therefore, the injury sustained by each of the employees did not result from a single occurrence because each employee was exposed to hazardous chemicals at different times (citing *Aguirre v. City of New York*, 214 AD2d 692 [1995], and *In re Prudential Lines*, 158 F.3d at 65).

On appeal, the First Department affirmed, concluding that "occurrence as defined in the policy... does not reflect the parties' intent to aggregate the individual claims for the purpose of subjecting them to a single policy deductible." In so concluding, the court noted a distinction between the policy language involved in *International Flavors*, which simply defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and the policy language in other cases, which added to the foregoing provision the additional language to the effect that "All bodily injury and property damage resulting from continuous or repeated exposure to the same general conditions is considered the result of one occurrence." While in the latter class of cases, as noted above, the courts have had little difficulty finding multiple injuries sustained by multiple claimants to comprise only "one occurrence" under such a provision, in the absence of the additional clarifying language, the contrary result is, at the very least, possible.[2]

Recent Decisions

In *Nesmith v. Allstate Ins.*, 103 A.D.3d 190 (4th Dept. 2013), mot. for leave to reargue/leave to appeal denied, 105 A.D.3d 1467 (4th Dept. 2013), a lead paint case, Allstate issued a $500,000 per occurrence policy to the building owner, which commenced in 1991, and was renewed for two additional one-year periods. In 1993, two children were exposed to lead paint while living in an apartment in the insured building and one suffered injuries as a result of that exposure. That family moved out of the apartment shortly thereafter, and the mother of those children commenced a lawsuit against the insured owner seeking damages for lead exposure. In 1994, two children of a subsequent tenant were also exposed to lead in the same apartment. A separate lawsuit was commenced against the insured owner on behalf of those children.

While the second action was pending, Allstate settled the first action for $350,000. Allstate then argued that under the "noncumulation clause" of its policy, its liability for all lead exposures in the apartment was limited to a single policy limit of $500,000, and, thus, offered the second set of plaintiffs the remaining $150,000 to settle the second action. The policy provision at issue provided as follows: "Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit shown on the declarations page. All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss."

Relying upon the Court of Appeals' decision in *Hiraldo*, supra, and the clear language of the policy, the court found that "the number of claims and claimants does not require the insurer to pay more than its single policy limit." Thus, the court's determination turned on the resolution of the discrete issue of "whether the exposure of children to lead paint in an apartment during different tenancies is encompassed in the phrase 'resulting from...continuous or repeated exposure to the same general conditions' in the noncumulation clause."

Siding with the insurer, the court concluded that "the only reasonable interpretation of that clause requires that the two claims be classified as a single accidental loss within the meaning of the policy." The court supported this conclusion with evidence that the lead paint that injured the second set of children was the same lead paint that was present in the apartment when the first set of children lived there. "Inasmuch as the claims arose from exposure to the same condition, and the claims were spatially identical and temporally close enough that there were no intervening changes in the injury-causing conditions, they must be viewed as a single occurrence within the meaning of the policy."

Roman Catholic Diocese Case

On the other hand, *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins.*, 87 A.D.3d 1057 (2d Dept. 2011), affd., —N.Y.3d—, —N.Y.S.2d—, 2013 N.Y. Slip Op. 03264, 2013 WL 1875302 (May 7, 2013), was an action to recover damages for breach of contract and for a judgment declaring that the defendant insurer was obligated to indemnify the Diocese of Brooklyn up to the limits of several policies (in excess of a $250,000 self-insured retention) in connection with the defense and settlement (for $2 million, plus "additional consideration") of an underlying action pertaining to alleged sexual abuse of the infant plaintiff by a reverend, which allegedly commenced "just after" her 10th birthday (Aug. 10, 1996), and continued until "in or around March to May 2002," and occurred at different times of the day and week, and at multiple locations. The issue presented was whether the alleged acts of sexual abuse constituted multiple occurrences, and, thus, whether the settlement amount should be allocated on a pro rata basis over seven policy periods.

In granting the motion for summary judgment by National Union, which had issued three annual CGL policies for the period of Aug. 31, 1998, through Aug. 31, 2001, the Supreme Court declared that the alleged acts of sexual abuse in the underlying action constituted multiple occurrences, that the settlement amount and any "additional consideration" were to be allocated on a pro rata basis over seven policy periods, and that the diocese was required to exhaust a $250,000 self-insured retention for each commercial general liability policy implicated. The court observed, as

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pertinent hereto, that "occurrence" was defined in the National Union policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," which language did not reflect an intent by the parties to aggregate claims for the purpose of subjecting them to a single policy deductible or SIR [citing, inter alia, *International Flavors & Fragrances v. Royal Ins. of Am.*, supra]. "In the absence of a specific aggregation-of-claims provision precisely identifying the operative incident or occasion giving rise to liability, the court must apply the 'unfortunate events' test (see *Arthur A. Johnson Corp. v. Indemnity Ins. of N. Am.*, 7 N.Y.2d 222 [1959]) to determine whether the underlying multiple claims constitute multiple 'occurrences' under the policy (*Exxon Mobil v. Certain Underwriters at Lloyd's, London*, 50 A.D.3d [434] at 435). In this regard, courts 'must analyze the temporal and spatial relationships between the incidents and the extent to which they were part of an undisrupted continuum to determine whether they can...be viewed as a single unfortunate event—a single occurrence' (*Appalachian Ins. v. General Elec.*, 8 N.Y.3d [162] at 174). Here, the sexual abuse allegedly occurred over a seven-year period, at different times, and at multiple locations. Thus, it cannot be said that there was a close temporal and spatial relationship between the acts of sexual abuse. Moreover, where, as here, 'multiple policies are triggered and liability is allocated to each, each policy's deductible is applicable' (*Olin Corp. v. Insurance of N. Am.*, 221 F.3d at 328)."

On appeal, the Court of Appeals, in a rare 3-1-1 plurality decision, affirmed, concluding that the Appellate Division correctly concluded that the incidents of sexual abuse constituted multiple occurrences, and that any potential liability should be apportioned among the several insurance policies, pro rata. Addressing the meaning of the term "occurrence" for the first time in the context of claims based on numerous incidents of sexual abuse of a minor by a priest, which spanned several years and several policy periods, the plurality noted, as pertinent hereto, that the policies at issue defined an "occurrence as an accident including continuous or repeated exposure to substantially the same general harmful conditions," but "nothing in the language of the policies, nor the definition of 'occurrence,' evinces an intent to aggregate the incidents of sexual abuse into a single occurrence." In so doing, the plurality specifically distinguished this case from those in which the policy contained a provision to the effect that "all such exposure to or events resulting from substantially the same general conditions during the policy period shall be deemed one occurrence."[3]

The plurality rejected the diocese's argument that the policies' definition of "occurrence" encompassed and anticipated multiple claims, losses and incidents within the meaning of a single occurrence, agreeing with this notion in principle, but disagreeing with it in this particular case. Focusing on the language of the policies and the intent of the parties as expressed therein, the plurality explained that "sexual abuse does not fit neatly into the policies' definition of 'continuous or repeated exposure' to 'conditions,'" like asbestos fibers in the air or lead-based paint on walls. "A priest is not a 'condition' but a sentient being.... The settlement in the underlying claim addresses harms for acts by a person employed by the diocese. The Diocese's argument that the parties intended to treat numerous, discrete sexual assaults as an accident constituting a single occurrence involving 'conditions' is simply untenable."

Conclusion

This line of cases provides yet another fine example of the vital importance of carefully examining and reading the policy. As the court aptly put it in *Roman Catholic Diocese*, supra, "[i]n determining a dispute over insurance coverage, we first look to the language of the policy." Whether a specific policy provision, such as a noncumulation clause, is in or out of a policy can make all the difference in the world. The search, therefore, is critical.

1. See also, to same effect, *Bahar v. Allstate Ins.*, 159 Fed. App. 311 (2d Cir. 2005), aff'g 2004 WL 1782552, 2004 U.S. Dist. LEXIS/5612 (S.D.N.Y. 2004).

2. See also discussion in *Mt. McKinley Ins. v. Corning*, 28 Misc.3d 893 (Sup. Ct. N.Y. Co. [Bransten, J.], 2010), aff'd., 96 AD3d 451 (1st Dept. 2012).

3. See, in addition to the New York cases cited above, *State Farm Fire & Cas. v. Elizabeth N.*, 9 Cal. App. 4th 1232 (1992), discussed and distinguished by the Court of Appeals' plurality in *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins.*, supra.