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Illinois High Court Issues a Jaw Dropper on Number of Occurrences

Yes We Can Find Multiple Occurrences

Number of Occurrences has always been an issue in the eye of the beholder. Policyholders generally argue for multiple occurrences (because it means multiple limits) -- unless of course the issue is number of deductibles. Then single occurrence looks pretty good. Primary insurers usually argue for a single occurrence, while excess insurers often see things as multiple occurrences. And reinsurers have their own set of glasses when looking at the issue.

While it is easy to say that such and such state is a "cause state," so it applies single occurrence, or it's a multiple occurrence state, the issue is nowhere nearly that simple. On Friday, the Supreme Court of Illinois made that point very clear in *Addison Insurance Company v. Fay*, finding multiple occurrences under the following tragic circumstances.

Two young boys were killed when they became trapped in an excavation pit located on property that they were crossing as a shortcut. At issue was the available limit of coverage under the property owner's policy that contained a $1 million Each Occurrence Limit and a $2 million General Aggregate.

First, the policy contained the standard ISO definition of "occurrence": "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Second, in 2006, the Illinois Supreme Court concluded in *Nicor v. Associated Electric & Gas* that Illinois is a "cause" state for purposes of number of occurrences. And, lastly, the court in *Addison* acknowledged that the property owner's liability arose from his negligent failure to properly secure and control his property.

But despite all this, the *Addison* Court still concluded that the injuries were the result of separate occurrences. The court did so by adopting a "time and space" test: "The insured's negligence consisted of an omission, the failure to maintain the property. Where negligence is the result of an ongoing omission rather than separate affirmative acts, a time and space test effectively limits what would otherwise potentially be a limitless bundling of injuries into a single occurrence." *Addison* at 12.

The *Addison* Court then looked at the facts and concluded that the Insurer could not meet its burden of proving that the two boys' injuries were so closely linked in time and space as to be considered one event. *Addison* at 13. As such, the claims were subject to the $2 million general aggregate rather than the $1 million per occurrence limit.

Adopting a "time and space" test was only one step in what enabled the *Addison* Court to find multiple occurrences. Given the evidentiary hurdles of proving that the two boys' injuries were so closely linked in time and space as to be considered one event – since there were no witnesses and the medical and police evidence was speculative – the *Addison* Court's decision to saddle the insurer with the burden of proof was lights out for it.

Some take-away points from *Addison v. Fay*:

The *Addison* Court essentially likened the insurer's effort to limit its liability to one occurrence to a policy exclusion – for which insurer's traditionally have the burden of proof. Number of occurrences is certainly not an issue in every case and *Addison* may be distinguishable in future cases. But insurers' efforts to limit their liability, by means other than exclusions, arises regularly and in all sorts of cases. The *Addison* Court's sleight of hand with the burden of proof may be its greatest impact.

Insurers on the losing end of coverage cases with tragic underlying facts often feel that the court's decision was prompted by its desire – of course, unstated -- to maximize coverage for the victims. In *Addison*, the Illinois Supreme Court freely acknowledged that it was looking to maximize coverage. The *Addison* court was clearly troubled by what it saw as a limits-reducing interpretation of the policy:

> Focusing on the sole negligent omission of failing to secure the property would allow two injuries, days or even weeks apart, to be considered one occurrence. The defendants raised this concern in the trial court. If several injuries suffered over the course of several weeks could be bundled into a single occurrence, the likelihood that damages would exceed a per-occurrence limit is significant, as demonstrated by the damages in the instant case. Purchasers of insurance such as Parrish would be left unprotected by their insurance policy, and liable for any amount above the per-occurrence limit. In accepting a per-occurrence limit, Parrish could not have intended to expose himself to greater liability by allowing multiple injuries, sustained over an open-ended period, to be subject to a single, per-occurrence limit.

Addison at 10.

A copy of the Supreme Court of Illinois's January 23 decision is *Addison v. Fay* can be accessed here:

http://www.state.il.us/court/Opinions/SupremeCourt/2009/January/105752.pdf

Please let me know if you have any questions.

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