LJN LAW JOURNAL NEWSLETTERS

The Insurance Coverage Law Bulletin®

An ALM Publication

Volume 9, Number 9 • October 2010

Grouping Language In NY After *GE* Footnote Number Three

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The determination of the number of occurrences in coverage litigation involving mass torts has significant ramifications. The definition of "occurrence" in general liability policies can be critical when determining the amounts of available coverage or which insurers — primary or excess — must provide that coverage. If policies include high per-occurrence deductibles or self-insured retentions, a determination that multiple claims must be treated as separate occurrences may effectively limit the amount of coverage available by requiring the policyholder to satisfy the deductible for each claim individually before ever accessing coverage. If policies provide for "first dollar coverage," a determination that multiple claims are separate occurrences may maximize coverage at the primary level by reducing the likelihood that per-occurrence limits on coverage will apply. By contrast, a determination that multiple claims constitute a single occurrence may reduce the primary insurer's exposure while increasing the likelihood that excess insurers' policies will be attached.

In a widely anticipated 2007 decision, the New York Court of Appeals addressed whether asbestos personal injury claims constitute a single occurrence versus multiple occurrences. In *Appalachian Insurance Co. v. General Electric Co.,* 8 N.Y.3d 162 (2007) ("*GE*"), the Court of Appeals reaffirmed that the number of occurrences is ordinarily determined by the "unfortunate event" test first adopted in *Arthur A. Johnson Corp. v. Indemnity Insurance Co. of North America,* 164 N.E.2d 704 (N.Y. 1959). The "unfortunate event" test is a fact-specific inquiry that focuses on the temporal and spatial proximity between the incidents causing the injury or loss, and whether the incidents were part of the same causal continuum, unbroken by intervening causes or factors. *GE* at 171-72. The *GE* court stated that the "unfortunate event" test does not uniformly yield a single or multiple occurrence result, but rather "[e]ach mass tort scenario must be examined separately under the [test]." *Id.* at 174. Nevertheless, under this test, it is unlikely that a New York court would find that multiple underlying incidents can be aggregated as a single occurrence if the incidents share few commonalities.

Importantly, the *GE* court indicated that insurers and policyholders may opt out of the "unfortunate event" test by adopting appropriate policy language that provides other methods for grouping claims against the policyholder into one or more occurrences. *See Id.* at 172-173. In particular, in footnote number three of its opinion, the court pointed out that policies may contain enforceable grouping language or "deemer clauses" that allow multiple claims to be treated as single occurrences:

> There are many ways that parties to an insurance contract can provide for the grouping of claims. Some liability policies, including the excess insurance policies interpreted by the Connecticut Supreme Court in *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.* (255 Conn. 295, 309, 765 A.2d 891, 898 [2001]), contain expanded definitions of occurrence that, for example, allow "continuous or repeated exposure to substantially the same general conditions [to] be considered as arising out of one occurrence" (*see also, Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,* 98 N.Y.2d 208, 746 N.Y.S.2d 622, 774 N.E.2d 687 [2002]), indicating an intent that certain types of similar claims be combined. In *Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London,* 96 N.Y.2d 583, 734 N.Y.S.2d 531, 760 N.E.2d 319 (2001), we interpreted language in reinsurance treaties that allowed aggregation of claims in some circumstances, provided temporal and spatial relationships were present. What these cases demonstrate is that the parties to an insurance policy, like the parties to any contract, are free to determine the terms of their arrangement. If they intend to allow grouping of claims, they need only include language expressing that intent. *Id.* at 173 n.3.

Thus, before applying the "unfortunate event" test, New York courts must first look to the language of the specific policy at issue to determine whether its terms reflect the parties' intentions concerning how multiple claims should be grouped. The *GE* decision, however, left open the question of precisely how courts would interpret such "grouping language" in the future. After taking a closer look at the *GE* decision, this article surveys four recent New York decisions that interpret "occurrence" definitions and grouping language in policies to address the number-of-occurrences issue.

A Closer Look at *GE*

In *GE*, the Court of Appeals considered a lower court's award of summary judgment for certain excess insurers against

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GE on the issue of whether personal injury asbestos claims arising out of GE's sale of turbines, which were insulated with asbestos-containing products, constituted a single occurrence under GE's primary insurance policies, as GE argued, or multiple occurrences, as the excess insurers argued. 8 N.Y.3d at 168-70. GE's primary general liability insurer during the relevant period was Electric Mutual Liability Insurance Co. ("EMLICO"), which GE and its employees partially owned. *Id.* at 167. The EMLICO policies required GE to reimburse EMLICO for the claims it paid and thus functioned like a self-insured retention or deducible for GE. *Id.* The EMLICO policies contained a $5 million per-occurrence coverage limit with no aggregate cap, and GE's excess policies did not attach until that primary per-occurrence limit was exhausted. *Id.* Thus, a determination that each asbestos exposure was a separate occurrence meant that GE would be unlikely to exceed the EMLICO limits and access its excess coverage. *Id.*

The EMLICO policies defined an "occurrence" as "an accident, event, happening or continuous or repeated exposure to conditions which unintentionally results in injury or damage during the policy period." *Id.* at 162. The court determined that the "continuous or repeated exposure" language in the definition did not reflect an intent to group claims into a single occurrence, but rather reflected a historical shift in the insurance industry away from "accident"-based policies toward "occurrence"-based policies, encompassing a wider range of liabilities, such as those stemming from losses that occurred gradually rather than suddenly. *Id.* at 172-73.

Although it found that the "continuous or repeated exposure" language in the primary policies before it did not constitute grouping language, the *GE* court emphasized that express grouping language could be given effect where it was present. *Id.* at 172, 173 & n.3. Contemplating wide latitude for parties' ability to adopt such language, the court stated: "Certainly these sophisticated parties could have chosen to define occurrence in a manner that grouped incidents based on the approaches rejected in *Johnson* (such as the sole-proximate-cause model or the single-occurrence-per-claimant model) or adopted yet another approach not envisioned by the *Johnson* court." *Id.* at 173.

Finding that the primary policies did not contain grouping language, the court proceeded to analyze the asbestos claims under the "unfortunate event" test laid down in *Johnson* and applied in *Hartford Acc. Indem. Co. v. Weslowski,* 33 N.Y.2d 169. *GE,* 8 N.Y.3d at 173-74. GE argued that all the asbestos claims could be traced to a single act of alleged negligence — GE's failure to warn of the dangers of exposure to asbestos insulation in its turbines. *Id.* at 169. The court, however, focused its analysis on the relationship among the incidents of exposure rather than their cause and found that those "incidents share[d] few, if any, commonalities, differing in terms of when and where exposure occurred, whether the exposure was prolonged and for how long, and whether one or more GE turbine sites was involved." *Id.* at 173-74. Accordingly, the court held that the asbestos plaintiffs' exposures "were unquestionably multiple occurrences and the excess insurers were entitled to a declaration to that effect." *Id.* at 174.

International Flavors

Shortly after the New York Court of Appeals decided *GE*, the New York Appellate Division's First Department was asked to determine the number of occurrences resulting from the alleged exposure by 30 workers at a microwave packaging plant to toxic compounds found in butter flavoring manufactured by International Flavors & Fragrances, Inc. ("IFF"), *Int'l Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am.*, 844 N.Y.S.2d 257, 258-59 (N.Y. App. Div. 1st Dep't 2007) ("*International Flavors*"). IFF and its predecessor in interest sought a declaratory judgment for coverage against their primary general liability insurers (collectively, "AIG") for claims brought against them by the workers. *Id.* at 258. The lower court granted and the Appellate Division affirmed AIG's motion for summary judgment for a declaration that each personal injury plaintiff's exposure constituted a separate occurrence, and thus, the per-occurrence deductibles in the AIG policies applied to each of the underlying claims. *Id.* at 259.

Following *GE*, the court first analyzed the policy language to determine whether the parties intended to provide for the grouping of such claims into a single occurrence. *Id.* at 259. The policies defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 258. In addition, the policies at issue provided that per-occurrence deductibles applied to "all damages because of 'bodily injury' or … 'property damage' as the result of any one 'occurrence,' regardless of the number of persons or organizations who sustain damages because of that occurrence." *Id.* at 259. The court held that this language "d[id] not reflect the parties' intent to aggregate the individual claims for the purpose of subjecting them to a single policy deductible." Rather, the court found that the language evinced an "intent to construe as a single occurrence the 'continuous or repeated exposure' of any one person to 'harmful conditions'" and also "the 'continuous or repeated exposure' of multiple persons to 'harmful conditions' that result from a single 'accident.'" *Id.* at 260-61. The court pointed to the varying characteristics of each personal injury plaintiff's exposure and concluded that, under the policies' definition of an "occurrence," "the exposure of numerous persons to a hazardous condition cannot be deemed a single 'occurrence' in the absence of any identifiable precipitating event or 'accident.'" *Id.* at 261.

Because the court found that the policies' definition of "occurrence" did not group the underlying claims at issue, it proceeded to analyze the number-of-occurrences question under the "unfortunate event" test and held that each claim represented a separate occurrence. *Id.* at 26-64. The court noted, however, that "[h]ad these sophisticated parties desired to aggregate all claims resulting from the exposure or series of exposures to a set of hazardous conditions, it would have been a simple matter to rewrite the definition of 'occurrence.'" *Id.* at 261.

ExxonMobil

In April 2008, the First Department once again examined grouping language under New York law. In *ExxonMobil Corp. v. Certain Underwriters at Lloyd's, London,* the court affirmed a decision by the Supreme Court for New York County, which had held that product liability claims arising from the manufacture and distribution of the same product constitute multiple occurrences under the general liability policies at issue. 50 A.D.3d 434, 435 (N.Y. App. Div. 1st Dep't 2008).

As explained in the lower court's decision, ExxonMobil sought insurance coverage for costs from its primary general liability insurers (the "London Insurers")

in connection with defending 13 lawsuits involving allegations that ExxonMobil produced a polybutylene resin material that caused pipes in which it was used to prematurely break. *ExxonMobil Corp. v. Certain Underwriters at Lloyd's, London,* No 603471/06, 2007 WL 1615102, at *2 (N.Y. Sup. Ct. June 5, 2007). At the same time, ExxonMobil sought coverage for costs it incurred to resolve a class action and 11 other lawsuits that alleged that Mobil AV-1, a synthetic aviation lubricant manufactured by ExxonMobil, caused aircraft engine damage and failure. *Id.* at *2-*3.

The insurance policies at issue contained a self-insured retention that required ExxonMobil to cover the first $5 million in costs for each occurrence, a threshold that all but one of the underlying claims failed to cross. *Id.* at *1. The policies defined an "occurrence" as:

> [A]n accident, event or a continuous repeated exposure to conditions which result in personal injury or property damage, provided all damages arising out of such exposure to substantially the same general conditions existing at or emanating from each premises location of the Assured shall be considered as arising out of one occurrence. *Id.* at *1.

Both ExxonMobil and the London Insurers moved for partial summary judgment seeking a ruling on whether the claims constituted multiple occurrences. *Id.* ExxonMobil argued that the polybutylene claims as a group and the lubricant claims as a group each constituted single occurrences because the individual claims within each group involved damages arising out of "continuous or repeated exposure" to the same general conditions, which ExxonMobil argued, were its "uniform manufacture and sale of products that failed during use by a third party, resulting in property damage." *Id.* at *3.

The Supreme Court rejected ExxonMobil's argument, finding that the manufacture of the defective products could not constitute an "accident" under the policies' definition for an "occurrence" or a "condition" within the definition's exposure clause. *Id.* at *7-*8. The court held that "a plain reading of the policies at issue indicates that they do not contain any provisions that would support the grouping of multiple claims into a single occurrence." *Id.* at *9. It then proceeded to analyze the incidents under the "unfortunate event" test and concluded that they were each separate "occurrences." *Id.* at *9-*10. The Appellate Division agreed, citing both *GE* and *International Flavors* in its decision affirming the lower court's decision in favor of the London Insurers. 50 A.D.3d 434, 435.

Bausch & Lomb

In *Bausch & Lomb Inc. v. Lexington Insurance Co.,* the U.S. District Court for the Western District of New York considered New York law on the grouping of claims. 679 F. Supp. 2d 345, 350-55 (W.D.N.Y. 2009). In that case, the plaintiff policyholder, Bausch & Lomb, brought an action against its umbrella insurance carrier, defendant Lexington Insurance Company ("Lexington"), seeking a declaration that Lexington was required to provide coverage for liabilities arising out customers' use of certain brands of Bausch & Lomb contact solution that allegedly fostered or failed to prevent ocular infections. *Id.* at 348. More than 2,000 such personal injury claims were brought by customers against Bausch & Lomb. *Id.*

Lexington denied coverage for nearly all of the contact solution claims because it deemed each alleged injury to be a separate occurrence under its policies, and the individual claims did not exceed the per-occurrence self-insured retentions contained in the policies. Lexington agreed to provide coverage for such claims only to the extent they exceeded the aggregate self-insured retentions in the policies and met additional per-occurrence maintenance obligations found in some of the policies. *Id.* at 348. Bausch & Lomb argued that grouping language within the policies' definitions of "occurrence" meant that all such claims should be considered to be a single occurrence within any given policy year, which would cause the policies' per-occurrence self-insured retentions to be exceeded and allow access to Lexington's umbrella coverage. *Id.* at 348, 349. Both parties moved for summary judgment based on the number-of-occurrences question. *Id.* at 347.

The policies during the period at issue contained two different versions of the definition for "occurrence," but the parties agreed that, for the purpose of the grouping determination, the different articulations were functionally equivalent. *Id.* at 350. One policy defined "occurrence" as:

> [A]n 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. All such exposure to substantially the same general conditions shall be considered as arising out of one Occurrence. *Id.*

The other group of policies defined "occurrence" as:

> [A]n accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions shall be considered as arising out of one Occurrence. *Id.*

The court agreed that the exposure clause contained grouping language, but concluded that it did not group the personal injury claims at issue in the case. *Id.* at 354. Quoting *International Flavors,* the court found that the "occurrence" definition grouped into a single occurrence continuous or repeated exposure of a single person to harmful conditions, and "continuous or repeated exposure of multiple persons to 'harmful conditions' that result from a single accident." *Id.* The definition, however, did not "group claims where there is no single incident that can be identified as the event resulting in injury to the numerous claimants" *Id.* (internal citations omitted) The court found that "there was no single accident that resulted in [the claimants being] subjected to the same or substantially the same harmful conditions." *Id.* at 355. Rather, based on the facts that the subject solutions were made at different times and places, and the alleged injuries occurred at various locations around the world at different times, the court found that "it was each individual's exposure to the solution, under conditions unique to each individual, that constituted the accident that caused the injury" in each claimant's case. *Id.* Thus, the grouping language did not apply. *Id.*

Based on an analysis of the contact solution claims under the "unfortunate event" test, which in the court's opinion preceded the analysis of the grouping

language, the court held that each claim represented a separate occurrence under the policies and accordingly ruled in Lexington's favor on the grouping issue. *Id.* at 351-54, 355.

Mt. McKinley

Most recently, in *Mt. McKinley Insurance Co. v. Corning Inc.* ("*Mt. McKinley*"), the Supreme Court for New York County examined the applicability of grouping language to numerous personal injury claims against a policyholder arising out of the claimants' exposures to asbestos. 903 N.Y.S.2d 709 (N.Y. Sup. Ct. 2010). Corning Incorporated ("Corning"), the policyholder, was named as a defendant in numerous actions brought by two groups of plaintiffs: The first group of claimants was allegedly exposed to asbestos contained in paper spacers provided with furnace refractory bricks that were manufactured by a former subsidiary of Corning; the second group was allegedly exposed to Unibestos, an asbestos-containing insulation product manufactured by a company that was 50% owned by Corning. *Id.* at 712.

Two of Corning's excess insurers, Mt. McKinley and Everest, brought a declaratory judgment action against Corning and its other primary and excess insurers. *Id.* The plaintiffs, Mt. McKinley and Everest, and Lumbermens, a primary carrier with a high-deductible program, brought motions for partial summary judgment, seeking a declaration that, under the policies at issue, each underlying asbestos-related bodily injury claim constituted a separate occurrence. *Id.* at 711. Several excess insurers joined the motions while Corning and Century Indemnity Company ("Century") (a primary insurer which did not have a high-deductible program similar to Lumbermens) opposed the motions. *Id.* at 712. Both Corning and Century relied on footnote number 3 of the *GE* decision to argue that, because of the grouping language in the policies, each asbestos claim against Corning did not constitute a separate occurrence. *See Id.* at 717. Century went further, arguing that all of the claims against Corning constituted a single occurrence. *Id.* at n.6.

The *Mt. McKinley* court examined the definition of occurrence in the policies at issue, which stated: "'occurrence' means 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." *Id.* at 713. In addition, the policies contained grouping language within a separate continuous exposure clause. For instance, the Lumbermens policy in effect for several years in the 1970s and 1980s contained the following:

> For purposes of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence. *Id.* at 713, 716 n.5.

In analyzing these policy provisions, the court appeared to follow the *ExxonMobil* and *Bausch & Lomb* decisions, which held that even if policies contained grouping language in continuous exposure clauses, such language might not cover the specific claims at issue, in which case the "unfortunate event" test would be applied and multiple occurrences could be found. *Id.* at 717. Nevertheless, the *Mt. McKinley* court declined to reach the same result as those cases, which held that the continuous exposure clauses at issue did not group the underlying claims against the policyholders. The court distinguished the clause at issue in *ExxonMobil* on the basis that the clause in that cases contained a premises location qualification not found in the Lumbermens clause, *Id.* at 720-21 & n.9, and criticized the *Bausch & Lomb* decision for focusing its analysis of the continuous exposure clause at issue "on the phrase 'continuous exposure' rather than the salient phrase 'same harmful conditions.'" *Id.* at 720. The *Mt. McKinley* court found that an issue of material fact existed as to whether the "continuous or repeated exposure" language in the Lumbermens policies reflected an intent to group the asbestos claims at issue, and accordingly denied the motions for partial summary judgment. *Id.* at 722. The court did not, however, explain what type of evidence would be sufficient to demonstrate the parties' intent or which party should bear the burden of proof.

Conclusion

While recent cases interpreting *GE* have provided insight into how New York courts will construe continuous exposure and grouping language, a question remains concerning what showing is required to establish that parties intended to aggregate multiple claims into a single occurrence. Outstanding questions concerning the applicability of grouping language will likely be answered in future coverage disputes where courts are asked to determine the number of occurrences.