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Commentary

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As untold numbers of COVID-19 insurance claims are submitted on a daily basis, insurers and reinsurers must prepare for busy times ahead. The COVID-19 pandemic has the potential to present many novel coverage issues for reinsurers and insurers, such as what constitutes physical property damage, whether pollution extensions and exclusions will apply, how event cancellation and infectious disease endorsements will affect claims, the application of civil authority coverage extensions, and which of the various kinds of claimed COVID-19 damages could potentially be covered. The pandemic also presents circumstances unique in modern life that could affect insurance and reinsurance claims, such as numerous statewide closure orders, multiple waves of virus outbreaks that are months apart, and the potential for re-contamination.

In this article, we examine an important quantum aspect of the current crisis that may affect reinsurance claim handling: assuming a policyholder can establish coverage, whether COVID-19 claims will be considered as a single occurrence or as multiple occurrences both on the direct side and the reinsurance side.

I. The Tests for Determining the Number of Occurrences

It goes without saying that treating COVID-19 claims as single or multiple occurrences could have significant monetary impact. In the absence of clear, determinative policy language, courts use several different tests to determine the number of occurrences. A novel situation like the current pandemic presents questions about “occurrence” over which reasonable people can and will disagree.

Most states use the “cause” test. Under this test, courts look to the number of causes leading to the injury or damage to determine the number of occurrences. For example, where a single cause is determined to result in multiple injuries, it will be deemed a single occurrence even though injuries may be widespread in time and place.

Some states use a form of an effect or “unfortunate event” test. Under those tests, courts focus on the number of injuries resulting from the covered act, and not the number of acts. New York applies an unfortunate event test, but courts there also analyze the temporal and spatial relationships between the incidents and the extent to which they were part of an undisputed continuum to determine whether they can nonetheless be viewed as a single unfortunate event.

II. Analogizing COVID-19 to Past Occurrence Determinations

Whether a court is applying a cause test or an effect/unfortunate event test, the ultimate determination of single or multiple occurrences will still be highly

fact-specific. While COVID-19 presents unique circumstances, how courts have determined the number of occurrences in situations involving other health crises may provide a window into how occurrence questions regarding the COVID-19 virus may be decided. Because pandemics like COVID-19 are fortunately rare, cases involving food contamination and bacterial outbreaks provide some of the closest analogous situations.

A. Single Occurrences in *E. Coli* Outbreaks

In *Republic Underwriters Ins. Co. v. Moore*, 493 F. App'x 907 (10th Cir. 2012), an insured restaurant prepared and served *E. coli*-contaminated food over a 13-day period at two different locations: its restaurant and a catered gathering. Three hundred and forty-one people were affected and one died. The insurers argued that under the cause test called for under Oklahoma law, there had been only one cause and thus one occurrence: the restaurant's preparation and handling of the affected food. Arguing for multiple occurrences, the restaurant relied on an investigation that suggested there could be multiple contributing factors, such as contamination by food handlers and cross-contamination from various surfaces. The magistrate judge found two occurrences, based on the two affected locations, but the Tenth Circuit overruled, finding that there was one occurrence because all the injuries were proximately caused by one thing: the restaurant's ongoing preparation of contaminated food.

Similarly, in another "cause test" jurisdiction, North Carolina, an *E. coli* outbreak was found to constitute a single occurrence. In *Western World Ins. Co. v. Wilkie*, No. 5:06-CV-64-H(3), 2007 U.S. Dist. LEXIS 81677, 2007 WL 3256947 (E.D.N.C. Nov. 2, 2007), the insured ran a petting zoo, and several visitors were injured after being exposed to *E. coli* over the course of nine days. The policy definition of "occurrence" was "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The insurer argued that the *E. coli* outbreak was one occurrence based on a single continuum of negligent acts by the petting zoo. The insured asserted that there were various acts of negligence, such as a failure to properly clean or a failure to separate the animals from the children, each of which constituted separate causes. The court ruled that "[t]he presence of *E. coli* at the petting zoo is the general harmful condition to

which [the minors] were exposed, and the cause of this condition was [the defendant's] ongoing negligence." *Id.* at *4. Accordingly, the court concluded that there was a single occurrence.

B. Multiple Occurrences in Salmonella and Botulism Outbreaks

Illness outbreaks can also constitute multiple occurrences. In *Golden Eagle Ins. Corp. v. Moon Marine Corp.*, 2013 U.S. Dist. LEXIS 197531 (N.D. Cal. Nov. 15, 2013), a salmonella outbreak led to a tuna recall. California is another "cause test" state, and the court in *Golden Eagle* ruled that it was not clear whether there were one or many causes of the salmonella contamination. Unlike other situations involving defective products, the court noted that there could be multiple causes of salmonella and multiple strains of bacteria, and thus denied the insurer's motion for summary judgment that there was one occurrence.

In *Mason v. Home Insurance Co. of Illinois*, 177 Ill.App.3d 454 (1988), a restaurant faced multiple claims brought by diners who were stricken with botulism poisoning after eating tainted onions served over a three-day period. Applying the cause test, an Illinois appellate court held that the restaurant did not become liable until it actually served an individual with tainted food and that each separate serving constituted a distinct occurrence under the meaning of the policy. The court distinguished these separate serving situations from those where there was an uninterrupted and continuing cause from which all of the injuries resulted, such as a hotel fire. *Id.* at 461. Similarly, shipments of contaminated livestock feed have been found to be separate causes of harm, and thus separate occurrences. *Michigan Chemical Corp. v. American Home Assurance Co.*, 728 F.2d 724 (6th Cir. 1984).

C. Application to COVID-19

If courts view COVID-19 cases as they have other health crises, occurrence decisions could turn on determinations regarding such matters as whether various strains of COVID-19 should be considered separate causes, what contributing causes there were to the introduction of COVID-19 in a particular location, and whether a governmental order causes or contributes to the injury to the insured. Specific policy language and the unique facts of each claim will weigh heavily on these decisions. And the manner in which insurers

resolve claims could have an impact on their ability to make a reinsurance recovery, including with respect to the number of occurrences.

III. How Reinsurance Can Be Affected by COVID-19-Related Occurrence Determinations

The risk of a disconnect between a direct policy and a reinsurance agreement concerning occurrences is heightened by the pandemic, as reinsurance issues could arise if courts deem virus losses to be covered by policies, and then apply the cause test to determine the number of occurrences. Consider the following scenario, which would be fanciful for traditional property perils such as fire and earthquake, but could be quite real with a nation-wide, potentially recurring peril like the COVID-19 virus:

- A direct property policy defines “occurrence” in relevant part as “all direct physical loss, damage or destruction insured against arising out of or caused by one event.” The excess of loss reinsurance agreement defines “loss occurrence” in relevant part as “the sum of all individual losses directly occasioned by any one disaster, accident or loss or series of disasters, accidents or losses arising out of one event which occurs within the area of one state and states contiguous thereto and to one another. However, the duration and extent of any one ‘loss occurrence’ shall be limited to all individual losses sustained by the Company occurring during any period of 168 consecutive hours arising out of and directly occasioned by the same event.”

- A policyholder submits separate claims for properties in New York, Illinois and California arising out of two waves of the COVID-19 virus (the second wave occurring several months after the first). One theory in applying the majority causation test could lead to a finding that all six claims arise out of a single event/occurrence, on the grounds that the virus was the single cause of the losses. But under the reinsurance agreement, these losses could be six occurrences, forcing the cedent to pay six retentions to fully access its reinsurance. Faced with such a prospect, if and when coverage is established, how a cedent addresses the number of occurrences with its policyholder may be influenced by where its reinsurance attaches and the size of the policyholder deductible.

While much ink has been spilled over whether various coverage terms apply to COVID-19 losses, it is important to keep in mind issues beyond coverage, including the amount of COVID-19 damages that might actually be recoverable under a policy and related reinsurance agreement. In the event there is coverage for the pandemic, the number of virus contamination occurrences, as determined by the facts, the contract language and the various judicial tests, will impact the extent to which the policyholder, direct insurer, or reinsurer ultimately bear the costs of the pandemic.

If you have questions, please contact Peter Steffen and John O’Bryan and stay tuned for more developments on [freeborn’s COVID-19 webpage](#). ■

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