

Illinois Appellate Court Examines Number of Occurrences and Limits Application of Time-and-Space Test

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On January 11, 2013, the Illinois Appellate Court for the First District in Chicago issued an important decision concerning the test for the number of occurrences under an insurance policy. *Ware et al. v. First Specialty Insurance Corp.*, No. 1-11-3340, 2012 IL App (1st) 113340 (Ill. App. Ct. Jan. 11, 2013). The number of occurrences can be a critical issue in insurance coverage litigation because it often determines the number of deductibles the policyholder must pay, as well as the maximum coverage limit a policyholder will receive.

In general, courts look first to the plain language of the policy when determining whether injuries were the result of a single occurrence or multiple occurrences. However, when the terms of the policy, standing alone, are insufficient to make this determination, courts generally look to one of two theories. Illinois courts, as well as many other jurisdictions, typically apply the "cause theory," which looks to the cause or causes of the injury to determine the number of occurrences. If the injuries to multiple persons were the result of a single cause, the court will likely hold that it was a single occurrence; multiple causes would constitute multiple occurrences. An alternate test is the "effect theory," which determines the number of occurrences based on the number of claims or injuries that result from a cause or event.

In 2009, the Illinois Supreme Court stated in *Addison Ins. Co. v. Fay*, 905 N.E.2d 747 (Ill. 2009) that, in some circumstances, the cause theory may be an insufficient rubric by which to determine the number of occurrences. In *Addison*, two boys went to go fishing together and their bodies were later found in an excavation pit. Claims against the property owner alleged a failure to properly secure the site. The boys' times of death could not be determined, nor could the amount of time that elapsed between their deaths. The *Addison* court held that, in this scenario – when multiple injuries are sustained over an undetermined period of time due to an "ongoing negligent omission," rather than an affirmative act or acts of negligence – the "time-and-space" test, rather than the cause theory, can apply.

Under the time-and-space test, as articulated by the Illinois Supreme Court, when injuries and their causes "are simultaneous or so closely linked in time and space as to be considered by the average person as one event, then the injuries will be deemed the result of one occurrence." *Addison*, 905 N.E.2d at 756 (citing *Doria v. Ins. Co. of N. Am.*, 509 A.2d 220 (N.J. 1986)). However, when "ongoing negligence" causes multiple injuries, it may be unreasonable to bundle all the injuries into a single occurrence, even though they were the result of a single cause – an ongoing negligent omission. *Id.* at 755. In applying this test in *Addison*, the Illinois Supreme Court found there was insufficient evidence to determine whether the boys' injuries were so "closely linked in time and space to be considered one event." *Id.* at 757. The Court also held that the insurer carried the burden of proof on this point and, considering the unknown gap in time and space of the boys' injuries, the court held there were multiple occurrences rather than a single one, resulting in multiple limits for the policyholder. *Id.*

The *Addison* court's adoption of the time-and-space test created some uncertainty about which test Illinois courts will apply when determining the number of occurrences. In February 2012, the Northern District of Illinois indicated that the time-and-space test may apply in certain situations involving an ongoing negligent omission; see *Travelers Property Cas. Co. of America v. RSUI Indem. Co.*, 844 F. Supp. 2d 933, 936 (N.D. Ill. 2012) (finding a single occurrence in multiple claims of injury from a tainted batch of meat product). This month's decision of the Illinois Appellate Court in *Ware* similarly suggests the use of a time-and-space test will only apply in certain circumstances.

The Illinois Appellate Court Decision

The *Ware* case involved the highly publicized 2003 porch collapse at a Chicago apartment that killed thirteen people and injured twenty-nine others. The policyholders settled with the plaintiffs and assigned the plaintiffs their right to attempt to recover the difference between the policy's aggregate limit of \$2 million and its per occurrence limit of \$1 million. The Illinois Appellate Court declined to apply the time-and-space test and held that the injuries were the result of only a single occurrence.

In support of its finding of only one occurrence, the First District Appellate Court began with the plain language of the insurance policy. *Ware*, 2012 IL App (1st) 113340, at *8. Focusing on language in the definition of bodily injury, it concluded that the per occurrence limit applied to all injuries or deaths arising "at any time" out of an accident. *Id.* at *8-9. The plaintiffs themselves conceded that all of the injuries were caused "directly and solely from the porch collapse." *Id.*

Next, the court stated that even if it accepted the plaintiffs' position that the policy was ambiguous, it would nevertheless reach the same conclusion by applying the cause theory. *Id.* Under this test, it was clear that the porch collapse was the sole cause of the plaintiffs' injuries and, thus, it constituted only one occurrence. *Id.* at *10-11.

The plaintiffs contended that the time-and-space test from *Addison* applied, rather than the cause theory used by the trial court. *Id.* at *13. According to plaintiffs, the case involved multiple occurrences on the theory that the insurer could not "possibly show that all of the individuals who died at the scene of the porch collapse, died at or near the same time." *Id.* at *9. The appellate court rejected this contention, noting the factual differences between *Addison* and the case at hand. *Id.* The *Addison* case involved injuries that were sustained over an open-ended period of time due to an "ongoing negligent omission," whereas the injuries in the *Ware* case were caused "directly and solely" by a discrete incident – the porch collapse. *Id.* at *14. Therefore, the court held that since the plaintiffs' losses all emanated from that single cause, there was but one occurrence. *Id.*

Finally, the court stated that even if it applied the time-and-space test, the same result would follow. *Id.* According to this court, the time-and-space test was a "limiting principle" in situations when the cause and result are not closely linked in time and space. In *Ware*, the cause of the plaintiffs' injuries – the porch collapsing – was so closely linked in time and space as to be considered by the average person as one event. *Id.* Further, all of the plaintiffs' deaths and injuries could be directly traced to this one cause. *Id.* This was different from the *Addison* case where "much was unknown as to the cause of the boys' death" and the court found the insurer could not meet its burden. *Id.* Therefore, the *Ware* court concluded that, under any of the theories discussed, there was only one occurrence that caused the plaintiffs' injuries. *Id.*

Implications

While the *Addison* case created some uncertainty in Illinois on which test would apply when determining the number of occurrences under an insurance policy, the recent *Ware* decision suggests that the cause theory will continue to be the primary test for determining an occurrence under Illinois law.

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