

THE RHA REVIEW

ROUTE TO:

Vol. 17, No. 3, Third Quarter 2011

A publication of Robert Hughes Associates, Inc., an international litigation support, actuarial, risk management and insurance consulting company.

WHOSE OX IS IT, ANYWAY?

by Robert N. Hughes, CPCU, ARM



It is my completely unscientific observation that most insurance-coverage issues are characterized by an insurer position, on the one hand, and a policyholder position, on the other. There is one issue, however, in the question of coverage under liability insurance policies on which almost no one agrees. That issue is the number of occurrences. The answer to that question depends almost exclusively upon whose ox is being gored. One would think that, in the case of some massive body of individual claims arising out of, say, pollution or toxic torts or asbestos, the policyholder would find it to its advantage to have the matter be deemed to involve as many "occurrences" as possible in order to multiply the number of "per occurrence limits" available. By the same token, you would expect all insurers to favor a single "occurrence" in order to protect their "per occurrence" policy limits from "runaway" catastrophes. Well, in the words of Sportin' Life of *Porgy and Bess*, it ain't necessarily so. (Out my way we say "No way, Jose.")

TUTORIAL

First, indulge me a brief didactic aside for those who may not live these issues on a day-to-day basis. Liability insurance is traditionally placed on a "layered" basis; i.e., the lower layer, or "primary," which generally includes the duty to defend, is structured with limits "per occurrence" and, in the case of

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some hazards such as "products," with aggregate limits. In addition, the coverage available is generally increased through the purchase of "excess" coverage that sits on top of the underlying primary and provides increased limits and, in the case of "umbrella" excess policies, broadened coverage. This "excess" liability coverage takes effect (or "attaches") when the underlying liability coverage is "exhausted" (the meaning of which precipitates a completely new set of arguments that will be the topic of a future article).

The definition of *occurrence* in the primary policies and in many of the excess forms is:

" 'occurrence' means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured;" (1966 ISO CGL)

or:

" '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."

The same or a similar definition appears in most excess policies, except they often contain what is known as the "deemer" clause that states in so many words that all claims arising out of continuous or repeated exposure to conditions shall be deemed to have arisen out of a single occurrence.

HYPOTHETICAL EXAMPLE

So, presuming you are still awake, let's consider a hypothetical example in which the insured is a manufacturing firm facing multiple claims for injury

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not caused by the use of its products ... say, an emissions problem. No single claim is more than \$50,000. The applicable coverage is provided by a primary CGL policy with per-occurrence limits of \$1,000,000 and an annual aggregate for products of \$5,000,000 and no retention or deductible. On top of that, there is an "umbrella" excess liability policy of \$10,000,000 per occurrence and in the aggregate. On top of that, there is "following form excess" coverage of

\$100,000,000 for each occurrence and in the aggregate.

LIKELY PRIMARY INSURER'S POSITION

If no policyholder retention is involved then the primary insurer's best interests are served if all the claims are deemed to be the result of a single occurrence, thus limiting its exposure to the "per occurrence" limit of \$1,000,000. If, however, there is a policyholder retention then it best serves the primary carrier if it is

determined that each claimant is a separate occurrence.

LIKELY EXCESS INSURERS' POSITION

The excess carriers, on the other hand, would be best served if it is determined that each claimant represents a separate occurrence. Since no individual claim exceeds \$50,000, the underlying \$1,000,000-per-occurrence limit would never be exhausted, and the excess would never attach. This position applies irrespective of whether

FROM NEAR AND FAR



Oldwick, NJ — According to an analysis released by A. M. Best Co. in August, the United States' property and casualty insurance industry was hit with \$27 billion in catastrophe-related losses in the first six months of 2011. For the same period last year, losses were reported at \$11.9 billion. Commercial-lines losses more than doubled from the same period last year, rising from \$4.1 billion to \$8.3 billion.



New York, NY — Reuters is reporting that BP PLC has paid out more than \$5 billion to victims of the Gulf of Mexico oil spill last year. The Gulf Coast Claims Facility was set up as a \$20 billion fund to pay claims. So far, more than 900,000 claims have been filed in all 50 states and from 36 other countries.



East Coast, USA — Hurricane Irene battered the eastern seaboard and much of New England at the end of August, causing an estimated \$7 billion in damages. According to various reports published in insurance journals, only about \$3 billion will be covered by insurance. Initial projections were forecasting up to \$20 billion in damages. Hurricane Katrina caused losses of almost \$50 billion.



Mineral, VA — An earthquake measuring 5.8 on the Richter scale surprised people on the East Coast on August 23, causing less than \$100 million in insured losses, according to catastrophe modeler EQECAT.



London, England — According to a report published at www.businessinsurance.com, losses attributed to the rioting and looting in London in August could amount to more than \$160 million. More than 450 people have been arrested so far.

(WHOSE OX, cont'd from opposite)

there is a policyholder retention in the underlying coverage.

LIKELY POLICYHOLDER POSITION

Presuming that the total of all the claims does not ultimately exceed the total coverage limits (\$111,000,000), the policyholder doesn't particularly care whether there is only one occurrence or many occurrences. However, this position changes radically if the primary coverage is subject to a retention (or deductible) by the policyholder or if there is only a limited amount of excess coverage available. In the example given, if the policyholder's primary coverage were subject to a \$100,000-per-occurrence retention, there would be no coverage available if it is determined that each claimant represents a separate occurrence. Therefore, it would be in the policyholder's best interests if the matter were deemed to be a single occurrence. If, on the other hand, there is limited excess coverage available, the policyholder might find that even though multiple occurrences would increase the total retained amount, the per-occurrence limits would also be increased, thus making up somewhat for the lack of excess coverage.

It should be noted that should there be a limited amount of excess coverage or no excess coverage at all, the policyholder's best interests are served if it is determined that each claimant is a separate occurrence.

WHAT DIFFERENCE DOES IT MAKE?

I'm sure you have already figured out at least some of the paradoxes that are created by this situation. If not, let

me 'splain ...

... Let's look at a situation in which the policyholder has no retention in the primary layer. In that case, the excess carrier and the primary carrier would be at cross purposes, with the primary carrier taking a position for a single occurrence, thus limiting the exposure to \$1,000,000, while the excess carrier would be taking a position for multiple occurrences.

... Okay, let's assume that the primary coverage is subject to a \$50,000-per-occurrence retention.

"Well, the fact is that, in the custom and practice of insurance (and, to a certain extent in the law), insurers are held to a higher degree of responsibility than are parties to other noninsurance contracts."

Suddenly, the policyholder wants very much for there to be a single occurrence in order to limit its exposure to one \$50,000 hit. Now, however, the primary carrier's position is reversed, since, given the scenario in our hypothetical, it would never have to pay because no claim exceeds the retention.

SO WHAT?

Were this exercise one that pertains to any subject other than insurance, one would expect each party to act in every circumstance in a manner that benefits itself the most. Policy-

holders who were seeking coverage in "exposure" cases involving multiple policy years would, if those years offered disparate coverage construction (some years having retentions and some not, for instance), take different coverage positions for different years. Insurers would take one coverage position with one insured and another with another having exactly the same loss profile, dependent not upon the interpretation of policy terms and conditions but upon the circumstances of the coverage construction. "So what?" you ask. Well, the fact is that, in the custom and practice of insurance (and, to a certain extent in the law), insurers are held to a higher degree of responsibility than are parties to other noninsurance contracts. For one, they owe a duty of good faith and fair dealing to their insureds. What this actually means in a court of law has been subject to judicial interpretation for decades. What it means in the custom and practice of insurance, however, is somewhat simpler. It means that an insurer must interpret its policies in a fair and even-handed manner and that it should not take arbitrary positions that serve its own purposes to the detriment of its policyholders.

SO WHOSE OX IS GETTING GORED?

Well, in this case there are so many oxen in the pasture that it is difficult to tell. The field is filled with parties having disparate agendas. At the end of the day, however, ambiguity must be resolved in favor of the policyholder. Hopefully, everyone's oxen survive to pull another cart on another day. **RIA**

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THE RHA REVIEW

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