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Who? What? When? "Ware" — An Illinois Appellate Court Addresses the "Number of Occurrences" Issue

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A recent Illinois Appellate Court decision has ruled that damages arising from a porch collapse in 2003 arose from a single occurrence. *Ware, et al. v. First Specialty Ins. Corp.*, 2012 Ill. App. (1st) 113340 (Jan. 11, 2013).

Facts

A party was held at the second and third-floor units of a three-floor apartment building in Chicago, Illinois. While several individuals were standing on the second or third-floor back porches, the third-floor porch suddenly collapsed onto the second-floor porch which immediately collapsed onto the first-floor porch. As a result of the porch collapse, 13 people died and at least 29 more were injured that night and in the "days or weeks after the collapse."

The owner of the property and others were identified as named insureds on a Bodily Injury and Property Damage Liability insurance policy issued by First Specialty Insurance Corporation. The Policy covered the subject apartment building and had limits of $1 million per occurrence and $2 million in the aggregate, subject to a $5,000 deductible.

The injured and the decedents' estates sued the property owner and the other named insureds in the Circuit Court of Cook County, Illinois, claiming, among other things, that the insureds' failure to inspect the porch and maintain it in a reasonably safe manner was the cause of the injuries and deaths of the plaintiffs. The parties ultimately agreed to resolve their differences, with one of the arrangements being First Specialty's agreement to contribute its $1 million per occurrence limit.

Following the First Specialty agreement and pursuant to an assignment of rights, the plaintiffs filed a declaratory judgment action as to whether there was more than one occurrence and thus whether First Specialty must pay the policy's aggregate limit of $2 million.

The parties agreed for purposes of the lawsuit that there were "no intervening acts or circumstances which could have or did in fact contribute to and/or cause" the deaths or injuries suffered. The parties cross-moved for summary judgment on the issue of the number of occurrences. The trial court denied plaintiffs' motion and granted First Specialty's, concluding that the injuries resulted from one occurrence.

The plaintiffs appealed. They argued that because the several injuries and deaths did not all occur at the same time, First Specialty could not establish that the injuries constituted a single occurrence under the Policy. First Specialty contended that the injuries and deaths were the result of one thing, the porch collapse, and thus the injuries arose out of a single occurrence.

In its recent decision, the Illinois Appellate Court sided with First Specialty, relying on the language of the Policy which defined "bodily injury" to mean "injury, sickness or disease sustained by a person, including death resulting from any of these at *any time*." (emphasis added). Based upon this language, the Appellate Court rejected the plaintiffs' argument that there were separate occurrences and determined the Policy's definition of "bodily injury" to mean that the phrase "deaths . . . at any time" controlled. When the deaths or injuries actually occurred was irrelevant to the Court's determination that there was a single occurrence.

The Appellate Court then discussed Illinois Supreme Court precedent on the "number of occurrences" issue. The Appellate Court first considered the Illinois Supreme Court's decision in *Nicor, Inc. v. Associated Electric & Gas Ins. Services*, 223 Ill. 2d 407 (2006) which said that the "cause theory" obligates the court to determine the source of the claims or injuries arising out of the event in order to determine the number of occurrences. Using *Nicor's* ruling as a guide here, the Appellate Court determined that the parties agreed there were no intervening acts or circumstances which could have caused the injuries and that the porch collapse was the single cause of the injuries. As the Court noted, "the time at which injuries manifest is irrelevant." Rather, there was one cause and, thus, only one occurrence.

The plaintiffs also asked the Appellate Court to consider the "time and space test" discussed in the Illinois Supreme Court's decision in *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446 (2009). The "time and space test" limits the *Nicor* "cause theory" and if "cause and result are simultaneous or so closely linked in time and space as to be considered by the average person as one event," then the Court must conclude that the injuries arise from a single occurrence. The *Addison* Court used the "time and space test" to say that the deaths of two boys who were found on private property constituted two occurrences because, even though there was an "ongoing omission" by the property owner in securing the land, there was insufficient evidence to determine how or when the boys died.

The Appellate Court determined that the "time and space test" was not useful in this instance because the porch collapse was a distinct incident and not an "ongoing omission" as in *Addison*. Further, the Appellate Court stated that even under the "time and space test," a single occurrence determination is warranted because the evidence made it so overwhelmingly clear that the cause of the injuries was "so closely linked in time and space as to be considered by the average person as one event. . . . All of the Plaintiffs' deaths and injuries can be directly traced to one cause: the porch collapse."

Considerations

The *Ware* decision spotlights some of the issues and tensions emerging from the two different "number of occurrences" analyses provided by the Illinois Supreme Court in its *Nicor* and *Addison* opinions. Both insurers and policyholders will need to analyze the relevant policy language and the specific facts of a situation in order to assess the possible outcomes when applying the growing body of Illinois law on the "number of occurrences" issue.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact one of the authors:

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