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Insurance law

After the storms, will insurers keep their commitments? p 20

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Multiplying coverage in collision cases

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Does the motor vehicle crash that injured your client encompass more than one 'occurrence'? If so, gather evidence to prove it, so that full coverage is available to all injured parties.

When an automobile collision causes multiple losses, determining the extent of liability coverage for each party can be problematic. Most liability policies limit coverage to a specified amount, depending on the number of "occurrences" in a particular case. It often is difficult to determine whether there has been one or multiple occurrences.

For instance, many trucking companies have a $1 million "per occurrence" liability policy. Simply agreeing with the defendant's restrictive definition of "occurrence" in such a case certainly will limit recovery to that amount, regardless of the number of injured parties. In a catastrophic injury or death case involving multiple parties, a settlement limited to $1 million often is insufficient to compensate each adequately.

However, by properly investigating and handling the case and evaluating the policy, you can separate your client's claim from those of others who were injured or killed. Under the law of your jurisdiction, you can use witness testimony, accident reconstruction, and vehicle black boxes to establish that a separate occurrence resulted in your client's injuries. Doing so can mean the difference between a full-limits recovery for your client and splitting that amount among multiple parties.

Liability insurance provides coverage for legal liability imposed on the insured as a result of unintentional and unexpected personal injury or property damage. Before 1966, coverage was keyed to the word "accident," defined in most policies as "a sudden and unforeseeable event." Courts have always struggled with the term "accident" and have defined it in different ways, but each definition—whether arising in property, personal, or liability insurance—included a common theme: An accident was defined as an unforeseen, unexpected, and unintended event that results from a known or unknown cause.[1]

In 1966, the standard liability policy was revised to key coverage to an occurrence. As of 1973, the standard comprehensive general liability policy defined "occurrence" as "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."[2] Because repeated exposure to conditions constitutes one accident, the policy limits apply once, regardless of the number of conditions or losses.

In determining whether a single policy limit or multiple limits should be applied to a case, the courts have considered the policy definition of "occurrence," the number of victims, and the events giving rise to liability. "Occurrence" has been defined by courts across the country in three primary ways: using the "effect" analysis, the "cause" analysis, and the "liability-triggering event" analysis.

The effect analysis

A small minority of courts employs the effect analysis, finding that the effect of the occurrence is what matters in determining the number of policy limits available for a particular incident. In those jurisdictions, the entire policy lim-

its are available to each injured or damaged party.[3] This is a pro-victim analysis that almost always leads to the conclusion that the loss in question constituted multiple occurrences if multiple parties were involved.

No known appellate cases have applied the effect analysis to an automobile collision case. If you are fortunate enough to practice in a jurisdiction that provides full policy limits to each injured party, you don't have to worry about getting separate coverage for your client. But most of us do.

The cause analysis

Most states addressing the issue of multiple occurrences have adopted the cause analysis, which says the cause or causes of an accident determine the number of occurrences.[4] Under this approach, there is only one cause if there "was but one proximate, uninterrupted, and continuing cause, which resulted in all of the injuries and damage."[5] Likewise, multiple collisions constitute multiple occurrences if more than one proximate cause led to the losses.[6]

For example, suppose a driver loses control of an automobile, strikes one car and bounces off of it, and then either regains control or has an opportunity to regain control before striking a second car. Has there been one or multiple occurrences? Under the cause analysis, this scenario would likely establish multiple occurrences and, therefore, access to multiple policy limits.

The cause analysis was first adopted in a 1956 Washington state case addressing the application of an insurance clause limiting liability to one occurrence. In *Truck Insurance Exchange v. Rohde*, the Washington Supreme Court considered whether "there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages."[7] In a 1972 case, the Wisconsin Supreme Court explained that "if, however, that cause is interrupted or replaced by another cause, the chain of causation is broken and more than one accident or occurrence has taken place."[8]

Courts consider time, distance, and control to be important factors in the cause analysis, as the Fifth Circuit did in *Liberty Mutual Insurance Co. v. Rawls*. The court was asked to determine whether one or two occurrences arose out of impacts occurring "2 to 5 seconds apart and 30 to 300 feet apart."[9] The collisions occurred when the defendant insured was traveling north at a high speed, pursued by law enforcement officials. The defendant collided with the left rear of the first vehicle, knocking it off the highway, to the right. The defendant continued northbound, veered across the centerline, and collided head-on with a second automobile. The court noted, "There is no evidence that the [defendant's] automobile went out of control after striking the rear end of [the plaintiff's] automobile."[10] The court held that there were two occurrences, providing full policy limits for both injured victims.[11]

In a Delaware case, *Ennis v. Reed*, a negligent driver struck one car from the rear and then, 15 to 20 feet away and several seconds later, struck a second car.[12] From the evidence presented, the court concluded the negligent driver stopped after he hit the first car, attempted to drive away from the scene, and then struck the second car. The court applied the cause analysis and found that the incident included two occurrences.

In another case, *Illinois National Insurance Co. v. Szczepkowicz*, a tractor-trailer going north began turning left into a crossover lane. Because of southbound traffic, the driver stopped in the crossover lane, but the rear of the vehicle blocked both northbound lanes. A car in the right northbound lane struck the trailer. Then, "almost immediately" after the collision, the tractor-trailer drove forward approximately 12 feet. Five minutes later, the tractor-trailer still blocked one northbound lane, and a second vehicle struck it there.[13] The court ruled that these were two separate accidents and that "there was no single force, nor an unbroken or uninterrupted continuum that, once set in motion, caused multiple injuries."[14]

Szczepkowicz demonstrates the importance of the control factor. The court looked to the fact that the defendant driver never lost control of his vehicle. After the first collision, the defendant could have moved his vehicle, avoiding the second collision. His failure to move it out of the way became a proximate cause of the second accident.

Establishing that a separate occurrence resulted in your client's injuries may mean the difference between a full-limits recovery for your client and splitting that amount among multiple parties.

In analyzing these cases and others, a Delaware superior court stated, "The common element of those cases finding that one accident or occurrence took place is that the time span was two seconds or less. Additionally, in most of the cases, the fact [that] the negligent driver never regained control over the car was an instrumental factor."[15]

In a recent declaratory judgment action in Alabama, the court used the cause analysis to determine that more than one occurrence applied.[16] In that case, the defendant truck driver drove his tractor-trailer approximately 900 feet through eight vehicles before pulling his truck off the road. The collision sequence took about 19 seconds from start to finish.

The trial court split the collisions into two occurrences, finding that the proximate cause of the first was the defendant's being out of control of his truck at a point when he could have applied his brakes. He steered the truck into the

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right lane, which was occupied by a slowing or stopped vehicle, and he struck that vehicle. That occurrence was proximately caused by the defendant's failure to stop his vehicle when approaching stopped traffic, and it resulted in impacts to the first two vehicles.

The second occurrence was separated from the first, because the defendant should have been able to avoid the third impact but did not. The defendant's failure to avoid subsequent collisions after the first two collisions, despite his ability to do so, was the proximate cause of the second occurrence. The court did not find subsequent occurrences because the vehicle lost its mechanical steering control.

The Alabama trial court applied the time, distance, and control factors in this case but seemed to focus primarily on control. The decisive question appeared to be whether the defendant had the opportunity after each collision to avoid the next vehicle.

The event analysis

Another group of courts has held that the "liability-triggering event" analysis determines the number of policy limits available.[17] This analysis is similar to the cause analysis. The main difference is that the liability-triggering-event analysis focuses on whether the insured defendant's conduct that resulted in liability was foreseeable, whereas the cause analysis focuses on whether the opportunity existed for him or her to avoid subsequent occurrences.

A New York court applied the event analysis in *Hartford Accident and Indemnity Co. v. Wesolowski*.[18] A car traveling southbound at about 55 mph sideswiped a northbound vehicle and then collided head-on with a second northbound vehicle. The court described the "event test" it used: "There is one accident if there has been but a single 'event of an unfortunate character that takes place without one's foresight or expectation,' a 'single unexpected, unfortunate occurrence.'"[19]

This test specifically states that multiple occurrences are possible only if the insured did not expect the unfortunate event, but it uses time, distance, and control—just as the cause analysis does—to make that determination. The event is either expected or unexpected to the insured based on the time and distance between the occurrences or the insured's ability to control the vehicle.

The liability-triggering-event analysis focuses on whether the insured defendant's conduct that resulted in liability was foreseeable.

In *Wesolowski*, the court found one occurrence. "[T]he two collisions here occurred but an instant apart. The continuum between the two impacts was unbroken, with no intervening agent or operative factor."[20] The court also discussed the reasoning behind the event doctrine:

> This approach of determining simply whether there was one unfortunate event or occurrence seems to us to be the most practical of the three methods of construction which have been advanced because it corresponds most with what the average person anticipates when he buys insurance and reads the "accident" limitation in the policy.[21]

Building a case

If you are seeking a finding of multiple occurrences, you must begin building the case from the initial client interview. Evidence such as your client's vehicle, the defendant's vehicle and black box, accident scene investigation, and witness statements should be obtained early in the case if it appears multiple occurrences could be at issue.

Fact witness depositions should focus on issues like time, distance, and control. For example, you could ask the witness whether he or she heard distinct collisions. Does the witness remember the distance between collisions? Many police reports show the point of impact, which is easily measured.

The driver's control of the vehicle is an important point of inquiry. Factors relevant to control may be the defendant's actions in operating the vehicle after striking the first vehicle, his or her mechanical control of the vehicle, and his or her alertness.

Data from vehicle black boxes may be downloaded to determine the driver's control during the collision sequences. More important, the black box in many vehicles can create a time line showing what actions the defendant driver took (or failed to take) during each phase of the collision.

For example, many black boxes record the actions of braking, clutching, and accelerating, and they can be key evidence in determining whether the driver remained in control of the vehicle. This evidence can help establish the control needed to prove a subsequent occurrence. Many tractor-trailer black boxes and some passenger vehicle black boxes can even be used to establish the time and distance between collisions. Unfortunately, not all black boxes record this information, and you will need to consult a qualified expert in black box interpretation to determine what information the vehicles in your case can provide.

Black boxes that can establish the time and distance between collisions give the time of each impact by recording the change in velocity of the vehicle. They create a time line backward, from the vehicle's stopping point. For instance, the black box may show that 19 seconds before stopping, the vehicle went from 50 mph to 45 mph. By looking at braking and accelerating inputs, an expert can determine whether that drop in speed was due to a collision. The speed may then drop to 40 mph at 14 seconds, where it can be determined that a second impact occurred. We would know that the vehicle traveled at 45 mph for 5 seconds between the impacts.

Looking at what the defendant driver did between those impacts is equally important to the distance factor. Did he or she accelerate, steer, brake, and/or clutch, for example?

An accident-reconstruction expert

can use the evidence you have obtained from the vehicles, witnesses, and accident scene to analyze the time, distance, and control factors. A qualified accident reconstructionist can look at the speed and distance between collisions to determine the exact amount of time between them. He or she can also analyze the defendant driver's actions to assess whether he or she was in control of the vehicle, and then may be able to give an opinion about whether the driver could have avoided subsequent collisions. A failure to act can itself be an act of negligence.

The facts of each collision sequence govern, and you must make several important determinations. Did the defendant have enough time and space to avoid the collision? Did the defendant regain control of the vehicle or have the opportunity to regain control before the second collision? Using this information to show that your client's injury resulted from a separate occurrence may be the only way for him or her to receive just compensation. ■

Notes

1. *See, e.g.*, Diana v. W. Nat'l Assurance Co., 785 P.2d 479 (Wash. Ct. App. 1990).
2. Irene A. Sullivan & Peri Erlanger, *Introduction to the Comprehensive General Liability (CGL) Policy, in* COMPREHENSIVE GENERAL LIABILITY POLICIES 1993, at *12 n.1 (PLI Com. L. & Prac. Course, Handbook Series No. 658, 1993). *See also* ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW §63C[a] (2d ed. 1996).
3. Courts in Kansas, Louisiana, Michigan, South Carolina, Tennessee, and Texas have adopted or applied the effect analysis to determine the number of occurrences. Courts in some states apply both the cause and effect analyses. *See* Michael P. Sullivan, Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to Specified Amount*, 64 A.L.R. 4th 668, 679 (1988 & Supp. 2002).
4. The states are Alabama, Arizona, California, Delaware, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maine, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Virginia, Washington, and Wisconsin. *See* Sullivan, *supra* note 3, at 676.
5. Michigan Chem. Corp. v. Am. Home Assurance Co., 728 F.2d 374, 379 n.5 (6th Cir. 1984).
6. Home Indem. Co. v. City of Mobile, 749 F.2d 659 (11th Cir. 1984).
7. 303 P.2d 659, 663 (Wash. 1956).
8. 8A JOHN APPLEMAN & JEAN APPLEMAN, APPLEMAN INSURANCE LAW & PRACTICE §4891.25 (1981) (citing Olsen v. Moore, 202 N.W.2d 236, 240-41 (Wis. 1972)).
9. 404 F.2d 880, 880 (5th Cir. 1969).
10. *Id.*
11. *Id.* at 881.
12. 467 C.A.1977 (Del. Super. Ct. Apr. 4, 1978) (letter opinion) (*cited in* McCoy v. Draine, No. 87C-AU18A, 1991 WL 18071 (Del. Super. Ct. 1991)).
13. 542 N.E.2d 90, 91 (Ill. App. Ct. 1989).
14. *Id.* at 93.
15. *McCoy*, No. 87C-AU18A, 1991 WL 18071, at *4.
16. Canal Ins. Co. v. Cummings, No. CV 03-4498 (Ala., Jefferson County Cir. Ct. June 20, 2005).
17. Courts in California, Illinois, New Jersey, Texas, and West Virginia have adopted or applied the "liability-triggering event" analysis to determine the number of occurrences. *See* Sullivan, *supra* note 3, at 679-80.
18. 305 N.E.2d 907, 910 (N.Y. Ct. App. 1973).
19. *Id.* at 910 (quoting Arthur A. Johnson Corp. v. Indemnity Ins. Co., 164 N.E.2d 704, 707 (N.Y. Ct. App. 1959)).
20. *Id.*
21. *Id.* (quoting *Arthur A. Johnson Corp.*, 164 N.E.2d 704, 708).