

Vertical Exhaustion & Occurrences

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APIE v GARCIA

- “IF A SINGLE OCCURRENCE TRIGGERS MORE THAN ONE POLICY, COVERING DIFFERENT POLICY PERIODS, THEN DIFFERENT LIMITS MAY HAVE APPLIED AT DIFFERENT TIMES. IN SUCH A CASE, THE INSURED’S INDEMNITY LIMIT SHOULD BE WHATEVER LIMIT APPLIED AT THE SINGLE POINT IN TIME DURING THE COVERAGE PERIODS OF THE TRIGGERED POLICIES WHEN THE INSURED’S LIMIT WAS HIGHEST...

Rules We Know

- 1) In a continuing injury case, there is no stacking of consecutive policies –
 - “Consecutive Policies, covering distinct policy periods, could not be ‘stacked’ to multiply coverage for a single claim involving indivisible injury.”
 - *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994)

Rules We Know

- 2) Stacking is allowed for concurrent coverage –
 - “Multiple policies may provide an aggregate limit under certain circumstances, such as if the insured purchased concurrent excess liability coverage.”
 - *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994)

Rules We Know

- 3) The insured is allowed to pick the policy period that provides the greatest recovery –
 - “The insured is generally in the best position to identify the policy or policies that would maximize coverage.”
 - *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994)

Rules We Know

- 4) The insurer(s) selected are liable for the loss up to their policy limits –
 - “In such a case, the insured’s indemnity limit should be whatever limit applied at the single point in time during the coverage periods of triggered policies when the insured’s limit was the highest.”
 - *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994)

Rules We Know

- 5) The exhaustion for the policy period that is selected is vertical rather than horizontal --
 - “Multiple policies may provide an aggregate limit under certain circumstances, such as if the insured purchased concurrent excess liability insurance.”
 - *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994)

- 6) The vertical exhaustion must be for the same policy period –
 - “In such a case, the insured’s indemnity limit should be whatever limit applied at the single point in time during the coverage periods when the insured’s limit was the highest.”
 - *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994)

Rules We Know

- 7) The insurer(s) may then seek subrogation from other insurers in their layers –
 - “Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.”
 - *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994)

Rules We Know

- 8) The insured must select the same policy period for both defense and indemnity.

Rules We Know

- 9) If the insured selects an insurer who defends, the insured has no further rights against any other consecutive insurer in the same layer for defense.
- *Burlington Ins. Co. v. Ranger Ins. Co*

Rules We Know

- 10) If the insured selects an insurer who pays its policy limits, the insured has no further rights against any other consecutive insurer in the same layer.
- *Burlington Ins. Co. v. Ranger Ins. Co.*

Vertical Exhaustion

- *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994).
- *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 2008 WL 3991187 (Tex., August 29, 2008).
- *Lennar Corp. v. Markel Am. Ins. Co.* 11--0394, 2013 WL 4492800 (Tex. Aug. 23, 2013).

Interpretations

- *LGS Technologies, LP v. U.S. Fire Ins. Co.*, No. 2:07-CV-399, 2015 U.S. Dist. LEXIS 139085 (E.D. Tex. Aug 14, 2015)
- *Mid-Continent Casualty Company v. Academy Developm.*, No. 11-20219 (5th Cir. 2012).
- *Burlington Ins. Co. v. Ranger Specialized Glass, Inc.*, No. 4:12-cv-1759 (S.D. Tex.—Houston, Dec. 17, 2012).

OCCURRENCE

- “IF A SINGLE OCCURRENCE TRIGGERS MORE THAN ONE POLICY, COVERING DIFFERENT POLICY PERIODS, THEN DIFFERENT LIMITS MAY HAVE APPLIED AT DIFFERENT TIMES. IN SUCH A CASE, THE INSURED’S INDEMNITY LIMIT SHOULD BE WHATEVER LIMIT APPLIED AT THE SINGLE POINT IN TIME DURING THE COVERAGE PERIODS OF THE TRIGGERED POLICIES WHEN THE INSURED’S LIMIT WAS HIGHEST...”

WHAT IS AN OCCURRENCE

- “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

WHAT IS AN OCCURRENCE

- *Lennar Corp. v. Great American Ins. Co.*, 200 SW3d 651 (Tex.App.-Houston [14th Dist.] 2006)
- “Consequently, the EIFS claim for each home constitutes a separate occurrence.”

WHAT IS AN OCCURRENCE

- *Carpenter Plastering Co. v. Puritan Ins. Co.*, 1988 WL 156829 (N.D.Tex. 1988)
- Multiple damages to one building caused by defective wall panels constituted one “occurrence.”

WHAT IS AN OCCURRENCE

- *Mid-Continent Cas. Co. v. Academy Devel., Inc.*, 476 Fed.Appx. 316 (5th Cir. 2012)
- Impliedly holding that a leak from a lake that was alleged to have damaged several homes was one “occurrence”

WHAT IS AN OCCURRENCE

- *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F3d 1178 (2nd Cir. 1995)
- Stating Texas law would apparently support finding that application of asbestos to numerous buildings constituted separate “occurrences”

WHAT IS AN OCCURRENCE

- *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429 (9th Cir. 1994)
- Holding insured's supplying of lime plaster, which ultimately caused plaster pitting in twenty-eight homes, constituted one "occurrence"

WHAT IS AN OCCURRENCE

- *Champion Int'l Corp. v. Cont'l Cas. Co.*, 546 F.2d 502 (2nd Cir. 1976)
- Holding insured's sale of defective paneling to twenty six manufacturers of vehicles resulting in damage to 1,400 vehicles was one "occurrence"

WHAT IS AN OCCURRENCE

- *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 823 F.Supp. 975 (D.Mass. 1993)
- Holding insured utility's use of insulation that was later banned constituted one "occurrence" although it was installed in 390 homes

WHAT IS AN OCCURRENCE

- *Household Mfg. Inc. v. Liberty Mut. Ins. Co., 1987 WL 6611 (N.D. Ill. 1987)*
- Holding insured's sale of defective plumbing systems which were ultimately installed in numerous homes constituted one "occurrence."

WHAT IS AN OCCURRENCE

- *Mid-Continent Cas. Co. v. Basdeo, 477 Fed.Appx. 702 (11th Cir. 2012)*
- Court found three separate occurrences from defective work in two separate areas and from failing to properly install a tarp over the roof during repairs
- Probably does not represent rule in Texas

WHAT IS AN OCCURRENCE

- ISSUES IMPACTED BY NUMBER OF OCCURRENCES:
 - 1) NUMBER OF PRIMARY POLICIES AVAILABLE
 - 2) EXHAUSTION BEFORE EXCESS IS TRIGGERED
 - 3) EXPOSURE OF AGGREGATE LIMITS OF LIABILITY FOR A PRIMARY POLICY
 - 4) NUMBER OF DEDUCTIBLES PAID BY INSURED

RULES FOR OCCURRENCE

- POINT OF VIEW IS DETERMINATIVE-IS PERSON A:
 - 1) MANUFACTURER,
 - 2) GENERAL CONTRACTOR, OR
 - 3) SUB-CONTRACTOR

MANUFACTURER

- SALE OF ONE PRODUCT USED AT ONE LOCATION, EVEN IN MULTIPLE BUILDINGS, IS ONE OCCURRENCE
- LEGAL CAUSE-WHAT WAS THE LEGAL CAUSE? THE SALE
- *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429 (9th Cir. 1994)
- *Champion Int'l Corp. v. Cont'l Cas. Co.*, 546 F.2d 502 (2nd Cir. 1976)
- *Household Mfg. Inc. v. Liberty Mut. Ins. Co.*, 1987 WL 6611 (N.D. Ill. 1987)

GENERAL CONTRACTOR

- GENERALLY, WHERE DEFECTIVE CONSTRUCTION OR NEGLIGENT SUPERVISION OF SUBS IS ALLEGED, THERE WILL BE ONE OCCURRENCE PER STRUCTURE IF SOLD TO DIFFERENT BUYERS. IF MULTIPLE STRUCTURES ARE SOLD TO SAME BUYER THERE WILL BE ONE “OCCURRENCE.”
- THERE IS “CONTINUOUS OR REPEATED EXPOSURE TO SUBSTANTIALLY THE SAME GENERAL HARMFUL CONDITIONS”. IT DOES NOT MATTER IF THE REPEATED EXPOSURE RESULTS IN DIFFERENT DAMAGES

GENERAL CONTRACTOR

- UNDER THE LEGAL CAUSE TEST, IT IS THE SALE OF THE DEFECTIVE STRUCTURE THAT DOES NOT CONFORM TO THE CONTRACT TO EACH BUYER THAT IS THE LEGAL CAUSE OF LIABILITY.
- *Lennar Corp. v. Great American Ins. Co.*, 200 SW3d 651 (Tex.App.-Houston [14th Dist.] 2006)

SUB-CONTRACTOR

- GENERALLY, WHERE DEFECTIVE CONSTRUCTION OR NEGLIGENT SUPERVISION IS ALLEGED, THERE WILL BE ONE OCCURRENCE PER CONTRACT WITH A GENERAL CONTRACTOR. IF THERE ARE MULTIPLE STRUCTURES COVERED UNDER THE SAME CONTRACT, THERE WILL BE ONE “OCCURRENCE.”
- THERE IS “CONTINUOUS OR REPEATED EXPOSURE TO SUBSTANTIALLY THE SAME GENERAL HARMFUL CONDITIONS”. IT DOES NOT MATTER IF THE REPEATED EXPOSURE RESULTS IN DIFFERENT DAMAGES

SUB-CONTRACTOR

- UNDER THE LEGAL CAUSE TEST, IT IS THE FAILURE TO PERFORM THE WORK UNDER THE CONTRACT THAT IS THE LEGAL CAUSE OF THE LIABILITY TO THE GENERAL CONTRACTOR OR TO THE OWNER.