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Insurance Coverage Alert

March 2007

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New York Court of Appeals Affirms Multiple Occurrence Treatment of Underlying Asbestos Claims in *General Electric*

Policyholders seeking coverage for mass tort liabilities, including, but not limited to, asbestos-related claims, often face the question as to whether the underlying claims arise from one, or more than one, "occurrences" under historical CGL policies. Depending on the structure of the insurance program at issue, millions of dollars in coverage may hang in the balance.

For example, if each individual claim is treated as a separate occurrence, a policyholder with non-aggregating policies may have potentially inexhaustible coverage at the primary layer. On the other hand, primary insurers with policies containing large per occurrence deductibles may balk at paying anything on claims that are characterized as arising from multiple occurrences. Policyholders with such policies may thus prefer a single occurrence treatment. Under a single occurrence treatment, however, some carriers may balk at paying a per occurrence limit (in contrast to an aggregate limit) for each annual period or portion thereof for a policy in effect for more than one year.

Because each policyholder's individual circumstances differ, general observations are of limited utility when considering the number of occurrences question. Rather, potentially governing state law should always be read against the backdrop of the underlying facts, facts that include the nature of the insurance program, the circumstances of the underlying claims, and the course of dealing between the policyholder and its insurers in handling those claims and the associated insurance coverage issues. One recent case of interest, likely to be debated by policyholders and their insurers for some time, is the *General Electric* decision issued on February 15, 2007 by New York's highest court.

The *General Electric* Decision

The New York Court of Appeals recently addressed New York law in this area in *Appalachian Insurance Company v. General Electric Company*, 2007 N.Y. LEXIS 119 (N.Y. Feb. 15, 2007). In its *General Electric* decision, the Court of Appeals affirmed, on the facts before it, the treatment of underlying asbestos-related claims as thousands of separate occurrences. The court reached this result by applying the so-called "unfortunate event" test, a broadly worded standard of often uncertain application despite having been New York law for over 45 years now. As the court itself emphasized, its decision does not mean that all policyholders facing mass tort claims will inevitably receive multiple occurrence treatment. Each case must be analyzed separately under this test, with the result likely turning on the pertinent facts of the underlying claims and the handling of those claims, and on the particular wording of the insurance policies at issue.

An understanding of the particular facts before the court is therefore essential to a proper assessment of the *General Electric* decision itself. The General Electric Company ("GE") had sought coverage for thousands of personal injury claims arising from the alleged exposure of the claimants to asbestos insulation contained in turbines produced by GE. During the relevant years, GE maintained a series of primary policies with $5 million per occurrence limits and no aggregate limits. These primary policies were issued under

a retrospective rating plan that functioned like a self-insured retention or deductible under which GE reimbursed the insurer for claims paid. Because no individual underlying claim was likely to exceed $5 million, GE's strategy for reaching its excess layers of coverage was to have the underlying claims aggregated.

When the number of asbestos-related claims filed against GE began to spike in 1991, GE negotiated a claims handling agreement with the primary carrier (an industry captive insurer which it and its employees partially owned) under which all claims associated with a single product line—such as turbines—would constitute a single occurrence.[1] One of GE's excess insurers filed a declaratory judgment action in 1996 to resolve, *inter alia*, the number of occurrences issue. After receiving an adverse ruling on summary judgment, GE appealed to and lost at the Appellate Division level, setting the stage for the New York Court of Appeals to address the issue.

GE had argued that the various asbestos-related claims brought against it should be treated as a single occurrence because all could be traced to GE's failure to warn of the danger of exposure to asbestos insulation in its turbines. The Court of Appeals affirmed the lower court's ruling that GE's argument failed under the "unfortunate event" test as originally set forth in *Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. Am.*, 164 N.E.2d 704, 707 (N.Y. 1959). Under that test, "the focus should be on the event for which the insured is being held liable, not a point further back in the causal chain."[2] Applying this test, the court went on to hold that GE's alleged failure to warn only created the potential for liability and that it was each individual exposure that actually created liability.[3] Hence, each individual exposure would be treated as a separate occurrence.

The court also noted, however, that its ruling did not "necessarily bar excess coverage in multi-plaintiff mass tort contexts. Each mass tort scenario must be examined separately under the *Johnson* rule."[4] For example, "a series of explosions, the actual release of hazardous substance, or some other calamity, that will result in numerous injuries or losses" could potentially allow these injuries or losses to be grouped together.[5] Crucial here is whether each individual injury or loss stands in sufficient temporal and spatial proximity to the other and whether the events are part of the "same causal continuum, without intervening agents or factors."[6]

The court found that the facts pertinent to the underlying asbestos claims against GE did not allow them to be grouped as a single occurrence. The turbines at issue were "custom-designed based on the specific needs of GE customers, with little or no uniformity in the amounts or types of asbestos insulation incorporated into the design. Moreover, the exposure of the individual plaintiffs varied in duration and intensity and occurred over decades at more than 22,000 work sites throughout the nation."[7] Of course, a different result could be reached under different facts.[8]

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[1] The captive primary insurer originally treated the claims as arising from separate occurrences. *General Electric*, 2007 N.Y. LEXIS 119 at *5-*6. GE and the insurer then decided to treat the claims as arising from a single occurrence, and GE did not contend that the excess insurers were bound by the retroactive construction of the term "occurrence" in that agreement. *Id.* at *7.

[2] *Id.* at *8. While acknowledging that causation was pertinent to its analysis, the court also noted that "the cause should not be conflated with the incident" that constitutes the "unfortunate event." *Id.* at *13. The court therefore rejected GE's focus on the alleged common cause of the events giving rise to liability, which was allegedly its failure to warn. *Id.* at *13 n.2. In this regard, New York law may be in the minority. According to some commentators and courts, the majority approach determines the number of occurrences based on their cause and not necessarily the event for which the policyholder is held liable. *See* Michael P. Sullivan, Annotation, *What Constitutes a Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount Per Accident or Occurrence*, 64 A.L.R. 4th 668, at § 2[a] (2006); *Washoe County v. Transcontinental Ins. Co.*, 878 P.2d 306, 308 (Nev. 1994) (describing the "causal approach" as that used by the "vast majority of jurisdictions").

[3] *General Electric*, 2007 N.Y. LEXIS 119 at *16.

[4] *Id.* at *18.

[5] *Id.*

[6] *Id.* at *13. For example, the court noted that *Johnson* treated as separate occurrences the collapse of two independent walls of adjoining buildings that occurred almost an hour apart. *Id.* While both collapses were due to the same heavy rainfall, the first collapse did not cause the second. In contrast, the court subsequently treated as a single occurrence a three-car collision where the policyholder's automobile struck one vehicle, ricocheted off and struck a second more than 100 feet away. *Id.* (citing *Hartford Acc. & Indem. Co. v. Wesolowski*, 305 N.E.2d 907 (N.Y. 1973)).

[7] *Id.* at *8.

[8] *See, e.g., Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1381-83 (E.D.N.Y. 1988) (finding that numerous claims related to Agent Orange exposure amounted to a single occurrence, with the "unfortunate event" being the insured's delivery of Agent Orange to the military); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Stroh Cos., Inc.*, No. 98 Civ. 8248 (DLC), 2000 WL 264320 (S.D.N.Y. 2000), *aff'd*, 265 F.3d 97 (2d Cir. 2001) (holding that multiple claims resulting from a defective production run in a bottling plant amounted to one occurrence); *Mark IV Indus., Inc. v. Lumbermens Mut. Cas. Co.*, No. 2005/2029, 2006 WL 1458245, at *3 (N.Y. Sup. Apr. 28, 2006) (concurring with the parties that continuous repeated manufacture and sale of defectively designed washing machine inlet hoses constituted a single occurrence). The

The Court of Appeals also noted that parties to insurance contracts are free to adopt language that would supersede the unfortunate event test and provide other methods for grouping claims against the policyholder into one or more occurrences.[9] For example, many policies contain language that expands the definition of occurrence to allow for a "continuous or repeated exposure to substantially the same conditions [to] be considered as arising out of one occurrence."[10]

Conclusion

The *General Electric* decision provides useful guidance on New York's "unfortunate events" test, under the specific facts before the court. Policyholders facing the number of occurrences question under New York law should, however, undertake a detailed review of their own particular facts and circumstances before drawing any firm conclusions on the potential effect of the decision on their own claims.

Second Circuit has also recently held in the context of coverage claims arising out of the World Trade Center disaster that the "unfortunate event" test was "considerably more nuanced" than the insurers and insureds contended, particularly in the context of property policies, and raised issues that must be put to a fact-finder. *World Trade Center Prop. v. The Travelers Indem. Co.*, 345 F.3d 154, 188 (2d Cir. 2003). In addition, the *General Electric* decision did not present the court with the question of the effect of a reasonable settlement between a policyholder and an unaffiliated primary insurer as regards the number of occurrences question.

9 *General Electric*, 2007 N.Y. LEXIS 119 at *14.

10 *Id.* at *15 n.3 (citing *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 898-99 (Conn. 2001)).