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Sarah E. Millin and Robyn L. Anderson*

I. INTRODUCTION

Policyholders and their insurers frequently dispute whether a claim under an "occurrence"-based insurance policy constitutes one occurrence or multiple occurrences. The financial consequences of this question can be profound. Take into consideration, for example, the insurance dispute that arose when two separate airplanes crashed into the World Trade Center towers on September 11, 2001. That case presented a $3.5 billion dollar question: did the two attacks, together, constitute one occurrence, or was each attack its own occurrence, thus doubling the coverage limits available to the property owner?[1] After being litigated up to the Second Circuit Court of Appeals (on multiple occasions), it ultimately was held to be a toss up. The terrorist attacks were deemed to be one occurrence under some insurance policies and two occurrences under other insurance policies.[2]

Although a fair amount of time has passed since the World Trade Center cases, the important "number of occurrences" coverage issue remains an oft-litigated issue and the reported decisions produce inevitably varied outcomes.[3] In recent years, the number of occurrences debate has been addressed in an increasing number of jurisdictions and in an increasing number of contexts. The issue can arise in nearly any situation where an insured faces allegations involving multiple injuries to persons or property. Common scenarios for "number of occurrences" disputes include: product liability claims,[4] environmental liability claims,[5] asbes-

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[1] SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC, 467 F.3d 107, 113 (2d Cir. 2006).

[2] *Id.* at 113–115. *See also* Mitchell L. Lathrop, *Insurance Coverage Issues That Emerged from the World Trade Center Attacks* § IV, New Appleman on Insurance: Current Critical Issues in Insurance Law (Spring 2009).

[3] 2 Zuckerman & Raskoff, Environmental Insurance Litigation: Law and Practice § 13:39 (2009) (with regard to number of occurrence determinations, "different courts with very similar fact patterns have often reached different conclusions").

[4] *See, e.g.*, E.I. Du Pont De Nemours & Co. v. Stonewall Ins. Co., C.A. No. 99C-12-253 (JTV), 2009 Del. Super. LEXIS 235 (Del. Super. Ct. Newcastle June 30, 2009) (defective material in plumbing systems); Irving Materials, Inc. v. Zurich Am. Ins. Co., No. 1:03–CV-361–SEB-JF (S.D. Ind. Mar. 30, 2007) (defective concrete); Parker Hannifin Corp. v. Steadfast Ins. Co., 445 F. Supp.

tos and other toxic tort claims,[6] construction claims,[7] food contamination claims,[8] discrimination claims,[9] automobile accident claims,[10] arson claims,[11] shooting claims,[12] police brutality claims,[13] and even dog bite claims.[14]

2d 827 (N.D. Ohio 2006) (defective gaskets in projection television sets); Associated Indem. Corp. v. Dow Chem. Co., 814 F. Supp. 613 (E.D. Mich. 1993) (defective pipe); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368 (E.D. N.Y. 1988) (defective herbicide); Champion Int'l. Corp. v. Cont'l Cas. Co., 546 F.2d 502 (2d Cir. 1976) (defective paneling).

[5] *See, e.g.*, Sunoco, Inc. v. Ill. Nat'l Ins. Co., 226 F. App'x 104 (3d Cir. 2007) (dozens of lawsuits involved claims filed against petrochemical company alleged "contamination in different geographic regions, result[ing] from a variety of sources"); Norfolk Southern Corp. v. California Union Ins. Co., 859 So. 2d 167 (La. Ct. App. 1 Cir. 2003) (numerous releases, drips, and spills as a normal part of the wood-preserving operations at multiple sites alleged to cause numerous dispersals of hazardous chemicals into the environment); Pyrites Co., Inc. v. Century Indem. Co., No. 4515, 2005 Phila. Ct. Com. Pl. LEXIS 393 (Pa. Com. Pl. Ct. Aug. 30, 2005) (cleanup of environmental contamination at multiple metal extraction facilities); Cadet Mfg. Co. v. American Ins. Co., 391 F. Supp. 2d 884 (W.D. Wash. 2005) (groundwater contamination emanating from multiple sites owned by manufacturer of electric heating equipment).

[6] London Mkt. Insurers v. Superior Court, 146 Cal. App. 4th 648, 53 Cal. Rptr. 3d 154, 161 (2007); Plastics Engineering Co. v. Liberty Mut. Ins. Co., 315 Wis. 2d 556, 759 N.W.2d 613 (Wis. 2009); Liberty Mut. Ins. Co. v. Treesdale, Inc., 418 F.3d 330 (3d Cir. 2005); *In re* Prudential Lines Inc., 158 F.3d 65 (2d Cir. 1998); Commercial Union Ins. Co. v. Porter Hayden Co., 116 Md. App. 605, 698 A.2d 1167 (1997); Cole v. Celotex Corp., 588 So. 2d 376 (La. Ct. App. 1991); Fina, Inc. v. Travelers Indem. Co., 184 F. Supp. 2d 547 (N.D. Tex. 2002); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 255 Conn. 295, 765 A.2d 891 (2001); Kvaerner U.S., Inc. v. One Beacon Ins. Co., 2005 Phila. Ct. Com. Pl. LEXIS 377 (Pa. Ct. Com. Pl. Ct. Aug. 19, 2005).

[7] *See* Lennar Corp. v. Great American Ins. Co., 200 S.W.3d 651 (Tex. App.–Houston 2006) (homebuilder's negligent construction of homes using defective exterior insulation that trapped water).

[8] *See* Mason v. Home Ins. Co. of Illinois, 177 Ill. App. 3d 454, 532 N.E.2d 526 (1988) (Taco Bell served meat contaminated with the Hepatitis A virus to several customers over a three-day period); Michigan Chem. Corp. v. American Home Assurance Co., 728 F.2d 374 (6th Cir. 1984) (company mistakenly shipped toxin-containing flame retardant instead of a livestock feed supplement, resulting in the destruction of over 40,000 animals); International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America, 844 N.Y.S.2d 257 (N.Y. App. Div. 2007) (30 separate personal injury claims arose from manufacturer's inclusion of diacetyl and other volatile organic compounds in popcorn).

[9] *See* Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3d Cir. 1982) (multiple sex discrimination claims); Transp. Ins. Co. v. Lee Way Motor Freight, Inc., 487 F. Supp. 1325 (N.D. Tex. 1980) (multiple race discrimination claims).

[10] *See* Walker v. Allstate Ins. Co., No. 265604, 2006 Mich. App. LEXIS 1241 (Mich. Ct. App. Apr. 20, 2006) (insured pedestrian was struck simultaneously by two vehicles while crossing street); Esparza v. Eagle Express Lines, Inc., No. 4:05-CV-315, 2007 U.S. Dist. LEXIS 22382 (E.D. Tex. March 28, 2007) (truck crossed the median on a highway and hit two vehicles); American Family Mut. Ins. Co. v. Wilkins, 285 Kan. 1054, 179 P.3d 1104 (2008) (car driving on the wrong side of the road forced two cars to swerve and roll and collided with third).

[11] *See* Lexington Ins. Co. v. Travelers Indem. Co. of Ill., 21 F. App'x 585 (9th Cir. 2001) (fires at four different county courthouses set by same arsonist).

[12] *See* Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 938 A.2d 286 (2007) (single shooter injured six victims in four different towns over the course of two hours); Koikos v. Travelers

From this growing list of cases, three different tests have emerged to determine the number of occurrences involved in a given claim.[15] The first test, accepted by the vast majority of jurisdictions, is commonly referred to as the "cause" test, under which all losses or damages arising from the same "cause" are treated as one "occurrence."[16] The second test, which has diminished in popularity, is the so-called "effects" test, which looks to the number of injuries or "effects," rather than to their causes, in determining the number of occurrences at issue.[17] Finally, the third test, adopted primarily by New York courts, is commonly referred to as the "unfortunate events" test.[18] Under this third approach, "each event of unfortunate character" that results in the injury or damage is considered a separate "occurrence."[19] While the "unfortunate events" test is thought by some as merely

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Ins. Co., 849 So. 2d 263 (Fla. 2003) (single shooter at a fraternity party fired "two separate-but nearly concurrent-rounds" injuring two party-goers); Bomba v. State Farm Fire and Cas. Co., 379 N.J. Super. 589, 879 A.2d 1252 (N.J. App. Div. 2005) (three separate gunshots each simultaneously hit two police officers); RLI Ins. Co. v. Simon's Rock Early College, 765 N.E.2d 247, 251 (Mass. 2002) (college student's shooting rampage resulted in the death of two individuals and injury to four others); New Hampshire Ins. Co. v. RLI Ins. Co., 807 So. 2d 171, 171 (Fla. Dist. Ct. App. 2002) (three shots fired over course of several minutes from three different locations within same apartment complex).

[13] Mead Reinsurance v. Granite State Ins. Co., 873 F.2d 1185 (9th Cir. 1988) (12 lawsuits filed against city alleging numerous civil rights violations by several policy officers against multiple claimants).

[14] *See, e.g.*, Allstate Property and Cas. Ins. Co. v. McBee, No. 08-0534-CV-W-HFS, 2009 U.S. Dist. LEXIS 35158 (W.D. Mo. April 27, 2009); Crum v. Johnson, 809 So. 2d 663 (Miss. 2002); Hodgson v. Bremen Farmers' Mut. Ins. Co., 27 Kan. App. 2d 231, 3 P.3d 1281 (1999).

[15] Lum, *America's Two Days of Infamy: The Immediate and Lasting Effects of Pearl Harbor and September 11th on the Ever-Evolving Insurance Industry*, 27 U. Haw. L. Rev. 111, 151 & n. 288 (Winter 2004) ("Three tests guide courts in defining "occurrence."); Jon A. Baumunk, *Comment, New York's "Unfortunate Event" Test: Its Application Prior to the Events of 9/11*, 39 Cal. W. L. Rev. 323, 328 & n.39 (2003) ("Courts in the United States have used three tests to define the term "occurrence."). *See generally* Michael Sullivan, Annotation, *What Constitutes 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 (2004); Am. L. Prod. Liab. 3d § 58:28 (2005); 46 C.J.S. Insurance § 1129 (2005).

[16] Heggem v. Capitol Indem. Corp., 336 Mont. 429, 438, 154 P.3d 1189, 1195 (2007) ("In interpreting the term 'occurrence' as used in liability policies . . . the vast majority of courts view it from the perspective of causation—referring to the cause or causes of the damage or injury—and not the number of injuries or claims.").

[17] Murray, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 Yale L.J. 1484, 1499 (2009) ("A small minority of courts reject the causation theory wholesale and instead define occurrence with respect to 'effects.' These courts view each injury as a separate occurrence."). *See, e.g.*, Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949); Elston-Richards Storage Co. v. Indem. Ins. Co. of North America, 194 F. Supp. 673 (W.D. Mich. 1960), *aff'd*, 291 F.2d 627 (6th Cir. 1961).

[18] *See generally* Jon A. Baumunk, Comment, *New York's "Unfortunate Event" Test: Its Application Prior to the Events of 9/11*, 39 Cal. W. L. Rev. 323 (2003).

[19] *Id.* at 328 & n.48. *See, e.g.*, Arthur Corp. v. Indemnity Ins. Co., 164 N.E.2d 704 (N.Y. 1959)

a variant of the "cause" approach,[20] most others treat it as an entirely separate test, while voicing criticism for its vagueness and propensity to produce inconsistent results.[21]

Despite being able to identify three primary approaches to the number of occurrences dilemma, readers will find that there remains a large degree of inconsistency and unpredictability among the cases even when courts are ostensibly applying the same analytical approach.[22] This uncertainty is, in part, due to the numerous ways in which "cause" can be interpreted in a given case.[23] Some courts focus on "proximate cause" while other courts look instead to "legal cause."[24] One court applying a "cause" test may find one occurrence even when

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(adopted the "unfortunate event" test for construing ambiguous uses of "accident.") *See also* Hartford Accident and Indem. Co. v. Wesolowski, 305 N.E.2d 907 (N.Y. 1973).

[20] Murray, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 Yale L.J. 1484, 1486 & n. 6 (2009) ("the 'unfortunate events' test . . . is in actuality a variation within a general causation approach"); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1381–1382 (E.D.N.Y. 1988) ("The 'unfortunate event' test is not a category wholly different from the 'cause' test.").

[21] *See, e.g.*, Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1381–1382 (E.D.N.Y. 1988) (remarking that early cases applying the "unfortunate event" test failed to "provide any guidance . . . on how to identify the "unfortunate event" or on how to distinguish among several plausible such events"). *See also* Jennings, *September 11 Insurance Litigation*, CRS Report for Congress, p. 4 (June 14, 2002) (describing New York's "unfortunate event" test as "not entirely clear" and noting that the test "neither minimiz[es] nor maximiz[es] the number of insurable events covered by a general 'per occurrence' clause").

[22] Kalis, Reiter, and Segerdahl, Policyholder's Guide to the Law of Insurance Coverage (1997) at § 3.03[c], p. 3-44 ("[T]he determination a court will reach on the number of occurrences issue in any given case is difficult to predict with certainty."). Frankel, *Insurance Recovery: Advanced Issues in Real Estate Law*, 38823 NBI-CLE 67, 126 (2007) ("Not surprisingly, courts have construed nearly identical policy language and reached inconsistent results when applying the cause test to an insurance coverage actions involving similar liabilities."). *Compare* Champion Int'l Corp. v. Cont'l Cas. Co., 546 F.2d 502 (2d Cir. 1976) (finding that multiple claims arising from defective paneling constitute one occurrence) *with* Irving Materials, Inc. v. Zurich Am. Ins. Co., No. 1:03-cv-361-SEB-TAB (S.D. Ind. Dec. 28, 2007) (finding that multiple claims arising from defective concrete constitute multiple occurrences). *Compare* Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003) (each shot fired by a gunman constitutes a separate occurrence) *with* Bomba v. State Farm Fire and Cas. Co., 379 N.J. Super. 589, 879 A.2d 1252 (N.J. App. Div. 2005) (multiple shots fired by gunman constitutes one occurrence). *Compare In re* Prudential Lines Inc., 158 F.3d 65 (each exposure to asbestos is a separate occurrence *with* Greene, Tweed & Co., Inc. v. Hartford Accident & Indem. Co., No. 03-3637, 2006 U.S. Dist. LEXIS 21447 (E.D. Pa. Apr. 21, 2006) (all asbestos injuries for which a particular defendant is responsible result from a single occurrence). *Compare* Sunoco, Inc. v. Ill. Nat'l Ins. Co., 226 F. App'x 104 (3d Cir. 2007) (environmental contamination at multiple sites deemed one occurrence) *with* Cadet Mfg. Co. v. American Ins. Co., 391 F. Supp. 2d 884 (W.D. Wash. 2005) (environmental contamination at multiple sites deemed one occurrence per site).

[23] Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising From the World Trade Center Attacks*, 69 Def. Couns. J. 169, 172 (2002) (acknowledging that "[i]n practice . . . 'cause' may have many different meanings" when analyzing number of occurrences).

[24] *Compare* H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 150 F.3d 526 (5th Cir. 1998) (holding that multiple abuses by the same individual are two occurrences under a

there are 469,000 claims brought over 18 years for different types of alleged defects in a product that was installed in half a million homes.[25] Yet, another court employing a "cause" test may find that an accident in which a single truck hits two cars is two occurrences.[26] Also, some courts have added unpredictability by weaving in "time and space" considerations, or other variations, into their analysis.[27] And, as is the case in so many coverage disputes, the number of occurrence determination is decidedly fact-based, with both the claim circumstances and the precise policy language impacting the analysis.[28]

In earlier years, scholars explained the contorted analysis as an overall trend toward maximizing insurance recovery to the benefit of policyholders.[29] Yet,

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legal cause view) *with* State Farm Fire & Cas. Co. v. Elizabeth N., 12 Cal. Rptr. 2d 327 (Ct. App. 1992) (holding that multiple abuses by same individual are one occurrence under a proximate cause view).

[25] E.I. Du Pont De Nemours & Co. v. Stonewall Ins. Co., C.A. No. 99C-12-253 (JTV), 2009 Del. Super. LEXIS 235 (Del. Super. Ct. Newcastle June 30, 2009).

[26] *See* Esparza v. Eagle Express Lines, Inc., No. 4:05-CV-315, 2007 U.S. Dist. LEXIS 22382 (E.D. Tex. March 28, 2007).

[27] Lavandier v. Landmark Ins. Co., 44 A.D.3d 501, 844 N.Y.S.2d 23 (1st Dep't 2007) (under liability insurance policy, underlying acts resulting in lead poisoning of two children did not amount to more than one occurrence, where there was a close temporal and spatial relationship between the incidents, given that the children lived in the same apartment, and both were exposed to lead at the same time); Walker v. Allstate Ins. Co., No. 265604, 2006 Mich. App. LEXIS 1241 (Mich. Ct. App. Apr. 20, 2006) at *5 ("to be considered more than one 'accident,' the causes of damage must be readily distinguishable, either in temporal or spatial proximity, or in nature); United Services Automobile Ass'n v. Baggett, 209 Cal. App. 3d 1387, 1394, 258 Cal. Rptr. 52 (1989) ("If cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event, courts adopting the "cause" analysis uniformly find a single occurrence or accident.").

[28] *See* Kalis, Reiter, and Segerdahl, Policyholder's Guide to the Law of Insurance Coverage (1997) at § 3.03[c], p. 3-44 ("Due to the flexibility of the various tests, the policyholder's recovery in large part will be determined by the policy language and how the facts are characterized and presented."). *See also What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specific Amount Per Accident or Occurrence*, 64 A.L.R.4th 668 (1988) ("In determining whether a single policy limit or multiple policy limits should be applied to a particular situation, the courts have considered important the policy language, the number of victims, and the factual event giving rise to the liability of the insured."); Lee v. Interstate Fire & Cas. Co., 86 F.3d 101, 105 (7th Cir. 1996) (court determined that whether there was one or multiple occurrences was tied to the specific facts concerning the negligence alleged in each case); London Mkt. Insurers v. Superior Court, 146 Cal. App. 4th 648, 657, 53 Cal. Rptr. 3d 154, 161 (2007) (number of occurrences analysis necessitates a "thorough examination of the policy language" in each case).

[29] *See What Constitutes 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 (1988). In 1997, a well-respected policyholder legal team noted:

> [A] significant factor shaping the number of occurrences determination, at least in some instances, is the impact that the determination will have on the policyholder's recovery . . . . It therefore should not be surprising that some decisions reflect a proclivity to avoid a

recent decisions appear to have steered away from this approach.[30] Indeed, insurers have prevailed on the issue of number of occurrences in several recent decisions.[31] That said, some courts continue to freely acknowledge that maximizing coverage is a factor considered in their number of occurrences analysis.[32]

Ultimately, whether an insured will fair better with a finding of one occurrence or a finding of multiple occurrences will change depending on the circumstances surrounding each insurance claim.[33] Indeed, even when immersed in an insurance dispute, it may be difficult to determine whether it will be in one's best interest to advocate for one or multiple occurrences. Thus, it is not unheard of for a party to change its position in the middle of a dispute.[34]

Before addressing the specific tests employed by the courts, this article provides a brief history of the standard CGL policy, noting how the transition into its current form affected the number of occurrence analysis. Next, the article provides a more detailed explanation of the cause, effects and "unfortunate event" tests, along with a discussion of several recent decisions employing each test, while highlighting nuances and variations along the way. Finally, the article presents asbestos litigation as a case study for the inconsistency and unpredictability

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determination that would forfeit or limit coverage that would reasonably be expected. Indeed, some courts have even acknowledged explicitly that the amount a policyholder will recover is a factor to be considered in the number of occurrences definition.

Kalis, Reiter, and Segerdahl; Policyholder's Guide to the Law of Insurance Coverage (1997) at § 3.03[c], p. 3-42

[30] Seaman & Schulze, Allocation of Losses in Complex Insurance Coverage Claims, 7.2, *The Number of "Occurrences" Analyses Employed by Various Courts* (2008) (noting that "courts in recent years have been more analytical in their approach, considering contract language and claim-specific facts instead of accepting the approach that maximizes the insurance recovery.")

[31] *See, e.g.*, International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America, 46 A.D.3d 224, 844 N.Y.S.2d 257 (1st Dep't 2007) (court held in favor of insurers that each of the underlying personal injury plaintiffs' claims constituted a separate "occurrence" for the purpose of applying a deductible under the primary general liability insurance policies); Allstate Property and Cas. Ins. Co. v. McBee, No. 08-0534-CV-W-HFS, 2009 U.S. Dist. LEXIS 35158 (W.D. Mo. April 27, 2009) (court held that dog attack was only one occurrence under insurance policy despite the fact that two people were injured, thus limiting coverage to one "per-occurrence" limit).

[32] *See, e.g.*, Addison Ins. Co. v. Fay, 232 Ill. 2d 446, 905 N.E.2d 747 (2009).

[33] 6 Sayler, Dolin, Engh, & Brown, Business and Commercial Litigation in Federal Courts § 69:57 (2d ed.) (2009) ("Depending on a variety of factors, including whether deductibles or limits are the issue, a single-occurrence result could help an insurer on one set of facts but engender catastrophic losses on another set of facts."); Murray, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 Yale L.J. 1484, 1493 (2009) ("the finding of one or multiple occurrences is neither universally pro-insured nor pro-insurer").

[34] Hartford Accident & Indem. Co. v. Employers Ins. of Wausau (Cal. Super. Ct. San Francisco Cty., filed Oct. 8, 1985, judgment Oct. 17, 1996), cited in 2 Zuckerman & Raskoff, Environmental Insurance Litigation: Law and Practice § 10.7 (2009) (policyholder's position before trial was that dioxin spraying at 27 locations was 27 occurrences, but, at trial, it switched positions and argued that the spraying was only one occurrence—an argument with which the jury agreed).

plaguing a number of occurrences insurance disputes.

II. HISTORICAL BACKDROP: THE EVOLUTION FROM "ACCIDENT" TO "OCCURRENCE" IN THE STANDARD COMMERCIAL GENERAL LIABILITY POLICY

Prior to 1966, most CGL policies were known as "accident" policies.[35] That is, such policies provided coverage for personal injury or property damage caused by an "accident," a term that typically went undefined.[36] In 1966, the language of the standard CGL policy was revised to provide coverage on an "occurrence" basis.[37] More specifically, the typical post-1966 CGL policy provides that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies," and that the "insurance applies to 'bodily injury' and 'property damage' only if" it is "caused by an 'occurrence' . . . ."[38] The standard 2009 CGL policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[39] The term "accident" remains undefined.[40]

The move to an "occurrence" form was widely understood, even by those in the insurance industry, to broaden coverage to not only encompass "boom-type" events (incidents that take place over a short period of time, such as automobile accidents), but also to include accidents involving a long-term injurious exposure

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[35] Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 671, 913 P.2d 878, 891 (1995).

[36] 2 Zuckerman & Raskoff, Environmental Insurance Litigation: Law and Practice § 5:3 (2009) ("The term 'accident' was, typically, not defined in accident-based liability policies, and this did not change in 1966 (with the advent of occurrence-based liability coverage) or, at any time thereafter (i.e. the definitions section of the most current versions of the standard CGL form still do not define 'accident.'") ; Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9, 30 (1986) (noting that CGL policies "fail to define the term 'accident'").

[37] Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 671, 913 P.2d 878, 891 (1995). This change was effected by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Board, the predecessor organizations to the Insurance Services Office (ISO). *Id.* (citing Pasich, Insurance Coverage for Environmental Claims, L.A.Law., p. 23, fn. 12 (Jan. 1989); 3 Cal. Insurance Law & Practice, Property and Liability Insurance § 49.04, at p. 49-10 (1986)). ISO is "a non-profit trade association that provides rating, statistical, and actuarial policy forms and related drafting services to approximately 3,000 nationwide property or casualty insurers." *Id.*

[38] *See* Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 12 04). "Most carriers use the basic ISO forms, at least as the starting point for their general liability policies." Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 671, 913 P.2d 878, 891 (1995).

[39] *See* Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 12 04).

[40] *Id. See also* 2 Zuckerman & Raskoff, Environmental Insurance Litigation: Law and Practice § 5:3 (2009).

to conditions.[41] Another notable consequence of the shift to the "occurrence" based policy was the more frequent grouping of several claims into fewer occurrences. As the then-secretary of the National Bureau of Casualty Underwriters explained in 1968:

> The new policy will afford coverage on an "occurrence" basis . . . . Note that this definition [of occurrence] includes the word "accident." This has been done in order to clarify the intent with respect to time of coverage and application of policy limits, particularly, in situations involving a related series of events attributable to the same factor. Under such circumstances only one accident or occurrence is intended as far as the application of policy limits is concerned.[42]

Thus, the shift from the "accident" form to the "occurrence" form was widely seen as one that would make it easier for courts to find that a series of events constitutes one "occurrence."[43]

What is more, the insurance industry reinforced this notion by specifically declaring policy limits on a "per-occurrence" basis.[44] Thus, the number of occurrences associated with any given claim determines how many "per-occurrence" limits are triggered under the policy. Although there is little doubt that the shift to "occurrence" policies with "per-occurrence" limits made it more difficult to trigger multiple limits and deductibles under a given policy, there is still enough ambiguity left in the policy language,[45] and enough elasticity in the tests that have emerged,[46] to make it difficult to predict case outcomes. As one court aptly noted:

> [D]ecided cases are imprecise guides . . . for unless particular words have crystallized into a definite legal rule their meaning necessarily varies with time, place, occasion and the vocabulary of the user. Nor is an all-inclusive definition of accident or occurrence possible or any formulation of a test applicable in every

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[41] *See* Norman Nachman, *The New Policy Provisions for General Liability Insurance*, 10 CPCU Annals 196, 223–25 (1965).

[42] Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 671, 913 P.2d 878, 891 (1995) (citing Richard H. Elliott, The New Comprehensive General Liability Policy, in Liability Insurance Disputes, 12-5 (Sol Schreiber & Stuart J. Motelson eds., PLI 1968)).

[43] Many policies even include a so-called "deemer clause" expressly providing that "[f]or the purpose of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *See* Endicott Johnson Corp. v Liberty Mut Ins. Co., 928 F. Supp. 176, 179 (N.D.N.Y. 1996); FMC v Plaisted and Cos., 61 Cal. App. 4th 1132 (1998).

[44] Murray, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 Yale L.J. 1484, 1493 n.45 (2009).

[45] *See* S.R. Int'l Bus. Co., Ltd. v. World Trade Ctr. Props., LLC, No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 9966, at *12 (S.D.N.Y. June 4, 2002) ("[t]he history of litigation over the meaning of the term 'occurrence' amply demonstrates that its meaning is far from unambiguous and must be divined from the particular context in which it is used").

[46] Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising From the World Trade Center Attacks*, 69 Def. Couns. J. 169, 172 (2002).

case, for the word has been employed in a number of senses and given varying meanings depending on the relevant context.[47]

III. CURRENT APPLICATION: HOW COURTS DETERMINE NUMBER OF OCCURRENCES

A. The "Effects" Test

1. Understanding the "Effects" Test

The "effects" tests, widely utilized in the past, has become largely discredited in recent years.[48] This test holds that "where several injuries result from a single underlying cause, each injury to person or property is a separate occurrence."[49] The "effects" approach tends to yield more occurrences than the "cause approach" (discussed in greater detail below).[50] More occurrences can mean more policy limits are in play, but it may also mean more deductibles to pay. What is more, if each discrete claim is less than a deductible, the insured may find itself barred from coverage entirely. For instance, in *Anchor Casualty Co. v. McCaleb*,[51] the seminal case adopting this approach, an oil well exploded and erupted intermittently for more than 50 hours, causing damage to several different properties in the area.[52] The court held that each instance of property damage was caused by a separate accident.[53] The court further explained that "[t]he blowing-out of the well was not a single accident but a series of events, a catastrophe. Numerous accidents were the product of this motivating force . . . . If one cause operates upon several at one time, it cannot be regarded as a single incident, but the injury to each individual is a separate accident."[54] It bears noting that the Fifth Circuit subsequently recognized that its holding in *Anchor Casualty* ought to be limited

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[47] Murray, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 Yale L.J. 1484, 1495 n.55 (2009) (citing Home Ins. Co. v. Aetna Cas. Co., 1977 Fire & Casualty Cas. (CCH), 9, 13 (S.D.N.Y. 1977)).

[48] Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising From the World Trade Center Attacks*, 69 Def. Couns. J. 169, 172 (2002).

[49] Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949); Elston-Richards Storage Co. v. Indemnity Ins. Co. of North America, 194 F. Supp. 673 (W.D. Mich. 1960), *aff'd*, 291 F.2d 627 (6th Cir. 1961). *See also* Kalis, Reiter, and Segerdahl, Policyholder's Guide to the Law of Insurance Coverage (1997) at § 3.03(B)(2): "Under the [effects] approach, the number of occurrences is determined by examining the results of the incident. Thus, an incident that results in multiple injuries or claims likely will be treated as involving multiple occurrences."

[50] *See* Sunoco, Inc. v. Ill. Nat'l Ins. Co., 226 F. App'x 104 (3d Cir. 2007) ("An effects approach . . . tend[s] to maximize the number of "occurrences.") . *See also* 2 Zuckerman & Raskoff, Environmental Insurance Litigation: Law and Practice § 13:38 (2009) ("The practical result of the adoption of an 'effects test' usually means that there will be numerous occurrences resulting from the underlying claim.").

[51] Anchor Casualty Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949).

[52] *Id.* at 324.

[53] *Id.* at 324–325.

[54] *Id.*

to an accident involving a series of events causing discrete damage in different places and at different times.[55]

Some courts have referred to the "effects test" as the "English Rule"[56] which "views an accident or occurrence from the perspective of the injured party, not from the perspective of the policyholder."[57]

2. Applying the "Effects" Test

While most recent cases addressing the effect theory merely reject it, a minority of jurisdictions continue to employ the test in certain situations. As one author recently noted:

> [m]odern courts have adopted the effects test in part because they have difficulty accepting the theory that a pattern of behavior, conduct, inactivity or negligence by the policyholder justifies aggregating individual claims into a single occurrence. Courts often have difficulty categorizing an abstract pattern of behavior as a condition that would satisfy the continuous exposure clause. In addition, some view the effects test as more appropriate where the injuries or damage complained of arise at different locations and at different times, and therefore clearly do not constitute one occurrence.[58]

For instance, in *Liberty Mut. Ins. Co. v. Jotun Paints, Inc.*,[59] the United States District Court for the Eastern District of Louisiana held that under Louisiana law, where different parties are damaged by a series of events, damage to each party constitutes a separate "occurrence" for purposes of the insurance contract.[60] More specifically, the court noted that the property damage in the petitions is alleged to have arisen "because of several negligent and fraudulent acts on the part of [the

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[55] *See* St. Paul Mercury Indem. Co. v. Rutland, 225 F.2d 689, 693 (5th Cir. 1955). *See also* McKeithen v. S. S. Frosta, 430 F. Supp. 899, 903 (E.D. La. 1977) (recognizing Fifth Circuit's limitation of the ruling in Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949)).

[56] Hartford Accident & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 173 305 N.E.2d 907, 910 (1973) (the "so-called 'English Rule' describes "that class in which it had been held that there is a separate accident with respect to each person who has suffered a loss.").

[57] E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co., No. 99C-12-253 (JTV), 2009 Del. Super. LEXIS 235 at *11, n.6 (Del. Super. Ct. New Castle June 30, 2009).

[58] Chanes & Daniels, *One Occurrence or Two: How the Courts Decide*, RIMS Risk Management Magazine (Jan. 1, 2002).

[59] Liberty Mut. Ins. Co. v. Jotun Paints, Inc., 555 F. Supp. 2d 686 (E.D. La. 2008).

[60] *Id.* at 695–696 (citing Lombard v. Sewerage & Water Board of New Orleans, 284 So. 2d 905, 915–16 (La. 1973) (the Louisiana Supreme Court held that, in cases where different parties are damaged by a series of events, the damage to each party is a separate "occurrence" for purposes of an insurance contract); Tesvich v. 3-A's Towing Co., 547 So. 2d 1106, 1111 (La. Ct. App. 1989) ("[W]e have concluded on the basis of *Lombard* that the claim of each plaintiff with respect to his or her leases constitutes a separate occurrence." (citation omitted)); Reynolds v. Transcontinental Ins. Co., Nos. 94-1367, 94-1432 (E.D. La. Jan. 17, 1995) (discussing and applying *Lombard, Tesvich*, and Soc'y of the Roman Catholic Church v. Interstate Fire & Cas. Co., 26 F.3d 1359 (5th Cir. 1994)).

insured] and others."[61] Rather than find each negligent or fraudulent act to be a separate occurrence, or find that all acts should be aggregated into one single occurrence, the court, following precedent in Louisiana, held that "the acts combined constitute one occurrence for each party injured, i.e., a separate occurrence for each plaintiff."[62] Once again, this approach focuses on the perspective of the third-party claimant, rather than the policyholder.

The "effects" approach was also recently employed by the Eighth Circuit Court of Appeals in *Nationwide Ins. Co. v. Central Missouri Electric Cooperative, Inc.*[63] In *Nationwide*, the Eighth Circuit, applying Missouri law, was faced with the question of which underlying events triggered coverage under the terms of two respective policies:[64] when the alleged wrongful act was committed or when the injury occurred.[65] Relying on an earlier Missouri appellate court decision (*Shaver v. Insurance Co. of North America*),[66] the court concluded that an "effects" analysis must be applied, and held that the policies in question were triggered by the occurrence of damages, not by the negligent acts.[67] However, the court recognized that Missouri may apply a simplified "cause" analysis for other purposes, such as to determine whether a single insurance policy covers a loss, "or to determine the coverage limits" or applicable deductibles under a given policy.[68]

B. The "Cause" Test

1. Understanding the "Cause" Test

As previously stated, the majority of courts today look to the cause, or causes, of damage rather than to each individual claimant's injury to determine the number of occurrences involved in a given insurance claim.[69] Courts justify this

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[61] Liberty Mut. Ins. Co. v. Jotun Paints, Inc., 555 F. Supp. 2d 686, 696 (E.D. La. 2008).

[62] *Id.*

[63] Nationwide Ins. Co. v. Central Missouri Electric Cooperative, Inc., 278 F.3d 742 (8th Cir. 2001).

[64] *Id.* at 746.

[65] *Id.*

[66] Shaver v. Insurance Co. of North America, 817 S.W.2d 654, 657 (Mo. Ct. App. 1991) (quoting Kirchner v. Hartford Accident & Indem. Co., 440 S.W.2d 751, 756 (Mo. Ct. App. 1969), "Our analysis of this issue is controlled by Missouri law, which provides that 'the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the alleged wrongful act was committed, but is the time *when the complaining party was actually damaged.*'") (emphasis original).

[67] Nationwide Ins. Co. v. Central Missouri Electric Cooperative, Inc., 278 F.3d 742, 746–47 (8th Cir. 2001).

[68] *Id.* at 746–47 n. 3.

[69] *See* Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 159, 938 A.2d 286, 293 (Pa. 2007) ("The prevailing view looks to the "cause" or "causes" of the damage to determine the number of occurrences."); Nicor, Inc. v. Associated Elec. and Gas Ins. Services Ltd., 223 Ill. 2d 407, 419, 307 Ill. Dec. 626, 860 N.E.2d 280, 287 (2006) ("A majority of jurisdictions have adopted the cause theory to determine the number of occurrences under general liability insurance policies of the type

approach under numerous theories. In part, courts focus on the distinction between "occurrence" based policies from "claim" based policies. It has been noted that, "[b]y dint of the use of the words 'occurrence' . . . rather than the word 'claim,' the courts say policies show the intent of the parties to focus on the circumstances underlying the claims or losses rather than their individual components."[70] Courts find further justification for the "cause" test by looking to the typical definition of "occurrence." Because "occurrence" is most often defined as a "series of related *acts*" or a "continuous or repeated exposure to conditions," courts conclude this definition clearly meant to define occurrence in terms of the causes of alleged damage or injury rather than in terms of the injury itself.[71] Finally, with regard to the limits of liability section in many insurance policies, courts have highlighted that such provisions contain language limiting the policyholder's recovery to a per occurrence limit "regardless of the number of . . . persons or organizations who sustain injury or damages, or . . . claims made or suits brought." According to some, "[t]his choice of wording also supports the position that the parties intended to gauge coverage not based on the individual lawsuits or properties damaged."[72] These "unifying definitional principles," the courts say, "require the number of occurrences to be determined by looking at the underlying cause."[73]

Compared to the "effects" test, the "cause" test tends to result in a finding of

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at issue in this case."); Owners Ins. Co. v. Salmonsen, 366 S.C. 336, 339, 622 S.E.2d 525, 526 (2005) ("The majority rule in interpreting the meaning of 'occurrence' in a liability policy is the so-called 'cause test' which focuses on the cause of the damage rather than the number of claimants or injuries. The minority view, on the other hand, focuses on the effect of the insured's action and considers each event or each injury a separate occurrence."); Irving Materials, Inc. v. Zurich Am. Ins. Co., No. 1:03-CV-361-SEB-JPG (S.D. Ind. Mar. 30, 2007) ("a majority of other courts who have addressed this issue have focused on the cause or causes of the resultant damage in determining the number of "occurrences," rather than basing that determination on each individual claimant's injury or the number of claims"). *See also* Safeco Ins. Co. of America v. Fireman's Fund Ins. Co., 148 Cal. App. 4th 620, 55 Cal. Rptr. 3d 844 (Cal. Ct. App. 2 Dist. 2007); Koikos v. Travelers Ins. Co., 849 So. 2d 263, 269 (Fla. 2003); Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co., 255 Conn. 295, 314, 765 A.2d 891, 901 (2001); Gaston County Dyeing Mach. Co. v. Northfield Ins. Co., 351 N.C. 293, 304, 524 S.E.2d 558, 565 (2000); Greengo v. Public Employees Mut. Ins. Co., 135 Wash. 2d 799, 814, 959 P.2d 657, 664 (1998); Bish v. Guaranty Nat'l Ins. Co., 109 Nev. 133, 135, 848 P.2d 1057, 1058 (1993); Travelers Indem. Co. v. Olive's Sporting Goods, Inc., 297 Ark. 516, 522, 764 S.W.2d 596, 599 (1989); Arizona Property and Cas. Ins. Guar. Fund v. Helme, 153 Ariz. 129, 137, 735 P.2d 451, 457 (1987); United States Fire Ins. Co. v. Safeco Ins. Co., 444 So. 2d 844, 847 (Ala. 1983); Olsen v. Moore, 56 Wis. 2d 340, 346, 202 N.W.2d 236, 239 (1972).

[70] Chanes & Daniels, *One Occurrence or Two: How the Courts Decide*, RIMS Risk Management Magazine (Jan. 1, 2002).

[71] *Id.*

[72] *Id.*

[73] U.S. Gypsum Co. v. Admiral Ins. Co., 268 Ill. App. 3d 598, 650, 643 N.E.2d 1226, 1259 (Ill. App. Ct. 1 Dist. 1994) (citing Owens-Illinois v. Aetna Cas. and Sur. Co., 597 F. Supp. 1515, 1527 (D.D.C. 1984)).

fewer occurrences.[74] However, near-universal adoption of the "cause" test has done little to "resolve the occurrence-counting task in self-executing fashion."[75] This is because courts often disagree in "how broadly or narrowly to define 'cause.'"[76] More specifically, "courts diverge . . . on whether to define cause as the proximate cause of the victim's injury or as the event causing the insured's liability."[77] Application of these different "cause" theories, although technically derived from the same test, can result in dramatically different outcomes.

a. The Proximate Cause Theory

Many courts hold the view that each occurrence must have a separate proximate cause, particularly where the insured's conduct was the immediate cause of the injuries.[78] These courts hold that a single occurrence encompasses all damages resulting from one proximate, uninterrupted and continuing cause.[79] Stated another way, these cases "tend to look to the direct, physical cause of the injuries as being the yardstick for measuring whether the claims had a common origin."[80] Thus, "where the insured physically strikes another person, whether with fists, firearms or a motor vehicle, courts may find that each separate physical act of the insured is a new 'occurrence.'"[81]

One of the most frequently cited cases on the "proximate cause" theory is *Appalachian Insurance Co. v. Liberty Mutual Insurance Co.*[82] In that case, the Third Circuit addressed whether a liability insurer was obligated to indemnify its insured for a settlement of a lawsuit involving allegations of multiple acts of sex discrimination in the workplace.[83] Since the applicable policy included a

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[74] Sunoco, Inc. v. Ill. Nat'l Ins. Co., 226 F. App'x 104 (3d Cir. 2007) ("Sometimes the cause analysis can result in more than one loss, but far fewer than the separate incidents of damage.").

[75] Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 Conn. Ins. L.J. 349, 378 (2006).

[76] *Id.*

[77] Murray, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 Yale L.J. 1484, 1495 (2009).

[78] *See* Pyrites Co., Inc. v. Century Indem. Co., No. 4514, 2005 Phila. Ct. Com. Pl. LEXIS 393, at *5 (Pa. Com. Pl. Ct. Aug. 30, 2005) (under the "cause" analysis, "the court asks if there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage"); United Servs. Auto. Assn. v. Baggett, 209 Cal. App. 3d 1387, 1393, 258 Cal. Rptr. 52 (1989) ("[T]he prevailing interpretation of the terms 'accident' and 'occurrence' in insurance policy provisions limiting liability . . . [is] a reference to the proximate cause of unexpected damage.").

[79] *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41, at 264 (5th ed. 1984) (proximate cause is considered to be "the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct" under a reasonableness standard).

[80] Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising From the World Trade Center Attacks*, 69 Def. Couns. J. 169, 172 (2002).

[81] *Id.*

[82] Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3d. Cir. 1982).

[83] *Id.* at 57.

per-occurrence deductible of $25,000 and each separate claim of each class member was valued at less than $25,000, the insured argued that all alleged acts of discrimination constituted a single occurrence.[84] The Third Circuit, applying Pennsylvania law, agreed, finding that there "was but one occurrence" because "[t]he injuries for which Liberty was liable all resulted from a common source: Liberty's discriminatory employment policies."[85] The court maintained this finding despite the fact that "there were multiple injuries and that they were of different magnitudes and that injuries extended over a period of time" because "[a]s long as the injuries stem from one *proximate cause* there is a single occurrence."[86] The proximate causation view has been applied in several contexts, from environmental to products liability to car accidents to shootings.[87]

b. The Legal Cause Theory

The "legal cause" or "liability-triggering event" theory is another method often employed by courts to determine causation in connection with analyzing the number of occurrences.[88] Courts adopting this method believe that the term "occurrence" should refer to the occurrence of the events or incidents for which the insured is liable.[89] In other words, courts looks to the acts or omissions that form the basis for the insured's legal liability as being the "cause" of the policyholder's liabilities, which forms the occurrence.[90] Some courts have described the particular focus of this causation theory as the "liability-triggering

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[84] *Id.* at 59.

[85] *Id.* at 61.

[86] *Id.*

[87] *See* Sunoco, Inc. v. Ill. Nat'l Ins. Co., 226 F. App'x 104 (3d Cir. 2007); Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003); Liberty Mut. Ins. Co. v. Treesdale Inc., 418 F.3d 330 (3d Cir. 2005); Chemstar, Inc. v. Liberty Mut. Ins. Co., 41 F.3d 429 (9th Cir. 1994); Associated Indem. Corp. v. Dow Chem. Co., 814 F. Supp. 613 (E.D. Mich. 1993); Transp. Ins. Co. v. Lee Way Motor Freight, Inc., 487 F. Supp. 1325 (N.D. Tex. 1980).

[88] It bears noting that there is some disagreement among courts whether the "liability-triggering event" test is a variation of the cause test or a separate test entirely. *See* H.E. Butt Grocery Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 150 F.3d 526, 530 n.2 (5th Cir. 1998) (Benavides C.J. concurring) (including a discussion regarding whether or not the "liability-triggering test" is a separate analysis or part of the "cause" test analysis under Texas law). *See also* Murray, *The Law of Describing Accidents: A New Proposal for Determining the Number of Occurrences in Insurance*, 118 Yale L.J. 1484, 1497 (2009) (listing "liability event" theory as subgroup of "cause" test.) *But see* Mid-Century Ins. Co. v. Shutt, 17 Kan. App. 2d 846, 845 P.2d 86 (1993) (differentiating between those jurisdictions that apply the "cause" test and those that apply a test focusing on events that trigger liability.).

[89] Mead Reinsurance v. Granite State Ins. Co., 873 F.2d 1185 (9th Cir. 1988) (multiple claims of police misconduct constituted one occurrence; liability did not arise from each separate act of misconduct, but rather from the underlying municipal policy of condoning a series of similar police acts); State Farm Lloyds, Inc. v. Williams, 960 S.W.2d 781, 785 (Tex. App.–Dallas 1997) (holding that, because each separate act of shooting gave rise to liability, two occurrences took place).

[90] Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising From the World Trade Center Attacks*, 69 Def. Couns. J. 169, 173 (2002).

event."[91] This theory is often applied in cases where "the insured's conduct is remote to the immediate cause of the plaintiff's injuries—as in products liability cases or cases based on theories of liability such as negligent training, supervision or inspection—the direct cause of injury may have little relevance to the 'cause' for purposes of ascertaining the number of 'occurrences.'"[92]

For example, in *Michigan Chemical Corp. v. American Home Assurance Co.*,[93] the Sixth Circuit, while agreeing with the "vast majority of courts," including the *Appalachian Insurance* court, that the "cause" theory should be employed for the purpose of determining the number of occurrences in a given insurance claim, the court deviated from the reasoning of *Appalachian Insurance* by zeroing in on "act from which liability arose" rather than the proximate cause of the injuries.[94] In *Michigan Chemical Corp.*, several animals were injured when the manufacturer of a livestock feed supplement mistakenly shipped flame retardant, rather than livestock feed supplement, to a distributor that mixed the flame retardant with regular livestock feed and sold the resulting product to dairy farmers.[95] The Sixth Circuit declined to find that the "cause" for the purposes of determining number of occurrences was the mistaken substitution of the fire retardant.[96] Instead, applying Illinois law, the Sixth Circuit took the position that each individual shipment of the fire-retardant constituted a separate occurrence, since each shipment constituted a separate act giving rise to the manufacturer's liability.[97]

Texas courts similarly focus the number of occurrences analysis on what ultimately is determined to be the "liability-triggering event"[98] or the "events or incidents for which [the insured] is liable."[99] For instance, the case *Maurice Pincoffs* involved several sales and shipments of bird seed which contained a toxic insecticide. The United States Court of Appeals for the Fifth Circuit, applying Texas law, held that the "occurrence" to which the subject contract refers was "the

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[91] *See* H.E. Butt Grocery Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 150 F.3d 526, 535 (5th Cir. 1998)

[92] Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising From the World Trade Center Attacks*, 69 Def. Couns. J. 169, 173 (2002).

[93] Michigan Chemical Corp. v. American Home Assur. Co., 728 F.2d 374 (6th Cir. 1984).

[94] *Id.* at 383.

[95] *Id.*at 376.

[96] *Id.* at 383.

[97] *Id.*

[98] *See, e.g.*, U.E. Texas One-Barrington, Ltd. v. General Star Indem. Co., 332 F.3d 274, 278–279 (5th Cir. 2003) (J. Smith concurring and dissenting opinion); Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co., 447 F.2d 204 (5th Cir. 1971) (applying Texas law); Ran-Nan Inc. v. General Accident Ins. Co. of America, 252 F.3d 738, 740 (5th Cir. 2001); State Farm Lloyds, Inc. v. Williams, 960 S.W.2d 781, 785 (Tex. App.–Dallas 1997) (holding that, because each separate act of shooting gave rise to liability, two occurrences took place).

[99] U.E. Texas One-Barrington, Ltd. v. General Star Indem. Co., 332 F.3d 274, 278–279 (5th Cir. 2003).

occurrence of the events or incidents for which Pincoffs is liable."[100] According to the court, the policyholder became liable to each claimant at the time each sale took place and not before.[101] Thus, the court rejected the argument that all sales constituted a single occurrence stemming from the contamination of the entire batch of seed, and instead found that each sale amounted to a separate occurrence.[102]

2. Applying the "Cause" Test

a. "Proximate Cause"

In *Koikos v. Travelers Ins. Co.*,[103] the court distinguished between the "proximate cause" and "liability-triggering event" views, albeit in somewhat different terms,[104] and ultimately adopted the latter view. Two shooting victims sued Koikos, the owner of a restaurant, for negligent security when they were shot on the premises by one person firing "two separate—but nearly concurrent—rounds."[105] Koikos argued that "the force that caused the injuries was the gunshots and, therefore, each shot injuring a victim was a separate occurrence."[106] Conversely, Travelers argued that "the injuries resulted from Koikos's alleged negligence" in failing to provide proper security, and that such negligence "constituted a single 'occurrence' under the terms of the policy" subject to the $500,000 per-occurrence limit.[107]

The Supreme Court of Florida disagreed with Travelers, noting that "it is the immediate injury-producing act . . . that constitutes the 'occurrence,' not the underlying tortious omission."[108] In this case, the "immediate injury-producing events" constituted each moment the shooter discharged his weapon.[109] The court further rationalized that the "continuous or repeated *exposure*" language of the policy under the precise facts of this case refers to the "exposure" of the victims to the shooter's bullets, not the negligent failure to provide security.[110] Thus, the court sided with Koikos view that each shooting was a separate occurrence to

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[100] Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co., 447 F.2d 204, 206 (5th Cir. 1971) (applying Texas law).

[101] *Id.*

[102] *Id.*

[103] Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003).

[104] What many courts refer to as "proximate cause," the *Koikos* court described as "the immediate injury-producing act," and what some call the "liability-triggering event," the *Koikos* court called the insured's "underlying tortious conduct." *Id.* at 271.

[105] *Id.* at 265.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 271.

[109] *Id.* at 273.

[110] *Id.* at 268.

which full policy limits applied.[111]

In *Sunoco, Inc. v. Ill. Nat'l Ins. Co.*,[112] the Third Circuit similarly applied the proximate cause test in its analysis of a number of occurrences dispute under Pennsylvania law, following the precedent set by *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.* The court held that, although dozens of cases against the insured alleged "contamination in different geographic regions, result(ing) from a variety of sources including gas tank leaks and accidental spills from pipelines," there was only one occurrence under the policy because all of the injuries—"save one"[113]—resulted from the "one proximate cause common for all of the injuries and damage sustained by the underlying plaintiffs," that being "the hazardous manufacture of gasoline containing MTBE and failure to warn."[114] Hence, the court would only apply one policy deductible.

The recent case of *E.I. Du Pont De Nemours & Co. v. Stonewall Ins. Co.*,[115] also resulted in a "one occurrence" finding, and further illustrates how the "proximate cause" test can sometimes resemble the "legal" cause test. In *Du Pont*, the Superior Court of Delaware considered whether 469,000 claims brought by different people over 18 years constituted one or multiple occurrences.[116] The claims arose from the insured's alleged manufacture and sale of a defective plastic material used in plumbing systems installed in residential homes over the course of several decades. The claimant homeowners alleged that products manufactured by the insured were inherently defective for a variety of reasons, and on that basis sought damages for property damage allegedly caused by the defective parts.[117]

Facing a $50 million SIR for each "occurrence" before reaching its excess

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[111] It also bears noting that the court rejected Travelers' argument that there should be one occurrence due to the close proximity in time and space of the shots fired. Instead, the court concluded that "using the number of shots fired as the basis for the number of occurrences is appropriate because each individual shooting is distinguishable in time and space." *Id.* at 272. Issues surrounding courts' introduction of "time and space" elements into their analysis of number of occurrences issues is discussed in greater detail below.

[112] Sunoco, Inc. v. Ill. Nat'l Ins. Co., 226 F. App'x 104 (3d Cir. 2007).

[113] The court ruled that one case was different from the rest because the underlying plaintiffs in that case were "suing Sunoco based on the negligent maintenance of a Sunoco gas station that resulted in contamination of the ground water surrounding their hotel." *Id.* at 108. The court further noted that "[w]hile the complaint in that case refers to the inherent dangerousness of MtBE, it is not the dangerous nature of MtBE that gives rise to the complaint, but a gasoline product that contaminated the ground water surrounding the hotel." *Id.* Accordingly, the court remanded to the district court so that it could determine if Sunoco had met its SIRs without its expenditures on this one exceptional case. *Id.*

[114] The court surveyed Pennsylvania law in toxic tort coverage cases and concluded that Pennsylvania courts have "repeatedly found that the negligent inclusion of a potentially dangerous chemical constitutes a single occurrence." *Id.* at 107.

[115] E.I. Du Pont De Nemours & Co. v. Stonewall Ins. Co., No. 99C-12-253 (JTV), 2009 Del. Super. LEXIS 235 (Del. Super. Ct. June 30, 2009).

[116] *Id.* at *8.

[117] *Id.* at *3.

insurance, the insured argued that all 469,000 claims presented but one occurrence, that is, "the sale or the unsuitability" of the allegedly defective plumbing equipment.[118] The court agreed, granting summary judgment in favor of the policyholder even though the equipment was alleged to have failed at the various residences for multiple, and different, reasons.[119] The court rejected the insurer's argument that damage to each house constituted a separate occurrence under these circumstances.

Central to the court's decision in *Du Pont* was the specific policy language at issue in the case. More particularly, the definition of the term "occurrence" in the applicable policy was defined as:

> an accident or happening or event where a continuous or repeated exposure to conditions which unexpectedly or unintentionally result in personal injury, property damage, or advertising liability during the policy period. *All such exposure to substantially the same general conditions existing at or emanating from premises location shall be deemed one occurrence. All Personal Injury or Property Damage arising out of the common condition and goods or products manufactured, sold, handled, or distributed by the Named Insured shall be deemed one occurrence.*[120]

Moreover, the court acknowledged that Delaware courts had previously "adopted the cause test for determining the number of occurrences, and reinforced the 'proximate, uninterrupted, and continuing' language that appears throughout the relevant case law."[121] However, unlike those courts that emphasized the actual "proximity" of the cause to the injuries in search of the most "direct, physical cause of the injuries," the *Du Pont* court instead looked to the more remote "*source* of the ultimately damaging condition, or the place of its creation."[122] The court even went so far as to state that "independent physical causes contributing to a product's failure is irrelevant for purposes of determining the number of occurrences."[123]

From this analysis, the *Du Pont* court concluded that the insurer's "contention that the damage at each individual house is a separate occurrence must be rejected" and found that, even if the products failed for different reasons, the damage giving rise to the insured's liability all arose from one occurrence—the product's "lack of suitability for use in [certain] plumbing systems."[124] As such,

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[118] *Id.* at *14 n.8.

[119] *Id.* at *43.

[120] *Id.* at *6 (emphasis added).

[121] *Id.* at *18 (citing E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., 1996 Del. Super. LEXIS 137, at *7 (Del. Super. Ct. 1996).

[122] *Id.* at *20 (original emphasis).

[123] *Id.* at *42.

[124] *Id.* at *43. The court pointed to a "number of cases outside the Third Circuit support[ing] [the insured's] position that the sale of . . . material improperly designed for its intended application, was one occurrence" including cases that "focus[] uses on the manufacture and sale of a defective

the result of this recent case appears to be more akin to those applying the "legal" or "remote" cause theory.

b. "Legal Cause"

In *Donegal Mut. Ins. Co. v. Baumhammers*,[125] the Supreme Court of Pennsylvania applied the legal cause theory to find only one occurrence on facts that were substantially similar to those in *Koikos*, in which the court found multiple occurrences under a proximate cause analysis. In the *Donegal* case, the insurer issued a homeowners policy to the parents of the shooter, an adult resident of the household.[126] The shooter left the house, and over the course of two hours drove through four towns and injured six people.[127] The shooter's parents were sued for negligence in failing to take the gun or alert police or mental health professionals about the shooter's dangerous propensities, which constituted an accident under Pennsylvania law.[128] They sought coverage under the policy issued by Donegal, and a dispute arose as to "whether, under the Donegal insurance policy, the injuries to the six individual victims constituted six separate 'occurrences' or one

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product" (*see* Champion Int'l Corp. v. Continental Cas. Co., 546 F.2d 502 (2d Cir. 1976) (holding that insured's "continuous and repeated" sale of defective vinyl-covered paneling constituted one occurrence despite existence of 1400 claims by vehicle owners); Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co., 707 F. Supp. 762, 773 (E.D. Pa.1989), *vacated on other grounds by*, No. 86-7501, 1989 U.S. Dist. LEXIS 7435 (E.D. Pa. June 30, 1989) (holding that hundreds of personal injury claims against asbestos and welding products manufacturer arose from single occurrence—"the continuing manufacture and sale by plaintiff of the products involved in each set of lawsuits"); Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., 587 F. Supp. 1515 (D.D.C. 1984) (finding that manufacture and sale of asbestos-containing products was one occurrence, and investigation of precise conditions of thousands of individual claimants' exposure to asbestos would be an "administrative nightmare"); Bartholomew v. Ins. Co. of N. Am., 502 F. Supp. 246, 251–52 (D.R.I. 1980) ("[T]he source of all [the plaintiffs'] injury was a single event: the sale of a defectively designed and constructed carwash unit. According to the 'cause theory,' then, this unitary, uninterrupted cause produced but one occurrence for insurance purposes.")), or "some other originating moment when a product was either designed unsuitably or placed into the stream of commerce" (*see* Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1383 (E.D.N.Y. 1988) (reasoning that manufacturer's delivery of Agent Orange to military—"the conceptual point at which [the manufacturer] set its contaminated herbicides free upon the world to do their damage"—constituted one occurrence); Union Carbide Corp. v. Travelers Indem. Co., 399 F. Supp. 12 (W.D. Pa. 1975) (holding that insured's incorporation of noxious chemical into widely sold resins during manufacturing process was one occurrence, in light of policy language and business risk insured against)), as well as cases that "analyze[] product failures in terms of a single vulnerable characteristic and rejects the argument that multiple technical causes can constitute multiple occurrences" *see* Household Manufacturing, Inc. v. Liberty Mut. Ins. Co., No. 85 C 8519, 1987 U.S. Dist. LEXIS 1008 (N.D. Ill. Feb. 11, 1987), *withdrawn*, No. 85 C 8519, 1987 U.S. Dist. LEXIS 1008 (N.D. Ill. Nov. 16, 1987); Associated Indem. Corp. v. Dow Chemical Co., 814 F. Supp. 613 (E.D. Mich. 1993); and Chemstar, Inc. v. Liberty Mut. Ins. Co., 797 F. Supp. 1541 (C.D. Cal. 1992)).

[125] Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 938 A.2d 286 (2007).

[126] *Id.* at 151–152.

[127] *Id.*

[128] *Id.* at 156.

single 'occurrence' in order to ascertain the limits of liability coverage.[129]

Like the court in *Koikos*, the Supreme Court of Pennsylvania adopted the cause approach in its analysis of the number of occurrences. However, unlike the *Koikos* court, the *Donegal* court found that, rather than focus on the "proximate" cause or causes of plaintiffs' injuries:

> to determine the number of 'occurrences' for which an insurance company is to provide coverage, the more appropriate application of the cause approach is to focus on the act of the insured that gave rise to their liability.[130]

The court relied on the reasoning of *Washoe County v. Transcontinental Ins. Co.*[131] In *Washoe County*, the County was sued for negligently licensing a daycare at which an employee sexually abused the children over a three-year period. The Supreme Court of Nevada found that:

> liability was premised on the insured's negligence in performing a duty, which permitted the intervening conduct of those who actively caused the victims harm . . . [A]s long as the injuries stemmed from one proximate cause there is a single occurrence . . . for purposes of liability.[132]

The *Washoe County* court concluded that each act of molestation arose from the same proximate cause: the County's alleged negligence.

Applying that rationale to *Donegal*, the Pennsylvania Supreme Court held that "coverage is predicated on Parents' inaction, and the resulting injuries stem from that one cause," so that Parents' negligence constituted one occurrence.[133] Supporting its application of the legal cause theory that focused more on the underlying cause of the insureds' liability, the court explained that:

> looking to the underlying negligence of the insured recognizes that the question of the extent of coverage rests upon the contractual obligation of the insurer to the insured. Since the policy was intended to insure Parents for their liabilities, the occurrence should be an event over which Parents had some control.[134]

To take "the covered risks out of the insured's hands [and to determine coverage] by the acts of the unfettered shooter, the insurer would have no basis for setting premiums . . . and the insurance contract would be illusory."[135]

Another recent case resulting in a one-occurrence determination is *Allstate*

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[129] *Id.* at 159.

[130] *Id.* at 163.

[131] *Washoe County v. Transcontinental Ins. Co.*, 878 P.2d 306 (Nev. 1994).

[132] *Id.* at 308.

[133] *See* Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 163, 938 A.2d 286 (2007).

[134] *Id.* at 296.

[135] *Id.* (citing *RLI Ins. Co. v. Simon's Rock Early College*, 765 N.E.2d 247, 251 (Mass. 2002) (where college sought insurance coverage for damages arising out of college student's shooting rampage that resulted in the death of two individuals and injury to four others, the court concluded that the college's negligence in failing to prevent the shooter from using his gun constituted the "occurrence" for purposes of determining liability under the policy.))

Property and Cas. Ins. Co. v. McBee.[136] *McBee* involved a dog attack that resulted in injuries to two victims. These victims and the dog owner's insurer disagreed as to whether the dog attack qualified as one occurrence or two occurrences under the applicable policy.[137] The United States District Court for the Western District of Missouri acknowledged that "circumstances at bar [had] not been considered under Missouri law as it relates to the interpretation of liability limitations."[138] Thus the court was tasked with predicting whether Missouri courts would adopt the "cause" or the "effects" test in determining the number of occurrences involved in a particular insurance claim. In its review of cases outside Missouri, the court expressed a certain degree of confusion,[139] particularly at cases such as *Addison Insurance Co. v. Fay*,[140] and *Evanston Ins. Co. v. Ghillie Suits.Com, Inc.*,[141] noting that while both cases purported to utilize the "cause" test, it appeared more likely that the cases were decided under the "effects" or "results" test.

The *McBee* court held that the attack by a dog of two people only constituted one occurrence under the policy.[142] In arriving at this conclusion, the court dismissed the reasoning of *Koikos*, finding the determination in *Haulers Ins. Co., Inc. v. Wyatt*,[143] to be more "pertinent and persuasive."[144] In the *Haulers* case, two people were injured when their car was struck by another car. The tortfeasor's insurer filed a declaratory judgment action seeking a determination that its obligation under the applicable policy, which included language similar to that which appeared in the policy at issue in *McBee*, was limited to a single per-occurrence limit of $500,000 in satisfaction of both the injured persons' claims.[145] In "keeping with the cause approach," the *Haulers* court found that the

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[136] Allstate Property and Cas. Ins. Co. v. McBee, No. 08-0534-CV-W-HFS, 2009 U.S. Dist. LEXIS 35158 (W.D. Mo. April 27, 2009).

[137] *Id.* at *6. The subject homeowner's policy included a standard definition of "occurrence": "an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage."

[138] *Id.* at *6.

[139] The *McBee* court is not the only court to have expressed frustration in connection with analyzing number of occurrences issues. *See, e.g.*, Parker Hannifin Corp. v. Steadfast Ins. Co., 445 F. Supp. 2d 827 (N.D. Ohio 2006) (court referred to debate over the "number of occurences" involved in coverage dispute as "perhaps the most contentious, and difficult, issue in the litigation.").

[140] Addison Ins. Co. v. Fay, 232 Ill. 2d 446, 905 N.E.2d 747 (2009).

[141] Evanston Ins. Co. v. Ghillie Suits.Com, Inc., 2009 U.S. Dist. LEXIS 22256 (N.D. Cal. 2009).

[142] Allstate Property and Cas. Ins. Co. v. McBee, No. 08-0534-CV-W-HFS, 2009 U.S. Dist. LEXIS 35158, at *17 (W.D. Mo. April 27, 2009).

[143] Haulers Ins. Co., Inc. v. Wyatt, 170 S.W.3d 541 (Mo. Ct. App. S.D. 2005).

[144] Allstate Property and Cas. Ins. Co. v. McBee, No. 08-0534-CV-W-HFS, 2009 U.S. Dist. LEXIS 35158, at *13 (W.D. Mo. April 27, 2009).

[145] Haulers Ins. Co., Inc. v. Wyatt, 170 S.W.3d 541, 544 (Mo. Ct. App. S.D. 2005).

injuries to the two underlying plaintiffs arose from the same occurrence.[146]

Following the rationale of *Haulers*, and without extensive analysis, the *McBee* court decided that the injuries sustained by two people during the same dog attack amounted to one occurrence. While it did not explicitly state so, it would appear that the court zeroed in on the "legal" cause of plaintiffs' injuries (*i.e.*, the failure of the dog owner to prevent the dog's escape) rather than the proximate cause of the dog actually coming into contact with each plaintiff.[147] It bears noting that the *McBee* court rejected the contention that the term "occurrence" is ambiguous. It therefore was not compelled to construe the policy language in favor of coverage.[148]

The *McBee* opinion illustrates how the varied and inconsistent application of the various tests can confuse even judges. As acknowledged by the court, predicting number of occurrence outcomes is "somewhat uncertain and debatable."

In *Atchison, Topeka & Santa Fé Railway Co. v Stonewall Ins. Co.*, an insured railroad sought coverage from its excess liability insurer for nearly 4,000 "noise-induced hearing loss" claims.[149] In a case of first impression, the Kansas Supreme Court held that the insured's allegedly "negligent failure to timely implement an effective hearing conservation program that would have protected its workers from the excessive noise inherent in railroad operations" was a single occurrence.[150] The court emphasized that the policies defined "occurrence" as "one or more accidents or a series of accidents arising out of or resulting from one event."[151] Once again, while it does not appear from this opinion that the Kansas Supreme Court employed any specific test in arriving at its conclusion, the opinion suggests that the court followed a legal or "remote" cause analysis since the failure to implement a hearing program represents the policyholder's "liability-triggering event" in this case.[152]

The case *Esparza v. Eagle Express Lines, Inc.*,[153] provides an example of how the "liability-triggering event" test may sometimes produce the same results as the

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[146] *Id.* at 546.

[147] Allstate Property and Cas. Ins. Co. v. McBee, No. 08-0534-CV-W-HFS, 2009 U.S. Dist. LEXIS 35158, at *16 (W.D. Mo. April 27, 2009).

[148] *Id.* at *15.

[149] Atchison, Topeka & Santa Fe Railway Co. v Stonewall Ins. Co., 275 Kan. 698, 71 P.3d 1097 (2003).

[150] *Id.* at 732.

[151] *Id.* at 703.

[152] Nor does it appear that the court took into consideration any time or space elements, discussed below, as the court arrived at its conclusion despite the fact that claimants alleged exposure to different noises at different times and places.

[153] Esparza v. Eagle Express Lines, Inc., No. 4:05-CV-315, 2007 U.S. Dist. LEXIS 22382 (E.D. Tex. March 28, 2007).

"proximate cause" test. This case was recently decided under Texas law by the United States District Court for the Eastern District of Texas, and involved a car accident in which one truck crossed the median on a highway and hit two cars within one-tenth of a second of each other.[154] Focusing on "the events that cause[d] the injuries and g[a]ve rise to the insured's liability," as that which constituted the "occurrence" or "occurrences" under the applicable policy, the court concluded that the incident resulted in two occurrences.[155] More specifically, the court rejected the argument that both damaged vehicles were exposed to "the same condition," that being the insured's negligent "crossing the median into the southbound lanes."[156] Instead, the court found that each separate collision created a continuous or repeated exposure to the same or substantially the same conditions.[157] With regard to the close succession in which the two car collisions occurred, the court commented that it was nonetheless "clear that each collision occurred independently" and that one collision did not cause or affect the other.[158]

C. The "Unfortunate Events" Test

1. Understanding the "Unfortunate Events" Test

Rather than strictly looking to the "cause" or "effects" of damage or injury in their number of occurrences analysis, New York courts employ what has come to be known as the "unfortunate event" test.[159] Under this approach, courts look to each "event of unfortunate character" that results in the injury or damage as a separate occurrence.[160] The principle at the heart of the unfortunate event test is

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[154] *Id.* at *10.

[155] *Id.* at *26.

[156] *Id.* at *30.

[157] *Id.* It bears noting that the case would have been decided differently had the court applied the effects test. Under that test, each of the 12 people injured or killed in the two damaged vehicles would have been considered a separate occurrence. It is less clear how a court would have decided this case under the "unfortunate event" test, as the court could have considered there to be one "unfortunate event" when the insured's truck crossing the center line, or multiple "unfortunate events" when the truck collided with each vehicle. Given the "close temporal and spatial relationship" between the collisions giving rise to the claimants' injuries, and because "the incidents can be viewed as part of the same causal continuum, without intervening agents or factors," it is more likely that a court would have found there to be one occurrence under New York's "unfortunate event" test. *See* § III[C] of this article.

[158] *Id.* at *32. The *Esparanza* decision illustrates how difficult it cam be to predict how a court will apply time and space considerations in their analyses of number of occurrences. What one court may consider to be enough time and space between events to justify the finding of two occurrences, another may view as mandating a finding of one occurrence, thus lending a significant amount of subjectivity to what would appear to be fairly objective standards.

[159] *See, e.g.*, Arthur A. Johnson Corp. v. Indem. Ins. Co. of N. Am., 7 N.Y.2d 222, 228–29, 196 N.Y.S.2d 678, 683, 164 N.E.2d 704, 707 (1959); Hartford Accident & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 173, 350 N.Y.S.2d 895, 899, 305 N.E.2d 907, 910 (1973); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1381–83 (E.D.N.Y. 1988).

[160] *Id.* at 1381.

that the "damage must be an event close to the injury or damage itself."[161] In other words, "more remote events, while certainly related to the ultimate injury or damage, merely cause the potential for liability or loss, and are not, in and of themselves, the direct cause—or unfortunate event—that results in the harm."[162] Thus, in contrast to the "cause" test, the "occurrence" under the "unfortunate event" test is the "immediate unfortunate event," or one that is "close[st] to the actual injury or loss, resulting in the harm."[163]

The leading case adopting the "unfortunate events" test is *Arthur A. Johnson Corp. v. Indemnity Ins. Co. of North America*, although that case involved an "accident" policy.[164] In *Arthur*, the New York Court of Appeals held that the collapse of two walls after a heavy rainstorm represented two separate accidents. In arriving at this determination, the court noted that property damage had occurred at separate times to separate buildings, and that the collapse of the first wall did not contribute to the collapse of the second wall.[165] Upon finding an "accident" to be "an event of an unfortunate character that takes place without one's foresight or expectation," the court concluded that "the collapse of separate walls, of separate buildings, at separate times, were in fact, separate disastrous events," and thus, "two different accidents within the meaning of the policy."[166]

2. Applying the "Unfortunate Events" Test

New York cases have since upheld the unfortunate events approach with regard to "occurrence" policies. For example, in *Uniroyal, Inc. v Home Ins. Co.*,[167] the United States District Court for Eastern New York applied the "unfortunate events" test in a dispute regarding Agent Orange. Uniroyal, as the manufacturer of Agent Orange, settled a class action suit brought by military personnel who claimed to be injured after being exposed to Agent Orange.[168] In applying the unfortunate events test, the court considered "whether the underlying event was: (1) the defective manufacture of the herbicide; (2) the numerous deliveries to the military; (3) the spraying of the herbicide; or (4) the touching of the herbicide by

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[161] Jon A. Baumunk, *Comment, New York's "Unfortunate Event" Test: Its Application Prior to the Events of 9/11*, 39 Cal. W. L. Rev. 323, 328 & n.39 (2003).

[162] Chanes & Daniels, *One Occurrence or Two: How the Courts Decide*, RIMS Risk Management Magazine (Jan. 1, 2002).

[163] *Id.* ("where the court applying the cause test might analyze the events near the beginning of the chain of causation—such as a negligent act or omission on the part of the policyholder—under the unfortunate event test it would analyze the events closer to the end of the causation chain (and closer to the actual injury or loss)").

[164] Arthur A. Johnson Corp. v. Indem. Ins. Co. of North America, 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959).

[165] *Id.* at 222–223.

[166] *Id.* at 222.

[167] Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368 (E.D.N.Y. 1988).

[168] *Id.* at 1369.

an individual serviceman."[169] The court concluded that the deliveries of Agent Orange, which "were part of routinized, repetitive process through which a large supply of herbicides was funneled to the military," constituted one continuous, unfortunate event, in part because this was the last act controlled by the insured.[170] Given that the court found that the delivery constituted only one occurrence, there was only one deductible applied, and the insured was afforded coverage up to the one per-occurrence policy limit.

The "unfortunate events" test has been met with some criticism. This is in large part due to the fact that the cases applying this test fail to define what constitutes an "unfortunate event."[171] Instead, cases have adopted an "average person" standard, inquiring whether an average person in the insured's shoes would regard a particular event as "unfortunate."[172] The number of unfortunate events an "average person" would identify corresponds to the number of occurrences under the test. While it may difficult to determine what, exactly, an "unfortunate event" is, courts have expressly stated what does *not* constitute an unfortunate event. For instance, an "unfortunate event" will, under no circumstance, be "the injury to each victim."[173] Moreover, "[n]egligent behavior, such as failure to warn of danger, cannot constitute an occurrence under the unfortunate event test because negligence does not cause injury or damage, it only creates the possibility for future injury."[174] Therefore, the occurrence, "would be one of several other events that preceded and contributed to the resulting injury."[175]

More recently, the Supreme Court of New York (Appellate Division, First Department) continued the use of the "unfortunate events" test in *International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America.*[176] That case involved an action by a manufacturer against its insurer to determine the insurer's duty to defend and indemnify the manufacturer with regard to claims brought by 30

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[169] Cetrulo, *Definition of Bodily Injury—Unfortunate Events Approach*, 1 Toxic Torts Litigation Guide § 8:14 (2009) (summarizing *Uniroyal*).

[170] Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1370 (E.D.N.Y. 1988).

[171] *See, e.g., id.* at 1381–1382 (remarking that early cases applying the "unfortunate event" test failed to "provide any guidance . . . on how to identify the 'unfortunate event' or on how to distinguish among several plausible such events.") *See also* Jennings, *September 11 Insurance Litigation*, CRS Report for Congress, p. 4 (June 14, 2002) (describing New York's "unfortunate event" test as "not entirely clear" and noting that the test "neither minimiz[es] nor maximiz[es] the number of insurable events covered by a general 'per occurrence' clause").

[172] *See* Arthur A. Johnson Corp. v. Indem. Ins. Co. of North America, 7 N.Y.2d 222, 229, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959). *See also* Uniroyal Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1381–1382 (E.D.N.Y. 1988).

[173] Uniroyal Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1382 (E.D.N.Y. 1988).

[174] Chanes & Daniels, *One Occurrence or Two: How the Courts Decide*, RIMS Risk Management Magazine (Jan. 1, 2002).

[175] *Id.*

[176] International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America, 46 A.D.3d 224, 844 N.Y.S.2d 257 (1st Dep't 2007).

workers employed at the same manufacturing plant.[177] These workers claimed they were exposed to a toxic substance found in butter flavoring produced by the manufacturer. Applying New York's "unfortunate event" test, the court found that whether the injuries represented a single "occurrence" within the meaning of the policy (thus triggering only a single deductible) was dependent on whether or not the loss sustained by the insured could be attributed to a single incident, irrespective of the number of persons sustaining injury.[178] The court reasoned that because the employees' injuries resulted from repeated deliveries of the flavoring compound to their workplace over a period of several years, causing them to be exposed to the hazardous chemicals at different times and for periods of unequal duration, their exposure could not be deemed a single "occurrence" in the absence of any identifiable precipitating event or "accident."[179] Accordingly, the court found that each of the underlying personal injury plaintiffs' claims constituted a separate "occurrence" under the primary insurance policies.[180]

It appears that the Connecticut Supreme Court has adopted the "unfortunate event" test promulgated by the New York Court of Appeals in *Arthur Johnson* and later affirmed in *Appalachian.*[181] In *Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co.*, the Connecticut Supreme Court elected to "apply the event test in determining the number of occurrences under the policies" and ultimately "conclude[d] that the exposures to asbestos constitute several occurrences."[182] More specifically, this case involved hundreds of thousands of claims alleging bodily injuries resulting from exposure to asbestos over a period of several years. These claims were based on the policyholder's "alleged failure to publicize adequately the health risks of asbestos exposure," which were discovered while

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[177] *Id.* at 225–226.

[178] *Id.* at 228.

[179] *Id.* at 229.

[180] Thus, *International Flavors* falls in line with the reasoning of those asbestos cases, including Appalachian Ins. Co. v. General Electric Co., 863 N.E.2d 994 (N.Y. 2007) (also decided under New York's "unfortunate events" test), London Mkt. Insurers v. Superior Court, 146 Cal. App. 4th 648, 53 Cal. Rptr. 3d 154, 161 (2007) and Plastics Engineering Co. v. Liberty Mut. Ins. Co., 315 Wis. 2d 556, 759 N.W.2d 613 (2009) (discussed below), in which the courts held that the "occurrence" is the claimant's exposure to the toxic substance, and that each exposure will be treated as a separate occurrence unless several claimants are exposed to the substance at the same time and place.

[181] *See* Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 255 Conn. 295, 765 A.2d 891 (2001) (applying "unfortunate event" test to the facts before it under both New York and Connecticut law). *See also* Providence Washington Ins. Group v. Albarello, 784 F. Supp. 950 (D. Conn. 1992) (applying Connecticut law and noting that "occurrence" is the unfortunate event causing bodily injury). It also appears that West Virgina courts have followed the rationale of the "unfortunate events" test. *See, e.g.* Shamblin v. Nationwide Mut. Ins. Co., 175 W. Va. 337, 332 S.E.2d 639 (1985) (following Hartford Accident & Indem. Co. v. Wesolowski, the court looked to that one "event of an unfortunate character that takes place without one's foresight or expectation" and which is objectively descriptive of what happened.).

[182] Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 255 Conn. 295, 316, 765 A.2d 891 (2001).

"engaged in medical research activities."[183] The court found that the "occurrence" in this case was "each claimant's initial exposure to asbestos, rather than [the policyholder's] alleged failure to warn."[184] The court concluded that "the continuous exposure clause in the . . . policies serve[d] to combine claims arising from exposure to asbestos *at the same place at roughly the same time* into one occurrence, not to combine hundreds of thousands of exposures at different times and locations into one occurrence.[185] Given that the insureds faced "hundreds of thousands of claims for bodily injury that have occurred in several locations, spanning six decades," and despite the continuous exposure clause, the court determined that there were "multiple occurrences" arising from the asserted asbestos claims.[186] Indeed, the court stated that it was "confident that a course of conduct spanning many decades is not a single occurrence as that term is used in the subject policies."[187]

D. Other Tests and Variations

A handful of jurisdictions have adopted methods for determining the number of occurrences that either do not squarely fit into any of the aforementioned tests, or which are used to supplement such tests.

1. "Condition" Test

Some, for instance, are guided by variations of the "cause test," but they do not look to the actual physical cause of the plaintiffs' injuries or to the conduct that forms the basis of the insured's liability. Rather, some courts focus on the underlying "'condition' without which the claims would not have arisen, such as the toxic propensities of asbestos" or "an employee's dishonest embezzlement scheme" carried out over a number of years or "a failed loan policy" which, through numerous failed loans, ultimately causes a bank's insolvency.[188] Such arguments "may be grouped as 'root' causes, which is to say, 'causes' that are based on some thematic linkage and not direct, physical causes or even legal causes."[189]

For instance, in *Madison Materials Co., Inc. v. St. Paul Fire & Marine Ins. Co.*,[190] the court considered whether an employee's prolonged embezzlement from his insured employer, comprising repeated, related acts throughout a 10-year period that spanned multiple insurance contracts, constituted one or more

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[183] *Id.* at 299.

[184] *Id.* at 305.

[185] *Id.* (original emphasis).

[186] *Id.* at 311.

[187] *Id.* at 324.

[188] Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising From the World Trade Center Attacks*, 69 Def. Couns. J. 169, 174 (2002).

[189] *Id.*

[190] Madison Materials Co., Inc. v. St. Paul Fire & Marine Ins. Co., 523 F.3d 541 (5th Cir. 2008).

"occurrences" under an insurance policy providing employee dishonesty coverage.[191] Although the court acknowledged that, under Mississippi law, "an 'occurrence' is determined by the cause or causes of the resulting injury," it did not focus its analysis on either the proximate or legal causes of the injuries arising out of the employee's scheme.[192] Instead, the court held that the underlying inherent cause of the insured's injuries was the employee's dishonesty.[193] On that basis, the court determined that the numerous acts of embezzlement committed by the insured's employee constituted a single occurrence.[194]

2. "Functional Event" or "Continuous Process"

Another variation of the "cause test" is referred to as the "functional event" or "continuous process" test. Under this alternative test, "the critical inquiry is whether or not the damage-causing process was continuous and repetitive."[195] If it is, then there is a single occurrence. One case to apply this test is *Unigard Ins. Co. v. United States Fid. & Guar. Co.* In *Unigard*, 98 doors at a storage facility were damaged during a four-hour period by a single operator of snow removal equipment.[196] Because the policy contained a $500 deductible, and because the damage to each door was less than this amount, the insurer took the position that damage to each door constituted a separate occurrence and that it was not obligated to afford any coverage.[197] However, based on the continuous and repetitive nature of the infliction of the injuries, the Court of Appeals of Idaho held that the 98 damaged doors constituted a single occurrence subject to a single deductible.[198]

3. Hybrid "Cause" and "Effect"

At least one court has combined "cause" and "effect" analyses to determine the number of occurrences in a claim involving personal injuries allegedly caused by a toxic waste site. In *Township of Jackson v. American Home Assurance Co.*,[199] the court concluded that several occurrences had taken place. In applying the "cause" theory, the court found that the bodily injuries allegedly sustained by the plaintiffs in the underlying action were the proximate result of "a multitude of

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[191] *Id.* at 543.

[192] *Id.*

[193] *Id.*

[194] *Id.* at 543–544.

[195] Unigard Ins. Co. v. U.S. Fid. and Guar. Co., 111 Idaho 891, 893, 728 P.2d 780, 782 (Idaho Ct. App. 1986). The Idaho Supreme Court declined to follow *Unigard* on an unrelated related issue in Northland Ins. Co. v. Boise's Best Autos & Repairs, 131 Idaho 432, 958 P.2d 589 (1998).

[196] Unigard Ins. Co. v. U.S. Fid. and Guar. Co., 111 Idaho 891, 894, 728 P.2d 780, 782 (Idaho Ct. App. 1986).

[197] *Id.* at 892.

[198] *Id.* at 895.

[199] Township of Jackson v. American Home Assurance Co., No. L-29236-80 (N.J. Super. Ct. 1984) (reproduced at 5 Law of Toxic Torts Appendix 31H (2009)).

causes," taking place over a six-year period, including "an alleged negligent selection of the [landfill], . . . the continuous digging beneath the water table, inadequate cover being provided, failing to inspect incoming tank trucks, improper digging of waste calls, . . . accepting improper and imprudent amounts of liquid in light of the amounts of solids being collected, . . . ignoring clear signs of problems in the landfill, . . . failing to properly manage the operation throughout the six-year period; permitting ponding or lagooning to occur, . . . [and] [f]ailure to warn with respect to the dangers of showering."[200] Based on these findings and circumstances, the court held the contamination of wells by the seepage of toxic chemicals from the landfill constituted separate occurrences. In arriving at this conclusion, the court remarked that:

> when causative events are distinct and independent, separated in time and space, courts have found multiple occurrences by noting that these acts or events which contribute to the ultimate cause of the injury are not one proximate uninterrupted and continuing cause and therefore are separate occurrences.[201]

Notably, the court observed that the result would have been the same had it applied the "effect" test because the plaintiffs in the underlying suit against the insured allegedly suffered from a variety of injuries and had been exposed to different types of contaminants for different periods of time.[202]

4. Specific Context and Policy Language

Rather than universally adopting the majority or minority view, the Supreme Court of South Carolina has advocated for "an approach that focuses narrowly on the facts and contract language."[203] In *Owners Ins. Co. v. Salmonsen*,[204] an insurer for a distributor of synthetic stucco sought a declaratory judgment that the policy did not cover property owners' water intrusion claims brought in a products liability class action.[205] At issue was whether one or multiple occurrences arose as a result of selling defective synthetic stucco building product. In answering the United States District Court for the District of South Carolina's certified question as to whether South Carolina would "adopt the majority [cause] or minority [effects] rule," the court responded that, "[i]n light of the diverse contexts in which the meaning of 'occurrence' may arise" it would "decline the district court's invitation to simply choose the majority or minority view and instead focus narrowly on the issue at hand."[206] After a close examination of the nature insured distributor's actions, the allegations of the complaint, and the policy language at

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[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] Seaman & Schulze, Allocation of Losses in Complex Insurance Coverage Claims § 7:2, *The Number of "Occurrences" Analyses Employed by Various Courts* (2008).

[204] Owners Ins. Co. v. Salmonsen, 366 S.C. 336, 622 S.E.2d 525, 526 (2005).

[205] *Id.* at 525.

[206] *Id.* at 526.

issue, the court concluded that the insured's placing of a defective product into the stream of commerce constituted one occurrence.[207] Notably, the court made clear that its ruling was limited to "the specific context and policy language" at issue in that case.[208]

5. "Time and Space" Considerations

Complicating the topic of number of occurrences even further is the recent inclusion by many courts of "time and space" factors into their analysis.[209] For instance, in *American Family Mut. Ins. Co. v. Wilkins*,[210] decided in 2008 by the Kansas Supreme Court, a car driving on the wrong side of the road forced two cars to swerve and roll and ultimately collide with a third car. The Kansas Supreme Court applied the proximate cause test, disagreeing with the insurer's argument that the "cause" was the defendant's negligent driving on the wrong side of the road.[211] Instead, the court reasoned that the more immediate "cause of the collisions at issue in this case [was] the encounter between [the insured's] vehicle and [each] oncoming vehicle."[212] However, the court also did not find three separate occurrences—one for every car affected in the crash. Instead, the court analyzed details such as the time and space between each of the crashes in order to determine the number of occurrences.[213] In the end, the court concluded there were two occurrences because one minute elapsed and half a mile passed between the time that the first and second car swerved.[214] However, because the head-on collision with a third vehicle immediately followed the moment when the second car was forced to swerve, the court deemed this to be a "nearly simultaneous

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[207] *Id.*

[208] *Id.*

[209] *See, e.g.*, Flemming v. Air Sunshine, Inc., 311 F.3d 282, 297 (3d Cir. 2002) (quoting Welter v. Singer, 376 N.W.2d 84, 87 (Wis. Ct. App. 1985)) (court identified additional factors to be considered in determining the proximate cause of an injury, including whether allegedly negligent acts are so closely linked in time and space as to be considered by the average person as one event). *See also* Lavandier v. Landmark Ins. Co., 44 A.D.3d 501, 844 N.Y.S.2d 23 (1st Dep't 2007) (under liability insurance policy, underlying acts resulting in lead poisoning of two children did not amount to more than one occurrence, where there was a close temporal and spatial relationship between the incidents, given that the children lived in the same apartment, and both were exposed to lead at the same time); Walker v. Allstate Ins. Co., No. 265604, 2006 Mich. App. LEXIS 1241, at *5 (Mich. Ct. App. Apr. 20, 2006) ("to be considered more than one 'accident,' the causes of damage must be readily distinguishable, either in temporal or spatial proximity, or in nature"); United Services Automobile Ass'n v. Baggett, 209 Cal. App. 3d 1387, 1394, 258 Cal. Rptr. 52 (1989) ("If cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event, courts adopting the "cause" analysis uniformly find a single occurrence or accident.").

[210] American Family Mut. Ins. Co. v. Wilkins, 285 Kan. 1054, 179 P.3d 1104 (2008).

[211] *Id.* at 1063, 179 P.3d 1104.

[212] *Id.*

[213] *Id.* at 1066–1067, 179 P.3d 1104.

[214] *Id.*

event."[215] Because the encounters with the second and third automobiles were not separated by significant amount of time and space, the court concluded that they could not be considered separate occurrences.[216]

New York courts have also employed time and space considerations in their analysis of number of occurrences issues. In determining how many "occurrences" take place under the "unfortunate events" test, New York courts consider "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors."[217] A recent case, *Appalachian Ins. Co. v. General Electric Co.*, is illustrative.[218] In that case, excess insurers of a manufacturer of asbestos-insulated steam turbines sought a declaratory judgment that multiple asbestos-related claims arising from exposure to insured's turbines could not be aggregated into a single "occurrence." Employing the "unfortunate events" test, the Court of Appeals of New York determined that each individual's "continuous or repeated exposure to" asbestos would constitute a separate incident, and further found that these incidents lacked the spatial or temporal relationship necessary in order to view these incidents as a single "unfortunate event."[219] Under the circumstances, the court found that "there were unquestionably multiple occurrences."

The court went on to distinguish the New York "unfortunate event" test from a "cause" test stating that "common causation" is relevant to the analysis, but only after the "incident—the fulcrum of our analysis—is identified."[220] The *Appalachian* court emphasized the significance of identifying the relevant event or "incident," and noted that the "cause should not be conflated with the incident."[221]

Several other jurisdictions have also recently introduced time and space elements into their analysis of number of occurrences issues. One case in particular, *Addison Insurance Company v. Fay*,[222] demonstrates that "the distinction between cause and effect isn't always clear" and how "time and space" elements are used to make such distinctions. The *Addison* concerns the deaths of two boys who fell in a water-filled excavation pit in the vicinity of their home.[223] The owner of the property on which the pit was located was alleged to have failed to properly secure and control the property. Investigators theorized that one of the boys became trapped while attempting to jump across the pit and that the other

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[215] *Id.*

[216] *Id.*

[217] Appalachian Ins. Co. v. General Electric Co., 863 N.E.2d 994, 999 (N.Y. 2007).

[218] *Id.*

[219] *Id.* at 1000–1001.

[220] *Id.* at 999.

[221] *Id.*

[222] Addison Ins. Co. v. Fay, 232 Ill. 2d 446, 905 N.E.2d 747 (2009).

[223] *Id.* at 448–449, 905 N.E.2d 747.

boy subsequently became trapped while trying to rescue the first.[224] Autopsies of the boys revealed that one of them had drowned while the other died of hypothermia. Significantly, no doctor could determine when, and how closely in time, the boys died.[225]

Relying heavily on a previous decision by the Illinois Supreme Court, *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*,[226] and a decision by a New Jersey appellate court with similar facts, *Doria v. Insurance Co. of North America*,[227] the Illinois Supreme Court applied a cause theory with a time-and-space analysis to determine the number of occurrences at issue. More specifically, a two-part test was created that courts must consider in determining the number of occurrences: (1) was it the negligent act or condition that caused the injury, and (2) how the temporal and spatial nature of the incident may have affected any "separate or intervening acts" or "increased the insured's exposure to liability."[228]

In applying this test to the facts, the Illinois Supreme Court acknowledged that "[the insured's] liability arose from his negligently failing to properly secure and control his property" and that "[the insured] committed no intervening negligent act between the injuries of each boy."[229] However, the court felt that a strict application of *Nicor* to the facts of this case would "lead[] to an unreasonable interpretation" of the subject insurance policy.[230] The court refused to "focus[] on the sole negligent omission of failing to secure the property" because to do so under these circumstances "would allow two injuries, days or even weeks apart, to be considered one occurrence."[231] Thus, the court reasoned that "in situations where a continuous negligent omission results in insurable injuries, some limiting principle must be applied."[232] More specifically, the court found it appropriate to apply a time and space test to determine if the cause (the insurer's failure to secure his property) and result (the boys' deaths) were simultaneous or so closely linked

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[224] *Id.* at 450.

[225] *Id.*

[226] Nicor, Inc. v. Associated Electric & Gas Ins. Services Ltd., 223 Ill. 2d 407, 307 Ill. Dec. 626, 860 N.E.2d 280 (2006).

[227] Doria v. Insurance Co. of North America, 210 N.J. Super. 67, 509 A.2d 220 (N.J. App. Div. 1986).

[228] Addison Ins. Co. v. Fay, 232 Ill. 2d 446, 457, 905 N.E.2d 747 (2009) (citing Nicor, Inc. v. Associated Electric & Gas Ins. Services Ltd., 223 Ill. 2d 407, 307 Ill. Dec. 626, 860 N.E.2d 280 (2006)) ("[w]here each asserted loss is the result of a separate and intervening human act, whether negligent or intentional, or each act increased the insured's exposure to liability, Illinois law will deem each such loss to have arisen from a separate occurrence within the meaning of liability policies containing [per occurrence] language").

[229] Addison Ins. Co. v. Fay, 232 Ill. 2d 446, 458, 905 N.E.2d 747 (2009).

[230] *Id.*

[231] *Id.*

[232] *Id.*, 232 Ill. 2d at 459, 905 N.E.2d 747.

in time and space as to be considered by the average person as one event.[233]

Applying this test, the court found that the insurer had failed to meet its burden to prove that the boys' deaths were so closely linked in time and space as to be considered one event.[234] This was mainly due to the fact that police investigators could not determine how closely in time the boys became trapped, nor could the medical experts indicate how closely in time the two boys had died. Accordingly, the court ruled that the boys' deaths would be considered two separate occurrences under the policy.[235] The *Addison* case illustrates just how unpredictable and inconsistent court decisions on number of occurrences can be, under different fact scenarios and given the courts' varied methods for applying even the most widely accepted test.[236]

Another recent case decided since *Addison* arrived at a similar conclusion. *Evanston Ins. Co. v. Ghillie Suits.com, Inc.*,[237] arises out of claims by two U.S. marines that they suffered severe burn injuries when their ghillie suits,[238] which they thought to be flame retardant, caught fire during a training exercise. The marines were standing 40 feet apart during that exercise when one of them discharged his automatic weapon. A receiver flash from the gun's ejection port

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[233] *Id.*

[234] *Id.*, 232 Ill. 2d at 455, 905 N.E.2d 747. In placing the burden on the insurer to prove that the deaths of the two boys were so closely linked in time and space as to be considered one occurrence, the *Addison* Court "essentially likened the insurer's effort to limit its liability to one occurrence to a policy exclusion—for which insurers traditionally have the burden of proof."

[235] *Id.*, 232 Ill. 2d at 462–463, 905 N.E.2d 747. In arriving at this conclusion, the *Addison* court distinguished its decision from that in another often-cited rescue case, Doria v. Ins. Co. of North America, 509 A.2d 220 (N.J. Super. Ct. App. Div. 1986), in which the New Jersey court applied the proximate cause test to conclude that an initial accident and failed rescue attempt were part of the same occurrence. *Id.* ("the term 'occurrence' clearly focuses on the underlying circumstances of the event which gave rise to the claim of injuries rather than on the injury itself . . . for the purpose of counting the number of occurrences, the term must be construed from the point of view of the cause or causes of the accident rather than its effect."). In *Doria*, three boys encountered an uncovered pool. *Id.* at 221. After one boy fell in to the pool, the second attempted a rescue but also fell in. *Id.* The two boys drowned before the third boy could summon help. *Id.* The court concluded both deaths arose from a single occurrence because of the close "temporal and spatial connection" between the initial fall and attempted rescue. *Id.* at 224. Moreover, the cause of the boys' respective injuries—an uncovered pool—occurred at the same time for both individuals and the danger remained throughout the entire episode. *Id.*

[236] *See* Allstate Property and Cas. Ins. Co. v. McBee, No. 08-0534-CV-W-HFS, 2009 U.S. Dist. LEXIS 35158 (W.D. Mo. April 27, 2009) (with regard to the *Addison* opinion, the court commented: "Although stating that Illinois uses the causation theory the court seems to me to have moved toward use of an effects test.").

[237] Evanston Ins. Co. v. Ghillie Suits.com, Inc., No. C 08-2099 JF (HRL), 2009 U.S. Dist. LEXIS 22256 (N.D. Cal. March 19, 2009).

[238] A ghillie suit is a "form of camouflage that typically consists of an abundance of shredded material attached to pants and a jacket and is designed to give the wearer a three-dimensional appearance that will blend in with surrounding vegetation." *Id.* at *4.

contacted his ghillie suit, causing it to catch on fire.[239] The other marine rushed to his aide, attempting to pat out the flames. Eventually, the fire spread to the second marine's ghillie suit, who also became engulfed in flames. At issue in the dispute was whether the injuries suffered by both marines would trigger coverage under one "per-occurrence" policy limit or two.[240] The court acknowledged that it would determine the number of occurrences involved by looking to "the proximate cause of unexpected damage."[241] The insurer argued that because the second marine's injuries "were a natural consequence of the initial accident," the two events should be considered the same occurrence,[242] and cited several cases in support of its proposition, including *United Servs. Auto. Ass'n v. Baggett*,[243] *Patoc v. Lexington Ins. Co.*,[244] *State of California v. Continental Ins. Co.*,[245] and *Flemming* ex rel. *Estate of Flemming v. Air Sunshine, Inc.*[246] The court did not

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[239] *Id.*, at *6.

[240] *Id.*

[241] *Id.*, at *20.

[242] *Id.*, at *20.

[243] United Servs. Auto. Ass'n v. Baggett, 209 Cal. App. 3d 1387, 1393, 258 Cal. Rptr. 52 (1989). In *Baggett*, an insured driver struck another vehicle, and the two drivers subsequently parked to discuss the accident. *Id.* at 1390. Then, a third car collided with the insured's car, causing it to strike and kill the other driver. *Id.* The court concluded that there had been only one occurrence because the insured's initial negligent act led to additional and foreseeable events that were directly attributable to the initial accident. *See id.* at 1394–1396. However, the court noted that where the "original cause is interrupted or replaced by another cause, then there is more than one 'accident' or 'occurrence.'" *Id.* at 1393.

[244] Patoc v. Lexington Ins. Co., No. 08-01893, 2008 U.S. Dist. LEXIS 108083 (N.D. Cal. Aug. 5, 2008). In *Patoc*, an employee of the insured failed to properly restrain a passenger in a van and as a result the passenger was injured. However, instead of bringing the passenger to the hospital for treatment, the employee drove the passenger back to her house. *Id.* at *3 n.2. The insured attempted to characterize these events as two separate occurrences, *i.e.*, the employee first was negligent in failing to properly secure the passenger and then was negligent again when he failed to drive her straight to the hospital. *See id.* at *9. However, the court found that there had only been one occurrence because "[i]f each negligent act or omission were regarded as a separate accident, there arguably would be numerous accidents based on heirs' characterization of insured's negligence." *Id.* at *10 (quoting *Baggett*, 209 Cal. App. 3d at 1394, 258 Cal. Rptr. 52).

[245] The case of *State of California v. Continental Ins. Co.*, 88 Cal. Rptr. 3d 288 (Cal. Ct. App. 2009), involved a number of occurrences dispute in connection with the remediation of an industrial waste site. The State argued that there had been several occurrences at the site because there had been multiple acts of negligence, including the escape of contaminants into an underground stream, the use of inferior construction materials in a dam, and a failure to monitor the dam properly. *Id.* at 314. The court rejected this argument, concluding that the only occurrence was the initial deposit of waste material, which then led to several related events that exacerbated the contamination. *See id.* at 316 ("there can be multiple contributing conditions, yet only a single occurrence.").

[246] Flemming *ex rel.* Estate of Flemming v. Air Sunshine, Inc., 311 F.3d 282, 295 (3d Cir. 2002) (a series of "allegedly negligent acts constitute a single occurrence under the terms of the insurance policy."). The *Fleming* court also incorporated "time and space" elements into its analysis, noting that a cause and its result are a single event only if they are "so closely linked in time and space as to be considered by the average person as one event." *Id.* at 296.

challenge the rationale of these cases, but rather disagreed that that the second marine's injuries were "traceable to the same proximate cause" as the first marine's injuries.[247] The court explained:

> In *Baggett, Patoc*, and similar cases, the additional injuries would not have occurred without the initial and primary act of negligence. In the instant case, the proximate cause of [the first marine's] injuries was the unexpected ignition of his ghillie suit by the receiver flash from his weapon. This ignition event clearly was not the proximate cause of [the second marine's] burns. [The second marine] was forty meters away and would not have been injured if he had stayed away from the fire. Moreover, the failure of his ghillie suit was likewise unexpected and not a natural consequence arising out of the spark that set [the first marine's] suit on fire. As the parties have stipulated, '[i]f [the second marine] had not attempted a rescue of [the first marine] while wearing his ghillie suit, he would not have caught on fire.' This is a classic recitation of but-for causation that reveals that there was a separate proximate cause of [the second marine's] injuries.[248]

Noting the resemblance between the instant case and the facts in *Addison*, (more so than those in *Doria*) the court concluded that "the decision by [the second marine] to aid [the first] was an independent event that severed the chain of causation," noting that "the conditions faced by [the second marine] were markedly different from the receiver flash that ignited [the first marine's] suit."[249] Because "[t]he two accidents did not occur simultaneously and under the same precise conditions" and because the injuries suffered by both marines were not "so closely linked temporally and spatially," they would not be considered as part of the same occurrence.[250]

IV. CASE STUDY: ASBESTOS LITIGATION

Asbestos litigation has generated a fair amount of coverage opinions on the "number of occurrences" issue. For starters, courts have reached "varying conclusions" with regard to the "meaning of 'occurrence' as it applies to asbestos injuries."[251] The court in *London Market* addressed these different approaches that courts have taken around the country.[252] Some courts have held that "occurrence" in the asbestos-exposure context means the manufacture and sale of the asbestos-ridden products, thus concluding in such cases that that "all asbestos injuries for which a defendant is responsible result from a single 'occurrence.'"[253] Other

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[247] Evanston Ins. Co. v. Ghillie Suits.com, Inc., No. C 08-2099 JF (HRL), 2009 U.S. Dist. LEXIS 22256, at *23 (N.D. Cal. March 19, 2009).

[248] *Id.* at *23–24.

[249] *Id.* at *28.

[250] *Id.*

[251] London Mkt. Insurers v. Superior Court, 146 Cal. App. 4th 648, 53 Cal. Rptr. 3d 154, 161 (2007).

[252] *Id.* This discussion was recently reiterated by the Wisconsin Supreme Court in Plastics Engineering Co. v. Liberty Mut. Ins. Co., 315 Wis. 2d 556, 759 N.W.2d 613 (2009).

[253] *Id.* (citing Greene, Tweed & Co., Inc. v. Hartford Accident & Indem. Co., Civ. No. 03-3637,

courts have held that the "occurrence" is the "claimant's unique asbestos exposure, and thus that each exposure is a separate occurrence."[254] However, some courts focusing on an individual's exposure to asbestos as the "occurrence" have concluded that "when exposure occurs at the same time and place, despite the fact that many individuals are injured, there is but one occurrence per time and place."[255]

Faced with these varying viewpoints, the *London Market* court elected to conduct a "thorough examination of the policy language" rather than employ a particular test to determine the number of occurrences at issue.[256] The court stated that "while [it] recognize[d] that consistent interpretation of standardized terms in insurance contracts promotes clear understanding of future contracts, it would be foolish to state as a matter of law that the word occurrence has the same meaning in all insurance contracts."[257] Upon review of the policy language, the *London Market* court sided with the line of cases holding that an individual's exposure to

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2006 U.S. Dist. LEXIS 21447 (E.D. Pa. Apr. 21, 2006); Liberty Mut. Ins. Co. v. Treesdale, Inc., 418 F.3d 330, 334–339 (3d Cir. 2005); Westinghouse Elec. Corp. v. American Home Assur. Co., Nos. A-6706-01T5 & A-6720-01T5 (N.J. Super. Ct. July 8, 2004); U.S. Gypsum Co. v. Admiral Ins. Co., 268 Ill. App. 3d 598, 205 Ill. Dec. 619, 643 N.E.2d 1226, 1257–1260 (1995); Owens-Illinois, Inc. v. United Ins. Co. 264 N.J. Super. 460, 625 A.2d 1, 21–23 (App. Div. 1993); Colt Industries Inc. v. Aetna Cas. & Sur. Co., No. 87-4107, 1989 U.S. Dist. LEXIS 14496 (E.D. Pa. Dec. 6, 1989); Air Products and Chemicals, Inc. v. Hartford Accident and Indem. Co., 707 F. Supp. 762, 772–774 (E.D. Pa. 1989); Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., 597 F. Supp. 1515, 1524–1528 (D.D.C.1984).

[254] *Id.* (citing *In re* Prudential Lines Inc., 158 F.3d 65, 79–83 (2d Cir. 1998); Commercial Union Ins. Co. v. Porter Hayden Co., 116 Md. App. 605, 698 A.2d 1167 (1997); Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178, 1212–1214 (2d Cir. 1995); Cole v. Celotex Corp., 588 So. 2d 376, 390–391 (La. Ct. App. 1991)).

[255] *Id.* (citing Fina, Inc. v. Travelers Indem. Co., 184 F. Supp. 2d 547, 549–553 (N.D. Tex. 2002); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 255 Conn. 295, 765 A.2d 891, 896–909 (2001).) *See also* Kvaerner U.S., Inc. v. One Beacon Ins. Co., 74 Pa. D. & C.4th 32, 2005 Phila. Ct. Com. Pl. LEXIS 377, at *10–11 (Pa. Ct. Com. Pl. Ct. Aug. 19, 2005) (applying the cause test, the court concluded that "claimants that were exposed to asbestos at the same location and at the same time were exposed to 'substantially the same general condition'" and on that basis held that "claims for each site should be considered one occurrence.").

[256] London Mkt. Insurers v. Superior Court, 146 Cal. App. 4th at 657, 53 Cal. Rptr. 3d 154.

[257] *Id.* (citing Flintkote Co. v. Gen. Accident Assur. Co., 410 F. Supp. 2d 875, 887 (N.D. Cal. 2006) (internal quotations and ellipses removed)). In *Flintkote Co v. General Accident Assur. Co.*, the court held that, based upon how the word "occurrence" was used within the policy—"in the sense of 'accident': an unforeseen event that causes injury"—every "event that causes and immediately precedes an injury giving rise to liability under the policy" constituted a separate occurrence. The court rejected the insurer's contention that "the meaning of 'occurrence' is different in the coverage and limitation of liability contexts." The word "occurrence" should not "be given two different meanings in two different sections of the policy." The court found that the insurer's theory of the number of occurrences as "the insured's decision to mine and sell asbestos or the number of [asbestos] plants [were] better characterized as business decisions or operational facts of [the insured's] business" noting that "[i]t would be nonsensical to require [the insured] to provide 'written notice as soon as practicable' as to its business decision to sell asbestos or as to the number of plants it operates."

asbestos fibers constitutes the occurrence, noting the policy defined "occurrence" to include "continuous or repeated *exposure* to conditions."[258] Furthermore, the court concluded that, the "plain language of the policies precludes treating all claimants' asbestos exposure as resulting from a single "occurrence."[259] More specifically, the court noted that "the sole aggregation provision" in the policy "provided that multiple injuries would be treated as resulting from a single occurrence if the injuries "ar[ose] out of one lot of goods or products prepared or acquired by the Named Insured or by another trading under his name."[260] Given that the asbestos claims against the insured "ar[o]se out of multiple products, made, packaged and distributed over many years," the court found that such claims could not be treated as one occurrence.[261]

With regard to later policies, the court found that a provision aggregating claims arising from "exposure to substantially the same general conditions existing at or emanating from each premises location" did not operate to classify all of the claimants' asbestos claims into one occurrence because the "products at issue were manufactured at 10 different facilities at various times," and did not "emanate from" a single premises location.[262] It bears noting that, based on the evidence before the court, it could not determine precisely now many occurrences were at issue—only that *more than one* occurrence was at issue.[263] Indeed, the *London Market* court specifically remarked that it had not concluded that "that the number of occurrences necessarily is equal to the number of asbestos claimants."[264]

At least one notable case addressing the number of occurrences dilemma in the asbestos context has been decided since *London Market*. In *Plastics Engineering Co. v. Liberty Mut. Ins. Co.*,[265] the Wisconsin Supreme Court incorporated a "time and space" analysis into their analysis of a number of occurrences dispute. This was an asbestos case in which an insured manufacturer of asbestos compounds sought coverage for claims asserted by several claimants who allege they were exposed to asbestos at varying geographic locations over many years.[266] Like the court in *London Market*, the *Plastics Engineering* court made clear that "it is the policy language here that controls the analysis."[267] Unlike the *London Market*

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[258] London Mkt. Insurers v. Superior Court, 146 Cal. App. 4th 648, 662–663, 53 Cal. Rptr. 3d 154 (2007).

[259] *Id.* at 668.

[260] *Id.* at 669.

[261] *Id.*

[262] *Id.* at 671.

[263] *Id.* at 671–672.

[264] *Id.* at 672.

[265] Plastics Engineering Co. v. Liberty Mut. Ins. Co., 315 Wis. 2d 556 (2009).

[266] *Id.* at 560.

[267] *Id.* at 572.

court, however, this court expressly acknowledged its adoption of the proximate cause approach, and found that the "cause" for the purposes of determining number of occurrences would be each individual claimant's continued and repeated exposure to the asbestos (noting the fact that the definition of occurrence under the applicable policy included "continuous or repeated *exposure* to substantially same general conditions").[268] Moreover, because of the significant amount of time and space between each claimant's exposure to the asbestos, the court concluded that each individual's continued exposure would be treated as a separate occurrence.[269] It bears noting that although the courts differed somewhat in their analysis of the claims, the outcomes of *London Market* and *Plastics Engineering* are remarkably similar.

V. CONCLUSION

The foregoing cases illustrate the continuing disagreement among courts with regard to their number of occurrences analysis. Even though a majority of courts now apply the cause test, it is nebulous in its application and the results remain varied. As a result, parties continue to frequently litigate this financially significant coverage issue, rendering it a key coverage issue to monitor for recent developments.

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[268] *Id.* at 578.

[269] *Id.*