CAUSED BY AN OCCURRENCE

Most Liability policies in common use today are written on an occurrence basis for bodily injury and property damage. Major exceptions are Professional Liability policies and coverages such as Medical Payments for premises and automobiles and Uninsured Motorists insurance.

Until October 1966, an advisory endorsement was available through National Bureau of Casualty Underwriters (now Insurance Services Office) for substituting the "caused by accident" provision with loss caused by an "occurrence" language. However, this endorsement was meant to be used only to broaden the scope of Bodily Injury Liability coverage. Since there was no endorsement available for writing Property Damage Liability coverage on an occurrence basis, many insurers merely amended the wording of the endorsement to include Property Damage Liability insurance — subject to an additional premium.

Definition of "Occurrence" — Scope

"Occurrence" in most Liability policies is defined as:

> an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Several points of the definition require special emphasis.

The use of the word "accident" has distracted some observers, seeming to them to reintroduce, as it were, the requirement that the loss be caused by accident. In the opinion of the editors, this overlooks the additional language of the definition. According to those responsible for this language, retention of "accident" is to denote *time of coverage* and *application of policy limits*, particularly in situations involving a related series of events attributable to the same factor. In such situations, it is intended that only *one* accident or occurrence has happened and, hence, that policy limits are not multiplied. According to this interpretation, this is the *only* sense in which "accident" is meant to be restricting.

★ While it is the intent of this definition that a related series of events attributable to the same cause be considered one occurrence, the first test of this language in the Texas case of *Maurice Pinoffs Co. vs. St. Paul Fire & Marine Ins. Co., 1971 C.C.H. (Fire & Casualty) 1156*, resulted in a decision contrary to intent.

★ The circumstances were as follows: The insured imported canary seed from Argentina which was sold in its original containers to eight feed and grain dealers in Texas and Oklahoma. These dealers in turn sold the seed to bird owners. The seed was apparently contaminated with a chemical insecticide — when received by the insured — and caused the death of many birds.

★ The insured had two Liability policies covering the loss. The first was a Comprehensive General Liability policy written with Products Liability limits of

(Continued on next page.)

0511640

Copy of [illegible] to C. Brent [illegible], [illegible] Jm

$50,000 per occurrence and $100,000 per aggregate. This was considered primary coverage over an Umbrella policy issued by another company.

★ When the insurer paid a total of $50,000 in claims, there were still a number of outstanding claims remaining. However, the insurer took the position that there was only one occurrence, i.e., the contamination of birdseed.

★ The excess insurer, however, argued that there were multiple occurrences and it was not obligated to respond until the primary insurer paid claims corresponding to its aggregate limit.

★ The question before the court was this: Was this loss considered an occurrence or more than one occurrence?

★ **The United States district court decided in favor of the primary insurer by holding that there was only one occurrence. The primary insurer convincingly argued that the prevailing view is to look to the *cause* of the accident rather than the *effect* to determine if there has been one or more accidents. Thus, there was but one cause — the contaminated birdseed; and, while there were many claimants, there was only one accident or occurrence.**

★ On appeal, the primary insurer introduced a number of court decisions which were frequently used to show that while an incident may cause damage to the property of more than one party — may involve a number of distinct claims — that does not make for more than one accident under Liability insurance.

★ The United States court of appeals for the fifth circuit, however, overruled the lower court's decision and held that while damage to the birds was caused by contamination, the insured's liability resulted from the sale of seed.

★ **The court reasoned that if the insured had destroyed the seed instead of selling it, no loss would have occurred. Since it was the *sale* that created the exposure to conditions which resulted in property damage, each of the eight sales to the grain and feed dealers was considered a new exposure and a *separate occurrence*. The primary insurer, therefore, was required to pay an additional $50,000, or an aggregate of $100,000, before the excess insurer was obligated to perform under its contract.**

Though bodily injury or property damage usually results immediately upon contact with someone or something, the phrase in the definition of occurrence, "injurious exposure to conditions," eliminates the necessity of proving the exact moment at which damage was sustained. In other words, injury or damage resulting from *gradual* exposure is included in this definition. An example of a loss that describes coverage from gradual exposure is the situation where a person repeatedly — but unintentionally — strikes his neighbor's fence (abutting the driveway) with his automobile. Each time it is negligently struck, the fence weakens and finally falls

(Continued on next page.)

TOWOLDMON0059026

after contact with the automobile. It is difficult to determine the exact time when contact substantially weakens the fence to the point of collapse but this is unnecessary under a policy written on an occurrence basis. As long as the insured has a policy in force at the time property damage occurs (the fence falls) the loss should be covered.

Other examples of loss commonly given to describe coverage from gradual exposure include inhalation of industrial fumes, damage from industrial wastes, pollution or contamination of air, water, etc. (Most of these loss examples are the very reason *many* underwriters were reluctant to add Property Damage Liability insurance on an occurrence basis under earlier editions of Liability policies.)

It is important to note, however, that many losses caused over a period of time by pollutants and contaminants are excluded under most General Liability policies — unless the cause is *sudden and accidental.** Hence, if there is to be coverage, loss must occur without the insured's foresight or expectation and must be unintentional.

Time of Injury or Damage Controlling

Note also that the definition of "occurrence" requires that the bodily injury or property damage happen *during the policy period*. The principal purpose of this requirement is to put the burden of loss upon the insurer at the time of *actual injury*, a matter of some consequence in cases involving continuous exposure to injurious conditions.

The previously mentioned example concerning the person who strikes his neighbor's fence with his automobile over a period of time until the fence finally collapses is an example. An insurer would probably find it difficult to determine the exact time of occurrence. If coverage were on an accident basis, however, an insurer would have no problem since the loss was not sudden or definite in time or place.

Generally, how an insurer handles the question concerning time of injury, under the definition of occurrence, depends upon several factors: (1) amount of damages, (2) length of time insurer has covered the risk, (3) circumstances of loss and (4) the extent of policy coverage.

For example, assume a person near a factory inhales fumes and finally contracts an illness diagnosed as a respiratory disease. If the insured (factory) were a relatively new risk, the insurer might try to determine the stage, in relation to its policy period, when fumes became harmful to the injured person — in an effort to transfer claim to the previous insurer.†

Also, if the escape of smoke, fumes, chemicals, etc., into the atmosphere were intentional and if harmful effects could have been expected by the insured, an insurer could probably decline loss as not being an occurrence as defined. In other words, bodily injury was expected from the standpoint of the insured. If this were

*Standard endorsement G335 must be attached to or its wording made a part of General Liability policies. This exclusion states that insurance does not apply to "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants *into* or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

†Quite possibly, too, injuries or damages might involve coverage under more than one policy. In this case, insurers are liable for their share of total loss.

(Continued on next page.)

TOWOLDMON0059027

not sufficient, an insurer could also deny loss under the Pollution or Contamination exclusion previously discussed.

Intentional Harm

The stipulation in the definition of occurrence that bodily injury or property damage be neither *expected* nor *intended* from the *standpoint of the insured* is a point which needs clarification. Previously, several court cases placed the emphasis not on the intent of the insured but on the point of view of the injured party.

That the injury must be neither expected nor intended from the standpoint of the insured not only rules out — or hopes to rule out — such cases but it also eliminates the need for an exclusion of intentionally caused injury.

★ Whether coverage applies in a given circumstance also depends upon whom the insured is and what the insured's relationship is to the claim in question. *Boltzar vs. Williams, 1972 C.C.H. (Fire & Casualty) 1488* is a case on this point. It involved a Louisiana township which was sued after one of its policemen shot and injured a citizen during an arrest.

★ The issue was this: Does the Manufacturers and Contractors Liability policy issued to the Town of Glenmora *exclude* coverage of intentional wrongful acts committed by the town's employes? The insurer answered affirmatively by arguing that when an employe of the town causes injury to another by an intentional act, the town is precluded from qualifying for coverage under its policy.

★ The Louisiana court of appeal would not accept this argument. The named insured under the policy was the Town of Glenmora and there was no other provision whereby an employe of the town could be considered an insured. The court reasoned, therefore, that since the town was the only insured, the policy provision must be interpreted from the town's standpoint. That being the case, the answer to the question is obvious: The town did not intend or expect that its deputy would commit an intentional, violent act upon a citizen. In normal course of events, the town only expected its employes to render services by keeping the peace by whatever means necessary, short of violent use of force. This was reinforced by the fact that the town had two deputies on duty in order to reduce any requirement of force in making any arrest. The court concluded, therefore, that the shooting was an accident, neither expected nor intended from the standpoint of the town.

Also, this wording is sufficiently broad to exclude the type of damage touched by the Pollution or Contamination exclusion. However, the reason the exclusion was introduced is to clarify the intent of insurers that pollution or contamination losses are not covered unless they are sudden and accidental.

Finally, this wording of the occurrence definition reinforces the policy condition concerning the insured's duties in event of a claim or suit. This provision states that in event of an occurrence, claim or suit, the insured must take reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions. Failure to take reasonable steps could put the insured in the position of being without coverage for a subsequent claim from the same condition. In other words, it was expected from the standpoint of the insured.

TOWOLDMON0059028