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OCCURRENCE COUNTING ISSUES RAISED BY MASS SHOOTING TRAGEDIES

I. BACKGROUND

Shootings, and specifically mass shootings (defined by the FBI as four or more victims killed), have been on the rise in recent years, and especially in 2012. http://www.nycrimecommission.org/mass-shooting-incidents-america.php (January 6, 2014). In 2012 alone, approximately seventy people were killed as a result of mass shootings, and the shootings all took place in public or semi-public locations such as movie theaters or schools. *Id.*, http://yahoo.com/factbox-major-shooting-incidents-united-states-214852409.html (January 6, 2014). Tragically, many more were severely injured in these shootings.

Many significant insurance coverage questions are raised by these incidents. One of the most common issues, and perhaps the most important, is whether the shooting incident constitutes one or multiple "occurrences." Does the resulting harm to each separate victim constitute a separate occurrence or is the entire incident one occurrence?

The need to determine whether a shooting incident constitutes one occurrence or multiple occurrences generally arises in one of two situations: (1) The shooter is the insured; or, (2) The insured is a party alleged to have had a duty to prevent the actions of the shooter. The first situation is less common because the shooter usually has no insurance coverage due to the intentional nature of his acts.

The more common situation is where the insured is alleged to have had a duty to prevent the actions of the shooter. This duty can arise in a number of ways and the insured may be of any type – for example, a restaurant, college, or security contractor. The insured may be a parent of the shooter, implicating homeowner's coverage. In all of these situations, victims may bring lawsuits alleging negligent

supervision, failure to warn, failure to take protective action, or failure to provide adequate security, among other creative theories. A key question is whether the shooting incident constitutes one or multiple occurrences under the applicable policy, and that is the subject of this paper.

II. NUMBER OF OCCURRENCES

All jurisdictions in the United States follow either the "cause" theory or the "effect" theory when determining whether an incident and damages constitute one or multiple occurrences. The majority of courts in the United States apply the cause theory instead of the effect theory to determine the number of occurrences. *Donegal Mutual Ins. Co. v. Baumhammers, et al.*, 595 Pa 147, 160, 938 A 2d 286 (2007). The effect theory, as the minority view, does not generate the same level of debate as the cause theory, and it will be set forth briefly later in this paper. Identification of the cause theory does not necessarily end the discussion because there are as many creative ways to apply it as there are creative legal minds involved in developing and arguing it.

Generally, under the cause theory, courts look to the underlying cause of the insured's alleged liability to determine the number of occurrences. For example, if an insured is sued on a theory of negligent supervision, the court determines whether the insured's negligent supervision constituted one occurrence or multiple occurrences. In some jurisdictions, Florida in particular, courts determine the number of occurrences by looking at the act that caused immediate harm to the plaintiff. In shooting cases, that act is the act of the shooting itself, and not any underlying liability of the insured. Therefore, although an insured's negligent supervision may be considered one occurrence under the policy, a court may hold that the number of occurrences is determined by the number of people shot.

i. Typical Policy Language

Courts typically consider language such as the following:

> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE
> 1. Insuring Agreement
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage"…But
> (1) the amount we will pay for damages is limited as described in Limits of Insurance.
> b. This insurance applies to "bodily injury" or "property damage" only if:
> (1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."

An occurrence is generally defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."

ii. Cause Theory

The cause theory asks whether there was a single cause or multiple causes for the resulting injury. The cause or causes of injury for purposes of coverage may be different than the cause or causes of injury giving rise to tort liability. *RLI Ins. Co. v. Simon's Rock Early College*, 54 Mass App Ct 286, 289, 765 NE 2d 247 (2002). This is an important distinction because the determination of which act caused the injury for purposes of insurance coverage can determine whether a court holds that the injury was caused by one occurrence or multiple occurrences. Courts have yet to reach a consensus on the matter, and therefore is it important to be familiar with cases that reach both conclusions.

1. *Koikos v. Travelers Ins. Co.*

Koikos v. Travelers Ins. Co., 849 So 2d 263; 28 Fla L Weekly S 194 (2003) is a notable, frequently cited case from the Supreme Court of Florida. The court reviewed a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit. That question, rephrased by the Florida Supreme Court, was: "When the insured is sued based on negligent failure to provide adequate security arising from separate shootings of multiple victims, are there multiple occurrences under the terms of an insurance policy that defines occurrence as 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions'?"

On April 25, 1997, George Koikos ("Koikos") rented his restaurant to a Florida A&M fraternity graduation party. During the party, two individuals attempted to enter the restaurant but were turned away. A few minutes later, the individuals returned and a fight broke out in the restaurant lobby. One of the individuals had a handgun and began firing. Two fraternity members were hit by bullets from the handgun.

The victims filed separate lawsuits in state court against Koikos for negligent failure to provide security. Koikos, in turn, brought a declaratory judgment action against the insurer, which the insurer removed to federal court. The United States District Court Judge ruled that, as a matter of law, the shooting incident constituted one occurrence: the failure of Koikos to provide adequate security.

The Supreme Court of Florida began its review of the case by looking at the policy language, which provided a $500,000 "Each Occurrence Limit" for occurrences resulting in bodily injury. The policy also had a "General Aggregate Limit" of $1,000,000 for each 12-month period of insurance. Occurrence was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Although accident was not defined in the policy, the court relied on a discussion in *State Farm Fire & Cas. Co. v. CTC Develop. Corp.*, 720 So 2d 1072, 1075-1076 (Fla 1998), which stated, in part: "[w]e hold that where the term 'accident' in a liability policy is not defined, the term, being susceptible to varying interpretations, encompasses not only 'accidental events,' but also injuries or damages neither expected nor intended from the standpoint of the insured."

Koikos argued that the shooting was the event that was neither expected nor intended from his standpoint, not his own negligent failure to provide security. The insurer argued that the single occurrence was Koikos' negligent failure to provide security.

The court analyzed what the victims were exposed to, under the occurrence definition. It concluded that the victims were not exposed to Koikos' alleged negligent failure to provide security; rather they were exposed to the bullets fired from the intruder's gun.

As a result, the court concluded that Koikos' alleged negligence was merely the basis upon which Koikos was sued by the injured parties. The accident in the case -- from the standpoint of the insured -- was the shooting incident itself. The court stated that "[a]lthough Koikos' alleged negligence in failing to provide security is the basis for which liability is sought to be imposed, it was the shooting that gave rise to the injuries that were neither expected nor intended from the insured's standpoint."

The court declined to hold that the number of occurrences should be based, in any way, on the length of time between each shot, because it would turn an insurance coverage issue into an intensive fact-based inquiry. The court concluded that using the number of shots fired as the basis for the number of occurrences was appropriate because each individual shooting was distinguishable in time and space. Therefore, the incident consisted of two occurrences under the policy-- one for each shooting.

2. Other Key Cases

Although some courts have chosen to follow the ruling in *Koikos*, holding that an occurrence arises out of the act immediately causing harm to the victim, and not the alleged act for which liability is alleged against the insured, a number of courts have declined to follow the *Koikos* ruling and applied the cause theory differently.

a. *RLI Ins. Co. v. Simon's Rock Early College*

In *RLI Ins. Co. v. Simon's Rock Early College*, 54 Mass App Ct 286, 765 NE 2d 247 (2002), the court analyzed whether a college's alleged negligence in failing to prevent a shooting rampage by a student constituted one or multiple occurrences under the insurance policy.

On the morning of the shooting, a college receptionist accepted delivery of a package addressed to Wayne Lo, a student at the college. The package bore the return address of an arms store. The college dean and resident directors allowed Lo to pick up the package, and then followed Lo back to his dorm and demanded to see the contents of the package. The package contained empty black plastic ammunition magazines, a plastic rifle stock, and an empty cartridge box, but did not contain any guns or ammunition. Lo explained that his father sent him the items for use at his home in Montana, where he shot guns for target practice.

Later that day, Lo traveled to a sporting goods store where he purchased an assault rifle. That night, the resident directors received a phone call warning them that Lo had a gun and ammunition and planned to kill the directors and others the following night. Before they could locate Lo and search him for weapons, they heard shots being fired nearby. Numerous individuals were injured or killed during Lo's shooting spree. The victims brought suit against the college for failing to prevent Lo from engaging in the shooting spree.

The court analyzed the cause theory differently than the *Koikos* court. In *RLI*, the court determined the cause of the injury by looking to the conduct of the insured for which coverage was afforded. It stated that courts should not base the number of occurrences on the assumption that the cause of injury in the insurance coverage context is the same cause of injury in the tort liability sense-- that is, the immediate cause of harm. It observed, "[t]his ignores the fact that the issue to be determined is not liability, but the contractual obligation of an insurer to an insured."

The court went on to follow a Nevada case, which held: "Even though the action of the individual wrongdoer[] [is] the most direct cause[] of harm for the victims…the actions of the individual wrongdoer[] taken alone are not the basis of liability…Instead, liability…is premised on the [county's] negligence in performing a duty, which permitted the intervening conduct of [the wrongdoer] who actively caused the victims' harm." *Citing Washoe County v. Transcontinental Ins. Co.*, 110 Nev 798, 804, 878 P2d 306 (1994). "In interpreting coverage for….entities under the 'causal' approach, 'occurrence' should be defined in such a way as to give meaning to the entity's connection to liability." The court continued, "[w]here the insured's conduct was remote to the immediate cause of the plaintiff's injuries, as in products liability cases or theories of liability based on negligent training, supervision, or inspection, the direct cause of injury may have had little relevance to the 'cause' for purposes of ascertaining the number of 'occurrences.'"

Applying these theories of coverage, the court looked to the alleged negligence of the college in determining the number of occurrences, not to the acts committed by Lo. The court determined that none of the acts or omissions of the college constituted discrete acts of liability, so separated by time and location as to warrant multiple occurrences. The court noted, however, that multiple occurrences may be found to exist in other cases involving a failure to supervise or implement a security policy.

b. *Bomba v. State Farm Fire and Cas. Co.*

Bomba, et al. v. State Farm Fire and Cas. Co., et al., 379 NJ Super 589, 879 A 2d 1252 (2005) is a case in which two police officers brought claims against homeowners whose son fired a shotgun and hit the police officer multiple times. On December 21, 2000, officers responded to a report of gunshots being fired. As they drove down the suspected street, a man emerged from behind a van and began firing at the police car, injuring both officers. The gunman then moved in front of the car, firing and striking both officers a second time. The gunman eventually struck one of the officers a third time before another officer arrived and shot and killed the gunman.

The court rejected the *Koikos* type coverage analysis and held instead that the incident that started the chain of events leading to the shooting was the occurrence for coverage purposes. The court determined that the single occurrence was the negligence of the gunman's parents in permitting him to have access to the firearms in their home.

The court noted that the complaint against the parents focused solely on their asserted acts of negligence rather than the gunman's acts, and that plaintiffs had recognized that for coverage purposes, the parents' alleged negligence was the appropriate claim to allege. The court further noted that if the gunman's actions had constituted the occurrence rather than the parents' alleged negligence, the claim would not have been covered by the policy due to the policy's exclusion for intentional or criminal acts.

c. *Donegal Mutual Ins. Co. v. Baumhammers*

In *Donegal Mutual Ins. Co. v. Baumhammers, et al.*, 595 Pa 147, 938 A 2d 286 (2007), the court discussed whether the alleged negligence of the shooter's parents constituted one occurrence under their homeowner's policy, or whether each individual shooting constituted a separate occurrence.

On April 28, 2000, Richard Baumhammers ("Baumhammers") left his parents' home where he was residing, and shot and killed his neighbor before setting her house on fire. Baumhammers then drove to other towns where he shot numerous other people.

The victims filed complaints against Baumhammers and his parents, alleging that the parents were negligent in failing to procure adequate mental health treatment for their son, failing to take their son's handgun away from him, and failing to notify authorities that their son possessed a handgun. The parents had a homeowner's policy which provided coverage for any claims brought against the insured for damages resulting from bodily injury caused by an occurrence.

The court, disagreeing with the approach adopted by the *Koikos* court, concluded that, when determining the number of occurrences, the proper application of the cause theory required the court to focus on the act of the insureds that gave rise to their liability. The court stated that the parents' liability was premised on their negligence in failing to confiscate the weapon and/or contact the authorities or health care providers of their son's condition. Therefore, their negligence was the occurrence that began the sequence of events that resulted in the eventual injuries to plaintiffs. The court held that the parents' alleged act of negligence constituted one occurrence for coverage purposes.

d. *The Travelers Indem Co. v. Olive's Sporting Goods, Inc.*

In *The Travelers Indem. Co. v. Olive's Sporting Goods Inc., et al.*, 297 Ark 516, 764 SW 2d 596 (1989), the insured sold a pistol and shotgun to a patron. The weapons were used by the patron to shoot a

policeman and several others. The victims filed several lawsuits against the insured, alleging negligence in the sale of the guns.

The insured's policy defined occurrence as "an accident including continuance [of] or repeated exposure to conditions which result in bodily injury neither expected nor intended from the standpoint of the insured." The policy also stated that regardless of the number of persons injured, or the numbers of claims made or suits brought on account of bodily injury, coverage was limited to a single limit of liability.

The court reached the conclusion that "to decide that each of the injuries required separate coverage under the policy would in effect put a no-limit policy into effect." The court held that the occurrence was the sale of the guns to the shooter, which it found constituted only one occurrence under the policy.

e. *Uniroyal Inc. v. Home Ins. Co.*

The court in *Uniroyal Inc. v. Home Ins. Co.*, 707 F Supp. 1368 (EDNY 1988), a non-shooting case involving an Agent Orange litigation, reached a similar conclusion. The court reasoned that since insurance policies are intended to provide coverage to insureds for their liabilities, occurrences should be events over which insureds have some control. Otherwise, with the covered risks out of the insureds' hands, and coverage for losses determined by the acts of an unfettered third party, "the insurer would have no basis for setting premiums *ex ante* and the insurance contract would be illusory." *Uniroyal Inc. v. Home Ins. Co.*, 707 F Supp. at 1383.

iii. Effect Theory

A minority of states apply the effect theory when determining whether an incident constitutes one or multiple occurrences. The theory states, generally, that limits in a liability policy regarding an insurer's liability to a specified amount per occurrence or per accident refers to the effect of the occurrence or accident, and not to the cause. *American Modern Select Ins. Co. v. Humphrey, et al.*, 2012 US Dist LEXIS 20800, 10 (E Dist Tenn, February 17, 2012). Courts that apply the effects theory resolve occurrence counting issues by "construing 'one accident' from the point of view of the person injured rather than from the point of view of the proximate cause of the accident." *Brooks v. Memphis & Shelby Cnty. Hosp. Auth.*, 717 SW 2d 292, 297 (1986), *citing Kuhn's of Brownsville v. Bituminous Cas. Co.*, 197 Tenn 60, 270 SW 2d 358 (1954).

For example, in *American Modern Select Ins. Co. v. Humphrey, et al.*, 2012 US Dist LEXIS 20800 (E Dist Tenn, February 17, 2012), the court analyzed a case in which the plaintiff had been jogging when she was attacked by seven dogs owned by the Humphreys. The attack lasted approximately twenty minutes, during which time all seven dogs bit the plaintiff, resulting in 147 wounds.

The court disagreed with plaintiff that there were seven separate occurrences because seven dogs were involved in the attack. The court instead held that plaintiff's wounds, while inflicted on separate parts of her body by several different dogs, were not separate and distinct, and were caused by only one occurrence.

III. CONCLUSION

Although most jurisdictions identify the occurrence in shooting cases as the underlying negligence of the insured, not all jurisdictions agree. The cause theory is approached in different ways reaching different results. Thus, while the court's selection between the cause or effect theory will make a difference in the exposed limits, how the cause theory is applied is of equal significance. Depending on the counting of

occurrences, an insurer's exposure can change dramatically. As such, careful wording of policy language is recommended.

For example, a party can apply language that the *Koikos* court suggested as a way to ensure multiple shootings only constituted one occurrence. The policy language, cited from *SR Int'l Business Ins. Co. v. World Trade Center Prop. LLC*, 222 F Supp 2d 385 (SDNY 2002) defined occurrence as:

> [A]ll losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occurred.

Koikos v. Travelers Ins. Co., 849 So 2d at 272, *citing SR Int'l Business Ins. Co. v. World Trade Center Prop. LLC*, 222 F Supp 2d at 398.

The evolution of the law in this area is not complete and it seems likely that more litigation will lead to more variety in results.