

It's Fundamental...Number of Occurrences in Construction Defect Claims

By Joseph M. Junfola, CPCU

Given the nature of latent, progressive, and cumulative injury or damage, and in the context of the definition of occurrence, it can be quite challenging to determine how many occurrences you are dealing with in a construction defect claim, providing a lot of fertile ground for controversy. This is important because the limits of liability and deductibles or self-insured retentions are impacted by the number of occurrences. In addition, more than one occurrence can complicate an already-challenging allocation scheme (among the carriers and potentially the insured with respect to defense cost and indemnity sharing).

The “cause and effect” paradigm is useful, and, in fact, forms the basis of case law to determine how many occurrences there are in a construction defect claim. But it must be applied with flexibility given the variety of fact situations in construction defect claims.

The “cause test” determines the number of occurrences by focusing on the specific cause of property damage, and not on the number of effects of the cause. A defective roof that is leaking, for example, can cause damage to attic insulation and personal property. Using the “cause test”, there is one occurrence. On the other hand, the “effects test” bases the number of occurrences on the number of effects. In our example, the damaged insulation and personal property may constitute two occurrences.

Most jurisdictions look to the cause to determine number of occurrences but what constitutes a particular cause is highly fact-specific and not without controversy, the controversy existing generally in the application of the definition of occurrence to the underlying facts. (“Cause” can mean a couple of things. The physical cause, or cause-in-fact, with a nearness, or not, in time or space to its effect, is distinguished from the legal or proximate cause.)

In the CGL policy, “occurrence” is defined as, “...an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Some issues to consider:

- **Are the effects, e.g. property damage, the result of the same or substantially the same conditions?**
- **Is the exposure of the property to these conditions repeated or continuous, and not unbroken by an intervening cause or causes?**
- **Are the exposures, while substantially similar, separated by time or distance to such an extent that to conclude that there is one occurrence pushes the envelope of reason?**
- **How many trades are potentially implicated as causes?**
- **Doesn't the determination of number of occurrences for insurance purposes depend on whose insurance you are evaluating, e.g. number of occurrences as to the general contractor whose scope of work is broad as opposed to a subcontractor whose scope his narrow?**
- **Nature of the defect and legal theory, e.g. a product defect in windows throughout the development versus various different installation defects throughout the development.**

Furthermore, there is a result-oriented consideration, the result being maximizing coverage where the claims are numerous and the damages are within the deductible, if applied on an effect basis. Finding one occurrence with just one deductible would be advantageous to the insured.