

THE
POLICYHOLDER ADVOCATE

December 2004



Internet Resources

- ◆ J. Hoey & K. Jorgensen, "Let's Make a Deal: Binders and the Creation of the Property Insurance Contract" http://www.clausen.com/Pdf_Docs/Articles/PropertyInsurance-Law.pdf
- ◆ S. Johnson, "Resolving Ambiguities in Insurance Policy Language" <http://www.rkmc.com/pdf/ambiguities.pdf>
- ◆ J. Chanes & M. Daniels, "One Occurrence or Two: How the Courts Decide" <http://www.fried-epstein.com/articles.htm>

ONE "OCCURRENCE" OR TWO?
HOW ABOUT BOTH?

By Linda J. Karpel

By now, we are all acutely aware of the tragic events of 9/11. A coordinated terrorist attack by Al Qaeda resulted in the destruction of the entire World Trade Center complex in New York City. Two separate airplanes crashed into two different buildings at the World Trade Center on the same day, sixteen minutes apart. One occurrence-- or two?

How about both? In September 2002, the trial judge in the litigation that was commenced to resolve this issue concluded the events of 9/11 constituted a single occurrence. Then, on December 6, 2004, a jury in the same insurance coverage litigation concluded that the same events constituted two separate occurrences.

Welcome to the wacky world of insurance coverage. In this world, insurance policy language means everything--or almost everything.

In this case, subtle differences in policy language utilized by the various property insurers of the World Trade Center explains how a judge and jury in the relevant insurance coverage litigation could examine the same events and yet reach seemingly contradictory conclusions.

Background

The World Trade Center complex is owned by the Port Authority of New York and New Jersey. As of spring, 2001, Silverstein Properties, Inc. had won the right to lease the World Trade

Center and, accordingly, in the summer of 2001, Silverstein undertook to obtain property insurance for the complex. Silverstein purchased insurance from about two dozen different primary and excess insurers, in order to make up its multi-layered property insurance program.

As of September 11, 2001, however, only one of the World Trade Center property insurers had issued its final policy to Silverstein. All of the remaining insurers had issued insurance "binders." Insurance binders are temporary contracts in which insurers set forth, in an abbreviated form, their coverage commitments--the binders remain effective until the issuance of finalized insurance policies

The Number of Occurrences Issue

A major task in the World Trade Center insurance coverage litigation was to ascertain and apply the definition of "occurrence" that Silverstein and the property insurers incorporated or intended to incorporate in each property insurance policy.

In liability insurance policies, insurers typically promise to pay the policyholder a specific monetary sum (or "limit") "per occurrence" of covered loss. The number of occurrences issue will greatly affect the amount of available insurance coverage. In such a situation, the more "occurrences" involved in the policyholder's loss, the more money that policyholder can po-

One Occurrence cont. from page 1

tentially recover. Liability policies typically include definitions of “occurrence” and there is a relatively large body of law dealing with the “number of occurrences” issue in the liability context. While “occurrence” limits may be used in property insurance policies, historically, such policies have not included definitions of “occurrence” and there is far less case law dealing with the “number of occurrences” in the property insurance context.

Here, the Silverstein property insurance program provided a total of about \$3.5 billion worth of insurance coverage per occurrence. The “number of occurrences” was important to Silverstein and its rebuilding efforts at the World Trade Center. Assuming that the events of 9/11 constituted a single occurrence, as the insurers argued, the most Silverstein stood to recover was \$3.5 billion. On the other hand, if there were two occurrences, Silverstein’s potential insurance recovery could increase to about \$7 billion.

Unfortunately, nearly all of the insurance binders contained no definition of the policy term “occurrence.” Policy definitions of “occurrence” and the lack of such definitions were, however, were at the heart of the seemingly contradictory decisions by the judge and the jury in the World Trade Center litigation.

The Wilprop Occurrence Language

The most significant policy language involved in the World Trade Center coverage litigation appeared in a sample property insurance policy (the “Wilprop Form”) that was circulated by Willis of New York, the insurance broker that sought to line up property insurance coverage for the World Trade Center during the summer of 2001. This language formed the basis for the trial judge’s ruling that the events of 9/11 constituted only a single occurrence.

According to the Wilprop Form,

“Occurrence” shall mean all 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 occur.

(emphasis added).

In September 2002, the trial judge decided that there was no factual dispute that the insurance binders issued by three particular World Trade Center property insurers were intended to incorporate this Wilprop definition of “occurrence” because the definition was the only one circulated to, referred to, or adopted by, the various insurers during negotiations for the sale of insurance to Silverstein.

The trial judge examined the wording of the Wilprop Form’s “occurrence” definition and concluded that the definition was unambiguous, that is, open to only one reasonable interpretation. Under that interpretation, the two plane crashes of 9/11 resulted from “one series of similar causes” and therefore constituted only a single occurrence. SR Int’l Business Ins. Co. v. World Trade Center Props. LLC, 222 F.Supp.2d 385, 399 (S.D.N.Y. 2002), aff’d, 545 F.3d 154 (2d Cir. 2003). As per the trial judge’s 2002 decision, only one per-occurrence limit will be available to Silverstein under each of the three insurance binders incorporating the Wilprop definition of “occurrence.”

In early 2004, a trial (the “Phase I trial”) was conducted on the issue of whether thirteen of the remaining World Trade Center property insurers had also intended to incorporate this same Wilprop “occurrence” definition in their insurance binders. The jury in the Phase I trial decided in May, 2004 that ten of those thirteen insurers had intended that the Wilprop Form’s “occurrence” definition be applied in their binders.

Thus, according to the judge and the Phase I jury, thirteen of the two dozen or so World Trade Center property insurers had intended that the Wilprop definition of “occurrence” govern their insurance binders, and, under the binders issued by those thirteen, the events of 9/11 would constitute just one occurrence. What of the remaining property insurers?

The Other “Occurrence” Language

The “two occurrence” jury verdict in December 2004 resolved the “number of occurrences” under the insurance policies issued by the remaining World Trade Center property insurers. Those insurance policies contained “occurrence” language that differed from the Wilprop Form .

Two of the remaining World Trade Center property insurers claimed to have incorporated their own definitions of "occurrence" into their insurance agreements. One, Allianz Insurance Company, was the only property insurer to actually issue its final policy to Silverstein prior to 9/11. The Allianz policy contained the following definition of "occurrence:"

[A]ny one loss, disaster or casualty, or series of losses, disasters or casualties arising out of one event. When the word applies to loss or losses from the perils of ... vandalism and malicious mischief one event shall be construed to be all losses arising during a continuous period of seventy-two hours.

In January, 2003, the trial court judge addressed this Allianz policy language. While the judge confirmed that Allianz's definition of "occurrence" governed Allianz's policy at the time of 9/11, the judge rejected the argument that, as a matter of law, the events of 9/11 constituted only one occurrence under the Allianz definition. SR Int'l Business Ins. Co. v. World Trade Center Props. LLC, No. 01 Civ. 9291 (jrm), 2003 WL 192487 at * 4 (S.D.N.Y. Jan. 29, 2003).

In contrast to the trial judge's previous decision that the Wilprop Form's definition of "occurrence" was open to only one reasonable interpretation, the trial judge concluded that the Allianz definition of "occurrence" was ambiguous and subject to multiple reasonable interpretations:

[T]he term "event" in its policies is ... ambiguous While reasonable people might consider the attack on the World Trade Center as a single event, it is no less reasonable to consider the separate highjackings [sic] of the two aircraft and the ultimate crashing of those aircraft into different buildings at different times as two separate events.

Id. at *5 (emphasis added). The judge concluded that the decision as to which one of those multiple reasonable interpretations was intended by the parties should be made by a jury, after considering all the available evidence.

Another property insurer relying on its own "occurrence" definition was Industrial Risk Insurers. Industrial issued an insurance binder incorporating its own policy form, which defined "loss arising out of one Occurrence" as "the sum total of all loss or damage in-

sured against arising out of or caused by one event." See World Trade Center Properties, LLC v. Hartford Fire Ins. Co., 345 F.3d 154, 186 (2003). The trial judge made no published pretrial ruling concerning Industrial's "occurrence" definition, which was similar to Allianz's definition and would be left to a jury to interpret.

The remaining World Trade Center property insurers had issued insurance binders containing no definition of "occurrence" at all, and did not incorporate the Wilprop Form in their binders. One such insurer was Travelers Indemnity Company. In June, 2002, the trial judge addressed Travelers' insurance binder. See SR Int'l Business Ins. Co. v. World Trade Center Props. LLC, No. 01 Civ. 9291 (jrm), 2002 WL 1163577 (S.D.N.Y. June 3, 2002), aff'd sub nom. SR Int'l Business Ins. Co. v. Hartford Fire Ins. Co., 345 F.3d 154 (2d Cir. 2003). Silverstein had argued that by failing to include any definition of "occurrence" in its insurance binder, Travelers had agreed to be bound by New York case law, under which there is a uniform and unambiguous meaning of "occurrence" and a legal doctrine for determining the "number of occurrences" as a matter of law.

The trial judge, however, disagreed with Silverstein. The judge decided that "the 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." SR Int'l, 2002 WL 1163577 at *4. For that reason, the judge concluded that the definition of an "occurrence" to be applied under Travelers' insurance binder was a question to be resolved by examining the parties' intent, as demonstrated by the facts, documents and testimony concerning the negotiations for the Travelers property insurance coverage.



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One Occurrence cont. from page 3

Now we arrive at the Phase II trial in the World Trade Center coverage litigation. The task of the jury in the Phase II trial was to examine the available evidence and resolve the intended meaning of the more ambiguous definitions of "occurrence" relied on by Allianz and Industrial. The jury also was charged with resolving the intent of Travelers and the six other insurers that had included no "occurrence" definition in their binders. On December 6, 2004, the Phase II jury decided that the events of 9/11 constituted two occurrences under the various binders or policies issued by these nine insurers.

Conclusion

The Phase II jury's "two occurrence" verdict may be in contrast to the previous ruling of "one occurrence" by the trial judge in the World Trade Center coverage litigation. It is not, however, inconsistent. Indeed, in the world of insurance coverage, the two decisions make perfect sense. The decisions of the trial judge and the Phase II jury addressed the coverage that would be available for the same events, but under different insurance binders and policies, with different policy language incorporated in them.

The trial judge was faced with policy language that was clear and specific on its face--all the judge needed to do was to apply that language. The Phase II jury, on the other hand, was faced with different, more ambiguous policy language. After considering evidence of the parties' intent, the jury properly interpreted that ambiguous language in a manner that maximized the insurance coverage recoverable for the World Trade Center property loss.

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