

Special Bulletin

Friday, February 6, 2009



Illinois Supreme Court Issues Ruling On Number Of Occurrences For Cases Involving Continuous Acts And Multiple Injuries

Addison Ins. Co. v. Fay, Docket No. 105752 (Jan. 23, 2009)

By James R. Murray and Todd M. Rowe

In *Addison Ins. Co. v. Fay*, Docket No. 105752 (Jan. 23, 2009), the Court ruled that to determine the number of occurrences at issue where there are multiple injuries, Illinois first applies the “cause test” to determine if there is more than one cause of the injuries and then applies a “time and space test” to determine if the cause and results are so closely linked in time and space as to be considered as one occurrence.

In *Addison*, the issue presented was whether the deaths of two boys that were found trapped in mud at the insured’s excavation pit constituted single or multiple occurrences. Applying the “cause test,” the Illinois Appellate Court found a single occurrence. The Appellate Court first noted: “the losses...arose from a single negligent act or condition. [The insured] failed to properly secure entry into the excavation pit, a single negligent condition which led to the boys’ injuries.” Second, the Appellate Court found that the unfortunate events resulting in the boys’ death were so closely linked in time and space as to be considered by a reasonable person as one occurrence. The Illinois Supreme Court reversed.

Although the Illinois Supreme Court also applied the “cause test” it reached

a different result. The Illinois Supreme Court noted although the insured bears the burden to prove that a claim falls within coverage, it is the insurance company’s burden to prove that a limitation or exclusion applies. Here, because the policy at issue had separate per occurrence and aggregate limits, a finding of a single occurrence would limit the insurer’s liability. Consequently, the Court held that the insurer had the burden to prove that there was a single occurrence.

In reversing the holding of the Appellate Court, the *Addison* Court found the insurer failed to meet its burden to establish a single occurrence. The Supreme Court held that although the insurer was correct in its position that the insured’s “liability arose from his negligently failing to properly secure and control his property” and there was “no intervening negligent act between the injuries of each boy,” this did not end the inquiry. The Illinois Supreme Court noted that courts in Illinois have required further refinement of the cause theory in its application to various factual situations. Specifically, the Court noted: “where 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 arose out of a separate occurrence.” *Nicor, Inc. v. Associated Electric & Gas Ins. Serv. Ltd.*, 233 Ill. 2d 407, 431-32 (2006).

Applying this test, however, might still lead to what the Illinois Supreme Court viewed as an unreasonable interpretation of the insurance policy. The court was concerned that if the focus was on the insured’s sole negligent act or omission, injuries that occurred days, or even weeks apart could be considered as arising out of one occurrence. Therefore, the Court held that some other limiting principle should be applied. Specifically, a court must then go on to apply the “time and space” test. Under the “time and space” test, “if cause and result are simultaneous or so closely linked in time and space as to be considered by the average person as one event, then the injuries will be deemed the result of one occurrence.”

The Supreme Court noted that the Appellate Court had applied the “time and space” test to the facts at issue. However, it disagreed with the Appellate Court that the facts “conclusively demonstrate” that the injuries to the two boys constituted a single occurrence. In reaching its decision, the *Addison* Court

found the following facts to be determinative under the “time and space” test.

“[t]he police investigators could not determine how closely in time the boys became trapped. They suggested it could have been seconds or minutes apart, but acknowledge that there was no way to know. Nor could the medical experts give a time of death with certainty, or indicate how closely in time the two boys had died. Any opinions on these issues would be inappropriately speculative.”

Based upon this evidence, the Court found: “[t]he substantial uncertainty on this issue persuades us that [the insurer] cannot meet its burden of proving that the two boys’ injuries were so closely linked in time and space as to be considered one event.”

Tressler Comments

The Supreme Court observed that the time and space analysis must be made on a case-by-case basis. It is also important to note that the court held that it was the insurer’s burden to prove that a limitation to coverage applies. Consequently, if the issue presented to the court involves the number of per occurrence deductibles,

the insurer will likely have the burden of proving multiple occurrences. However, it is unclear who has the burden on the number of occurrences when multiple policies or insurers are involved and a finding of multiple occurrences under only some, but not all, the policies at issue would be to the insured’s benefit. The number of occurrence issue is very result oriented.

Finally, it is unclear whether the Court intended to set forth a new standard of proof that the insurer bears on the number of occurrence issue. The Court stated that it could not accept the Appellate Court’s opinion that the facts “conclusively demonstrate” that the boys’ injuries constituted a single occurrence. Arguably, if the Court intended to place a higher burden of proof than the preponderance of the evidence standard, it would likely not have done so in such a cryptic manner.

Tressler, Soderstrom, Maloney & Priess, LLP

If you have any questions concerning this bulletin, please contact:

James R. Murray	312/627-4039	jmurray@tsmp.com
Todd M. Rowe	312/627-4180	trowe@tsmp.com

This advisory is for general information only and is not intended to provide, and should not be relied on for, legal advice in any particular circumstance or fact situation. The reader is advised to consult with an attorney to address any particular circumstance or fact situation. The opinions expressed in this advisory, if any, are those of the authors and not necessarily of Tressler, Soderstrom, Maloney & Priess, LLP or its clients.

OFFICE LOCATIONS

233 South Wacker Drive
Sears Tower, 22nd Floor
Chicago, IL 60606

305 West Briarcliff Road P.O. Box 1158 Bolingbrook, IL 60440 630/759-0800 Fax 630/759-8504	744 Broad Street Suite 1510 Newark, NJ 07102 973/848-2900 Fax 973/623-0405
--	--

3070 Bristol Street Suite 450 Costa Mesa, CA 92626 714/429-2900 Fax 714/429-2901	22 Cortlandt Street, 17th Floor New York, NY 10007 212/971-6250 Fax 212/971-6263
--	--

1901 Avenue of the Stars Suite 450 Los Angeles, CA 90067 310/203/4800 310/203-4850	2100 Manchester Road Suite 950 Wheaton, IL 60187 630/668-2800 Fax 630/668-3003
--	--