ONE MAN'S CEILING IS ANOTHER MAN'S FLOOR: MULTILAYER COVERAGE CHALLENGES ARISING FROM THE NUMBER OF "OCCURRENCES" AND "BATCHES"

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Imagine a series of claims against the manufacturer of a mass-produced product, each entailing potential damages in excess of $1 million, but for which the insured has strong defenses to liability. Then imagine two radically different insurance programs:

> **Scenario No. 1**: The insured carries a primary policy with $1 million per occurrence limits and $2 million aggregate limits, with a deductible of $10,000 per occurrence, with no aggregate deductible. The primary policy's duty to defend is not subject to the deductible and defense expenditures do not erode the primary policy limits. The retention of the first-layer excess policy matches the occurrence and aggregate limits of the primary layer. The excess policy carries limits of $5 million per occurrence and in the aggregate, which are eroded by defense costs. There are no higher-level excess policies.
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> **Scenario No. 2**: The insured carries a primary policy with $1 million per occurrence limits, $2 million in the aggregate, which are eroded by defense expenditures. The primary policy sits over a $500,000 per occurrence self-insured retention, which is eroded by defense expenses (as wells as settlements or judgments) but has no aggregate cap. The primary insurer has no duty to defend until the self-insured retention is exhausted. Sitting above the primary policy are a series of excess layers, providing an additional $100 million in coverage, each of which carries identical occurrence and aggregate limits, and each of which is eroded by defense expenditures.

Without knowing anything else about the circumstances of these claims, it is a safe assumption that the policyholder in Scenario No. 1 will contend that the

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[1] Marion Adler regularly represents commercial policyholders in coverage disputes. The views expressed in this paper are hers alone and do not necessarily represent the views her clients.

Credit for the title goes to the incomparable Paul Simon, "One Man's Ceiling is Another Man's Floor," *There Goes Rhymin' Simon* (Side 1, Cut No. 5) (1973).

claims entail multiple "occurrences" whereas, in Scenario No. 2, the policyholder will contend that each claim constitutes a single "occurrence," with the primary insurer taking the opposite sides of those arguments in both scenarios. And, if the policyholder and primary insurer in Scenario No. 2 compromise their dispute over the number of occurrences, without the concurrence of the excess insurer and without resolving all of the underlying suits, the excess insurer will likely argue that the underlying retention is not yet exhausted because the settlement is based on an understatement of the number of occurrences.

Of course, the self-interest of each party explains the diametric views of the policyholders and insurers in these hypotheticals. As advocates and advisors, however, coverage lawyers need to go beyond that cynical observation. We need to master the substantive law in this area, so as to present the best arguments possible for our client's position, advise clients of the strengths or weaknesses of their position, and, when possible, assist clients in minimizing the future risk arising from these conflicting interpretations of the term "occurrence," and similar problems when applying per "batch" clauses.

I.
Framework for Determining the Number of "Occurrences"

As with most questions of insurance coverage, the number of "occurrences" entailed in any coverage dispute is determined by the applicable policy language, as interpreted under state common law. For decades, the standard form definition of "occurrence" has been virtually identical throughout the industry – i.e., "an accident, *including continuous or repeated exposure to substantially the same general harmful conditions*." (Emphasis added.)[2]

Despite the uniform policy language, however, the states construing that language have developed three basic tests for counting the number of "occurrences" when multiple claims or injuries arise from the same or similar circumstances:

- **The "Cause" Test** is applied by the majority of jurisdictions. As described in *United States Gypsum Co. v. Admiral Insurance Co.*, this approach determines the number of "occurrences" "by referring to the cause or the causes of the damage … , as opposed to the number of individual claims or injuries." In *U.S. Gypsum*, the court concluded that claims of property

[2] See, e.g., ISO Form CG 00 01 10 01 at 14; ISO Form CG 00 01 12 07 at 14. See also Hartford Form 8117 at 2 (from a 1979 policy), defining "occurrence" in relevant part as "an accident, including continuous or repeated exposure to conditions."

damage brought against the manufacturer of asbestos-containing building products, asserted in eight separate lawsuits and encompassing 53 separate buildings, constituted a single "occurrence." The court reasoned that the "cause" of all of the claims "should be characterized as the continuing process of the manufacture and sale of asbestos containing products." As such, the insured only needed to pay a single "occurrence" deductible as to all of the claims.[3]

- **The "Effects" Test** is employed by a minority of jurisdictions. As explained by the Louisiana Supreme Court in *Lombard v. Sewage & Water Bd.,* the number of "occurrences" is counted "from the point of view of the many persons whose property was damaged" even when that damage has a single root cause. *Lombard* involved claims by 119 plaintiffs for damage to their buildings caused by a canal construction project. The project lasted more than one year, spanning two policy periods, each with "occurrence" limits of $50,000 and aggregate limits of $100,000. By deeming each plaintiff's claim a separate "occurrence," the court maximized the policy limits available to the insured.[4] Similarly, in *Kuhn's of Brownsville v. Bituminous Cas. Co.,* the Tennessee Supreme Court held that the collapse of two separate buildings, with different owners, constituted two separate "accidents" even though both were caused by a single excavation project.[5]

- **The "Unfortunate Events" Test** is a cousin of the "cause" test, which has been adopted most notably by New York. As explained in *Appalachian*

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[3] 268 Ill. App. 3d 598, 607, 647-51, 643 N.E.2d 1226, 1232, 1257-60 (1994).

[4] 284 So. 2d 905, 915-16 (La. 1973).

[5] 197 Tenn. 60, 270 S.W.2d 358 (1954). *Kuhn's* involved a policy written on an "accident," not "occurrence" basis, and the term "accident" was not defined.

It is unclear that Tennessee would continue to adhere to the "effects" test if presented with a standard-form definition of "occurrence," as applied to the typical mass or serial tort claims – e.g., claims involving product liability, environmental injury, or negligent supervision of perpetrators of sexual molestation. The only recent Tennessee insurance case of which we are aware adhering to the "effects" test is *American Modern Select Insurance Co. v. Humphrey*, No. 3:11-CV-129, 2012 U.S. Dist. LEXIS 20800, 2012 WL 529576 (E.D. Tenn. Feb. 17, 2012). The dispute arose from a simultaneous attack upon the plaintiff by seven dogs, all owned by the same couple. The court held there was a single "occurrence" because there was a single victim but the same interpretation almost certainly would have been reached under the "cause" or "unfortunate event" test.

Insurance. Co. v. General Electric Co., this approach considers, not just to the root cause of the claim, but also:

> whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors.

Appalachian v. GE held that each claimant alleging bodily injury from exposure to asbestos in turbines manufactured by the insured represented a separate "occurrence" because of the lack of "commonalities" in terms the time, place, and duration of the exposure.[6]

All three approaches are malleable and often result in unpredictable rulings. This unpredictability is exemplified by the contradictory decisions by differing courts, all purporting to apply the majority "cause" test or the closely-related "unfortunate event" test, when confronted with asbestos-related claims. As noted above, in *U.S. Gypsum*, the Illinois Appellate Court applied the "cause" test to conclude that the manufacturer's continued production and sale of its products over decades constituted a "single" occurrence, requiring the insured to pay only one deductible. That was the majority view among "cause" jurisdictions, when *U.S. Gypsum* issued in 1994.[7] One year later, in *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, the Second Circuit reached the opposite conclusion, holding that each separate installation of the insured's asbestos-containing products constituted a single "occurrence" under both New York's "unfortunate event" and Texas's "cause" tests.[8] The Second Circuit reached this conclusion by reversing the rationale of the Illinois Appellate Court: Whereas *U.S. Gypsum* held that a manufacturer's liability for the claims arose from the single, continued act of manufacturing the products, unlike an installer's multiple separate acts of installation,[9] the Second Circuit reasoned a manufacturer's liability results from "the presence of [asbestos-containing materials] each time the products were installed in the property of third parties."[10] The Wisconsin Supreme Court in *Plastics Engineering Co. v. Liberty Mutual Insurance Co.*,

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[6] 8 N.Y.3d 162, 171-72, 174, 863 N.E.2d 994, 999, 1002 (2007).

[7] *See U.S. Gypsum*, 268 Ill. App. 3d at 649-50, 643 N.E.2d at 1258-59 (collecting cases).

[8] 73 F.3d 1178, 1212-14 (2d Cir. 1995).

[9] 268 Ill. App. 3d at 651, 643 N.E.2d at 1260.

[10] 73 F.3d at 1214.

applied the "cause" test to likewise hold that the claims of each separate plaintiff asserting asbestos-related bodily injury claims was a separate "occurrence."[11]

More recently, courts applying the "cause" test seem to have been influenced by the "unfortunate events" approach and focused more on the actual event(s) giving rise to the insured's liability, rather than in more remote "causes" of the claims. This is seen in product defect cases in which the courts consider the insured's place in the chain-of-distribution, treating claims against: (a) a manufacturer, whose liability arises from a design defect present in an entire product line, as a single "occurrence"; (b) a distributor or shipper as correlating to the number of discrete shipments of the product; and (c) a builder or installer as equaling the number of buildings or installations in which the product was incorporated.[12]

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[11] 2009 WI 13 ¶¶ 29-43; 315 Wis. 2d 556, 571-78; 759 N.W.2d 613, 620-23.

[12] **Cases finding a single "occurrence" as to claims involving defective products against the manufacturer**: *United Conveyor Corp. v. Allstate Ins. Co.*, 2017 IL App (1st) 162314 ¶¶ 31-33, 92 N.E.3d 561, 569-70 (only single "occurrence" applied to thousands of bodily-injury asbestos-related claims against manufacturer of conveyor systems; therefore only a single "occurrence" limit of liability was available, rather than higher aggregate limits); *Westchester Supply Surplus Lines Ins. Co. v. Maverick Tube Corp.*, 722 F. Supp. 2d 787, 797-98 (S.D. Tex. 2010) (Mo. Law) (claims arising from defective drill casings incorporated into four gas wells were a single "occurrence" because "the property damage in the present case arose out of a single manufacturing defect and the manufacturer is the insured"); *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co.*, C.A. No. 99C-12-253 (JTV), 2009 WL 1915212 (Del. Super. June 30, 2009) (thousands of claims asserted against manufacturer of acetal resin used in plumbing systems constituted a single "occurrence"); *Nat'l Union Fire Ins. Co. v Puget Plastics Corp.*, 649 F. Supp. 2d 613, 628 (S.D. Tex. 2009) ("there is a single occurrence when multiple claims have arisen from the policyholder's manufacture and sale of the same product to many customers"); *Associated Indem. Corp. v. Dow Chemical Co.*, 814 F. Supp. 613 (E.D. Mich. 1993) (claims by 40+ rural co-ops for leaks in gas pipelines extruded from defective resin manufactured by the insured constituted a single occurrence under cause test). *But see Irving Materials, Inc. v. Zurich Amer. Ins. Co.,* 1:03-CV-361-SEB-JPG, 2007 WL 1035098 (S.D. Ind., March 30, 2007) (where insured manufactured ready-mix concrete on "as needed basis," using 12 "standard formulations" and "numerous specialty mixes," then "each contract between [the insured] and a third party requiring … deliver[y or] a specific formulation of concrete" was separate "occurrence").

Cases equating the number of shipments in claims against distributors and shippers: *Axis Ins. Co. v. Buffalo Marine Svcs., Inc.*, Civ. No. H–12–0178, 2013 WL 5231619 at *16 (S.D. Tex. Sept. 12, 2013) (in claims against barge operator, each

Some courts are candidly results-oriented, counting the number of "occurrences" differently, depending upon whether it favors the insured or insurer. In *Thebault v. American Home Assurance Co.*, the Louisiana Court of Appeal held there was only a single "occurrence" as applied to 41 claims arising from the failure of a back-up generator during Katrina; the policy had a $50,000 self-insured retention, with no aggregate retention.[13] The court offered two explanations for distinguishing the case from *Lombard*, which had applied the "effects" test such that each plaintiff's claim equaled a separate "occurrence": (a) unlike *Lombard*, which involved a "series of events occurring over a significant period," *Thebault* involved a "single, uninterrupted" loss of power, which, given the policy language, could not be viewed as giving rise to separate occurrences under the policy "occurrence" definition; and (2) if each claim were a separate "occurrence," then the insured would have no coverage at all, as none exceeded the $50,000 self-insured retention.[14] The second explanation seems closer to the court's real reasoning as the "occurrence" definition in *Lombard* was not that different.[15] *Thebault* may also reflect that Louisiana is in the process of substituting the "unfortunate events" test for the "effects" approach.

In contrast to *Thebault*, the Illinois Appellate Court in *United Conveyor Corp. v. Allstate Insurance Co.*, held that it was immaterial that prior case law involved the applicable deductible whereas the current dispute related to the policy limits. "[I]f an insured's conduct is a single occurrence for purposes of

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shipment of contaminated petroleum was separate "occurrence"); *Michigan Chem. Corp. v. Am. Home Assur. Co.,* 728 F.2d 374, 382–83 (6th Cir.1984) (Ill. law) (each shipment to distributor of defective livestock feed was separate "occurrence" because manufacturer's liability did not arise until it shipped defective product to distributor).

Cases against installers or contractors, basing the number of "occurrences" on the number of buildings or installations: *Nicor, Inc. v. Associated Elec. & Gas Ins. Svcs. Ltd.*, 223 Ill. 2d 407, 431-32, 860 N.E.2d 280, 294 (2006) (in claims arising from removal and replacement of residential gas meters, which resulted in spillage of mercury, each separate job constituted separate "occurrence"); *Lennar Corp. v. Great Amer. Ins. Co.*, 200 S.W.3d 651, 682-83 (Tex. App. 2006) (as to claims against general contractor arising from installation of EIFs in homes, each home was a separate "occurrence"), *abrogated in part on other grds.*, *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyds' London*, 327 S.W.2d 3d 118 (Tex. 2010).

[13] 195 So. 3d 113 (La. App. 2016).

[14] *Id.* at 118-19.

[15] *See* 214 So. 2d at 915 ("occurrence" definition included "repeated exposure to conditions" and that "[a]ll damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one concurrence").

establishing the applicable deductible, it should be the same for purposes of setting the limits of the insurer's liability."[16]

II.
Counting the Number of Occurrences in Multilayer Coverage Situations

Not unlike the conflicts addressed in Section I, in which policyholders and their primary insurer dispute the number of occurrences, the same conflicts arise between primary and excess insurers when asymmetric primary occurrence and aggregate limits are mirrored in the retained limits of the excess policy. Such a dispute arose in *Evanston Insurance Co. v. Mid-Continental Casualty Co.*, when a driver lost control of his truck, resulting in a series of collisions over a 10-minute period. The primary policy limits were $1 million per "accident," with "accident" defined similarly to the standard "occurrence" definition. The applicable Texas law uses the "cause" test, with a focus on the "immediate," not "overarching," cause of the claims. Predictably, the excess insurer contended that each collision was a separate "accident," while the primary insurer urged the contrary. The court agreed with the primary insurer because the cause of the entire series of events was the "continuous negligence" of the truck driver, who failed to apply the brakes, unbroken by any intervening cause of injury. This unbroken chain of proximate causation distinguished the case from, for example, negligent hiring and supervision claims arising from the insured's employee's molestation of multiple children, in which multiple occurrences were found because the overarching negligence of the employer was broken by the intervening intentional torts of the employee.[17]

Travelers Property Casualty Co. v. Continental Casualty Co. involved a more complex conflict between the primary and excess insurers as to the number of "occurrences." In that case, 19 plaintiffs, who sustained burns as a result of defective packaging of fuel gel, sued the manufacturer of the defective bottles, which had been distributed over a period of several years. Travelers, as primary insurer, had issued a series of five one-year liability policies, each with $950,000 "occurrence" limits and $5 million aggregate limits. The Travelers policies also

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[16] 2017 IL App (1st) 162314 ¶ 32, 92 N.E.3d at 569-70. *See also Michigan Chem.* 28 F.2d at 380 n.7 (rejecting the argument that the number of "occurrences" depended on whether it applied to the deductible or policy limits) ("[O]nce courts establish a legal rule, such as how the number of occurrences is to be determined, any party is entitled to rely upon that rule in future litigation.").

[17] 909 F.3d 143 (5th Cir. 2018).

contained a "non-cumulation" clause that essentially restricted coverage to a single $950,000 "occurrence" limit as to claims for which injury spanned multiple Travelers policy periods. Sitting above each Travelers policy was a Continental excess policy with $25 million policy limits. After incurring $950,000 in settling some of the claims, Travelers tendered the remaining claims to Continental, on the ground that all of the claims constituted a single "occurrence," with recovery capped at $950,000 pursuant to the non-cumulation clauses. Applying Georgia's version of the "cause" test, the court agreed with Travelers that there was only a single "occurrence" because all of the claims arose from the same product defect.[18]

Evanston v. Mid-Continental and *Travelers v. Continental* are both instructive because of the policyholder's absence from the dispute. In *Evanston,* even before the coverage action was filed, the underlying suits were settled with the primary insurer contributing $1 million, consistent with its position that only a single "accident" had occurred, and the excess insurer funding the rest, thereby mooting any further exposure to the insured.[19] In *Travelers*, evidently the insured had sufficient excess policy limits – as well as the motivation of minimizing the size of its self-insured retention – that it was content to allow *Travelers* to urge that its primary policies were responsible for only $950,000 total rather than the $25 million in aggregate Travelers limits if multiple claims had been involved.

Resolution of these inter-layer disputes are often messier and the policyholder may get caught in the cross-hairs. The excess insurer may adhere to its objection that the primary policy limits have not been exhausted and decline to participate when a settlement opportunity presents itself. The primary insurer and policyholder then must assess whether to front the cost of the entire settlement, and pursue the excess insurer for sums they believe it owes. Where the primary policy limits are not eroded by defense costs, the primary insurer may decide to front the entire settlement costs, reserving its right to pursue the excess insurer for the sums above the single "occurrence" limit. The primary insurer's funding of the entire settlement in these circumstances is more likely when the primary insurer is persuaded that the insured's liability for the claims is strong and the underlying plaintiff's settlement demands are reasonable; it is notable that, in *Evanston v. Mid-Continental*, the truck driver's liability for the accident

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[18] 226 F. Supp. 3d 1359 (N.D. Ga. 2017). Although not stated directly in the opinion, one presumes that the insured concurred in the primary insurer's position that there was a single occurrence. The policyholder's self-insured retention was $50,000 per occurrence for the first four Traveler policies, and $100,000 per occurrence for the last Travelers policy.

[19] *See* 909 F.3d at 146.

was evidently clear. If the primary policy limits are eroded by defense costs and/or the primary insurer does not perceive that the settlement demands are reasonable, the insured may find itself with the unenviable choice of contributing to the settlement itself or paying defense costs once the primary carrier declares its single "occurrence" limit exhausted, if the excess insurer refuses to assume responsibility for the claim.

Another distinguishing feature of *Evanston v. Mid-Continental*, compared to some of the hardest "real-world" examples, is that it involved a single incident resulting in immediate injury to a small number of individuals. As such, it was relatively easy for the policyholder and the insurers to form a relatively complete evaluation from the outset of both their potential exposure for the underlying claims and their preferred interpretation of the number of "accidents." And, even though the claims involved in *Travelers v. Continental* arose from defective bottles that were distributed over several years, the number of claims was known within a few years, as the defect resulted in explosion of the fuel and instant injury to the users, rather than an insidious latent injury.[20]

When long tail claims are involved, these evaluations are much more complex as the full scope of those claims only becomes understood over time. For example, in the early years of asbestos litigation, many insureds were most focused on reducing the amount paid in deductibles under their primary policies, because settlements were small and rarely exceeded those deductibles. What these policyholders did not appreciate was that: (a) as the plaintiff's bar became more adept, the size of the settlements and verdicts would increase, as would the number of claims;[21] (b) unlike the primary policies for which defense costs did not erode limits, defense costs would erode their excess limits; and (c) if there were only a single "occurrence," recovery might be diminished under excess policies with "non-cumulation" clauses and under multi-year excess policies with a single "occurrence" limit, even when they carried separate annual aggregate limits.[22]

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[20] *See* 226 F. Supp.3d at 1361, 1368.

[21] *See generally* Francis E. McGovern, *Resolving Mass Tort Litigation*, 69 B.U.L. Rev. 659 (1989) (discussing the "maturation process" of mass tort litigation; in the early years it is difficult to measure the insured's exposure because the claims have not undergone a critical mass of discovery, verdicts, and appeals); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 948-50 & nn. 33-40 (May 1995) (discussing McGovern's theory of "maturation" of mass torts) ("Asbestos crossed a kind of developmental threshold in the early 1990s ….").

[22] *See, e.g., Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330 (3rd Cir. 2005) (Pa. law) (Liberty issued 10 successive excess policies, each of which contained "non-

III.
Batch Clauses

A. What are "Batch" Clauses?

"Batch clauses" are endorsements typically added to liability policies for insureds in industries in which defective manufacture or storage may result in deviant "lots" or "batches" of a product. Manufacturers and distributors of food, drug, medical device, or chemical products are among the insureds most likely to have "batch clauses" endorsed on their policies. The gist of such clauses is to deem multiple injuries or claims arising from the same defective batch or lot of the product as constituting a single "occurrence." At least in theory, by using a batch clause, the policy creates greater certainty as to the number of "occurrences" rather than relying upon the judge-made common law under the "cause," "effect," or "unfortunate event" tests to determine the number of "occurrences."

There is no standard, industry-wide batch clause. Individual insurers may have their own standard form. Compare this batch clause from a primary policy issued by Travelers:

> The definition of "occurrence" in Section V - Definitions is amended to include the following:
>
> > All actual or alleged damages arising out of "bodily injury" or "property damage" to which this insurance applies, and which arises out of the same:
> > a. Lot or lots of "your product" manufactured, handled, sold, acquired or in any way distributed or disposed of by or for any insured; or
> > b. Supervision, recommendations, warnings, instructions or advice provided or which should have been provided in connection with "your product";
> > shall be considered as arising out of the same "occurrence."[23]

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cumulation" clause that provided that, as to claims giving rise to injury in multiple policy periods, insured was restricted to recovering a single "occurrence" limit as to all of the years; pursuant to "cause" test, there was only a single "occurrence" as to thousands of asbestos bodily injury claims asserted against product manufacturer and therefore insured could not "stack" the policy limits of all 10 excess policies).

[23] *See Travelers v. Continental*, 226 F.3d at 1363.

with this batch clause from an AIG 2006 *umbrella* policy form:

> With respect to the **Products-Completed Operations Hazard,** all **Bodily Injury** or **Property Damage** *arising out of one* ***Lot or Batch*** of products prepared or acquired by you, shall be considered as arising out of one **Occurrence.** Such **Occurrence** shall be subject to the Each Occurrence and **Products-Completed Operations Hazard** Aggregate Limits of this policy show, in Item 3. of the Declarations.
>
> Notwithstanding the foregoing, it is understood and agreed that *nothing in this endorsement shall* be interpreted to:
>
> 1. *provide coverage for* ***Bodily Injury*** *or* ***Property Damage*** *which occurs outside of the* ***Policy Period*****;**
>
> 2. *recognize erosion of the limits of* ***Scheduled Underlying Insurance*** as a result of any underlying **Lot** or Batch provision which provides coverage *for Bodily Injury or Property Damage which occurs outside of the* ***Policy Period*** *of this policy;*
>
> 3. *provide* ***Lot or Batch*** *coverage which is broader than that provided under* ***Scheduled Underlying Insurance.***
>
>   *If applicable* ***Scheduled Underlying Insurance*** *defines the term* ***Lot or Batch,*** *the term shall have the meaning given to it under applicable* ***Scheduled Underlying Insurance.***
>
>   If **Scheduled Underlying Insurance** does not define **Lot or Batch**, the term will have the following meaning:
>
>   *Lot or Batch* means that quantity of a product *produced at a single production facility within a single manufacturing cycle and specifically marked with a date, distinctive combination of letters, numbers or symbols*, or any combination of any of the foregoing, from which it can be determined that an individual item of the product was produced during that cycle. *Lot* ***or Batch*** *includes*:
>
>   a.) the handling, selling, distribution, sharing or disposing of such quantity of products; and

b.) *the providing of or failure to provide warnings for such quantity of products.*

(NU Form 91003 (5/06); bold in original, referring to defined policy terms; italics added for emphasis.)[24]

Notably, the Travelers primary batch clause and AIG umbrella batch clause have very different language as applied to "duty to warn" claims. The Travelers policy language states that all claims relating to allegedly defective warnings, instructions, and the like are "considered as arising out of the same 'occurrence'" without regard to whether the products are from the same "lot." The AIG language is to the contrary; duty to warn claims are treated as pertaining to the same occurrence only if they relate to the same "lot" or "batch."

One other important feature of the AIG umbrella batch clause is the provision incorporating the definition of "batch" or "lot" contained in scheduled underlying insurance, if there is one. Imagine the confusion if an insured had primary coverage with the Travelers batch clause treating all duty-to-warn claims relating to the insured's "product" as arising from a single "occurrence," but the batch clause of the AIG umbrella, which counts each "lot" separately to determine the number of "occurrences" arising from duty-to-warn claims.

However, in our hypothetical of Travelers primary coverage and AIG umbrella coverage under the above-quoted batch clause provisions, there still is room for disputes as to whether and when the coverage under the AIG umbrella policy attaches. The AIG umbrella merely follows form to the definition of a "batch" or "lot," not the entirety of the underlying batch clause. As illustrated in the discussion of *National Union v. Donaldson*, below, batch clauses may also contain language that affects the trigger of coverage by pulling all claims arising from injuries occurring over multiple policy periods into the first triggered policy period. (See pp. 14-16, *infra*.) The language in paragraphs "1" and "2" of the AIG umbrella clause, quoted above, would seemingly prevent that sort of cumulation into a single policy period for the AIG umbrella policies, even when the underlying scheduled policy contained such language. In such circumstances, the policyholder could face a coverage gap between the deemed exhaustion of the primary coverage before the umbrella coverage attached.

Even when policies contain a batch clause, disputes arise as to whether it applies at all to a series of claims arising from defects in mass-produced products.

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[24] *See* Amended Complaint, Ex. 14 in *Medline Indus., Inc. v. Landmark American Ins. Co.*, No. 12-cv-5464, Doc. No. 6-11, Page ID No. 755 (N.D. Ill. Sept. 13, 2012).

For example, in *Conagra Food, Inc. v. Lexington Insurance Co.*, Lexington's umbrella policy sat above a self-insured retention of $1 million. The insured faced thousands of bodily injury claims arising out of salmonella-tainted peanut butter. The policy contained a standard form occurrence definition, which was modified by a batch clause that defined a "lot" or "batch" as "a single production run at a single facility not to exceed a 7 day period." All of the peanut butter had been produced at a single plant, but the production run exceeded seven days. Arguing that the purpose of the batch clause had been to expand, not contract, coverage, the insured persuaded the court that the batch clause should be disregarded. The court instead relied upon the policy's basic "occurrence" definition. Under Delaware's "cause" test, this resulted in the policyholder only needing to satisfy a single "occurrence" SIR. As collected in *Conagra*, there are many courts that have agreed with the position that the regular "occurrence" definition, rather than a batch clause, applies if application of the batch clause would result in reducing the amount of coverage available to the policyholder.[25]

B. Anatomy of a Multi-Layer "Batch Clause" Dispute: *National Union v. Donaldson*

A notable example of a batch clause dispute that ensnared the policyholder and both its primary and excess insurers is addressed in a series of decisions rendered by Judge Tunheim of the District of Minnesota in *National Union Fire Insurance Co. v. Donaldson Co.*[26] The underlying lawsuits involved a defectively designed plastic component that the insured manufactured at two different plants over the course of several years for incorporation into the air-intake system of diesel trucks; claims were asserted by approximately 15 individual truck purchasers and by a distributor, encompassing a total of approximately 100 trucks.[27] The policies consisted of (a) consecutive AIG primary policies issued from 1996 to 2002, each of which carried a $500,000 per-occurrence deductible and

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[25] 21 A.3d 62, 69-72 (Del. 2011).

[26] See Civ. No. 104948, 2012 U.S. Dist. 44931 (D. Minn. March 30, 2012) ("*Donaldson I*"); 2015 U.S. Dist. LEXIS 35499, 2015 WL 1292561 (D. Minn. March 23, 2015) ("*Donaldson II*"); and 2017 U.S. Dist. LEXIS 201328, 2017 WL 6210915 (D. Minn. December 6, 2017) ("*Donaldson III*).

There were several other decisions rendered in *Donaldson* addressing questions not directly relating to the application of the "batch clause." *See, e.g., National Union v. Donaldson*, 272 F. Supp. 3d 1099 (D. Minn. 2017) (addressing insured's bad faith claims arising from primary insurer's changed positions as to the number of $500,000 deductibles the insured was required to pay).

[27] *See Donaldson I*, 2012 U.S. Dist. 44931 at *3-*5.

$1 million per-occurrence and aggregate limits;[28] and (b) first layer excess policies issued by Federal that sat immediately above and followed-form to each AIG primary policy.

The Batch clause in the AIG primary policies provided that the term "occurrence" was amended such that:

> [all] "property damage*" arising out of and attributable directly or indirectly to* the continuous, repeated or related exposure to *substantially the same general conditions affecting one lot of goods or products manufactured, sold, handled or distributed* by you or others trading under your name, shall be deemed to result from a single "occurrence." *Such "occurrence" will be deemed to occur with the first injury notified to you during the policy period.*

(Italics added.)[29] Thus, not only did the Batch clause treat claims arising from a single "batch" as constituting a single "occurrence," it also treated the injuries from all such claims from a single "batch" as occurring during the policy period in which the policyholder received first notice of injury.

The underlying claims settled in two stages, consisting of approximately $214,000 paid to the various individual truck purchasers, followed by a $6 million settlement of the dealer's claims. The settlements were funded by the primary and excess insurers subject to a reservation of rights as to the amounts owed by each, and by the insured as deductible(s).[30]

The AIG primary policies did not define the term "lot." The court therefore relied upon dictionary definitions to construe "lot" as meaning "each type of unique product as a distinct group, kind, or sort" wiithout any "arbitrary temporal limitation."[31] The insured and primary insurer urged that there was only a single

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[28] The existence of $1 million aggregate limits in the AIG policies is inferred. None of the opinions states that AIG policies had any aggregate limits at all. But the court's ultimate determination that there were two "lots" – and hence two "occurrences" – obligating the insured to pay two deductibles but imposing merely a $1 million obligation on AIG makes sense only if the AIG primary policies had $1 million aggregate limits. *See Donaldson III*, 2017 U.S. Dist. LEXIS 201328 at *9-*10.

[29] *Donaldson I*, 2012 U.S. Dist. LEXIS 44931 at *10.

[30] *Donaldson III*, 2017 U.S. Dist. LEXIS 201328 at *3-*4.

[31] *Donaldson* I, 2012 U.S. Dist. LEXIS 44931 at *45-*46, quoted in *Donaldson II*, 2015 U.S. Dist. LEXIS 35499 at *28.

"lot" at issue because all of the claims arose out of a single design defect, whereas the excess insurer urged that there were 22 separate "lots," based upon the frequency of "break[s] in production" and the subsequent reassembly of the product molds "to continue production, even if the molds were the same and the product designs and materials were unchanged."[32]

Ultimately, the court concluded that there were two "lots" based upon "differences in their product numbers, specifications, and base materials [that] are significant enough to treat each as a distinct group, kind, or sort, and, therefore, a separate lot." This result was very much dependent on the actual wording of the batch clause (as it should be), which contained no temporal limitation as to the duration of manufacture of any single "lot."[33]

The parties also disputed the policy periods to which the claims should be assigned. The insured and primary carrier urged that they all should be assigned to the 1999-2000 policy period, relying upon the last sentence of the Batch Clause and the timing of the insured's first awareness of any claim; the court agreed.[34] Federal argued that the claims should be allocated to all six policy periods, which would have delayed the exhaustion of the underlying limits. Federal initially reasoned that the claims entailed a minimum of seven lots and that all six policy periods were triggered because the insured's first notice of claims needed to be separately determined as to each individual lot. After the court rejected Federal's contention as to the number of lots, Federal argued that all six policy periods were nonetheless involved because, even though its policies followed form to the AIG primary policies, the coverage could not be all lumped into Federal's 1999-2000 umbrella because of explicit langage in that policy requiring that "injury … takes

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[32] *Donaldson II,* 2015 U.S. Dist. LEXIS 35499 at *26-*28. The description above glosses over significant disagreements between the insured and AIG over the course of the litigation as to the number of occurrences that existed for purposes of computing the number of $500,000 deductibles under the AIG policies. Although AIG had initially treated all of the claims as entailing only a single "occurrence," assigned to a single policy period for which only a single deductible was owed, AIG subsequently contended that the insured was required to pay a separate $500,000 deductible for each of the six policy periods – i.e., $3 million total. *See Donaldson I*, 2012 U.S. Dist. LEXIS 44931 at *11-*16.

[33] *Donaldson II*, 2015 U.S. Dist. LEXIS 35499 at *29-*30. Compare the batch clause in *Conagra*, quoted above, that limited the size of any "lot" to a seven-day production run. (See p. 13, *supra*.)

[34] *Id.* at *34-*35.

place during the Policy Period of this policy." The court rejected this argument too.[35]

The upshot of the court's rulings was that the insured owed two deductibles totalling $1 million, AIG as primary insurer owed $1 million based on the $1 million aggregate limit of its 1999-2000 policy, and coverage for the remainder of the settlements was owed by Federal.[36]

IV.
Concluding Remarks

After reviewing the myriad coverage disputes that arise from uncertainty as to the number of "occurrences" or "batches," one might wonder why anyone buys insurance where the "occurrence" and "aggregate" limits are not identical, or that lack aggregate SIRs or deductibles. From a claims perspective, it would be much simpler to determine the scope of coverage if there never was asymmetry between the "occurrence" and "aggregate" limits, deductibles, or SIRs of any policy.

This observation would ignore the equally important underwriting perspective, however. Higher "occurrence" limits that match a policy's aggregate limit or an aggregate deductible/ SIR that capped the insured's deductible/ SIR may not be available except at a much higher premium. For insureds who manufacture or distribute a wide range of products, for example, the availability of multiple "occurrence" limits may have considerable value even if the full amount of their aggregate limits is not available to cover the totality of claims arising from defects in a specific product that is deemed a single "occurrence."

In the meantime, so long as policies are written with asymmetric "occurrence" and aggregate limits, deductibles, or SIRs, coverage lawyers for both policyholders and insurers can expect to continue to represent their clients in self-interested litigation designed to count the number of "occurrences" in a manner that benefits their respective clients.

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[35] *Id.*; *Donaldson III*, 2017 U.S. Dist. LEXIS 201328 at *9-*10.

[36] *Donaldson III*, 2017 U.S. Dist. LEXIS 201328 at *8-9.