



# Number of Occurrences

By

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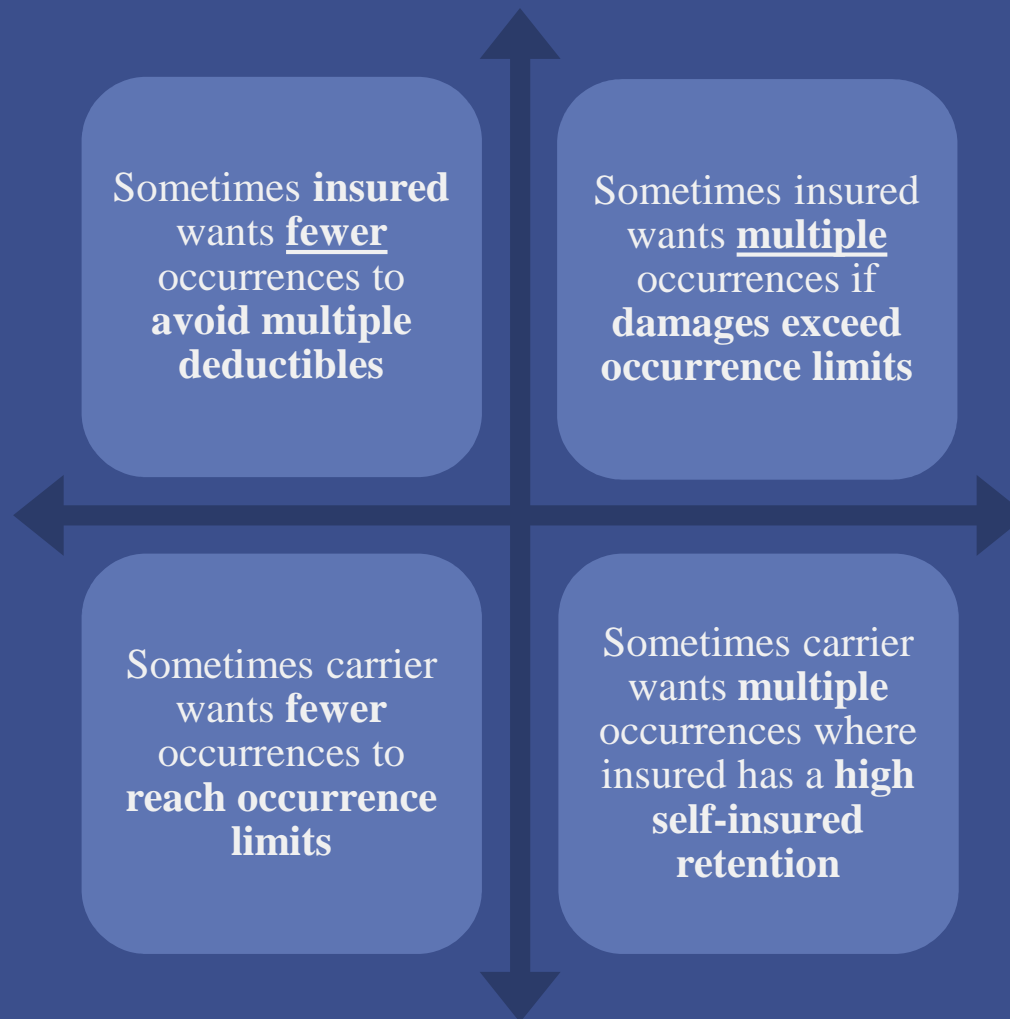
# Policy Definition of Occurrence

“Occurrence” means “an accident, including continuous or repeated exposure to the same general harmful conditions.”

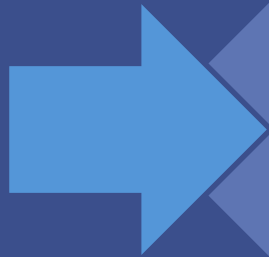
# Number of Occurrences: Conflicting Effects on Coverage

- The standard policy definition of “Occurrence” is not ambiguous.
- The definition of “occurrence” cannot be interpreted in favor of the insured because “the interpretation of ‘occurrence’ favorable to the insured in this case will not necessarily be the interpretation favorable to the insured in the next case.” – *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526 (5th Cir. 1998).

# Number of Occurrences: Conflicting Effects on Coverage

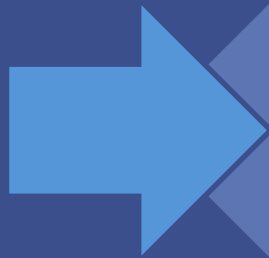


# Number of Occurrences: Conflicting Effects on Coverage



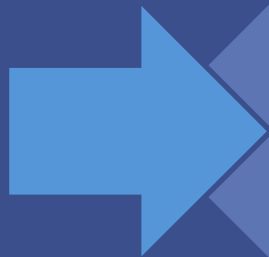
## AGGREGATE LIMITS

*Foust v. Ranger Insurance Co.*



## SELF INSURED RETENTIONS

*Lennar Corp v. Great American Insurance*



## PRIMARY v. EXCESS COVERAGE

*Evanston Ins. v. Mid-Continent Casualty*

# Number of Occurrences: Tests

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graph LR; A[Cause Test] --> B[Number of occurrences determined by number of underlying causes]; C[Effects Test] --> D[Number of occurrences determined by number of parties damaged by events];
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Cause Test

Number of  
occurrences  
determined by  
number of  
underlying causes

Effects Test

Number of  
occurrences  
determined by  
number of parties  
damaged by events

# Number of Occurrences: Tests

“Texas courts agree that the proper focus in interpreting ‘occurrence’ is on the events that cause the injuries and give rise to the insured’s liability, rather than on the number of injurious effects.”

— *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526 (5th Cir. 1998).

# Number of Occurrences: Tests

## Liability Triggering Event

- Liability stems from the liability-causing event, such as a contractual obligation, no matter how many instances of damage

## Independent Cause Test

- Whether there was one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage



# Liability Triggering Event

- *Maurice Pincoffs, Co. v. St. Paul Fire Marine Insurance Co.*, 447 F.2d 201 (5th Cir. 1971).
  - Wholesaler received contaminated imported birdseed
  - Wholesaler sold the seed to eight vendors that then sold the seed to many individual bird owners, killing many birds
  - Primary carrier argued one occurrence & excess carrier argues multiple occurrences



Argentinian  
Supplier

Importer  
(Insured)

Eight  
Vendors

Many  
Bird owners

# Liability Triggering Event

- *Maurice Pincoffs, Co. v. St. Paul Fire Marine Insurance Co.*, 447 F.2d 201 (5th Cir. 1971).
  - Eight occurrences for the eight sales to the vendors
  - The “occurrence” to which the policy must refer is the occurrence of the events or incidents for which the insured *is liable*.
  - “[I]t was not the act of contamination which subjected [the insured] to liability. . . . It was the sale that created the exposure to ‘a condition which resulted in property damage neither expected nor intended from the standpoint of the insured,’ under the definition of the policy.”

# Liability Triggering Event

- *Lennar Corp. v. Great American Insurance Co.*, 200 S.W.3d 651 (Tex. App.— Houston [14th Dist.] 2006)
  - 450 homes built with defective EIFS that caused damage to property
  - Self-insured retention of \$250,000
  - Insured contended there was only one “occurrence” because there was only one cause of damage—EIFS’ repeated and continuous entrapment of water.

# Liability Triggering Event

- *Lennar Corp. v. Great American Insurance Co.*, 200 S.W.3d 651 (Tex. App.— Houston [14th Dist.] 2006)
  - The court disagreed, relying on *Maurice Pincoffs*, to find that each home constitutes a separate “occurrence.”
  - Lennar was not the designer or the manufacturer of EIFS, so Lennar’s liability stemmed from Lennar’s incorporation of the EIFS in each home. Rather, Lennar’s liability stemmed from the fact that it built and sold homes with EIFS.

# Liability Triggering Event

- *Trammel Crow Residential Co. v. St. Paul Fire & Marine Ins. Co.*, No. 3:11-cv-02853-N, at 2-3 (N.D. Tex. Jan. 21, 2014).
  - Developer of a multi-family housing project sued by the HOA for defective construction
  - Insured sought excess coverage for out of pocket payments over the limits of the primary policies
  - the Excess insurer disputed the number of occurrences involved.

# Liability Triggering Event

- *Trammel Crow Residential Co. v. St. Paul Fire & Marine Ins. Co.*, No. 3:11-cv-02853-N, (N.D. Tex. Jan. 21, 2014).
  - The court found that the liability arose from the “general duties as a developer—the sale of the property.”
  - As a result, the single cause of liability was the sale of the homes
  - As the sale was the cause that gave rise to the insured’s liability, the sale itself constituted the occurrence.

# Independent Cause Test

- *Goose Creek Consolidated ISD v. Continental Casualty Co.*, 658 S.W.2d 338 (Tex. App.—Houston [1st Dist.] 1983).
  - Two separate fires were set at two locations blocks apart at different times
  - Insured only wanted to pay **one deductible** because both fires were likely caused by the same group or individual
  - The court found the fires were not part of “a process of continuum” but instead “two fires distinguishable in space and time occurred and that one did not cause the other.”

# Independent Cause Test

- *Foust v. Ranger Insurance Co.*, 975 S.W.2d 329 (Tex. App.—San Antonio 1998).
  - Herbicide drifted onto neighboring tracts of land
  - Several neighboring homeowners sought damages
  - 100k per occurrence limit with 200k aggregate limit
  - Insured wanted **multiple occurrences** to reach aggregate limit of the policy



# Independent Cause Test

- *Foust v. Ranger Insurance Co.*, 975 S.W.2d 329 (Tex. App.—San Antonio 1998).
  - Factors Argued:
    - Crop dusting took place over 3 hours
    - Plane landed several times
    - More than one field damaged
    - Altitude changed
    - Wind changed

# Independent Cause Test

- *Foust v. Ranger Insurance Co.*, 975 S.W.2d 329 (Tex. App.—San Antonio 1998).
  - The court ruled any change between the application of the herbicide was “incidental”
  - The crop dusting was all “repeated exposure to the same general conditions—the drift of a herbicide which was being applied to crops on adjoining property.”

# Independent Cause Test

- *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526, 530 (5th Cir. 1998).
  - Two instances of abuse inside HEB stores
  - Same employee in the same store a week apart
  - Victims filed two separate lawsuits
  - HEB did not want to pay a self-insured retention for both suits

# Independent Cause Test

- *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526, 530 (5th Cir. 1998).
  - When the underlying basis for liability is negligent supervision, but the damage is caused by an intervening intentional tort, the court cannot look past the immediate cause of the damage for the purpose of the insurance policy
  - “[I]f one cause is interrupted and replaced by another intervening cause, the chain of causation is broken and more than one occurrence has taken place.”

# Independent Cause Test

- *Seahawk Liquidating Trust v. Certain Underwriters at Lloyds London*, 810 F.3d 986 (5th Cir. 2016).
  - Oil rig damaged by a February storm and by a July storm
  - “When an occurrence is technically defined to include a series of losses arising from the same event, it includes only those losses *proximately caused* by that event.”

# Independent Cause Test

- *Evanston Ins. Co. v. Mid-Continent Casualty Co.*, 909 F.3d 143 (5th Cir. 2018).
  - Truck driver hit three different cars going through a toll booth. At no point did driver hit his breaks
  - Dispute between primary and excess insurer
  - District Court, applying *Goose Creek* and *H.E.B.*, found multiple occurrences

# Independent Cause Test

- *Evanston Ins. Co. v. Mid-Continent Casualty Co.*, 909 F.3d 143 (5th Cir. 2018).
  - Fifth Circuit reversed
  - Noted that *HEB* was misconstrued to mean that an “overarching cause” can never constitute a single occurrence.”
  - Found that *HEB* suggests that an “overarching cause should be ignored where an intervening cause—like an intentional tort—breaks the chain of causation.”

# Independent Cause Test

- *Evanston Ins. Co. v. Mid-Continent Casualty Co.*, 909 F.3d 143 (5th Cir. 2018).

“[T]he appropriate inquiry is whether there was one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage. If so, then there was a single occurrence. If the chain of proximate causation was broken by a pause in the negligent conduct or by some intervening cause, then there were multiple occurrences, even if the insured’s negligent conduct which caused each of the injuries was the same kind of negligent conduct.”



## Recent Cases

- *Liberty Insurance Underwriters v. First Mercury Insurance Co.*, 2019 WL 7902961 (N.D. Tex. Aug. 2, 2019).
  - Construction company built a performing arts center
  - School district alleged several defects including leaky roof and retaining wall
  - Argument between primary and umbrella coverage
  - Different defects mean different causes and different occurrences?

## Recent Cases

- *Liberty Insurance Underwriters v. First Mercury Insurance Co.* 2019 WL 7902961 (N.D. Tex. Aug. 2, 2019).
  - Northern District found one occurrence
  - Despite various defects with various damages, all of the property damage was caused by a single event—the defective construction of the performing arts center.
  - The defective construction and **delivery of the performing arts** center was the specific event that harmed the school district and was the underlying cause **generating liability** for all property damage.

## Recent Cases

- *Travelers Casualty Insurance Co of America v. Mediterranean Grill & Kabob, Inc.*, 2020 WL 6536163 (W.D. Tex. Nov. 4, 2020).
  - Nearly two hundred cases of salmonella poisoning over three days
  - Seven lawsuits that each alleged that the restaurant was negligent in the manufacture and preparation of the food
  - Travelers was about to reach its \$1 million “per occurrence” limit.

## Recent Cases

- *Travelers Casualty Insurance Co of America v. Mediterranean Grill & Kabob, Inc.*, 2020 WL 6536163 (W.D. Tex. Nov. 4, 2020).
  - Relied on *Foust* and *Evanston* to find one occurrence
  - After the restaurant negligently allowed the food to become contaminated, there was no indication that the restaurant returned to preparing food safely and then allowed the food to become contaminated again
  - Only one cause gave rise to the liability, the contamination.
  - Single, continuous event gave rise to the liability, thus there was a single occurrence.

# Practical Application: Type of Claims Against Insured

## Contract Claims

- Number of contractual obligations affect the number of occurrences *See Lennar, Maurice Pincoffs*

## Negligence Claims

- Intervening Causes – intentional torts
- Continued Negligence

# Practical Application: Position in Construction Process



Owners/Developers



General Contractor



Subcontractor



# Practical Application

## Multiple Occurrences

- Multiple discrete events
- *See H.E.B., Goose Creek, & Seahawk Liquidating Trust*

## Single Occurrence

- Continued negligent activity, without any meaningful end to the negligent activity, even with temporal breaks.
- *See Foust, Evanston, & Travelers*

# Questions

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