Insurance Claims for Construction Defects: Defining Single vs. Multiple Occurrences

For decades, insurance and claims professionals have seen insurers treat construction defect lawsuits as a single occurrence within controlled insurance programs. Even when suits allege multiple and various defects involving multiple trades, or multiple discrete defects arising from the same trade contractor's work, the suit is treated as one occurrence.

As a result, claims adjusters have typically asked policyholders to make just one deductible payment or satisfy the self-insured retention once during the loss adjustment process before they proceed to defend and indemnify the named insureds and other enrolled contractors under the program.

An emerging trend among a small consortium of insurers, however, is treating each alleged defect within a single construction defect suit as a separate occurrence.

This treatment has the narrow potential to benefit policyholders in cases where the aggregate limits of a controlled insurance program are higher than its occurrence limits, but it also has the more debilitating potential effect that the policy deductible or self-insured retention (typically written on a "per occurrence" basis) may be applied multiple times for the same construction defect suit.

The more costly the deductible or self-insured retention amount on the policy—the more damaging the outcome is for the policyholder.

Retail agents and insurance brokers need to be aware of this new development so they can negotiate with carriers on their clients' behalf and help manage policyholders' expectations for how definitions might be applied.

CONTACT

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History of defining “occurrence”

Much has been authored and litigated regarding the topic of an “occurrence” as it applies to a commercial insurance policy.

In the famous World Trade Center case **(SR International Business Insurance Co. Ltd v. World Trade Center Properties LLC, et al)** the events of 9/11 were mostly defined as a single occurrence.

In the casualty arena, specifically construction, an “occurrence” has been adjudicated in various ways depending on the degree of negligence of the policyholder, resulting damage versus damage to work itself, and the venue for the claim (for example, **American Home Assurance Co. v. Trumbull Corp., Westfield Insurance Co. v. Custom Agri Systems Inc., Travelers Indemnity Co. of America v. Moore & Associates. Inc.**, etc).

As a result of the various interpretations, some states have developed their own distinct opinions and statutes regarding what qualifies as an “occurrence” within the CG0001 policy form (see South Carolina, Hawaii, among others). However, there is a dearth of literature on the topic of an occurrence when it comes to the narrow focus of construction defects within the scope of a controlled insurance program.

Controlled insurance programs

Within the unmodified CG0001, “occurrence” is defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

This definition has been used successfully by several attorneys and insurance brokers to argue the single application of a policy deductible to a single and consistent defect that exists in multiple locations/units within a single building, or within several different buildings in the case of detached residential construction (or other similar cases).

Example: Several hundred windows that were flashed improperly in the same manner across multiple units, all resulting in similar water intrusion.

Under different circumstances however, if there are multiple failures involving multiple trades (leaky windows, leaky roof, leaky planter boxes, leaky toilet seals, etc), it creates the undesired effect of several discrete construction defects within a single suit requiring the satisfaction of several multiples of the policy deductible or self-insured retention.

Possible solutions

Since this is a rather new development in the industry, any proposed solutions that are favorable to policyholders are also new. It is up to each insurance agent or broker to craft a solution befitting his or her client.

Some insurers within the controlled insurance program arena have not regularly been asked to address this issue, so they may balk at initial requests. The broad appetite and expertise of construction liability risk underwriters, however, typically helps in finding a viable solution on which all parties can agree.

The following are two workable solutions to this issue that agents and brokers might suggest:

1. **Deductible/self-insured retention aggregate stops.** This is probably the most elegant solution. This strategy caps the policyholder's out-of-pocket expense for all claims attributable to the life of the policy, regardless of the number of occurrences. The aggregate stop amount can thus be structured to work within the client's balance sheet.
2. **"Per claim or Per occurrence" deductible wording.** This is a slightly more artistic solution that allows the policyholder to elect the basis on which the deductible applies, on a claim-by-claim basis, depending on the circumstances.

Different carriers have different levels of tolerance in allowing for aggregate stops, but this option is certainly available with a good handful of carriers in the marketplace. The latter solution may be a bit too out-of-the-box for some carriers' appetites, but the example serves to highlight how creative a broker can be in crafting a workable solution for their client to address this emerging coverage concern.

Takeaway

As the construction industry evolves, so too does the environment for controlled insurance programs. Retail agents and brokers need to stay current about how policies are applied and adjudicated so they can help their clients understand their coverages and make adjustments where needed. Amwins construction brokers are experts in the space and can help you guide your clients toward their best coverage options. Contact your Amwins broker today.

About the Author

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