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The Increasing Significance of Aggregation in Complex Claims Litigation: The U.S. Perspective

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Perhaps one of the most complex aspects of claims management involves determining if two or more claims should be considered separate or multiple occurrences or separate or a single aggregated claim under the policy wording. The range of claim types in which this issue arises spans from employee thefts in which several thefts span over more than one policy period to mass tort cases with exposure periods spanning decades and latent injuries not appearing until years later. The circumstances of such claims can be as mundane as whether a series of embezzlements spanning several years constitute a single claim to the tragic 911 attacks on the World Trade Center in which insureds argued that two separate hijacked planes hitting each of the two towers 16 minutes apart constituted separate occurrences.

The consequences of the number of occurrences or aggregation of claims determination can be significant for both the insured and the insurer. If the policy provides for substantial self-insured retentions or deductibles, the aggregation of a large number of small value claims may be the only way to reach a policy's coverage. On the other hand, if each claim sought to be aggregated has a large value, a finding that each claim is a separate occurrence or claim could result in multiples of policy limits being at stake. The implications of the number of occurrences or claims determination on the amount of available coverage to the insureds is not lost on U.S. courts addressing the issue. Seemingly inconsistent decisions by the same court can frequently be explained by the court's attempt to maximize available coverage.

Most claim handlers are familiar with these issues arising in mass tort claims like asbestos, silicosis, noise induced hearing loss and repetitive stress injuries. Questions involving whether coverage is implicated by date of exposure, date of manifestation, a triple trigger or by injury-in-fact have been the basis of significant litigation both in the United States and Europe. Today, we face similar aggregation issues, but in the context of new claim types. The issue of claim aggregation is at the forefront of claims involving the marketing of abusive tax shelters, stock option back-dating, pension mis-selling, and other claims of corporate malfeasance. Pharmaceutical and progressive injury claims

are on the rise. Current significant claim types implicating aggregation issues include welding fume exposures, clergy sexual abuse cases, employment class action claims and renewed tobacco class action litigation based on “light” or “low tar” advertising by manufacturers.

In this paper, we address the state of U.S. law on aggregation for claims spanning more than one policy period and involving more than one potentially triggering event. Particular emphasis will be on the “series of loss” clauses, aggregation clauses, and “occurrence-first-reported” forms as they have been interpreted under U.S. law. We address the aggregation issue in the context of current claims in the forefront of the news and which may become significant to the insurance industry in the near future.

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