Cray • Huber

# Illinois Coverage Basics

## *Illinois Supreme Court Creates Negative Precedent on Policy Limits Issue in Double Death Case*

A recent Illinois Supreme Court decision addressing policy limits in a double death case creates new, bad law. This decision is noteworthy for the new law that it announces, and also for what it reveals about the current Illinois Supreme Court's attitude toward insurers.

In Addison Insurance Company v. Fay (Ill. Sup. Ct. No. 105752, filed January 23, 2009), the Illinois Supreme Court considered whether two or only one "occurrence" indemnity limit should apply to a case in which two boys died in a water-filled sand pit. The families of the two boys sued the premises owner on theories of negligent maintenance and control of the property. Both estates ultimately settled with the premises owner for the amount of the available limits of the owner's liability insurance. At the time of the settlement the parties recognized that a question existed about how many "occurrence" indemnity limits would be available.

Addison Insurance Company was the liability insurer of the owner of the sand pit. The policy carried a $1 million "occurrence" limit and a $2 million aggregate limit. Following the settlement of the claims, the insurer filed a declaratory action to resolve the policy limits issue.

Burden of Proof on the Policy Limits Issue

The long-standing rule in Illinois has been that an insured has the burden to prove that a claim falls within the coverage of its liability insurance policy. On the other hand, insurers have the burden to establish the applicability of any limitation or exclusion of coverage. Previously, the Illinois courts had never squarely decided who has the burden of proof when a question arises as to how many "occurrence" policy limits should apply.

The Court in Addison Insurance characterized the insurer's position that both deaths arose from a single "occurrence" as "an effort to limit coverage under the policy" by invoking a "stricter policy limit." Without benefit of any legal authority or any further analysis, the Court held that the insurer must bear the burden of proving that the deaths of the two boys constitute one occurrence. This ruling on the burden of proof was a matter of first impression for the Court.

Tests for Determining the Number of Applicable "Occurrence" Limits

After deciding that the insurer had the burden of proof on the policy limits issue, the Court considered what test should be used to determine whether the two death claims triggered one or two "occurrence" indemnity limits. Although the policy defined the term "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful

conditions," the Court determined that it was necessary to construe the policy "because the policy itself does not indicate when an injury will be treated as a separate occurrence."

The Court confirmed that in cases involving allegations of *active negligence*, Illinois courts apply the "cause test," which determines the number of occurrences by focusing on the cause or causes of the injuries or damage. The principle underlying the "cause test" is that all injuries arising from one cause should be considered as parts of a single "occurrence." When a single cause produces multiple injuries the "cause test" directs that only one "occurrence" limit applies.

However, the Court ruled that the "cause test" should not be used without limitation in cases that are based on allegations of ongoing *negligent omissions*. The Court reasoned that it would be unreasonable to apply the "cause test" to a case alleging an ongoing negligent omission, because under the "cause test" all injuries arising during the period of the omission could be subsumed within single "occurrence." The Court found, without citation to any evidence, that the insured "could not have intended to expose himself" to the risk of such limited coverage.

But the Court held that for cases involving allegations of ongoing negligent omissions, the "cause test" must be applied in conjunction with the "time and space test." Under the "time and space test" multiple injuries will be considered to have arisen from a single occurrence if they are so closely linked in time and space that an average person would consider them to be one occurrence. This was also a ruling of first impression for the Court.

Application of the Burden of Proof and "Time and Space Test" to the *Addison Insurance* Facts

The evidence in the Addison Insurance case showed that the decedents had left home to go fishing together and did not return. The boys' bodies were found in a water-filled pit approximately 150 yards from their homes. The bodies were touching and were positioned in a manner that suggested the boys had died while one was attempting to rescue the other. However, there was no direct evidence to establish how closely in time they had become trapped in the pit.

The Illinois Supreme Court held that these facts failed to "conclusively demonstrate" that the injuries to the two boys constituted a single occurrence. Concluding that the insurer could not meet its burden of proving that the two deaths were so closely linked in time and space to be considered one event, the Court held that the deaths constituted two "occurrences" and that the insurer had to pay two "occurrence" limits ($2 million).

In summary, Addison Insurance instructs: (1) an insurer has the burden of proof regarding whether a single "occurrence" limit applies; (2) in a case involving allegations of negligent omissions, the number of "occurrences" is to be measured by what an ordinary person would consider to be a single event under the "time and space" test; and (3) if the insurer fails to "conclusively" prove a single event under the "time and space test," the insurer will owe multiple policy limits. Addison Insurance not only changes the law, it reflects a hostile environment for insurers appearing before the Illinois Supreme Court.

* * *

If you have questions or would like to discuss the implications of this report further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.