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Counting Your Losses:
Don't Let The Insurance Company Use The "Number Of Losses" Against You

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Securities and financial institution cases tend to involve damages consisting of numerous individual injuries over a period of time resulting from a single business policy. This issue can have serious insurance coverage ramifications: a single loss may expose only one policy limit whereas multiple losses may expose additional policy limits, thereby increasing coverage. Conversely, multiple losses can trigger multiple deductibles, swallowing up a policyholder's insurance recovery.

Counting Losses

Relevant policies frequently contain language like the following:

> . . . all Loss arising out of the same Wrongful Act and Interrelated Wrongful Acts of any Insured Person shall be deemed one Loss . . .

A review of the caselaw, however, reveals no coherency in the courts' interpretations of the "interrelated wrongful acts" provision. Where one court found multiple losses on 200 bank loans, another found a single loss on 9 bank loans involving a series of similar acts. The law on "interrelated wrongful acts" is so confused that policyholders and insurance companies can both find caselaw support for their positions, depending on such issues as, *i.e.*, deductibles, limits and aggregates.

This is good news for policyholders — bad news for insurance companies:

> Where the language of an insurance contract is ambiguous as to render it susceptible to two interpretations, it should be most strongly construed against the insurer, . . . Insurance contracts, above all others, should be clear and explicit in their terms. They should not be couched in language as to the construction of which lawyers and courts may honestly differ.

Janneck v. Metropolitan Life Ins. Co., 162 N.Y. 574, 577-78, 57 N.E. 182 (N.Y. 1900).

Ambiguity Maximizes Insurance Recoveries

Courts have found the terminology ambiguous. *See, e.g., Home Ins. Co. v. Spectrum Info. Tech.*, 930 F.Supp. 825, 848 (E.D.N.Y. 1996) (the terminology "wrongful acts or interrelated. . . acts . . . shall constitute a single claim" is "at best . . . ambiguous"); *McCuen v. American Cas. Co.*, 946 F.2d 1401, 1407-08 (8th Cir. 1991) (finding term "interrelated" in a D&O policy

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"so lacking in concrete content, that [it] import[s] into the contract, . . . substantial ambiguities"). *Stauth v. National Union Fire Ins. Co.*, 185 F.3d 875 (10th Cir. 1999) found ambiguity and ruled for the policyholder:

> Most courts faced with such policy language have generally taken a pro-insured approach to defining "interrelated," and have found a single loss or multiple losses depending on the approach that favors the policyholder.

Id. at *7-8.

Insurance Companies Can Fuel Findings of Ambiguity

The *E.B. Michaels v. Mutual Marine Office, Inc.*, 472 F.Supp. 26 (S.D.N.Y. 1979) court noted the flexibility with which the insurance company maneuvered through its own drafting and found the fact that "experienced parties can so readily shift their positions . . . emphasize[d] [the provision's] ambiguity." *Id*. at 29 n.11.

Additionally, insurance companies often go on record taking whatever position prompts their financial interest. However:

> A litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.

National Westminster Bank v. Ross, 130 B.R. 565, 672 (S.D.N.Y. 1991); *Federated Mut. Ins. Co. v. Anderson*, 920 P.2d 97, 101 (Mont. 1996) ("in light of its prior position, the sincerity of [the insurance company's] current argument must be questioned").

Conclusion

There are inconsistent court and insurance company interpretations on the issue of single versus multiple losses. This phenomenon underscores the inherent ambiguity in the insurance company's definition of "Loss." That ambiguity requires one result: maximizing insurance coverage in favor of the policyholder. ■

Anderson Kill & Olick, P.C. created the Financial Services Insurance Coverage Group to serve its various clients in the financial industry and to focus its coverage expertise on the insurance issues common to broker/dealers, commercial banks, investment banks, investment advisors, hedge funds and financial institutions including mutual funds.

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