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COMMENTS

NEW YORK'S "UNFORTUNATE EVENT" TEST: ITS APPLICATION PRIOR TO THE EVENTS OF 9/11

I. INTRODUCTION

On the morning of September 11, 2001, terrorists hijacked two airplanes from Boston's Logan Airport.[1] After American Airlines Flight 11 struck the North Tower of the World Trade Center,[2] some employees of the investment banking and brokerage firm, Keefe Bruyette & Woods, ran to the windows of the firm's headquarters in the South Tower.[3] The co-CEO emerged from his office and exclaimed, "[w]hat the hell was that?"[4] The traders, however, remained at their desks;[5] some even chided those who abandoned their computer screens to see what happened.[6] Shortly thereafter, United Airlines Flight 175 struck close to the top of the South Tower,[7] trapping the firm's employees on the 88th and 89th floors.[8] Between the first and second airplanes hitting the twin towers, an announcement came over the intercom that the South Tower was secure and structurally sound and employees could return to their floors.[9] Some reports even indicate that the message said employees should return to their offices unless otherwise authorized by a company representative.[10]

Later that morning, both towers collapsed.[11] Still later, another building, Seven World Trade Center, fell.[12] "The terrorist attack on the World Trade

1. Elizabeth J. Stewart, *Insurance Coverage Can Expand or Shrink Based on How You Count Occurrences*, THE METROPOLITAN CORP. COUNS., NE. ED., May 2002, at 15.
2. *Id.*
3. Juliette Fairley, *Book Recounts Tale of Company's Rebirth; Keefe Bruyette & Woods Lost 67 Workers in the Sept. 11 Attacks*, USA TODAY, Sept. 16, 2002, at B7.
4. Matthew Kauffman, *Back from the Brink; One Year Later, KBW Marks Progress on Road to Recovery*, THE HARTFORD COURANT, Sept. 11, 2002, at E1.
5. Fairley, *supra* note 3.
6. Kauffman, *supra* note 4.
7. Stewart, *supra* note 1.
8. Kauffman, *supra* note 4.
9. Fairley, *supra* note 3.
10. *Id.*
11. Stewart, *supra* note 1.
12. *Id.* Seven World Trade Center, was a 47-story building at the north end of the 16-acre

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Center did damage to human lives for which no amount of money can provide adequate compensation."[13] "It also did massive property damage for which monetary compensation is possible."[14]

> The extent of the liability of the insurance carriers may ultimately depend upon the resolution of the following question: Which of the two following statements best describes what caused the destruction of the World Trade Center on September 11, 2001?
>
> 1) In a single coordinated attack, terrorists flew hijacked planes into the twin towers of the World Trade Center.
>
> 2) At 8:46 A.M. on the morning of September 11th, a hijacked airliner crashed into the North Tower of the World Trade Center, and 16 minutes later a second hijacked plane struck the South Tower. [15]

The answer to that question will certainly be a significant factor in deciding how to redevelop the World Trade Center complex site.[16] Normally, the U.S. District Court for the Southern District of New York[17] would "ex-

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World Trade Center complex site, was subject to a separate lease. Christopher J. Sullivan, *As Dust Settles, Thorny Real Estate Issues Arise*, THE NAT'L L.J., Feb. 18, 2002, at B13.

13. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., No. 01 Civ. 9291, 2002 WL 1163577, at *1 (S.D.N.Y. June 3, 2002). "More than 2,800 people died, including 343 firefighters and 23 police officers, when twin towers of the center collapsed after being struck by two hijacked aircraft in the September 11attack blamed by the United States on the al Qaeda movement of Osama bin Laden." *WTC Insurer Welcomes Port Authority Land Swap Talk*, FACTIVA GLOBAL INS. NEWS DIG., Aug. 5, 2002, *available at* 2002 WL 4443700.

14. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., No. 01 Civ. 9291, 2002 WL 1163577, at *1 (S.D.N.Y. June 3, 2002). "Larry Silverstein, who owns the 99-year lease on the demolished Twin Towers, has submitted expert reports, which . . . estimate the cash value of the Twin Towers, buildings 4 and 5, and the retail mall at $5.7 billion." *WTC Insurance Fight Continues; 'Billions of Dollars Apart' over Settlement*, NEWSDAY, Aug. 6, 2002, *available at* 2002 WL 2756870. "[A]n attorney in Wachtell, Lipton, Rosen & Katz, the New York law firm representing Mr. Silverstein's interests . . . said that this figure represents replacement cost minus depreciation of the two towers and surrounding edifices." E. E. Mazier, *War of Words Rages Over WTC Coverage*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMT. ED., Aug. 12, 2002, *available at* WL 9936159. "[t]he reports indicate that business interruption losses, which Silverstein would receive if he rebuilds the complex, are estimated at more than $2.5 billion." *WTC Insurance Fight Continues; 'Billions of Dollars Apart' over Settlement, supra*. This amount would cover Silverstein's lease payments to the Port Authority of New York and New Jersey. Eric Herman, *CEO of World Trade Center's Lead Insurer Says Settlement Agreement Unlikely*, KNIGHT-RIDDER TRIB. BUS. NEWS, Aug. 8, 2002, *available at* 2002 WL 25437142. "That would bring the total amount to $8.2 billion, which . . . exceeds the amount Silverstein is seeking." *WTC Insurance Fight Continues; 'Billions of Dollars Apart' over Settlement, supra*.

15. No. 01 Civ. 9291, 2002 WL 1163577, at *2.

16. Christopher J. Sullivan, *As Dust Settles, Thorny Real Estate Issues Arise*, THE NAT'L L.J., Feb. 18, 2002, at B13.

17. On September 22, 2001, Congress enacted the Air Transportation Safety and System Stabilization Act, which grants relief to the airline industry, established the September 11th Victim Compensation Fund of 2001 and provides that "[t]he US [sic] District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions

pect to find the answer to the question whether the events of September 11th constituted one or two 'occurrences' by looking at how the parties to the insurance contract [the Silverstein Parties[18] and twenty-two insurance companies,[19]] defined that term in the policy they negotiated."[20]

"[H]owever, with minor exceptions, there were no insurance policies in place on September 11," 2001.[21] This is because in July 2001, after an "extensive bidding process," the Silverstein Parties entered into a ninety-nine year lease for the World Trade Center complex with the Port Authority of

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brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of 11 September 2001 [sic].'" Laurie Kamaiko, *World Trade Centre; Who Will Foot the Bill?*, REINSURANCE MAG., Aug. 13, 2002 (quoting Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230, 241 (2001)[hereinafter Air Transportation and Safety System Stabilization Act]). That court must apply the substantive law of the State of New York. Raymond L. Mariani, *The September 11th Victim Compensation Fund of 2001 and the Protection of the Airline Industry: A Bill for the American People*, 67 J. AIR L. & COM. 141, 171 (2002) (citing Air Transportation Safety and System Stabilization Act).

18. The Silverstein Parties include: "World Trade Center Properties LLC, Silverstein Properties Inc., Silverstein WTC Management Co. LLC, 1 World Trade Center LLC, 2 World Trade Center LLC, 4 World Trade Center LLC, 5 World Trade Center LLC." No. 01 Civ. 9291, 2002 WL 1163577, at *1 n.1.

19. The twenty-two insurance companies include: "Allianz Insurance Company, Copenhagen Reinsurance Co. (UK) Ltd., Employers Insurance of Wausau, Federal Insurance Company, Great Lakes Reinsurance (UK) PLC, Gulf Insurance Company, Hartford Fire Insurance Company, Houston Casualty Company, Industrial Risk Insurers, Lexington Insurance Co., Certain Underwriters at Lloyd's of London, QBE International Insurance Limited, Royal Indemnity Company, St. Paul Fire and Marine Insurance Co., Swiss Reinsurance Co. UK LTD. (Swiss Re), TIG Insurance Co., Tokio Marine and Fire Insurance Co., Twin City Fire Insurance Co., Wurttembergishce Versicherung AG and Zurich American Insurance Co." *Id.* at *2. "Swiss Reinsurance Co. underwrote about 22 percent—$780 million—of the World Trade Center's insurance coverage." Alison Frankel, *Double Indemnity*, AM. LAW., Sept. 2002, at 81. Therefore, if Swiss Re loses the trial, it faces insurance losses of "$1.5 to $1.6 billion." Nieck Ammerlaan, *Swiss Re Says U.S. Ruling Strongly Supports its Case*, DOW JONES REUTERS BUS. INTERACTIVE, Sept. 26, 2002 *available at* www.factiva.com (document no. lba00000200209 26dy9p00u3e). On September 25, 2002, the U.S. District Court for the Southern District of New York granted summary judgment to Hartford Fire Ins. Co., Royal Indem. Co. and St. Paul Fire and Marine Ins. Co., which limited their liability to only one payment on the face amount of their respective policies. 222 F. Supp. 2d 385, 399. The three companies provided about $112 million in coverage for the World Trade Center complex. Bill Rigby, *Court Says Three Insurers to Pay Only One WTC Claim*, DOW JONES REUTERS BUS. INTERACTIVE, Sept. 26, 2002 *available at* www.factiva.com (document no. lba0000020020925dy9p010ff). This ruling "means that 17 of the original 22 insurers" who took shares in the policy on the World Trade Center complex remained in the litigation at the U.S. District Court for the Southern District of New York. *See id.* Two Bermuda-based insurers previously settled with Mr. Silverstein "on the basis that the attack was one event." *Id.* In February, 2002, Ace Bermuda Insurance, Ltd. (Ace) and XL Insurance (Bermuda) Ltd. (XL) agreed to pay $67 million and $298 million, respectively, for a total of $365 million. Meg Green, *Silverstein Asks to Delay WTC Lawsuit*, BESTWIRE, Sept. 27, 2002. Ace and XL specifically referred to the WilProp form, a specific insurance form provided by Willis of New York, Inc., the broker for the Silverstein Parties, in their binders. Frankel, *supra*.

20. No. 01 Civ. 9291, 2002 WL 1163577, at *2.

21. *Id.*

New York and New Jersey.[22] "[A]lthough each of the insurers had signed binders setting forth in summary form their agreement to provide property damage coverage[, s]ome of these binders expressly stated that the precise language was 'to be agreed upon.'"[23] As a result, the extent of liability of the various insurance companies to provide compensation to those who had an ownership interest in the World Trade Center complex is an issue.[24]

> Although [The] Travelers [Insurance Company (Travelers)] had not issued a policy as of September 11th, three days later, it issued a policy providing $210,620,990 in property damage insurance for the World Trade Center "per occurrence." Despite the fact that the media had already reported the controversy over whether the attack on the World Trade Center constituted one or two "occurrences" for insurance purposes, the policy Travelers issued did not define the term "occurrence."[25]

However, the other insurers argue that, at the time they issued their binders, they agreed to be bound by the WilProp form (WilProp), a specific insurance form provided by Willis of New York, Inc., the broker for the Silverstein Parties.[26] The insurers allege the WilProp "contained a definition of 'occurrence' under which the terrorist attack on the World Trade Center is unambiguously a single occurrence."[27]

The Silverstein Parties make two arguments. On the one hand, they argue that although the insurers' reading of the WilProp's definition of occurrence is the most reasonable one, it is "not the *only* reasonable reading, and . . . therefore the question of the number of occurrences under the WilProp form must be decided by a jury."[28] The Silverstein Parties' second argument is that the definition of the term "occurrence" is not incorporated into the binders and that upon signing the binders, the insurance companies "were well aware that they were committing to participate in a process in which they would ultimately agree to be bound by the contract terms negotiated by

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22. *Id.* at *1.

23. *Id.* at *2.

24. *Id.* at *1. In addition to the Silverstein Parties, those who had an ownership interest in the World Trade Center complex include Westfield Inc., The Port Authority of New York and New Jersey, GMAC Commercial Mortgage Corporation, UBS Warburg Real Estate Investments Inc., Westfield America Inc. and Wells Fargo Bank Minnesota N.A. as trustee for the registered holders of GMAC Commercial Mortgage Securities Inc. Mortgage-Backed Pass-Through Certificates Series 2001-WTC. *Id.*

25. *Id.* at *2.

26. 222 F. Supp. 2d at 387.

27. *Id.* According to the WilProp,

> "Occurrence" shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.

Id. at 398.

28. *Id.* at 388.

the insureds and the lead underwriter, . . ." Travelers.[29] Therefore, as of September 11, 2001, the insurers were bound to the terms to which the Silverstein Parties and Travelers agreed.[30] Because the term "occurrence" is not defined in that policy, the Silverstein Parties contend that the insurance companies should be "bound by the meaning given to that term in the decisions of the courts of the State of New York, where the coverage was negotiated."[31]

New York courts use the "unfortunate event" test to define the term "occurrence."[32] Because Travelers did not define that term in its policy,[33] it appears likely that the U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals will have an opportunity to apply New York's "unfortunate event" test, at least in connection with that policy. The Silverstein Parties purchased $3.55 billion of property and business interruption insurance for the World Trade Center complex.[34] Whether they are entitled to receive a greater amount is likely to be determined by how faithfully the U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals apply New York's "unfortunate event" test.

This Comment discusses how New York State and federal district courts previously applied the "unfortunate event" test where the number of occurrences was an issue. Part II begins with a brief summary of the three tests used in the United States to determine the number of occurrences. The first application of the "unfortunate event" test in connection with the term "accident" was in 1959.[35] Fourteen years later, courts applied the "unfortunate event" test in connection with the term "occurrence."[36] Part III discusses the application of New York's "unfortunate event" test in different insurance and reinsurance contexts. It appears that courts apply New York's "unfortunate event" test less consistently in third-party contexts than in first-party contexts. However, there were only a few first-party cases before New York State and federal courts prior to September 11, 2001. Since September 11, 2001, the Court of Appeals of New York decided two reinsurance cases where the number of occurrences was an issue.[37] Those cases could have a

29. *Id.* Travelers, which is "one of six primary insurers of the trade center, has admitted that its policy governs at least in its own case." Tamara Loomis, *Insurance Lawyers Debate Payment for Terrorist Attack*, N.Y.L.J., Jan. 17, 2002, at 1. Therefore, at least one insurer does not have the term "occurrence" defined in its policy.

30. 222 F. Supp. 2d at 388.

31. No. 01 Civ. 9291, 2002 WL 1163577, at *2.

32. Hartford Accident & Indem. Co. v. Wesolowski, 305 N.E.2d 907, 910 (N.Y. 1973).

33. No. 01 Civ. 9291, 2002 WL 1163577 at *2.

34. *Id.* at *1.

35. *See* Arthur A. Johnson Corp. v. Indem. Ins. Co. of N. Am., 164 N.E.2d 714, 706 (N.Y. 1959).

36. *See Wesolowski*, 305 N.E.2d at 910.

37. *See* Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d 319, 322 (N.Y. 2001).

considerable impact on future judicial decisions affecting the companies that sold reinsurance policies to the insurers of the World Trade Center complex.[38] Finally, Part IV concludes with an approach which may result in a more consistent application of New York's "unfortunate event" test in the aftermath of the attack(s) on the World Trade Center's twin towers.

II. EARLY APPLICATIONS OF THE "UNFORTUNATE EVENT" TEST: THE POLICY BEHIND THE RULE

Courts in the United States have used three tests to define the term "occurrence."[39] A majority of states follow the "cause" test, which examines the cause or causes of bodily injury or property damage.[40] States applying this test conclude that, "where there are losses to more than one person or entity, the number of occurrences should be determined by looking at the underlying cause of the loss or liability."[41] Therefore, the losses are treated as one occurrence "as long as multiple injuries or instances of property damage are the direct result of a single action or event."[42]

The "effects" test, followed by a minority of courts, "focuses on each injury or incident of damage to determine the number of occurrences."[43] Courts applying this test "look at the individual claimants or instances of property damage to determine the number of occurrences."[44] Some courts "view the 'effects' test as more appropriate where the injuries or damage complained of arise at different locations and at different times."[45]

New York courts utilize a third test, the "unfortunate event" test, to define an occurrence.[46] Often viewed as a variant of the "cause" test,[47] the underlying principle of the "unfortunate event" test is "that the cause of the injury or damage must be an event close to the injury or damage itself."[48] However, the "unfortunate event" and "cause" tests are distinguished because in the "unfortunate event" test, the cause is the "immediate unfortunate

38. Carl J. Pernicone & James T.H. Deaver, *Insurance Implications of the World Trade Center Disaster*, 31 SPG BRIEF 23, 28 (2002).

39. Stewart, *supra* note 1 (citing Michael P. Sullivan, Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount per Accident or Occurrence*, 64 A.L.R.4th 668 (1988)).

40. *Id.*

41. Jeannine Chanes & Mary Daniels, *One Occurrence or Two: How the Courts Decide; Terrorist Attacks Liability Court Decision*, RISK MGMT., Jan. 1, 2002, at 32.

42. *Id.*

43. Stewart, *supra* note 1.

44. Chanes & Daniels, *supra* note 41.

45. *Id.*

46. *Wesolowski*, 305 N.E.2d at 910.

47. *See* Stewart, *supra* note 1.

48. Chanes & Daniels, *supra* note 41.

event," or one that is "close[st] to the actual injury or loss, resulting in the harm."[49]

A. Case of First Impression: "How Many Accidents Within the Meaning of the Policy?"[50]

In *Arthur A. Johnson Corporation v. Indemnity Insurance Company of North America*, the Court of Appeals of New York held "that the collapses of separate walls, of separate buildings at separate times, were in fact separate disastrous events and, thus, two different accidents within the meaning of the policy."[51] In *Arthur Johnson*, a protecting wall erected by a contractor in front of the basement of a building collapsed under the water pressure caused by a heavy rainfall, which flooded the building's basement.[52] Almost an hour later, another temporary wall the contractor erected to protect an adjoining, but separate building, gave way causing water to flood the second building too.[53] There was "no suggestion that the collapse of the first wall caused the failure of the second."[54] The contractor's liability policy provided property damage coverage of $50,000 for "each accident."[55]

To determine how many accidents were within the meaning of the contractor's insurance policy, the Court said it "must construe the word 'accident' as would the ordinary man on the street or ordinary person when he purchases and pays for insurance."[56] The Court considered three categories of authorities in evaluating the soundest approach to the question "of whether, in a given set of circumstances when the damage is to several persons, there is one or more accidents within the meaning of the clause limiting coverage to a certain amount per accident. . . ."[57] The first class of cases the Court considered and rejected was "'where . . . one negligent act or omission is the sole proximate cause, or causa causans, there is, as a general rule, but one accident, even though there be several resultant injuries or losses.'"[58] This is the "cause" test.

The second approach the Court considered and rejected was "to hold that each person who has suffered a loss has suffered an accident."[59] Under

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49. *Id.*
50. *Arthur A. Johnson Corp.*, 164 N.E.2d at 706.
51. *Id.* at 708.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 705.
56. *Id.* at 706 (citation omitted).
57. *Id.*
58. *Id.* at 706 (quoting Hyer v. Inter-Insurance Exchange of the Automobile Club of Southern California, 77 Cal. App. 343, 350 (2d Dist. 1926) (omission in original)).
59. *Id.* at 706.

the English rule,[60] the number of persons damaged determines the number of accidents.[61] The English rule is also known as the "effects" test.[62]

The third approach the Court considered, which it believed the soundest, was to use the term "accident" in its "common sense of 'an event of an unfortunate character that takes place without one's foresight or expectation . . .'" or "an unexpected, unfortunate occurrence."[63] The Court believed the approach of determining simply whether there was one unfortunate event or occurrence was the most practical of the three methods of construction that had been advanced because "it corresponds most with what the average person anticipates when he buys insurance and reads the 'accident' limitation in the policy."[64] This approach later became known as the "unfortunate event" test.[65]

In applying this test, the Court reasoned, "if the walls were located blocks away from each other on different job sites but subject to the same rainfall, no one could contest that there were two accidents."[66] Therefore, "the collapses of separate walls of separate buildings at separate times, were in fact separate disastrous events and, thus, two different accidents within the meaning of the policy."[67] The proximate cause was "separate negligent acts of preparing and constructing separate walls . . ." and not the heavy rainfall.[68]

However, the dissenting opinion reasoned that, because the collapse of the two walls was the result of an overwhelming flood, the "deluge was a single event," rather than separate accidents.[69] The dissent observed, "there will always be more than one event wherever the person or property of more than one is affected."[70] Therefore, in essence, the dissent reasoned that the "unfortunate event" test and the English rule, or "effects" test, were the same.[71] This initial dissatisfaction with the application of New York's "unfortunate event" test has been joined by other judges, who critically assessed how courts resolved disputes where the number of occurrences was an issue, at least in third-party contexts.[72] One observer even characterized the U.S.

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60. *Id.* at 709 (Van Voorhis, J., dissenting).

61. *Id.* at 707.

62. *See* Chanes & Daniels, *supra* note 41.

63. *Arthur A. Johnson Corp.*, 164 N.E.2d at 707 (quoting Croshier v. Levitt, 5 N.Y.2d 259, 269 (1959)).

64. *Id.* at 708.

65. Chanes & Daniels, *supra* note 41.

66. *Arthur A. Johnson Corp.*, 164 N.E.2d at 708.

67. *Id.*

68. *Id.*

69. *Id.* at 709 (Van Voorhis, J., dissenting).

70. *Id.*

71. *Id.*

72. *See* Dicola v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n. (In re Prudential Lines, Inc.), 158 F.3d 65, 87 (2d Cir. 1998) (Lay, J., dissenting); Champion Int'l Corp. v. Cont'l Cas. Co., 546 F.2d 502, 508 (2d Cir. 1976) (Newman, J., dissenting).

District Court for the Southern District of New York as a "result-oriented court"[73] because of how it resolved disputes in which the number of occurrences was an issue.[74]

B. Extension of the "Unfortunate Event" Test to Number of Occurrences

In 1973, fourteen years after *Arthur Johnson*, in *Hartford Accident & Indemnity Company v. Wesolowski,* the Court of Appeals of New York equated the term "occurrence" with "accident."[75] Making no distinction between the words "accident" and "occurrence," the Court applied New York's "unfortunate event" test in a case that arose under an automobile liability policy.[76] In *Wesolowski*, the Court determined that there was only one occurrence where two collisions "occurred but an instant apart," with an unbroken continuum between the two impacts and "no intervening agent or operative factor."[77]

The first of several factors cited by the Court in reaching its conclusion was that the two collisions in were extremely temporally close.[78] Also, it was clear that the second collision did not have a cause independent from the first collision.[79] Finally, the Court noted that the police made a single accident report at the time of the accident and made reference to "common understanding and parlance."[80]

Should a settlement not be reached in the Silverstein Parties' dispute with their insurance companies, a New York jury, subject to post-trial motions and appeals, would determine the verdict.[81] Larry Silverstein and his spokespeople have waged a public relations "campaign as to the need for insurance proceeds to rebuild" the World Trade Center complex,[82] which one of its insurance company adversaries characterize as wasteful.[83] However, the Silverstein Parties' efforts may ultimately seem like a wise investment if they are able to use "common understanding and parlance" to their advantage.

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73. *See* Michael F. Aylward, *Multiple 'Occurrences'—A Divisive Issue*, 5 No. 1 COVERAGE 39, 40 (1995).

74. *See id.*

75. *In re* Prudential Lines, Inc., 202 B.R. 13, 22 (1996) (citing Wesolowski, 305 N.E.2d 907; Arthur A. Johnson Corp., 164 N.E.2d 704).

76. *Wesolowski*, 305 N.E.2d at 910.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Kamaiko, *supra* note 17.

82. *Id.*

83. Ammerlaan, *supra* note 19. Swiss Re Chief Legal Officer, Markus Diethelm, "called [Mr.] Silverstein's efforts, which have been backed by an aggressive media push, a 'colossal waste of time and money.'" *Id.*

III. APPLICATIONS OF THE "UNFORTUNATE EVENT" TEST

"The issue of number of occurrences [affects] which layer of insurance responds [to a loss] and for how much."[84] "[D]epending upon how their interests are affected in a particular case," the number of occurrences is "an issue on which insurance companies take different positions."[85] It has been urged that "policyholders and their counsel . . . exploit these differences, arguing that the language [of the policy] is imprecise and, therefore, ambiguous."[86]

A. Third-Party Contexts

Liability, or third-party, policies cover amounts that a policyholder must pay to third-parties for damages to their interests.[87] The U.S. District Court for the Southern District of New York has been critically assessed as a "result-oriented court" because it sought "to 'maximize' coverage . . ." in several third-party contexts.[88] Although "sympath[etic] with the majority's effort to construe the [plain meaning of the words] of an insurance policy in such a way [as to] provide[] payments to the insured,"[89] Judge Newman dissented from the opinion in *Champion International Corporation v. Continental Casualty Company* because "there [was] simply no basis for combining. . . separate events, widely separated in time and space, into one 'occurrence.'"[90] A change in the application of New York's "unfortunate event" test was noted by the U.S. Bankruptcy Court for the Southern District of New York, which, in an earlier decision, relied upon a "long line of cases applying the New York law's presumption that the 'occurrence' in an insurance context is the underlying event that ultimately results in a filed claim or claims."[91] Several third-party cases are discussed, along with the U.S. Bankruptcy Court for the Southern District of New York's reconciliation of their apparently inconsistent holdings.[92]

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84. Randy Paar, *Recovery is in the Details: Hot Issues in the Administration and Application of General Liability Insurance Policies*, 86 PRAC. L. INST., N.Y. PRAC. SKILLS COURSE HANDBOOK SERIES 199, 211 (2000).

85. *Id.* at 212.

86. *Id.*

87. Richard Lewis, *Insurance Law: Understanding the ABCs*, 63 PRACTICING L. INST., LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 221, 229 (2002).

88. Aylward, *supra* note 73. Specifically, the court is more likely to find one occurrence where the "insured face[s] hundreds of small claims that will be absorbed by policy deductibles and self-retentions." *Id.* Conversely, "courts are more likely to find multiple 'occurrences' where the limits of liability are relatively low compared to the insured's total exposure." *Id.*

89. Champion Int'l Corp. v. Cont'l Cas. Co., 546 F.2d at 506 (Newman, J., dissenting).

90. *Id.* at 508 (Newman, J., dissenting).

91. *In re Prudential Lines, Inc.*, 202 B.R. at 22.

92. *Id.* at 23-24.

1. Combining Separate Events into One Occurrence

Champion International Corporation ("Champion") sold vinyl-coated paneling, which began to split apart after it was sold to manufacturers of houseboats, house trailers, motor homes and campers.[93] As a self-insurer, Champion had assumed the first $5,000 of any loss and looked to its two insurers for coverage after claims were asserted for damages incurred in excess of that amount.[94] The defective panels damaged approximately 1,400 vehicles manufactured by Champion's 26 different customer companies during the policy period.[95] Damages were in excess of $1 million, the upper limits of Continental Insurance Company's policy,[96] which was intended to cover Champion's liability in excess of $100,000 caused by an occurrence.[97] "'[A]ll property . . . damage arising out of continuous or repeated exposure to substantially the same general conditions [was] considered as arising out of one occurrence.'"[98] The U.S. District Court for the Southern District of New York held that the contested language in the policy was ambiguous and that Champion's interpretation of the policy was a reasonable one.[99] This result created a single deductible for 1,400 claims.[100]

The only issue on appeal was the scope of the term "occurrence" in the policies.[101] Because the Second Circuit Court of Appeals determined that there was no ambiguity in the policy, it was not necessary for the Court to resort to New York's rules governing the construction of ambiguous insurance policies.[102] In affirming the judgment of the U.S. District Court for the Southern District of New York, the Court held that there was only one occurrence because "the policy was not intended to gauge coverage on the basis of individual accidents giving rise to the claims, but rather on the underlying circumstances."[103]

The dissent noted that the "majority had strained the [policy's] occurrence language, which define[d] as one occurrence all personal injury and property damage 'arising out of continuous or repeated exposure to substantially the same general condition[s].'"[104] The dissent concluded that the pan-

93. Champion Int'l Corp. v. Cont'l Cas. Co., 546 F.2d at 504.

94. *Id.*

95. *Id.*

96. *Id.* at 504.

97. *Id.* at 505.

98. *Id.* (omission in original) (citation omitted).

99. *Id.* at 504.

100. Kenneth W. Erickson & Randall W. Bodner, *Number of Occurrences: Single or Multiple, and Effect on Aggregates and Deductibles*, 419 PRAC. L. INST., COM. L. & PRAC. COURSE HANDBOOK SERIES 403, 408 (1987).

101. 546 F.2d at 505.

102. *Id.* at 506 n.5.

103. *Id.* at 506.

104. Erickson & Bodner, *supra* note 100 (citing Champion Int'l Corp. v. Cont'l Cas. Co., 546 F.2d 502, 507 (2d Cir. 1976)).

els splitting apart at "widely different times and places were separate occurrences."[105] He predicted that, "although the majority's view would promote coverage in this particular case, it would, if consistently applied, cap insured limits in subsequent disputes."[106]

2. Business Purpose of the Parties

In *Champion International Corporation v. Liberty Mutual Insurance Company*, a product liability insurance coverage case, the U.S. District Court for the Southern District of New York held that an umbrella excess liability

> policy's language [was] unambiguous and... that, based on the business purpose of the parties and the plain meaning of the policy's language, all of the individual claims of property damage... resulting from [the splitting apart of the insured's] plywood relate[d] back to one "occurrence" which gave rise to the damage upon which the claims [were] based.[107]

In *Champion International v. Liberty Mutual*, the Court discussed the Second Circuit Court's opinion *Champion International v. Continental Casualty Corporation* where it reaffirmed the two-year-old rule that "individual instances of damage comprise one 'occurrence' where the underlying cause of harm is the same."[108] At this juncture, the court appears to abandon New York's "unfortunate event" test in favor of the "cause" test. One commentator observed, "[a]lthough the New York Court of Appeals applies the 'unfortunate event' test, the Second Circuit has not always followed that lead."[109]

3. Manufacture Versus Delivery

In *Stonewall Insurance Company v. Asbestos Claims Management,* the Second Circuit Court of Appeals explained its holding in *Champion International v. Continental Casualty Company* when it reversed the U.S. District Court for the Southern District of New York.[110] According to the Second Circuit Court of Appeals, the claims in *Champion International* that were based on the installation of defective vinyl panels in more than a thousand vehicles arose from a single occurrence, which was the insured's delivery of

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105. *Id.*

106. *Id.*

107. Champion Int'l Corp. v. Liberty Mut. Ins. Co., 701 F. Supp. 409, 413 (S.D.N.Y. 1988).

108. *Id.* (citing Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127 (S.D.N.Y. 1986)).

109. 4 ROBERT L. HAIG, N.Y. PRACT. SERIES § 52.6(b) (West 1995 & Supp. 2001) (citing N.Y. INS. L. § 41.02[6] n.69 (Wolcott B. Dunham, Jr., ed., 1995).

110. Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1214 (2d Cir. 1995).

the panels to the manufacturers of the vehicles.[111] In contrast, the Second Circuit Court of Appeals in *Stonewall Insurance* said the policyholder's liability resulted, not from the manufacture of the asbestos-containing products, but rather from the policyholder's installation of those products, which resulted in the presence of asbestos each time the products were installed on the property of third parties.[112] Therefore, each location at which the policyholder's products were present constituted a separate installation of those products and hence, a separate occurrence requiring the imposition of another deductible.[113] The lower court held that a decision to manufacture and sell asbestos-containing products was a single occurrence.[114]

4. Presumption that "Occurrence" is the Underlying Event that Ultimately Results in a Filed Claim or Claims[115]

The U.S. Bankruptcy Court for the Southern District of New York assessed New York's "unfortunate event" test in *In re Prudential Lines, Inc.*[116] Earlier, the U.S. District Court for the Southern District of New York reversed and remanded the case for consideration of whether extrinsic evidence resolved ambiguity in the term "occurrence." The district court held that the term was ambiguous and that the U.S. Bankruptcy Court for the Southern District of New York should have considered the parties' practices.[117] In its first opinion, the U.S. Bankruptcy Court for the Southern District of New York relied upon "the long line of cases applying the New York law's presumption that the 'occurrence' in an insurance context is the underlying event that ultimately results in a filed claim or claims."[118] It observed, "several courts which have applied Johnson's holding have broadly construed a single 'occurrence' as encompassing the many injuries or claims which have resulted from an underlying event, process or condition."[119]

The U.S. Bankruptcy Court for the Southern District of New York explained that, in its earlier decision, a certain line of cases led it to conclude that an "occurrence" was the general presence of asbestos on board the in-

111. *Id.* at 1213 (citing Champion Int'l Corp. v. Cont'l Cas. Co., 546 F.2d 502, 506 (2d Cir. 1976)).

112. John H. Gross et al., *"Occurrence" Policy Coverage: Overview and Recent Cases*, 557 PRACTICING L. INST., LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 57, 77 (1997) (citing Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1214 (2d Cir. 1995)).

113. *Id.*

114. *Id.* (citing *Stonewall Ins. Co.*, 73 F.3d at 1212-14).

115. Dicola v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (*In re* Prudential Lines, Inc.), 202 B.R. 13, 22 (1996).

116. *Id.* at 22-23.

117. *Id.* at 18.

118. *Id.* at 22.

119. *Id.*

sured's ships.[120] Meanwhile, the Second Circuit Court of Appeals rendered a decision possibly casting doubt on the continuing validity of broadly construing the term "occurrence" under New York law.[121] In *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, thousands of building owners sued the insured, a leading manufacturer of asbestos containing materials from 1930 to 1981, for property damage caused by the insured's products.[122] The deductible provision in the insured's property damage insurance policy allowed one deductible per "occurrence."[123] The Second Circuit Court of Appeals held that the "occurrence" was not the insured's general decision to manufacture asbestos, but rather the installation of its asbestos-containing products.[124] In that decision, where the insured was a manufacturer, the Second Circuit Court of Appeals distinguished the more recent holding from its earlier one in *Champion International Corp. v. Continental Casualty Company*, where the insured was a wholesaler.[125]

However, the U.S. Bankruptcy Court for the Southern District of New York said there was no indication that the parties attached a similar meaning to the deductible provisions of the numerous insurance policies as applied to asbestosis claims.[126] Because New York courts formulated a contra proferentum rule[127] for insurance contracts, doubt must be resolved in favor of the insured.[128] Therefore, on remand, there was no reason for the Court to reject its earlier determination that, as a matter of law, the "occurrence" was the general presence of asbestos at each location where the insured's asbestos-containing products had been installed.[129] This construction of the term "occurrence" permitted the insurer to apply only a single deductible for all the asbestosis claims indemnified by each policy.[130]

But nearly two years later the Second Circuit Court of Appeals disagreed with the U.S. Bankruptcy Court for the Southern District of New York and agreed with the U.S. District Court for the Southern District of New York's holding that each asbestosis bodily injury claim was subject to a single deductible.[131] Because each claim against the insured arose from a separate occurrence, each insured incurred a new per occurrence deductible,

120. *Id.*

121. *Id.* at 22-23 (citing *Stonewall Ins. Co.*, 73 F.3d at 1178).

122. *Id.* at 23 (citing *Stonewall Ins. Co.*, 73 F.3d at 1178).

123. *Id.* at 23 (citing *Stonewall Ins. Co.*, 73 F.3d at 1178).

124. *Id.* at 23 (citing *Stonewall Ins. Co.*, 73 F.3d at 1178).

125. *Id.* at 23.

126. *Id.* at 24.

127. This rule sometimes is referred to as *omnia praesumuntur contra proferentum*, which literally means "all things are presumed against the offeror." *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Second Circuit Applies "Per Occurrence" Deductible to Each Asbestos Bodily Injury Claim, Rather than to All Claims Arising from Exposure on a Single Ship*, 20 NO. 19 INS. LITIG. REP. 744 (1998).

rather than the deductible being applied to all claims arising from exposure on a single ship.[132] In order to establish the reasonable expectations of the parties, the Second Circuit Court of Appeals applied New York's "unfortunate event" test to determine the number of occurrences.[133] It concluded that each claimant's injuries represented a new occurrence because each claimant was separately exposed to asbestos at different points in time.[134]

The dissent argued that the majority had equated both the event and injury in its definition of the term "occurrence."[135] New York law did not support such a construction of the policy because each claimant's subsequent exposure would also count as a separate occurrence under the majority's reasoning.[136] Because the insurance policy did not define the term "occurrence" as the event and the resulting injury, common understanding would dictate that an "unfortunate event" is one that causes an injury.[137] Therefore, common understanding of the term "occurrence" pointed to the underlying event, rather than to the initial exposure to the insured's asbestos-containing products.[138]

B. First-Party Property Claims by an Insured

Property insurance policies are first-party policies because they obligate property insurance companies to pay benefits directly to policyholders for losses they suffer to their own property or profits.[139] In addition to tangible property, first-party policies cover intangible property, such as anticipated profits and lost income both during and after a business interruption.[140] Courts recognized that the business purpose of the property insurance policy is to protect specific property from designated perils, which distinguishes the interpretation of the word "occurrence" in a property policy from its usage in third-party policies.[141] Although there are hundreds of cases construing the number of "occurrences" in a third-party context, few courts have addressed this issue in the context of first-party policies.[142] In New York, the "unfortunate event" test has been applied to a relatively small number of first-party contexts.

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132. *Id.*

133. *Id.*

134. *Id.*

135. Dicola v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n. (*In re* Prudential Lines, Inc.), 158 F.3d 65, 87 (2d Cir. 1998) (Lay, J., dissenting).

136. *Id.*

137. *Id.* at 88 (Lay, J., dissenting).

138. *Id.* at 90 (Lay, J., dissenting).

139. Lewis, *supra* note 87.

140. *Id.*

141. Edward J. Ozog, *When the Roof Falls In . . . Defining "Occurrence" in Property Insurance*, 19 WTR BRIEF 8, 31 (1990).

142. Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, 69 DEF. COUNS. J. 169, 171 (2002).

1. Physical Loss Due to Theft

In *I Q Originals, Inc. v. Boston Old Colony Insurance Company*, an insurer issued a policy covering "*all risks* of physical loss or damage to the insured property from any cause whatsoever" to a wholesaler of merchandise.[143] The policy contained a clause limiting liability to not more than $60,000 in any one shipment, loss, disaster or casualty.[144] The insured's truck, which contained five separate shipments of the insured's goods worth $21,584, $39,620, $48,147, $69,135 and $88,095, respectively, was hijacked.[145] Before the hijacking, the insured's customer consolidated the five shipments by repacking them on one truck at its New Jersey warehouse.[146]

In applying the "unfortunate event" test, the New York Supreme Court, Appellate Division, First Department determined that the hijacking constituted one event or occurrence, not five separate events or occurrences.[147] Therefore, the limitation of liability clause in the policy limited the insured's recovery to $60,000.[148] The Court also held that the limitation of the insured wholesaler's liability clause was unambiguous and that the policy's construction presented a question of law.[149] Regarding whether the events of September 11, 2001 constituted one or two occurrences, there is no definition of the term "occurrence" contained in at least one of the policies, that of Travelers.[150] Therefore, the facts of *I Q Originals, Inc. v. Boston Old Colony Insurance Company* can be distinguished on that basis.

The dissenting opinion said there could be confusion as to the limitation of liability clause's meaning because it was not sufficiently clear.[151] Therefore, the Court should have applied the rule that "insurance policies should be construed according to the 'reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract.'"[152] The dissent's reasoning is similar to the Silverstein Parties' argument that, although the insurers' reading of the WilProp's definition of "occurrence" is the most reasonable one, "it is not the *only* reasonable reading, and . . . therefore the question of the number of occurrences under the WilProp must be decided by a jury."[153]

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143. I Q Originals, Inc. v. Boston Old Colony Ins. Co., 447 N.Y.S.2d 174, 175 (1982) (emphasis added).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 176.

148. *Id.*

149. *Id.* at 175.

150. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., No. 01 Civ. 9291, 2002 WL 1163577, at *2.

151. *See I Q Originals, Inc.*, 447 N.Y.S.2d at 176.

152. *Id.* (quoting Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86, 87 (N.Y. 1918)).

153. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., 222 F. Supp. 2d 385, 388 (S.D.N.Y. 2002).

2. Loss Due to Theft by False Pretenses

In *Great Northern Insurance Company v. Dayco Corporation*, an insurer brought an action seeking declaratory judgment that it was not liable under an "all risk" policy covering direct physical loss of all real and personal property of the insured.[154] The insured, a manufacturer and seller of belts and hoses, failed to receive full payment for twelve shipments of goods that were lost.[155] The U.S. District Court for the Southern District of New York observed that the rule in the Second Circuit was in accord with the "proposition that 'an occurrence is determined by the cause or causes of the resulting injury.'"[156] Therefore, the insured's loss was a multiple, rather than a single, loss.[157]

The Court also referred to the absence of a comprehensive definition of "occurrence" as a basis for finding ambiguity and therefore compelling coverage for multiple "losses" under the property policy.[158] This reasoning is similar to the Silverstein Parties' argument that U.S. District Court for the Southern District of New York should apply New York's "unfortunate event" test because Travelers' World Trade Center complex policy does not contain a definition of the term "occurrence."[159] In *Great Northern Insurance Company v. Dayco Corporation*, the language of the policy did not clearly limit coverage.[160] "To the extent that the absence of broader 'occurrence' wordings created ambiguity in the policy, the court held that the ambiguity had to be resolved in favor of the insured."[161] This reasoning is also similar to the Silverstein Parties' argument that the WilProp's definition of occurrence is "not the *only* reasonable reading, and . . . therefore the question of the number of occurrences under the WilProp form must be decided by a jury."[162]

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154. Great N. Ins. Co. v. Dayco Corp., 620 F. Supp. 346, 350 (S.D.N.Y. 1985).

155. *Id.* at 348, 349.

156. *Id.* at 354 (citing Bus. Interiors, Inc. v. Aetna Cas. & Sur. Co., 751 F.2d 361, 363 (10th Cir. 1984); Michigan Chem. Corp. v. Am. Home Assurance Co., 728 F.2d 374, 379 (6th Cir. 1984); Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 61 (3d Cir. 1982); Champion Int'l Corp. v. Cont'l Cas. Co., 546 F.2d 502, 504 (2d Cir. 1976)).

157. *Id.* at 355.

158. *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 171-72 (citing Great N. Ins. Co. v. Dayco Corp., 620 F. Supp. at 354).

159. *See* SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., No. 01 Civ. 9291, 2002 WL 1163577, at *2.

160. *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 174-75 (citing Great N. Ins. Co. v. Dayco Corp., 620 F. Supp. at 354).

161. *Id.* at 175 (referring to Great N. Ins. Co. v. Dayco Corp., 620 F. Supp. at 354).

162. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., 222 F. Supp. 2d at 388.

3. Property Damage Due to Natural Causes

In *Newmont Mines Limited v. Hanover Insurance Company*, the insured brought an action for indemnification under two property damage policies arising out of the collapse of two separate sections of the roof of the insured's building.[163] Each of the two collapses occurred on a different day, but each had the same cause, concentration of snow on the roof.[164] The two insurance companies were among four that provided layered insurance coverage against a variety of perils, including collapse caused by the weight of ice and snow.[165] In the dispute with their insurers, the Silverstein Parties argue that the U.S. District Court for the Southern District of New York should apply New York's "unfortunate event" test because Travelers' policy does not contain a definition of the term "occurrence."[166] Like Travelers' World Trade Center complex policy, the two policies at issue in *Newmont Mines Limited v. Hanover Insurance Company* did not contain a definition of the term "occurrence."[167]

In *Newmont Mines Limited v. Hanover Insurance Company*, the two insurers contended that both collapses should constitute only one occurrence for coverage purposes because the collapses were caused by the same condition, excessive buildup of snow on the roof of the building.[168] However, the Second Circuit Court of Appeals distinguished property damage from product liability insurance policies.[169] It noted, "when construing a *property damage* policy, . . . the business purpose sought to be achieved by the parties is considerably different."[170] Because the goal of a first-party policy is "to provide financial protection against damage to property," the parties "intended to provide coverage for property damage each time it occurred unexpectedly and without design, unless the damage occurring at one point in time was merely part of a single, continuous event that already had caused other damage."[171] "The business purposes to be achieved by property insurance are . . . expressed in the nature of the policy protections and the negotiations of the parties."[172] Therefore, the construction and interpretation of the parties should control for purposes of construing the term "occur-

163. Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 129 (2d Cir. 1986).

164. *Id.* at 130.

165. *Id.* at 131.

166. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., No. 01 Civ. 9291, 2002 WL 1163577, at *2.

167. Ozog, *supra* note 141, at 28.

168. Newmont Mines Ltd v. Hanover Ins. Co., 784 F.2d at 134.

169. *Id.* at 136. *See also* Champion Int'l Corp. v. Liberty Mut. Ins. Co., 701 F. Supp. at 412.

170. Newmont Mines Ltd v. Hanover Ins. Co., 784 F.2d at 136.

171. *Id.*

172. Ozog, *supra* note 141, at 11.

the parties should control for purposes of construing the term "occurrence."[173]

In *Newmont Mine Limited v. Hanover Insurance Company*, the Second Circuit Court of Appeals was concerned about time and space having significance in ordinary business relations because the causal analysis was too dependent on the construed timing of events comprising an "occurrence."[174] If the first roof collapse would have been adjusted and paid without full knowledge of the cause, then the ordinary pursuit of business relationships would have certainly resulted in two occurrences.[175] Therefore, "[t]he cause analysis . . . failed to recognize the business purpose of the property policy."[176]

Although the Court did not explicitly cite *Arthur Johnson*, the reasoning is similar. Just as the Court of Appeals of New York in *Arthur Johnson* viewed the proximate cause as the separate negligent acts of the insured in preparing and constructing separate walls and not the heavy rainfall,[177] the Second Circuit Court of Appeals declined to look at the snowstorm as the only cause of the damage because the two collapses were unrelated.[178] Because the jury received proper instruction to find separate insured losses unless the losses were part of a single continuous event,[179] the Court upheld a finding that the two collapses were separate occurrences within the meaning of the insurance policies[180]

The approach in *Newmont Mines* has elements of both the "cause" and "effect" analysis.[181] The Court emphasized the lack of evidence presented at trial of any clear common "cause" and cited several factors supporting its decision to uphold the jury's finding.[182] First, "the two collapses occurred at least three, and perhaps as many as seventeen, days apart."[183] Also, the insured's structural engineering expert testified that the buildings were designed as separate structures.[184] Therefore, the first collapse did not cause or contribute to the second, and the second collapse was not merely a continua-

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173. *Id.* at 12-13.

174. *Id.* at 27.

175. *Id.*

176. *Id.*

177. *Arthur A. Johnson Corp.*, 164 N.E.2d at 708.

178. Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d at 136-37.

179. *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 174 (citing Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d at 135).

180. *Newmont Mines Ltd.*, 784 F.2d at 137.

181. *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 174 (discussing Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d at 127).

182. *Id.* (citing Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d at 135-36).

183. *Newmont Mines Ltd.*, 784 F.2d at 137.

184. *Id.*

tion of the earlier one.[185] The expert's opinion was that the two collapses were separate events.[186] In answering the question of whether the events of September 11, 2001 constituted one or two occurrences, expert testimony provided by both sides could be crucial because it would determine whether the second tower was likely to have collapsed anyway even if it had it not been struck.[187]

In *Newmont Mines*, the Second Circuit Court of Appeals observed that, although "the cause of the insured's liabilities might be an appropriate focus for third-party coverage, the subject matter of first-party insurance is the damaged property itself."[188] "A liability policy is intended to protect an individual or a business from liability from their tortuous conduct."[189] Because that is the "business purpose sought to be achieved by the parties, it is eminently reasonable to look to the underlying conduct or cause of that liability."[190] However, the "cause" test may conflict with the business purpose of property insurance, which is to provide financial protection against damage to property.[191] Therefore, there is a considerable difference when construing a property damage policy.[192] "In accordance with this [business] purpose, the parties must have intended to provide coverage for property damage each time it occurred unexpectedly and without design, unless the damage occurring at one point in time was merely part of a single, continuous event that already had caused other damage."[193] The contrast in the business purposes of third-party and first-party policies that the Second Circuit Court of Ap-

185. *Id.*

186. *Id.*

187. For Travelers,

> Harvey Kurzweil of [New York-based] Dewey Ballantine [has argued] that the attack on the second tower, which occurred 16 minutes after the first plane hit the North Tower of the World Trade Center, could hardly be considered a "remote cause," in part because the destruction of either building would have resulted in the destruction of the supporting infrastructure of the other. And Mr. Kurzweil raised the possibility that expert testimony would show that the destruction of either one of the two towers would have brought the second to the ground.

Mark Hamblett, *Not Quick End to Trade Center Insurance Case*, N.Y.L.J., June 4, 2002, at 1. Swiss Re's counsel has said, "there is 'substantial engineering evidence' that even without the second plane, the first plane would have caused both towers to collapse because of the common systems that connected" them. Tamara Loomis, *Insurance Lawyers Debate Payment for Terrorist Attack*, N.Y.L.J., Jan. 17, 2002, at 1. Mr. Silverstein's counsel has said the issue is "a total and complete red herring." *Id.* Mr. Silverstein himself was equally dismissive, saying "that the twin towers stood on separate foundations, and the fact that underground concourses connected them did not make the foundations dependent upon each other." *Id.*

188. *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 171 (citing Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d at 136).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

peals discussed in *Newmont Mines* was also noted by U.S. District Court for the Southern District of New York.[194] In *Burroughs Wellcome Company v. Commercial Union Insurance Company*, the district court reasoned, "[s]o long as the subsequent injury may be considered a consequence of the first, it may be considered part of the same 'accident.'"[195]

The Second Circuit Court of Appeals described this cause analysis as "absurd" in the first-party context of *Newmont Mines* and distinguished the cause approach followed in *Champion International* because it involved products liability.[196] *Newmont Mines* suggests that, "in property damage cases, courts should consider whether the damage was part of a single continuous event, [and] not whether the damage occurring at one point in time had a similar cause to damage occurring another time."[197]

C. Post-9/11 Reinsurance Cases

Since September 11, 2001, the New York Court of Appeals has addressed the number of "occurrences" question in the context of two cases involving reinsurance policies, which were resolved by the Court in a single opinion.[198] In *Travelers Casualty and Surety Company v. Certain Underwriters at Lloyd's of London*, the Court of Appeals decided "whether losses from environmental injury claims involving decades of commercial activities at numerous industrial and waste disposal sites may properly be aggregated as a single 'disaster and/or casualty' under certain reinsurance treaties."[199] "The treaties define[d] 'each and every loss' as '*all loss arising out of any one disaster and/or casualty under coverage of any or all insureds of the Companies*. . . .'"[200] The definition of "disaster and/or casualty" was

> each and every accident, occurrence and/or causative incident, it being. . . understood that all loss resulting from a series of accidents, occurrences and/or causative incidents having a common origin and/or being traceable to the same act, omission, error and/or mistake shall be considered as having resulted from a single accident, occurrence and/or causative incident.[201]

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194. Burroughs Wellcome Co. v. Commercial Union Ins. Co., 632 F. Supp. 1213, 1221 (S.D.N.Y. 1986) (discussing Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d at 136-37).

195. *Id.* (citing Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d at 137).

196. Erickson & Bodner, *supra* note 100, at 410 (citing Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d at 136-37).

197. David Marshall Moriarty & David A. Martland, *Insurance Coverage Issues for Toxic Chemicals or Hazardous Waste Claims*, 316 PRAC. L. INST., LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 207, 261-62 (1986).

198. Pernicone & Deaver, *supra* note 38, at 27.

199. Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d at 322.

200. *Id.* at 323 (emphasis in original).

201. *Id.*

The reinsured, Travelers Casualty and Surety Company, (Travelers Surety) contended that the plain language of the reinsurance treaties required the "widest possible search for a unifying factor among the underlying claims."[202] This "would mean Travelers [Surety] could surmount the retention limits in the treaties and thus be entitled to a recovery."[203] However, the reinsurers challenged Travelers Surety's single allocations of its losses based on the contractual language in the reinsurance treaties.[204] In finding "that the necessary relationship did not exist between the dozens of sites belonging to each insured, which were 'separated spatially by thousands of miles and temporally by decades,' the Court said that the phrase 'series of' created a requirement of a temporal and spatial relationship among the accidents to be aggregated under the wording."[205] Therefore, Travelers Surety's "attempt to treat the disparate environmental claims in each case, respectively, as one 'disaster and/or casualty' for the purposes of allocating [the] cost [of these claims] to its reinsurance treaties was barred by the policy language."[206]

Unlike Travelers' World Trade Center complex policy,[207] there was language in the reinsurance treaties that defined the term "occurrence."[208] However, the words "series of" are used in the WilProp.[209] One of Mr. Silverstein's arguments is that the WilProp's definition of occurrence reasonably allows for two occurrences.[210] Therefore, Mr. Silverstein's argument that the insurers' reading of the WilProp's definition of occurrence is not the *only* reasonable one and must be decided by a jury[211] may be similar to the one made by Travelers Surety as the reinsured in these two cases.

The Court's multiple events analysis seems to support the Silverstein Parties' position that the events of September 11, 2001 were two separate occurrences for purposes of insurance coverage for the collapse of the World Trade Center's Twin Towers.[212] In reaching its conclusion that under the facts and reinsurance contracts at issue, the aggregation of those losses was "beyond the scope of the applicable treaties,"[213] the *Travelers Casualty and*

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202. *Id.* at 326.

203. Pernicone & Deaver, *supra* note 38, at 27.

204. Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d at 325-26.

205. Pernicone & Deaver, *supra* note 38, at 28.

206. *Id.*

207. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., No. 01 Civ. 9291, 2002 WL 1163577, at *2.

208. Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d at 323.

209. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., 222 F. Supp. 2d at 398.

210. *Id.* at 388.

211. *Id.*

212. *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 169 (citing Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d 319).

213. 760 N.E.2d at 322.

Surety Court listed several factors to determine whether a reinsured could properly aggregate claims.[214] The factors were whether "those 'accidents, occurrences and/or causative incidents' have a spatial or temporal relationship to one another and a 'common origin.'"[215] The Court determined that "the parties did not intend for the reinsured to simply group together all losses as a single 'disaster and/or casualty. . . .'"[216] Therefore, the losses could not be treated as having any common causative origin because they involved discrete pollution problems that occurred in different parts of the United States at different times.[217] This meant that the treatment of each site as a separate "disaster and/or casualty" failed to pierce any of the reinsurance treaties' retention levels.[218]

However, *Travelers Casualty and Surety* also arguably sets forth a method for treating the attack on the World Trade Center complex as a single event for insurance purposes.[219] The Court of Appeals of New York's focus was on whether the underlying claims were closely linked in time and space.[220] This would imply that the two aircraft striking the adjoining twin towers within minutes of each other, as a consequence of a coordinated attack, constitute a single "occurrence."[221]

IV. CONCLUSION

"One must deal with an infinite number of causes and effects" in devising insurance policies.[222] In *Bird v. St. Paul Fire & Marine Insurance Co.*, Judge Benjamin Cardozo said,

> General definitions of proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. There are times when the law permits us to go far back in tracing events to causes. The inquiry[] is how far the parties to th[e] contract intended us to go. . . . That cause is to be held predominant which they would think of as predominant. A common-sense appraise-

214. *Id.* at 327.

215. *Id.*

216. *Id.*

217. *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 169 (citing Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d 319).

218. 760 N.E.2d 327.

219. *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 169 (citing Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d 319).

220. *Id.*

221. *Id.*

222. Ozog, *supra* note 141, at 11.

> ment of everyday forms of speech and modes of thought must tell us when to stop.[223]

"The elasticity of the [term 'occurrence'] depends on the individual policy language to give it full meaning in light of the intentions of the parties."[224] One insurance company contends that its use of the term "event" in defining the term "occurrence" in its policy[225] makes it less ambiguous than Travelers' policy.[226] However, the U.S. District Court for the Southern District of New York responds, "[w]hile reasonable people might consider the attack on the World Trade Center as a single event, it is no less reasonable to consider the separate hijackings of two aircraft and the ultimate crashing of those aircraft into different buildings at different times as two separate events."[227] Therefore, the issue of whether the events of September 11, 2001 constituted one or two occurrences must be decided by a jury.[228]

"One cannot have an occurrence under a property policy unless there is a compensable 'loss.'"[229] At least one New York court has "gone so far as to say that 'occurrence' equals 'loss.'"[230] "The phrase 'inception of the loss' has been interpreted as 'equivalent to the occurrence of the casualty or event insured against.'"[231] If so, then it would seem two airplanes striking the World Trade Center's twin towers created two losses, and therefore, two occurrences.

In *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, an airline brought suit against the insurers of its airplane, which was hijacked in the sky over London by members of a Palestinian terrorist group and destroyed in Egypt.[232] In determining "which of the various underwriters . . . must bear the cost of the loss,"[233] the Second Circuit Court of Appeals reasoned, "[r]emote causes of causes are not relevant to the characterization of an insurance loss."[234] In the context of that litigation, the Court did "not trace

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223. *Id.* (quoting Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86, 87 (N.Y. 1918)).

224. *Id.* at 10.

225. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., No. 01 Civ. 9291, 2003 WL 554768, at *4.

226. *Id.* at *5.

227. *Id.*

228. *Id.* at *6 (S.D.N.Y. Feb. 26, 2003).

229. Ozog, *supra* note 141 at 10.

230. *Id.* (citing Margulies v. Quaker City Fire & Marine Ins. Co., 97 N.Y.S.2d 100 (1950)).

231. Morgan Guar. Trust Co. of New York v. Aetna Cas. & Sur. Co., 604 N.Y.S.2d 952, 953 (1993) (citing Margulies v. Quaker City Fire & Marine Ins. Co., 97 N.Y.S.2d 100, 104 (1950)).

232. Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 993 (2d Cir. 1974).

233. *Id.*

234. *Id.* at 1006.

events back to their metaphysical beginnings," instead stopping the causation inquiry "at the efficient physical cause of the loss. . . ."[235] It noted, "[t]he words 'due to or resulting from' within all-risk policies' exclusion of coverage of loss or damage due to or resulting from various enumerated perils, referred only to facts immediately surrounding the loss."[236]

In its opinion, the Second Circuit Court of Appeals quoted a passage written by Mr. Justice Holmes that said,

> [t]he common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. This is a settled rule of construction, and if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their contract as they like.[237]

The Second Circuit Court of Appeals noted, "New York courts give especially limited scope to the causation inquiry."[238] While discussing *Bird v. St. Paul Fire* [239] the Court added, "[i]t [is] ascertained that the scope of causation relevant to the insurance nature of a loss is largely a question of fact depending on the reasonable expectations of businessmen. . . ."[240] "'The question is not what men ought to think of as a cause. The question is what they do think of as a cause.'"[241] The cases that the Court discussed "establish a mechanical test of proximate causation for insurance cases, a test that looks only to the 'cause[s] nearest to the loss.'"[242]

In reviewing *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, the U.S. District Court for the Southern District of New York noted that the Second Circuit Court of Appeals said, "'if the insurer desires to have more remote causes determine the scope of exclusion, he may draft language to effectuate that desire.'"[243] Therefore, any ambiguity in this regard should be construed against the insurer under the maxim contra proferentum.[244] If the U.S. District Court for the Southern District of New York and Second Circuit Court of Appeals strictly apply a test of proximate causa-

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235. *Id.*

236. *Id.* (citing Standard Oil Co. v. United States, 340 U.S. 54, 58 (1950)).

237. *Id.* (quoting Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 492 (1924)).

238. *Pan Am. World Airways, Inc.*, 505 F.2d at 1006.

239. Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47 (1918).

240. *Pan Am. World Airways, Inc.*, 505 F.2d at 1006.

241. *Id.* (quoting Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 52 (1918)).

242. *Id.* at 1007 (quoting Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 492 (1924)).

243. Holiday Inns, Inc. v. Aetna Ins. Co., 571 F. Supp. 1460, 1464 (S.D.N.Y. 1983) (quoting *Pan Am. World Airways, Inc.*, 505 F.2d at 1007).

244. *Pan American World Airways, Inc.*, 505 F.2d at 1007.

tion that looks only to the "causes nearest to the loss," an inconsistent application of New York's "unfortunate event" test may be avoided.[245]

Jon A. Baumunk[*]

245. In January 2002, Mr. Silverstein filed a summary judgment brief in which he argues that the terrorists' plan was not the proximate cause of the losses and was, at best, an inconsequential remote cause. Citing *Pan American World Airways, Inc.*, Mr. Silverstein argues that "remote causes of losses are not relevant in the characterization of an insurance loss." *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, *supra* note 142, at 171.

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