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Words worth billions: there's no shortage of exclusionary language and restrictive terms in the fine print of humdrum homeowners' policies. But when it comes to defining an occurrence, or two, or three, in policies designed to protect billions of dollars belonging to some of the nation's largest companies, pinpoint definitions vanish in a semantic swamp

[Risk & Insurance, June, 2004](#) by [Michael Fitzpatrick](#)

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Ask a mathematician what two plus two equals, and he'll reply "four." Ask an accountant and he'll say, "What do you want it to equal?" That old joke especially hits home in the insurance industry, where some of the biggest disputes revolve around the meaning of "one" when it comes to defining what constitutes a single occurrence.

Do the Sept. 11 attacks where terrorists crashed two planes into two buildings count as one occurrence or two? Are 266 terrorist attacks over two years against a Colombian oil pipeline a single occurrence? Are asbestos claims from hundreds of job sites one occurrence? At first it seems like defining an occurrence is an issue that should have been settled long ago with standardized language, but the Sept. 11 attacks present a case where the devil really is in the details.

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"You would think that occurrence would be standard and worked out ahead of time, and it all comes back to contract drafting. Not all insurance or reinsurance contracts are drafted equally," says Larry P. Schiller, a partner specializing in insurance and reinsurance with LeBoeuf, Lamb, Greene & MacRea LLP. "The whole dispute over occurrences really comes back to how one defines words in that insurance or reinsurance contract and how precise the parties are when they define them."

The otherwise esoteric topic of occurrences has hit the mainstream news with a court fight over \$3.5 billion in insurance coverage for the destruction of the twin towers at the World Trade Center. That is causing a closer look overall at the terms and conditions of policies.

"This is a part of a larger trend--although there's a lot of focus on the definition of occurrence specifically--toward tighter control of terms and conditions," says Robert Hartwig, chief economist at the Insurance Information Institute. "I think everyone has got a commonsense understanding that we need to have an ironclad definition of occurrence here to prevent future litigation."

Whether each party wants to call an event one or many occurrences, and whether the policy limits or deductibles favor the insured, the insurer or the reinsurer, may change with the circumstances.

"Typically insureds want to minimize the number of deductibles, so they want a broad occurrence definition, while insurance companies want a narrow definition or none at all," says Seth B. Schafler, senior counsel at Proskauer Rose LLP. New York-based Proskauer Rose is one of the firms representing the World Trade Center leaseholders Silverstein Properties Inc. in its dispute with insurers and Swiss Reinsurance over \$3.5 billion in coverage for the World Trade Center.

If an insured is seeking catastrophic coverage in the event of a massive loss, it might be willing to accept multiple deductibles, but the best definition of an occurrence for either party, however, may not become dear until later.

"One cannot say for sure which type of occurrence definition is 'better' before the loss has occurred," Schafler says.

THE TWO-OCCURRENCE DEFINITION

In the World Trade Center case, the Silverstein group argued that the attacks were two occurrences and that entitled them to two payments of \$3.55 billion instead of one. The lead insurer, Swiss Re, argues that the attacks were one occurrence.

The dispute over whether the attack constitutes one occurrence or two occurrences hangs on which form is ruled to have been in force at the time: a Willis Group Holdings form with a

narrow definition, or a Travelers form which lacked any definition of what constitutes an occurrence. Although the Silverstein policy had not been finalized by the time of the attacks, the developer has argued that the Travelers form had already taken effect.

Recent verdicts in the WTC case have found the attacks to constitute one event. In April, the jury found that eight of two dozen insurers were bound to a form defining the loss as one event. In May, the jury found Swiss Re liable only for a single payment, not two as sought by Silverstein.

"The problem with the Silverstein loss was that there's no finalized policy form in place at the time of binding--and that's normally true--you don't normally have a final policy form in place at the time of binding, what you have is a binder, or a slip in London, and those types of documents don't spell out all of the terms and conditions that might be included in the final policy wording," says Schafler.

That dispute has led to insured and insurers to take a closer look at binders.

"Probably the biggest change that has happened as a result of Sept. 11, there is greater scrutiny given to what the binder says and whether the policy form is specified in the binder contract," Schafler says.

FAVORING A SINGLE-OCCURRENCE THEORY

In contrast to the World Trade Center dispute, where the leaseholder is seeking to have the attacks declared as two occurrences, it is more likely for an insured to seek to limit its deductible by having a chain of events declared as one occurrence.

Take, for instance, Occidental Petroleum Corp. In 2002, it sued a group of insurers led by Lloyd's of London over coverage for the Cant Limon off pipeline in Colombia, a critical piece of infrastructure-bombed by anti-government guerillas 266 times in 2000 and 2001. Occidental, which had a \$2 million deductible for each occurrence and has lost hundreds of millions of dollars as a result, has argued that the attacks on the pipeline should have been considered one occurrence. Occidental and Lloyd's declined to comment on the suit.

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