In this world there are only two tragedies. One is not getting what one wants, and the other is getting it.”

Oscar Wilde, *Lady Windermere’s Fan*

Issues concerning excess insurance are now at the forefront of twenty-first century coverage litigation. While the role of excess insurance was previously reserved for the truly “once in a lifetime” type of loss faced by a major corporation, the prevalence of class actions, mass tort (e.g., asbestos, medical device and pharmaceutical products), environmental, clergy abuse and other large-scale litigation has greatly increased the potential significance of even high-layer excess insurance policies as policyholders respond to these ever-evolving claims situations. Further, as older primary commercial general liability (CGL) policies have become exhausted responding to these claims, policyholders increasingly look to their excess insurers as a potential source of recovering the astronomical sums that can be involved. Not surprisingly, particularly in light of the relatively small premiums that were paid for this coverage decades ago and the amounts at stake, excess insurers have become more willing now than in the past to contest these claims.

These modern-era coverage disputes have spawned a number of complex issues related to how a multi-layer insurance program is to function in response to new claim situations. Nowhere has this trend been more evident than in a multitude of recent cases that have dealt with number of “occurrences.” While the so-called “rules” for making such determinations—for example, the “cause” and “unfortunate event” tests—are not new, the ways in which litigants and courts interpret and use these rules as strategic tools in coverage litigation continue to undergo dramatic changes. In particular, how many “occurrences” a given claim situation presents has created fertile ground for disputes not only between insurers and their policyholders, but among insurers within a policyholder’s program. Where a particular insurer “sits” in the layers of coverage can have a significant effect on how the insurer assesses its course of action on this critical issue.

These types of inter-insurer disputes frequently result in an insurer making arguments that can be used by policyholders in subsequent litigation. Further complicating the situation is the increasing role of high self-insured retentions and deductibles in place of tra-
ditional primary insurance, which complicates how these layers are to be treated for purposes of the number of “occurrences” analysis.

This article will explore the many new variations on a fundamental question of insurance coverage, considering the latest strategies to address the problem on a national basis and how insurers can take advantage of these approaches while avoiding the many pitfalls they are likely to encounter along the way. As will become evident, there is no one “right” answer that fits every situation. Indeed, the challenge that faces insurers is how to use the relevant legal rules to their financial advantage while not falling into traps that can come back to haunt them later. This issue is truly one that can put the insurer on the twin horns of an uncomfortable dilemma that involves very serious financial consequences.

The Source of the Dilemma

As with most disputes arising from the application of insurance policies to claims situations, the source of the dilemma of how to measure the number of “occurrences” inheres in the policy language itself. While there are certainly variations to be found in the language of liability insurance policies, a typical example of the operative provision states that “occurrence” means the following:

- an accident, including continuous or repeated exposure to conditions, which results in bodily injury neither expected nor intended from the standpoint of the insured.

For the purpose of determining the company’s liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

Despite the facial simplicity of this language, applying the terms of a policy containing it in complex claim situations, particularly those that involve large numbers of individuals who were allegedly injured through exposure to a product at diverse locations and over an extended period of time, has proven to be elusive. The problematic nature of applying the language is well-illustrated by the fact that in virtually every type of claim situation courts grappling with similar cases have come out at diametrically opposite poles when deciding how many “occurrences” the cases involved and thus whether a particular insurance policy potentially would have to pay more than a single set of limits of liability or at which point in time an underlying SIR would be deemed to have been satisfied.

Apart from the policy language, the other major source of the “occurrences” dilemma is how the evolution of mass tort claims has shaped coverage disputes. For the “occurrences” issue to be significant and worth litigating requires an unusual cluster of circumstances, including (1) an insured must be liable; (2) the policy must afford coverage for the claim, meaning that the question is not whether there is coverage for the claim, but rather how much coverage is available; and (3) the liability must exceed the conceded coverage, making it necessary to consider whether more than a single set of policy limits is available. These are issues that insurers—and for the most part policyholders—have shied away from litigating because there is no consistent “right” position that is always going to benefit an insurer or a policyholder. For example, an excess carrier seeking to escape liability on the theory that all of the costs should be borne by the primary layer on the basis that each individual claimant in a mass tort situation should be considered to be a separate “occurrence” must, if the carrier is taking a sensible approach, also take into account that it may be the primary insurer in the next claim down the road and thus could be inadvertently creating bad law for itself in another case. Similarly, a policyholder may be cautious about arguing that a primary carrier should be saddled with the entire obligation for a loss when it has towers of excess insurance that it wants to access.

For this reason, it was extremely rare in any of the major “wars” arising from pollution and other big-ticket losses that raged during the 1980s and 1990s and beyond that either an insurer or a policyholder raised the number of “occurrences” issue. It was simply too fraught with peril for other cases even if it had potential benefits in the case at hand. Now, the landscape has changed dramatically. The focus of most coverage litigation is increasingly on indemnity issues accompanied by the erosion of underlying layers of coverage and the growing role of self-insured retentions (SIRs) in the profiles of most major policyholders.

The sheer range of cases in which the issue of the number of “occurrences” has come up demonstrates how critical the issue has become. The debate has played out in contexts as varied as asbestos, Appalachiann Ins. Co. v. General Electric Co., 8 N.Y.3d 162, 863 N.E.2d 994 (N.Y. 2007), to bad batches of peanut butter, ConAgra Foods, Inc. v. Lexington Ins. Co., 21 A.3d 62 (Del. 2011), to imported drywall, Cincinnati Ins. Co. v. Devon International, Inc., 924 F.Supp.2d 587 (E.D. Pa. 2013), to clergy abuse cases (Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa, 21 N.Y.3d 139, 991 N.E.2d 666 (N.Y. 2013). The number of high-stakes cases centering on whether a claim situation involves one occurrence or more than one occurrence and, if so, how many, indicates that the gloves are off. The cases that have emerged also reveal that the old dilemmas still remain. While policyholders may generally advocate an approach that favors multiple “occurrences” to maximize the limits that are available to satisfy a loss, that won’t be the case if they have significant SIRs that must be satisfied for each “occurrence” or if they want to be able to “spike” their excess towers of coverage. Similarly, while insurers can generally be said to favor a one “occurrence” rule, their incentives to argue for a contrary position can increase exponen-
Over time a consensus view has emerged that most courts will look to the *cause* underlying a claim or group of claims to determine the number of occurrences.

The Relevant “Tests”

In considering whether a group of claims constitutes a single “occurrence” for the purpose of determining how the available limits of liability within an insured’s program will apply, the courts have developed several general legal standards or tests for measuring the number of “occurrences.” As with any such legal “test,” however, the ones that govern this inquiry have been molded to lead to the result that the court wants to reach.

Over time a consensus view has emerged that most courts will look to the *cause* underlying a claim or group of claims to determine the number of occurrences. See, e.g., RLI Ins. Co. v. Simon’s Rock Early College, 54 Mass. App. Ct. 286, 289, 765 N.E.2d 247 (Mass. App. Ct. 2002); Addison Ins. Co. v. Fay, 232 Ill. 2d 446, 905 N.E.2d 747, 753–54 (Ill. 2009); Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd., 223 Ill. 2d 407, 860 N.E.2d 280, 287–88 (Ill. 2006); Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3rd Cir. 1982); Plastics Engineering Co. v. Liberty Mut. Ins. Co., 315 Wis. 2d 556, 759 N.W.2d 613 (Wis. 2009); Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 255 Conn. 295, 765 A.2d 891, 900–901 (Conn. 2001)(collecting cases). Thus, when separate claims or injuries or damage have a common cause, only a single “occurrence” exists for insurance purposes. RLI, 54 Mass. App. Ct. at 250; Addison, 905 N.E.2d at 753 (ruling that two boys who froze to death were separate occurrences). Under this rationale, the courts conclude that since the focus of whether there has been a covered “occurrence” is on the insured’s conduct, that same inquiry should drive the question of whether a given claim situation involves a single “occurrence” or multiple “occurrences.” As the Massachusetts Appeals Court stated: “We conclude that when the issue is the number of occurrences, we must look to the ‘cause’ of the injury by reference to the conduct of the insured for which coverage is afforded, and that ‘cause’ and ‘occurrence’ are indistinguishable for purposes of this analysis.”

Simon’s Rock, 54 Mass. App. Ct. at 251 (college’s negligent failure to prevent shooting spree, not the individual injuries or separate injured claimants, was the “cause” and thus only involved a single “occurrence”); see Donegal Mut. Ins. Co. v. Bauhammers, 938 A.2d 286, 293 (Pa. 2007); Mitsui Sumitomo Ins. Co. of America v. Duke Univ. Health Systems, Inc., 509 Fed. Appx. 233, 2013 WL 491942 (4th Cir. 2013) (barrels of hydraulic fluid that were mistakenly used to wash hundreds of medical instruments held to be one “occurrence” triggering a single limit of liability).

Despite the seeming simplicity of the formulation, applying the “cause” test can be much harder in practice than it would appear. Equally, the way in which the test is typically stated can lead to manipulation. This is particularly the case when the “cause” of an alleged injury is debatable, which, of course, in most cases depends upon how the parties and the court hearing the dispute choose to define “cause.” Many courts tie the number of “occurrences” analysis to the familiar “chain of causation” rule, adding a further layer of complexity. As the Wisconsin Supreme Court summarized:

Under the cause theory, where a single uninterrupted cause results in all of the injuries and damage, there is but one ‘accident’ or ‘occurrence.’ If the cause is interrupted or replaced by another cause, the chain of causation is broken and there has been more than one accident or occurrence.

Plastics Engineering Co. v. Liberty Mut. Ins. Co., 759 N.W.2d 613, 622 (Wis. 2009)(internal citations omitted)(exposure to asbestos, not the decision to manufacture asbestos, is the “occurrence,” therefore each claimant is a separate occurrence). In a complex claim situation, it is not difficult to envision how a court could find that there is more than one discrete cause of the alleged injuries or damages if it is so inclined.

In contrast to the above analysis, a small minority of jurisdictions has examined the issue through the opposite end of the lens by focusing not on the insured’s conduct but on the effects that such conduct has on the entities or persons claiming to have been injured. See Nicor, Inc. v. Associated Elec. and Gas Servs., Ltd., 223 Ill. 2d 407, 860 N.E.2d 280, 287 (Ill. 2006)(explaining that “[t]he effect theory, as its name implies, determines the number of accidents or occurrences by looking at the effect that the event had, *i.e.*, how many individual claims or injuries resulted from it” and declining to adopt the effect theory but holding that each of 195 mercury spills from gas meters constituted a separate “occurrence” requiring exhaustion of a SIR). See, e.g., Elston-Richards Storage Co. v. Indemnity Ins. Co. of N. Am., 194 F.Supp. 673 (W.D. Mich. 1960), aff’d, 291 F.2d 627 (6th Cir. 1961); Anchor Cas. Co. v. McCabe, 178 F.2d 322 (5th Cir. 1949); Lombard v. Sewerage & Water Bd., 284 So.2d 905 (La. 1973). As the vintage of these cases suggest, the courts have moved away from the “effect” test as a separate doctrinal concept and have instead applied the “cause” or “event” tests as a way to reach the same outcome.

Not content to follow anything other than its own unique path, New York has fashioned a hybrid rule known as the “unfortunate event” test, or as the *Lemony Snicket* rule for fans of that popular young adults series. The New York formulation emanates from a decision in the 1950s involving a much different factual context than the cases being litigated today. Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. Am., 7 N.Y.2d 222, 164 N.E.2d 704 (N.Y. 1959). In *Johnson*, the issue was whether the collapse of two independent walls of
adjoining buildings during an intense rain-fall constituted one or two “occurrences” for the purpose of determining whether the insured was entitled to coverage up to the “per accident” limit for the failure of each wall. The New York Court of Appeals determined that there were two accidents and adopted what it referred to as the “unfortunate event” test, which focuses on the specific event or events for which an insured is being held liable, rather than a point further back in the causal chain:

We need only point out that it is agreed that, during a heavy rainfall, a protecting wall collapsed under the water pressure and destruction poured into a building. Almost an hour later, another wall gave way and water flooded another building. There is no suggestion that the collapse of the first wall caused the failure of the second. … In addition, the catastrophe was not the rain—that, in itself, did not harm. It was the breach of the wall letting the rain water in. Furthermore, if the walls were located blocks away from each other on different job sites but subject to the same rainfall, no one could contend that there were not two accidents.

7 N.Y.2d at 230. This test—which in many circumstances will operate as the functional equivalent of the “cause” test—has remained the operative legal standard since Johnson. See Appalachian Ins. Co. v. General Elec. Co., 8 N.Y.3d 162, 171–72 (2007).

**Modern “Occurrences” Litigation**

**A Case in Point: Stonewall v. DuPont**

A cogent and cautionary example of how the factors discussed above can coalesce to generate high-stakes battles over the number of “occurrences” can be found in the Delaware Supreme Court decision in Stonewall Ins. Co. v. E.I. Du Pont De Nemours & Co., 996 A.2d 1254 (Del. 2010) (Du Pont). While arising out of a not terribly uncommon type of product claim, the convergence of the policyholder’s coverage profile and the litigating insurer’s position in that profile led the insurer to attempt to stretch the literal terms of the policy to their breaking point, and some courts evidenced unwillingness to follow the insurer over the cliff.

The underlying claims arose out of a resin that was manufactured by Du Pont and incorporated into polybutylene plumbing systems. At some point after Du Pont began selling the resin for this use, claims surfaced that the product was causing the plumbing systems to leak. Du Pont ceased distributing the product. Thousands of claims were ultimately asserted against Du Pont, which it defended and settled at a cost of nearly $240 million. Du Pont sued its excess insurers in four different towers of coverage from 1983 to 1986. Significantly, the lowest layer in each tower did not kick in until the losses exceeded a $50 million SIR. Du Pont settled with all insurers save for Stonewall and recovered nearly $112 million from the settling insurers, at which point Du Pont fixed its sights on the lone holdout.

Stonewall only participated in the 1985 tower of coverage, providing $1 million of coverage in the first layer of excess policies and $4 million in the second layer. A central issue in the case was whether all of Du Pont’s liability for the product arose out of a single “occurrence,” which would mean that Du Pont only had to satisfy a single SIR before it could recover under its excess policies, or whether the liabilities arose out of multiple occurrences, which would trigger multiple SIRs. Stonewall’s policies included fairly standard “occurrence” language with a slight wrinkle:

The term ‘occurrence,’ whenever used herein, shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

996 A.2d at 1257 (emphasis added). The trial court ruled, as a matter of law, that all of the claims arose out of a single “occurrence,” and thus once Du Pont satisfied a single $50 million SIR, it could access its excess coverage. On appeal, Stonewall presented two distinct theories relating to the number of “occurrences.” First, Stonewall contended that there were disputed fact issues that should be determined by a trial, in particular whether there were two distinct “causes” of the system failure: (1) chemical degradation and (2) the product’s inability to resist mechanical stresses. Second, Stonewall separately argued, based upon the language quoted above, that each of the some 469,000 locations at which a plumbing system was installed and failed should be treated as a separate “premises location” under the policy language and thus each failure constituted a separate “occurrence.”

The Delaware Supreme Court soundly rejected both propositions that were advanced by Stonewall. As for the first, the court concluded that Stonewall’s position conflated the issue of what constitutes a “condition” with the issue of whether there were multiple occurrences. Whatever the specific cause or defect in the product—and whether there was a single defect or multiple defects—was simply irrelevant to the number of occurrences question. In every claim, it was the product that was the source of the leaking plumbing systems and resulting property damage. Accordingly, searching beyond this fundamental fact, on which experts from both sides agreed, to determine whether there were different types of defects that inhere in the product was simply of no moment.

The court next held that Delaware, as had the majority of states, would adopt the “cause” test for determining whether there was a single or multiple occurrences, noting that “where a single event, process or condition results in injuries, it will be deemed a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals.” 996 A.2d at 1257 (citing Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d

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**Many courts tie the number of “occurrences” analysis to the familiar “chain of causation” rule, adding a further layer of complexity.**

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primary coverage long ago—it is not surprising that a “number of occurrences” war should have erupted when these losses began to penetrate the excess layers of coverage. Two cases from New York demonstrate how truly unsettled the law is in this area—even within a single jurisdiction—and how the particular facts of the underlying claims and the policy terms can affect the analysis.

Certainly, many coverage lawyers thought that the debate over number of “occurrences” in the asbestos context had largely been resolved by the New York Court of Appeals’ decision in Appalachian Ins. Co. v. General Electric Co., 8 N.Y.3d 162, 863 N.E.2d 994 (N.Y. 2007). The central issue presented in General Electric was whether, for the purpose of exceeding the annual “per occurrence” limits of its primary insurance and thereby being able to access its excess insurance program, GE could group together as a single “occurrence” thousands of personal injury claims arising from exposure to asbestos-containing insulation in GE turbines. The underlying claimants alleged that they were exposed to asbestos during the 20-year period between 1966 and 1986 from insulation that was used in steam turbines manufactured by GE and installed at some 22,000 work sites throughout the United States. Although GE did not manufacture the asbestos, the plaintiffs in the underlying cases typically sued on the theory that GE had knowledge of the dangers of asbestos and yet designed, manufactured, sold, installed and serviced turbines that incorporated the asbestos-containing insulation, or engaged in combinations of these activities without issuing proper warnings.

Notwithstanding GE’s deep pockets, given the nature of its connection to asbestos it was usually a relatively small player in the lawsuits, which also named scores of other defendants, including manufacturers and installers of the asbestos. In light of the nature of the allegations, GE’s relative share of any particular settlement or judgment was typically small. As the court noted, “as of 2002, over 400,000 asbestos-related claims had been filed against GE, with GE’s share of each judgment averaging $1500.” 8 N.Y.3d at 167. Nevertheless, the sheer volume of claims made it at least a half billion dollar problem for GE.

During the period from the 1950s to the 1990s, GE maintained general liability insurance through Electric Mutual Liability Insurance Company (EMLICO), which was a modified form of captive arrangement in which premiums were adjusted annually based upon loss history. In effect, the retrospective premium procedure operated as the equivalent of a SIR or deductible with GE reimbursing EMLICO for the losses that it paid on behalf of GE. The dispute between GE and its excess insurers arose from the fact that while before 1966 the EMLICO policies had a $5 million “per occurrence” limit with a $10 million products aggregate, from 1966 to 1986 the EMLICO policies did not include an aggregate liability limit. Thus, for each “occurrence” GE was required to reimburse EMLICO for up to $5 million of loss. The excess insurance policies in GE’s multilayered program generally provided that “liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured’s underlying insurer, shall have paid the amount of the underlying limit on account of such occurrence.” 8 N.Y.3d at 168. Interestingly, until 1992, EMLICO treated each asbestos-related personal injury claim as a separate “occurrence,” which meant that GE paid the full freight on each claim based upon the reimbursement arrangement with EMLICO.

Starting in 1991, the volume of claims experienced by GE increased substantially and GE began objecting to EMLICO’s treatment of each individual claim as a separate “occurrence” for the purpose of the deductible or SIR arrangement. GE and EMLICO ultimately agreed upon a claim handling arrangement under which asbestos-related claims would be grouped by product type. This in effect meant that all of the turbine claims would be considered a single “occurrence” with a $5 million annual limit of liability. GE and EMLICO recognized that the excess insurers were not legally bound by this agreement, but nevertheless the two began processing claims based upon the arrangement. Not surprisingly, GE’s excess insurers objected and ultimately commenced a declaratory judgment action to resolve the issue of whether GE was entitled to group its asbestos claims based upon the type of product involved.
The trial court concluded on cross-motions for summary judgment that there was no basis in the language of the excess policies for GE and EMLICO to group all of the personal injury claims resulting from a particular product into a single “occurrence.” The New York Court of Appeals treated the matter as involving a pure question of law: how should New York’s “unfortunate event” test be applied? The court focused on defining the “event” for which the insured was being held liable. The court noted that the turbines were largely custom-made for particular companies with little or no consistency in the amount of asbestos-containing insulation that each version included. Further, the exposure of any individual worker varied in duration and intensity and occurred over decades at more than 22,000 unrelated locations that were not owned by GE. Thus, there was insufficient temporal and spatial proximity among the claimants to support grouping them into a single “occurrence” for the purpose of determining how GE’s underlying coverage would be exhausted. As the court summarized:

Applying the [unfortunate event standard], the asbestos exposure claims GE seeks to join as one occurrence (per policy period) represent multiple occurrences. Using the language adopted by the parties in the EMLICO policies, the incident that gave rise to liability was each individual plaintiff’s ‘continuous or repeated exposure’ to asbestos. Before the exposures occurred, there was only the potential that some unidentified claimant would someday be harmed by GE’s alleged failure to warn. To be sure, the exposure to asbestos was not sudden—it was gradual and, for many plaintiffs, continued over a number of years. But that does not make it any less the operative incident or occasion giving rise to liability in this factual context. Having determined that there were numerous exposure incidents, we must analyze the temporal and spatial relationships between the incidents and the extent to which they were part of an undisrupted continuum to determine whether they can, nonetheless, be viewed as a single unfortunate event—a single occurrence. Even if we were to assume that the continuum element was met here because the exposures share a common cause (as GE urges), the scenarios presented would fail the Johnson test because of the lack of any spatial or temporal relationship. On this record, it appears that the incidents share few, if any, commonalities, differing in terms of when and where exposure occurred, whether the exposure was prolonged and for how long, and whether one or more GE turbine sites was involved. Under the circumstances, there were unquestionably multiple occurrences and the excess insurers were entitled to a declaration to that effect. 8 N.Y.3d at 174. Based upon this ruling, GE was essentially deprived of any ability to access its excess coverage.

While many coverage specialists thought that the decision in General Electric had resolved the number of occurrences debate in New York and would perhaps serve as a bellwether for other jurisdictions, any such notion was utterly dispelled by the more recent First Department decision in Mt. McKinley Ins. Co. v. Corning Incorporated, 96 A.D.3d 451, 946 N.Y.S.2d 136 (N.Y. App. Div. 2012). The appellate court in that case upheld an order denying motions for summary judgment that sought a ruling that each of the asbestos-related claims at issue constituted a separate “occurrence” under the General Electric rationale. The court found that summary judgment was correctly denied because there were disputed factual issues concerning the nature of the alleged “occurrences” requiring a trial. Although on its face the Corning decision would seem to be a departure from General Electric, the seeds of the decision can be found in the earlier pronouncement by the New York Court of Appeals. Although most everyone focused on the outcome of General Electric, the court was careful to note that it was not establishing a rule that “one claimant = one occurrence”:

In reaching this conclusion, we emphasize that the Johnson standard is not, as GE suggests, the equivalent of a one-occurrence-per-injured-party approach. Although there may be instances when application of the rule will result in each individual claimant representing a single occurrence, the standard can lead to the grouping of claims.... Nor does the rule necessarily bar excess coverage in multi-plaintiff mass tort contexts. Each mass tort scenario must be examined separately under the Johnson rule. 8 N.Y.3d at 174.

This language was used by certain of Corning’s insurers to argue that the number of “occurrences” issue should not be resolved as a matter of law. The Corn-
Relying upon the language in *General Electric* discussing how claims could be “grouped” based upon the “same general conditions” language contained in the “occurrence” definition, both the trial court and the New York Appellate Division concluded that it could not be said as a matter of law that each of the claims asserted against Corning was in fact a separate “occurrence.” While the decision ruled out the possibility that all of the disparate claims constituted but a single “occurrence,” the court concluded that the facts could show that some “grouping” of claims—whether by spatial or temporal connection or some other criteria—was the appropriate measure of what constitutes an “occurrence.” How many was left up to future proceedings. As the court summarized, “any group of claims arising from exposure to an asbestos condition at a common location, at approximately the same time (for example at the same steel mill or factory) may be found to have arisen from the same ‘occurrence.’” 96 A.D. 3d at 452.

Although the court offered this scenario as an example, the decision makes it clear that the parties were essentially permitted to make any argument that they wanted explaining how the claims should be grouped based upon the particular facts elicited through discovery coupled with the policy language. The court further noted that the parties could pursue extrinsic evidence concerning the underwriting intent insofar as “there is any ambiguity concerning the application of the grouping provision to the circumstances of the underlying claims.” 96 A.D. 3d at 453.

The *Corning* case—while not reaching any final outcome—is significant in that it demonstrates how divisive the number of “occurrences” issue can be. Here, insurers were pitted against other insurers, *which aligned their interests with those of the policyholder*, on this critical issue of policy construction and application. *Corning* also suggests that a new wave of litigation may be at hand in which the particular facts concerning the specific products and claims at issue will be at the forefront of the debate. *Corning* strongly intimates that for many courts the days of resolving this issue as a matter of law may be of limited duration.

**Construction Defect**

Another area where the “occurrences” fight rages is construction defect claims. With their myriad of players—contractors, distributors and manufacturers—it is not hard to imagine the diverse and complex scenarios that frequently arise. Take, for example, cases brought against the manufacturer of Periclasse, a plaster product that was used in home construction. A central claim in the underlying cases was that the bills of lading were marked “For Exterior Use Only,” but there was no similar warning on the actual product containers. Contractors using the product installed the plaster on the interiors of dozens of homes, causing stains and blemishes at some 28 properties. The primary insurer argued that the “cause” was the defective product. The excess carrier contended that because not every home at which the product was used was damaged the injuries were not inevitable and therefore each of the 28 applications was the direct cause of the policyholder’s liabilities and should be considered to be a separate “occurrence.”

In these types of claims, for which there was no proof that the particular means of application caused the damage apart from the inherent properties of the product itself, the court determined that all of the separate installations of the product should be considered to be one “occurrence.” *Chemstar v. Liberty Mut. Ins. Co.*, 41 F.3d 429 (9th Cir. 1994)(applying California law and holding that there was no intervening proximate cause after insured’s failure to warn). See *Southern Int’l Corp. v. Poly-Urethane Ind., Inc.*, 353 So.2d 646 (Fla. Dist. Ct. App. 1977)(negligent application of insured’s roofing product to numerous buildings was one “occurrence”).

Distributors caught up in the maelstrom of these claims have faced similar quandaries about whether the “occurrence” is the installation of the defective product at each location or the design or manufacture of the product itself. In *Owners Ins. Co. v. Salmonsen*, 366 S.C. 336, 622 S.E.2d 525 (S.C. 2005), the South Carolina Supreme Court dealt with coverage for a class action filed against the distributor of “Parex,” a synthetic stucco product that caused water intrusion into plaintiffs’ homes. Applying the traditional “cause” test, the court concluded that the class members’ claims all arose out of a single “occurrence” because they were all based on the distribution of an inherently defective product and not because the distributor had engaged in any separate acts of negligence with respect to the distribution of otherwise satisfactory goods. The court reasoned that “placing a defective product into the stream of commerce is one occurrence.” 622 S.E.2d at 526.

More recently, the U.S. District Court for the Eastern District of Pennsylvania reached the same result in *Cincinnati Ins. Co. v. Devon International*, Inc., 924 F. Supp. 2d 587 (E.D. Pa. 2013). Devon International, a sourcing agent for Chinese drywall, arranged for the purchase of a single lot of drywall that was shipped from China to Florida. Devon ultimately faced a rash of lawsuits from owners of buildings where the drywall was installed. None of the lawsuits alleged that Devon had been negligent in a way that caused any change in the condition of the drywall en route from Shandong to Florida. Based upon this constellation of facts, the court determined that there was a single “cause” and therefore but one “occurrence”:

Here, all the injuries to the underlying plaintiffs and claims against Devon originate from a common source: Devon’s single purchase and shipment of defective drywall from Shandong. More-
over, Devon had some control over the cause of the injuries, in that it chose to purchase and distribute the defective drywall. Therefore, the court finds that there is only one “occurrence” for purposes of insurance coverage.

924 F. Supp. 2d at 592.

Not all courts that have considered such issues arising from the installation of a product have agreed, however. See, e.g., Maryland Cas. Co. v. W.R. Grace & Co., 128 F.3d 794, 799 (2nd Cir. 1997)(each installation of asbestos-containing material in a building was a separate “occurrence”); Stonewall Ins. Co. v. Asbestos Claims Management, Inc., 73 F.3d 1178 (2nd Cir. 1995)(insurable “occurrence” was not the manufacturer’s “general decision” to manufacture wallboard that contained asbestos, but rather each installation of those wallboards).

These disputes can also haunt the businesses of individual contractors. For example, in Home Ind. Co. v. City of Mobile, 749 F.2d 659 (11th Cir. 1994), the court had to resolve the number of “occurrences” issue in the context of claims that arose from numerous separate heavy rainstorms, which caused sewage to back up into various homeowners’ properties. Claims were asserted against the city for failing to maintain the municipal drainage system properly, and the contractor responsible for the work was sued as well. To limit its liability, the primary insurer contended that the number of “occurrences” should be determined by the number of storms involved, while the city contended that the court should look to the individual circumstances of each resident’s claim. In the end, the court declined to adopt either party’s position in toto, reasoning that each discrete causative act of negligence was a separate “occurrence” without regard to how many individual properties were damaged as a result of the specific act of negligence. Compare Bethpage Water District v. S. Zara & Sons, 546 N.Y.S.2d 645 (N.Y. App. Div. 1989)(contractor’s negligent backfilling that damaged 250 separate connections to the water main system held to be one “occurrence” as all claims involved exposure to “substantially the same general conditions”; ruling benefitted the municipal policyholder as it was then only required to pay a single deductible).

### Sexual Abuse

Cases involving sexual abuse claims, or other types of repetitive personal injury claims, clearly have the potential to engender disputes about whether multiple incidents involving numerous abusers and their victims should be grouped as a single “occurrence.” In a novel twist on the arguments that someone would likely assume would be made by an insurer, however, the New York Court of Appeals recently considered an attempt by an insurer to reduce its exposure by contending that multiple instances of abuse by a single perpetrator and involving a single victim should be considered to be separate “occurrences.” Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa., 21 N.Y. 3d 139, 991 N.E.2d 666 (N.Y. 2013). The underlying claim in Diocese of Brooklyn arose out of the alleged sexual molestation of a girl by a priest on numerous occasions over a six-year period in several areas of a church as well as at the plaintiff’s home. The diocese settled the lawsuit for $2 million and sought reimbursement from its insurers. National Union had provided primary coverage during three of the seven policy years at issue. The annual limits of liability were $750,000 in excess of a $250,000 self-insured retention applicable to each occurrence.

National Union waged a two-prong argument that (1) the incidents of sexual abuse were separate occurrences that required the separate exhaustion of a SIR for each occurrence, and (2) the $2 million settlement should be allocated in a pro rata basis over the seven years of policies at issue in the case. The diocese contended that the incidents were a single “occurrence” requiring the payment of only a single $250,000 SIR and that the entire settlement amount could be allocated to the period of the National Union policies. The trial court determined that the incidents were a single “occurrence,” but that the language of the policies required the exhaustion of a separate SIR under each policy. The New York Appellate Division court reversed, holding that the alleged acts of sexual misconduct were separate occurrences, the settlement should be allocated over the seven years of coverage, and the SIR must be satisfied for each policy period. Under this scenario, National Union would not have any obligation to indemnify the Diocese for any portion of the settlement. The New York Court of Appeals accepted the case for review.

Applying the standard articulated in Johnson and General Electric, the New York Court of Appeals determined that the incidents of sexual abuse constituted multiple occurrences:

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**Serious thought should be given to whether an insurer wants to champion the position adopted by a policyholder, as in the Corning case.**

Clearly, incidents of sexual abuse that spanned a six-year period and transpired in multiple locations lack the requisite temporal and spatial closeness to join the incidents. While the incidents share an identity of actors, it cannot be said that an instance of sexual abuse that took place in the rectory of the church in 1996 shares the same temporal and spatial characteristics as one that occurred in 2002 in, for example, the priest’s automobile. Moreover, the incidents are not part of a singular causal continuum [such as a three-car collision].

21 N.Y.3d at 149 (internal citations omitted). The court went on to note that while the diocese was correct in arguing that the definition of “occurrence” could encompass multiple events, the definition alone would not answer the question because the court determining the question must take into account the specific nature of the facts involved in the claim. Here, it was “tenable to conclude that from the victim’s perspective each event is marked by its own serious, individualized set of facts with particularized harms, further supporting a multiple per-occurrence interpretation of the molestation.” 21 N.Y.3d at 151.

**Occurrences**, continued on page 76
The court also rejected the diocese’s contention that even if the incidents of abuse should be considered to be separate “occurrences,” the policyholder should not have to pay the $250,000 SIR for each occurrence. The court noted that the policies expressly provided that the SIR “shall apply separately to each occurrence” and only to “occurrences covered under the policy.” The court concluded that for each policy from which coverage is sought, the SIR is inextricably linked to an occurrence which results in bodily injury during the policy period, and the attendant deductible must be satisfied before coverage can be triggered. … To permit the Diocese to exhaust a single SIR and then receive coverage from up to seven different policies would conflict with the plain language of the policies and produce an outcome not intended by the parties.

21 N.Y.3d at 153.

Reflecting the difficulty of the analysis, the plurality decision generated both concurrences and partial dissents, with Justice Smith concluding that there was only one “occurrence” that should be allocated on a pro rata basis over the seven years of coverage and that one retention should be applied to each triggered year. Justice Graffeo disagreed that there were multiple “occurrences,” but because of how he would have decided the SIR and allocation issues, he came out in the same place as the majority. The Diocese of Brooklyn case illustrates how inextricably intertwined these issues can become.

**Practical Tips and Guidance**

If there are any lessons to be gleaned from these modern-era cases litigating the number of “occurrences,” it is that the issue presents virtually boundless opportunities for both insurers and policyholders to craft new and creative arguments. The cases show how the tests used to decipher the “cause” of an injury and whether “events” are related to one another can be molded to benefit either an insurer or a policyholder, depending upon the particular facts of the claims at issue and how those claims intersect with the coverage profile. Equally, however, the cases, as well as common sense, suggest that an insurer entering this minefield must *not* have tunnel vision and must *not* advocate the argument that will minimize or avoid coverage in a particular case automatically. Serious thought should be given to whether an insurer wants to champion the position adopted by a policyholder, as in the *Corning* case. Similarly, an insurer must consider whether it really wants to be the insurer that advocates in favor of a position that the policyholder should not be able to access its excess towers of coverage that attach at $50 million until it has paid out some $24 trillion in losses, as happened in *Du Pont*. Insurers and attorneys representing them must contemplate how taking a particular position on the number of “occurrences” in a case that is on an insurer’s plate at the moment will affect other cases in which the insurer may be on a very different footing because it has a different position in another policyholder’s insurance program. All of these questions create serious dilemmas for an insurer seeking a favorable outcome in a particular case without setting up a situation that will skewer the insurer in the next case down the road. As Oscar Wilde once famously quipped in *Lady Windermere’s Fan*, “In this world there are only two tragedies. One is not getting what one wants, and the other is getting it.”