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Eric A. Pearce

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The use and development of the phrase "each and every occurrence" in excess of loss reinsurance contracts

by

ERIC A. PEARCE, F.C.I.I.

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There seems little doubt that the early use of excess of loss reinsurance was in its application to casualty insurance. In those far off days of modest compensation for bodily injury, insurers required to protect themselves against the effects of an accident involving death or injury to several people, particularly in respect of workmen's compensation and motor insurance.

The parties to those early reinsurance contracts were, no doubt, thinking in terms of the type of accident which was sudden and short-lived; the collapse of a building, an explosion in a factory or mine in which many workmen might be involved; or the collision between two vehicles or between a vehicle and some stationary object, in which several passengers might be killed or injured.

The early contracts, which were drafted to apply in such circumstances seemed clear when the purpose of the contract was expressed as:

to pay the excess of (a stated sum) any one loss subject to a limit of liability of (a stated sum) any one loss, as aforesaid.

Indeed, in the narrow context suggested above, it was not necessary to define the word « loss ».

However, in the field of motor insurance, as the scope of the policy was broadened from simple public liability to the much wider comprehensive cover, the terms of the excess of loss were broadened, possibly to include all the sections of the original policy, but more probably to include the fire section in addition to the public liability section.

I have before me the copy of a file note written nearly fifty years ago, by the general manager of a greatly respected London company, following consultation with the company's solicitor. From the context it is evident that the problem of what constitutes one event was already giving considerable food for thought.

A S S U R A N C E S

Unfortunately the actual text of the contract being discussed is not available to me at this distance of time, but it seems probable that the operative clause was similar to that quoted above. The following is an extract from the file note:

« Motor excess treaties »

Saw our solicitor on 24th January 1933 and asked his opinion with regard to the real meaning of the term « any one occurrence ».

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He discussed the question at some length and then said that it was a difficult problem and in the event of a dispute thought it probable that one judge would interpret it one way and another quite differently, his own feeling was that the real meaning was damage due to « any one accident in any one place », whether due to fire or any other cause, if several fires were burning at one time each group of buildings being considered one event or occurrence; a town conflagration could only involve garages, etc. at different times, and in his opinion, if a garage in one place is destroyed by fire which gradually spreads until another garage at a distance from it is involved in the fire, the first garage would be one event and the fire at the second garage would be another event.

He said that in the event of a town being destroyed by an earthquake the treaty could be held to cover all the cars in the area affected, as the « earthquake » was the occurrence and the damage would happen at one time.

The recent bus strike was mentioned and it was assumed that if the strikers got out of hand and deliberately destroyed the garages, he holds that the destruction of, say, garage No 1 would be an entirely different « occurrence » to the destruction of, say, garage No 2, although both events arose out of the same « strike ».

He suggested the following alteration to the wording of Article 1.

Between the words (Five hundred pounds) and (including fire) add: « in respect of each and every occurrence arising out of one and the same cause ».

There is no doubt, I think, that when the note makes reference to « garages » the loss being considered was relative to damage to the vehicles in the garages, because this is a motor reinsurance and it is very unlikely that the buildings would have been included in a motor policy.

It would be helpful to know whether the questions had been communicated to the solicitor beforehand so as to enable him to consider the various aspects, before the meeting took place. From the fact that he was not required to express his views in writing and that the conversation was recorded merely as a file note, it is possible that the general manager recognised the imprecise wording of the reinsurance contract and was seeking opinions before approaching the reinsurers with a view to clarifying the general definition.

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Be that as it may, it is possible that the conversation, so many years ago, was the first informed discussion on this aspect of excess of loss reinsurance.

In the extract quoted above there are two very interesting points.

Firstly the solicitor considered whether « any one occurrence » would be better expressed as « any one accident in any one place ». One can readily understand the thinking behind this. In any large town it is possible that there may be fire damage to vehicles in more than one garage at the same time. The fire in each would have a different proximate cause and as such would be a different occurrence, exactly as if two vehicles were involved in separate collisions in different parts of the town.

Secondly, however, his opinion (as expressed in the note) seems to be that if the fire starts in one garage and spreads to another garage some distance away, this would constitute two separate occurrences. This is more difficult to understand. In fact, I believe that many insurance men would be firmly of the opinion that the fire and spread of fire arose from one and the same proximate cause.

The solicitor, well versed as he was in insurance matters, was obviously perplexed by the questions put to him, but in the final paragraph of the note we see the emergence of a new phrase — « each and every occurrence » instead of « any one occurrence ».

As far as I know the new phrase was not canvassed in reinsurance circles at that time, because as recently as the late 1940's and early 1950's « any one occurrence » was in current use and generally accepted. Personally I was very unhappy at the use of this expression. Was it possible, for example, that the ceding company could be required to wait until the end of the period of reinsurance and then, if there had been more than one occurrence, to decide in respect of which occurrence the company could claim against the reinsurer ? In fact, was it possible for a court of law or a court of arbitration to decide that the company could apply the reinsurance to « any one occurrence » but not more than one occurrence ?

This was discussed with a number of reinsurers at the time and it was generally agreed that « each and every occurrence » expressed the intention more clearly. Over the intervening period it has become very widely used, replacing almost entirely the earlier phrase.

As excess of loss came into more common use and replaced or supplemented proportional reinsurance in various classes of insurance, the concept of the multiple loss became apparent, as did the necessity to define « occurrence » for the purposes of the contract. So we find the increasing use of such phrases as « occurrence or occurrences arising out of one event ». Here we have the firm adherence to the principle of proximate cause.

In some instances it is evident that the parties sought to express the concept of multiple loss by the use of a multiplicity of words, and we find such definitions as:

The expression « each and every loss » shall mean each and every loss and/or occurrence and/or catastrophe and/or disaster and/or calamity and/or series of losses and/or occurrences and/or catastrophes and/or disasters and/or calamities arising out of one event.

It is doubtful whether all this verbiage served any purpose other than to confuse those who were seeking to apply correctly the terms of the reinsurance to known circumstances, following loss.

If we turn to the dictionary for guidance, it is found that « calamity » means « grievous disasters »; whereas « disaster » means « sudden or great misfortune, calamity ». Is not a calamity or a disaster or a catastrophe an occurrence ? Certainly the dictionary seems to believe that it is.

There was a feeling that if the use of so many words added nothing to the scope of cover, it was possible that their use might even constitute a restriction of cover. Thus it is that a simplified definition came into general use, as follows:

The expression « each and every occurrence » as used herein shall be understood to mean each and every occurrence or series of occurrences arising out of one and the same event, irrespective of the number of policies involved.

Such a definition is probably quite adequate when dealing with many of the risks covered by standard casualty policies. However, progressively excess of loss reinsurance was applied to fire and many extraneous perils and it became evident that in such cases new definitions were required. So the hours clauses were developed, as a result of which the reinsurance would be linked, not solely to proximate cause, but also to all losses of a like nature occurring within a stated period of time.

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As this introduced an entirely different concept of « occurrence » and as there are a number of interesting points to be considered, I will deal with the definitions in subsequent articles.
