Assurances

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Volume 48, numéro 2, 1980

URI : https://id.erudit.org/iderudit/1104078ar
DOI : https://doi.org/10.7202/1104078ar

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Éditeur(s)

HEC Montréal

ISSN

0004-6027 (imprimé)
2817-3465 (numérique)

Découvrir la revue

Citer ce document

Pearce, E. (1980). The use and development of the phrase "each and every occurrence" in excess of loss reinsurance contracts. *Assurances*, *48*(2), 142–145. https://doi.org/10.7202/1104078ar

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

II

by

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Part 2. Cataclysms of nature.

In my previous article, I referred to the application of the phrase "each and every occurrence" to liability insurance (chiefly Motor), where the occurrence is simple and readily understood. I then showed how the application was broadened and I referred to the emergence of the concept of multiple loss, arising out of one event.

Excess of loss reinsurance was developed and applied to the various other classes of insurance, particularly Fire, and to the extraneous perils frequently included in Fire policies. It very soon became apparent that there could be considerable doubt as to what constituted one event. In the case of windstorm, for example, there might be losses in various places, sometimes at great distances one from the other. Was this one event or several? If it constituted several events, where did one end and another commence?

In an endeavour to solve the problem, the "hours clause" came into being and the intention was to change entirely the definition of "occurrence" from that of all losses arising out of one event, to that of all losses of a like nature arising during a stated period of time.

A typical clause in respect of the various storm risks is as follows:

Clause No 1.

As regards the risk of Tornado, Hurricane, Windstorm, Cyclone and Hailstorm, the term "each and every occurrence" used in this Agreement shall mean the sum total of all losses of the Company arising out of such risks and happening during any period of 72 (seventy-two) consecutive hours.

The usual clause in respect of earthquake etc. risks, is similar, as follows:

[1] The first part of this article has been published in the January 1980 issue of the Review.

Clause No 2.

As regards the risks of Earthquake, Seaquake, Tidalwave and Volcanic Eruption the term "each and every occurrence" as used in this Agreement shall mean the sum total of all losses of the Company arising out of such risks and happening during any period of 72 (seventy-two) consecutive hours.

Both definitions are usually completed by making it clear that the Company alone shall decide when each period of 72 hours commences, and that the number of periods shall not be limited. At the same time it is stated that any period shall not commence within the period of any previous such period.

In the case of storm risks, there may be a requirement by Reinsurers that the definition should be restricted in its application, by the use of a phrase such as "arising out of one atmospheric disturbance". To me this is a little surprising as it seems to nullify the purpose of the hours clause by making the amount of the ultimate net loss dependent upon whether there was more than one atmospheric disturbance in progress during the period of the claim. The view of the Reinsurers is, presumably, that the contract is intended to deal with each event, and that Reinsurers should not be expected to include in one claim settlement, losses attributable to more than one event.

There is not universal insistence on the principle of each claim being in respect of one atmospheric disturbance only, and the phrase is now less frequently set forth in the text. However, an amended hours clause recently issued by an important group of Reinsurers is ambiguous.

The amended clause states first of all that the "occurrence" shall mean all losses arising out of and directly occasioned by one catastrophe, but in the next sentence it is stated that the duration and extent of any "occurrence" shall be limited to 72 consecutive hours as regards a hurricane, a typhoon, windstorm, rainstorm, hailstorm and/or tornado.

The phrase "occasioned by one catastrophe" raises a question as to the intention. It does appear that the parties to the contract are expressing their agreement that the losses must arise out of one catastrophe. If that is the basis of the agreement then there is little room for doubt that each atmospheric disturbance is a separate catastrophe, and that each must be treated separately for the purpose of making a claim against the Reinsurers.

If this is true, then the purpose of the hours clause is purely one of limitation as to time and is not intended to facilitate settlement of claims by avoiding dispute as to whether one or more atmospheric disturbances were in progress at the time.

No great imagination is necessary to visualize the complications which could arise if a Company has a portfolio of risks which are widely spread geographically and extensive windstorm damage is sustained. It seems probable that Company and Reinsurers alike would be entirely dependent on the expert knowledge of the officials at various meteorological offices to decide which losses resulted from which atmospheric disturbance.

In my belief these are very important considerations which should be carefully discussed and clearly understood by the parties at the time the contract is being studied. If it is the intention of the Reinsurers to maintain the principle of each storm being a separate occurrence, I would prefer to see this stated unequivocally in the text. For example, Clause No 1 above could be altered to read:

"... total of all losses of the Company arising out of one atmospheric disturbance and happening during...".

When dealing with cataclysms of nature not specified in Clauses Nos 1 and 2 above, there is a body of opinion which takes the view that the reinsurance applies on a per occurrence basis and that claims settlement must be made accordingly.

Few, perhaps, would quarrel with the theory that a flood is an "occurrence" within the meaning of the contract and that all losses arising during the rise, fall and eventual disappearance of the waters should be aggregated for the purpose of making a claim against the Reinsurers, irrespective of whether the flood lasted for hours, days or weeks.

What then is the position with regard to frost damage? Is it reasonable to expect the Reinsurers to recognise as one occurrence, a continuous period of frost of whatever duration? Certainly there are conflicting views on this point, and thus it is that sometimes within the Article of the contract dealing with the hours clause, is found a limitation of any one occurrence, possibly 168 hours, in respect of any unspecified perils.

An alternative development is the recognition of the likely accumulation of losses caused by winter weather, and the following is an example of the relevant clause:

Clause No 3.

As regards loss or losses from collapse caused by weight of snow and water damage from burst pipes and/or melting snow, the Company shall have the option to deem any one "occurrence" to be the aggregate of all such individual losses which occur during a period of 168 consecutive hours within one continent. No period may commence earlier than the date and time of the happening of the first recorded in-

dividual loss to the Company in that "occurrence" and the periods of two or more "occurrences" may not overlap.

It is interesting to see that in this instance the definition does not link the separate losses to one catastrophe, as in respect of the risks referred to above. On the contrary, the Company may "deem any one occurrence to be the aggregate of all such individual losses - - - -". Thus, as I understand it, it would be quite acceptable to the Reinsurers if within one seven-day period there were two or three days of extreme cold, followed by a sharp rise in temperature and a further period of frost, each producing its own variety of original claims.

It should be noted that in the draft text before me in respect of this clause there is an automatic increase in the deductible, as compared with all other types of claim under the same contract. Nevertheless, I believe that many Companies would find this a very valuable protection.

In my next article I shall deal with the risks of Riots, Strikes and the like, and some general considerations.

— **Numéro spécial sur l'arrêt Kravitz, McGill Law Journal,** Vol. 25 no 3 (1980)

Les collaborateurs de la revue *Assurances* ont déjà présenté divers points de vue en matière de responsabilité civile des produits et commenté l'arrêt Kravitz.

Le *McGill Law Journal* a réuni un dossier à partir de cet arrêt. Notons lers articles suivants:

— L'arrêt Kravitz: un réponse qui soulève plus d'une question/Pierre -G. Jobin;

— La responsabilité civile du manufacturier en droit québécois/P. Hianappel;

— La responsabilité civile du manufacturier en droit comparé/P. Hianappel. M. D.

— **L'assurance automobile du Québec: votre protection, vos droits.** Une publication de la Régie de l'assurance automobile. Janvier 1980.

Voilà une brochure de trente-neuf pages, qui présente, en une langue très simple et bien ordonnée, la garantie accordée par la Régie aux accidentés de la route. Sans prétention, mais précise, elle résume ce à quoi l'accidenté a droit et ce qu'il lui faut faire. Bien conçue et rédigée, la brochure est destinée à l'usager, mais elle peut également être utile au spécialiste. La plaquette est valable. C'est pourquoi nous la signalons au lecteur. Elle contient entre autres choses un tableau des indemnités, que l'accidenté peut obtenir de la Régie dans certains cas particuliers. J.H.