

**LETTER OPINION
2003-L-36**

August 29, 2003

The Honorable Jim Poolman
Commissioner of Insurance
600 E Boulevard Ave Dept 401
Bismarck, ND 58505-0320

Dear Commissioner Poolman:

Thank you for your letter requesting my opinion on the extent of coverage afforded by a policy of insurance issued from the State Fire and Tornado Fund to the University of North Dakota. The coverage is for damage to buildings and property during the Grand Forks flood of 1997. Your specific question is whether various policy limits on coverage should be interpreted as applying to the policy as a whole regardless of how many buildings were damaged or whether the limits would apply to damages on a per building basis.

The interpretation and legal effect of an insurance policy is a question of law. Wahl v. County Mut. Ins. Co., 640 N.W.2d 689, 693 (N.D. 2002) (quoting Close v. Ebertz, 583 N.W.2d 794, 796 (N.D. 1998)); Martin v. Allianz Life Ins. Co., 573 N.W.2d 823, 825 (N.D. 1998). The Supreme Court has stated that the goal when interpreting insurance policies, as when construing other contracts, is to give effect to the mutual intention of the parties as it existed at the time of contracting. N.D.C.C. § 9-07-03. Grinnell Mut. Reinsurance Co., 658 N.W.2d 363, 369-70 (N.D. 2003) (quoting Ziegleman v. TMG Life Ins. Co., 607 N.W.2d 898, 900 (N.D. 2000)); Wahl, 640 N.W.2d at 694. To accomplish this goal, the courts should look first to the language of the insurance contract, and if that language is clear on its face, there is no room for construction. McPhee v. Tufty, 623 N.W.2d 390, 395 (N.D. 2001); Ziegleman, 607 N.W.2d at 900.

The Declarations page of the insurance policy in effect at the time of the flood states which forms¹ are applicable to all coverage parts. One of these forms, Form CP00100695, entitled Building and Personal Property Coverage Form, includes the following provision under "Section C. Limits of Insurance":

¹ Including Forms CP00100695, CP10300695, FTSF070194, CP00500695, and FTOL051090, amongst others.

The most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

Building and Personal Property Coverage Form, Section C (CP 00 10 06 95 page 4 of 11). The extent of coverage under the policy depends on what is meant by the term "occurrence". The term "occurrence" is not defined by the policy. If the flood is deemed to be the "occurrence", then the coverage limitations represent the maximum amount payable under the policy regardless of the number of buildings that were damaged. On the other hand, if an occurrence is deemed to be the flooding of an individual building, the coverage limits would apply on a per building basis.

When coverage hinges on an undefined term, as it does in this case, the plain, ordinary meaning of the term is applied in interpreting the policy. Martin v. Allianz Life Ins. Co., 573 N.W.2d 823, 825 (N.D. 1998). Occurrence is defined as: "1. An act or instance of occurring. 2. Something that takes place; incident." The American Heritage Dictionary 860 (2nd Coll. Ed. 1991). Based on this plain, ordinary meaning, the act or instance occurring is the causative action, not the effect or effects of that action. Although this specific question has not been addressed by the North Dakota Supreme Court, this interpretation of the term occurrence is widely supported by case law in most states that have considered the issue.

Courts that have addressed the issue of whether an event and resultant damage is a single occurrence or multiple occurrences generally have adopted the rule that the determination must be made by looking to the cause of the damage and not the effect. 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, § 3 (1988). "[T]he vast majority of [jurisdictions] have construed the term 'occurrence,' as used in insurance policies, to refer to the 'cause or causes of the damage [or injury] and not to the number of injuries.'" Greaves v. State Farm Insurance Co., 984 F.Supp. 12, 16 (D.D.C. 1997) (final insertion is in the quoted material). "Although a small minority of courts have held that an occurrence is calculated by reference to the number of injuries, . . . subsequent decisions from these same courts either repudiate their earlier holdings or modify them to such an extent as to render their persuasive value de minimis." Id. (citations omitted). Since the "vast majority" of jurisdictions that have addressed the issue follow the "cause" analysis, reliance on these cases is persuasive and it is my opinion that the term occurrence as used in the policy in question should be interpreted to mean the causative event and not the resultant number of injuries or claims.

The cause of the damage in this case is the flooding of the buildings. The 1997 Grand Forks flood was a single occurrence over many days time. It was not a new flood each time the water reached another building. The fact that multiple buildings were damaged

by the flood does not mean that there were multiple occurrences. Barrett v. Iowa National Mut. Ins. Co., 264 F.2d 224, 226 (9th Cir. 1959) (single fire destroyed property of seven tenants; held to be one accident, not seven, and insurer's liability was the contractual limit for one accident, not the higher aggregate limit); see also Michigan Chemical Corp. v. American Home Assurance Co., 728 F.2d 374, 379 (6th Cir. 1984) (toxin mixed with animal feed was a single occurrence which caused hundreds of liability claims, court held that "the number of occurrences for purposes of applying coverage limitations is determined by referring to the cause or causes of the damage and not to the number of injuries or claims." (emphasis supplied)).

Initially, the policy provides Basic Property Coverage. Under the policy, damage caused by flood is a covered loss with a maximum limit of liability of \$10,000 per occurrence. Causes of Loss – Special Form Section B(1)(g) (CP 10 30 06 95) as modified by Policy Changes Form (FT SF 07 01 94). Because there was only one occurrence, regardless of the number of buildings damaged by the flood, only \$10,000 of Basic Property Coverage is available through the policy.

However, the policy of insurance also provided additional coverages on Forms CP00500695, Extra Expense Coverage, and Form FTOL051090, Ordinance and Law Coverage.

Extra Expense Coverage is an addition to basic property coverage. Assuming that a covered loss has occurred and that Extra Expense Coverage applies to a qualifying expense, this coverage is specifically limited by "Section C Limits of Insurance" on Form CP00500695:

The most we will pay for loss in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

The Limit applicable to the Coverage Extension is in addition to the Limits of Insurance.

Payments under the following Additional Coverages will not increase the applicable Limit of Insurance:

1. Alterations and New Buildings; or
2. Civil Authority.

The Declaration page of the policy sets the Extra Expense Coverage Limit of Liability at \$50,000. Because there was only one occurrence, the maximum amount of Extra Expense Coverage provided by the policy is \$50,000 regardless of how many buildings were damaged by the flood.

Ordinance or Law Coverage is provided on Form FTOL051090, which modifies the Coverage provided under Form CP00100695 to provide this coverage. Form FTOL051090. The basic premise behind Ordinance or Law coverage is that it compensates the insured for extra costs or losses stemming from a Covered Cause of Loss that are incurred to comply with enforcement of applicable laws or ordinances. There are three different types of Ordinance or Law Coverage provided by the Form. Form FTOL051090. Coverage A is coverage for loss to the undamaged portion of a building. Id. Coverage B is Demolition Cost Coverage. Id. Coverage C is Increased Cost of Construction Coverage. Id.

These three types of Ordinance or Law Coverages each have unique requirements that must be met before the specific type of Ordinance or Law Coverage will apply, and they also have different limits of insurance coverage. Because the policy covers multiple buildings which may qualify for coverage under one or more of the three Ordinance and Law Coverages and because individual buildings may be insured for either replacement or actual cost value, and because coverage limits under the Demolition Cost Coverage and Increased Cost of Construction Coverage are separate and distinct coverages, Section F of Form FTOL051090 provides that the terms of the endorsement apply separately to each building to which the endorsement applies. Section F harmonizes the schedules of Ordinance or Law Coverage to insure that the correct limits are applied, but does not act to change or modify the provision in Form CP00100695 that Limits of Coverage are on a per occurrence basis. Coverage A is included within the Limit of Insurance applicable to the covered Building property shown in the declarations and is not additional insurance coverage. Form FTOL051090 Section A(1). Coverage B has a limit of \$50,000 for Demolition Cost Coverage and Coverage C also has a limit of \$50,000 for Increased Cost of Construction. Form FTOL051090. Consequently, because the per occurrence limit established by Section C of Form CP00100695 has not been modified by Form FTOL051090, the maximum amount of coverage provided by Coverage B is \$50,000, regardless of the number of buildings damaged, and the maximum amount of coverage provided by Coverage C is \$50,000 regardless of the number of buildings damaged.

Sincerely,

Wayne Stenehjem
Attorney General