

## Testing the Limits: 124 Cases of Food Poisoning Over a Four-day Period Ruled a Single Occurrence

On November 4, 2020, the U.S. District Court for the Western District of Texas, San Antonio Division ruled that 124 separate cases of food poisoning at the Pasha Mediterranean Grill restaurant over a four-day period arose out of a single occurrence. As a result of the Court's ruling in Travelers Casualty Insurance Company of America v. Mediterranean Grill & Kabob Inc. d/b/a Pasha Mediterranean Grill, Civil Action No. SA-20-CA-0040-FB (W.D. Tex. Nov. 4, 2020), under its CGL policy, Pasha has the remainder of a \$1 million per occurrence limit, not a \$2 million aggregate limit, to settle 124 remaining claims of food poisoning.

Almost 200 patrons dining at Pasha over a four-day period in 2018 made claims against Pasha for salmonella food poisoning. Seven lawsuits ensued. Travelers was Pasha's primary CGL insurer, and the policy had a \$1 million per occurrence limit with a \$2 million aggregate limit. Travelers defended the suits. Travelers paid \$450,000 to settle the claims of many claimants and sought to tender the remainder of its \$1 million per occurrence limit to settle the remaining 124 cases. Pasha rejected this position, arguing that each claimant's case was a separate occurrence. The Court ruled that the 124 cases over four days constituted a single occurrence subject to the \$1 million limit under the CGL policy.

The Court's opinion contains an in-depth analysis of Texas law on determining the number of occurrences. Where, as in this case, "occurrence" is defined as "an accident, including continuous or repeated exposure to the same general harmful conditions," Texas (like most jurisdictions) looks to the "cause" of the injury, not the number of injurious "effects." A court applying the "cause" test will look at whether there is a single, unbroken chain of causation or whether causation is broken in some manner, such as by an intervening causal event. A court applying the "cause" test will not look to the number of injurious effects – i.e., here, the number of sick patrons. The Court stated:

Thus, under Texas's "cause" analysis, it appears there was a single, continuous event that both allegedly caused the injuries in the underlying suits and gave rise to Pasha's liability. Therefore, the food poisonings were a single "occurrence" under the policy.

Importantly, this conclusion comports with the language of the policy. Included in the definition of occurrence is "continuous or repeated exposure to the same general harmful conditions." The allegedly harmful condition here was food that had been contaminated with salmonella bacteria and, therefore, increased the risk of illness and possibly death. Individual patrons were continuously exposed to this alleged condition while they ate Pasha's food, and patrons, as a group, were repeatedly exposed to it.

The Court did not find persuasive Pasha's argument that because the restaurant closed overnight, each day was a new occurrence. The Court cited several cases holding that a "pause" in the action does not necessarily translate to a break in causation. The Court also found persuasive similar food poisoning cases from other jurisdictions which all found a single occurrence under the CGL policy, notwithstanding the exposure to the contaminated food that happened over multiple days and caused bodily injuries to many victims.

The question of the number of occurrences under a CGL policy is a classic conundrum frequently presented in coverage cases. Thousands of cases on this issue can be found from courts across the nation, with varying results. The answer to the number of occurrences inquiry often determines one or more of three important questions affecting the policyholder's coverage: (1) whether the insured can access aggregate versus per occurrence policy limits; (2) whether the insured can access excess limits; and (3) whether the insured must pay a single or multiple deductibles/retentions.

What is not stated in this opinion is whether Pasha is insured under an excess liability policy and, if so, what position the excess carrier has taken. If the excess carrier has taken the position that there are multiple occurrences and, therefore, the primary CGL limits are not exhausted by Travelers' payment of \$1 million, then Pasha could have difficulty triggering coverage under the excess policy to access its higher limits. Also, Travelers' tender of its remaining per occurrence policy limit will cut off its obligation to provide Pasha with a defense in the underlying liability cases. Pasha would then be looking to its excess carrier (if any) to assume its defense in the litigation of all claims not settled through the payout of the Travelers policy proceeds. Such considerations are frequently at issue in similar cases where the number of occurrences is disputed. Coverage counsel, retained early on, can help shape the narrative in a manner that favors the maximum coverage and best outcome available to the policyholder in these situations.

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