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ExxonMobil Corp. v Certain Underwriters at Lloyd's, London
2007 NY Slip Op 51138(U)
Decided on June 5, 2007
Supreme Court, New York County
Fried, J.
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Supreme Court, New York County

ExxonMobil Corporation, Plaintiff,

against

Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, Defendants.

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For Plaintiff:

Steward Occhipinti, LLP

65 West 36th Street, 7th Floor

New York, NY 10018

(Charles A. Stewart, III)

Howrey LLP

1299 Pennsylvania Avenue, N.W.

Washington, DC 20004

(Jeffrey M. Lenser, Lara A. Degenhart)

For Defendant:

Lord, Bissell & Brook LLP

885 Third Avenue, 26th Floor

New York, NY 10022

(Joseph N. Froelich)

Lord, Bissell & Brook LLP

11 South Wacker Drive

Chicago, IL 60606-4410

(Gary W. Westerberg, Molly McGinnis

Stine, Laura S. McKay)

Bernard J. Fried, J.

This is an insurance coverage action in which defendants Certain Underwriters at Lloyd's London and Certain London Market Insurance Companies (collectively, the London Insurers) sold [*2]plaintiff ExxonMobil Corporation (ExxonMobil) successive general liability insurance policies that protect ExxonMobil against product liability claims.

ExxonMobil now moves for an order granting it partial summary judgment on the ground that the two distinct series of product liability lawsuits at issue each constitute separate single occurrences under the terms of the insurance policies, and that the London Insurers must cover each occurrence under a single policy period.

The London Insurers cross-move for an order granting them partial summary judgment by holding that ExxonMobil's product liability claims constitute multiple occurrences under the policies at issue, and cannot be allocated to a single policy period.

For the reasons set forth below, ExxonMobil's motion for partial summary judgment is denied, and the London Insurers' cross motion for partial summary judgment is granted.

The following facts are not disputed by the parties: The London Insurers sold ExxonMobil a long sequence of general liability insurance policies. The policies for every year from 1971 to 1989 contain identical language pertinent to this motion. Each policy obligates the London Insurers to pay "all sums which [ExxonMobil] shall become legally liable to pay ... because of ... property damage ... arising out of or incidental to or in connection with [ExxonMobil's] operations anywhere in the World" (*see e.g.* Policy No. ADS131 [1972-1973], at 21 [Aff. of D. Christopher Heckman, Exh C]; Policy No. 551/SAM0100 [1988-1989], at 38 [Heckman Aff., Exh D]). The policies define occurrence to mean:

an accident, event or a continuous or repeated exposure to conditions which result in personal injury or property damage, provided all damages arising out of such exposure to substantially the same general conditions existing at or emanating from each premises location of the Assured shall be considered as arising from one occurrence.

See e.g. Policy No. ADS131, at 30; Policy No. 551/SAM0100, at 53). The policies define Property Damage as follows: "The term "property damage" means loss or destruction of, damage to, or loss of use of property" (Aff. of Laura S. McKay, ¶ 8, Exhs C, D, and E).

Each policy is subject to a $5 million self-insured retention (SIR). That means that ExxonMobil absorbs the first $5 million in costs for each occurrence in any given year, and then the London Insurers' coverage kicks in.

The policies also contain an "Extended Expiration" clause:

If this insurance should expire or be cancelled whilst any occurrence or disaster covered hereunder is in progress, it is understood and agreed that Underwriters, subject to the other conditions of this insurance, are responsible as if the entire loss had occurred prior to the expiration of this insurance.

See e.g. Policy No. ADS131, at 5; Policy No. 551/SAM0100, at 10. The policies do not define the term "loss."

In this action, ExxonMobil seeks insurance coverage for costs that it incurred in defending and resolving 13 lawsuits alleging that ExxonMobil produced polybutylene resin that caused premature pipe breakage, leakage and catastrophic pipe failure in municipal

utility district piping (the Polybutylene Claims) (Heckman Aff., ¶ 4). ExxonMobil manufactured and sold polybutylene resin from 1968 to 1975 at its semi-works plant in Beaumont, Texas (*id*., ¶ 6). ExxonMobil sold the polybutylene resin in pellet form to pipe extruders, who incorporated the pellets into potable water service tubing for municipal utility water systems (*id*.). [*3]

East Bay Municipal Utility District v Mobil Oil Corporation, filed in California state court, typifies the Polybutylene Claims (*id*., ¶ 5; Exh A). In *East Bay Municipal Utility District*, the municipality sued ExxonMobil and others, alleging that the use of polybutylene resin in its municipal utility district piping resulted in premature pipe breakage, leakage, and catastrophic pipe failure. The 12 other lawsuits that comprise the Polybutylene Claims contained similar allegations against ExxonMobil (*id*., ¶ 5).

Each of the 13 products liability claims alleged that ExxonMobil's polybutylene product was purchased at different times, installed at different times and in different locations, and resulted in property damage to multiple claimants on different dates over the years following the various installations (McKay Aff., ¶ 12). The locations and allegations of 11 of these claims are as follows:[FN1]

Plaintiff	**Purchase Date**	**Installation Date**	**Damage Date**
PRASA (Puerto Rico Aqueduct and Sewer Authority	Various dates between 1976 and 1980	Various dates between 1976 and May 1980	Various dates between 1978 and 1982
Camrosa County Water District	Various dates between 1975 and 1983	Various dates between 1975 and 1983	Various dates, including 1980
North Marin Water District	Various dates between 1972 and 1973	Various dates between 1972 and 1973	Various dates between 1981 and 1986, 1994
City of Medford	Various dates between 1971 and 1981	Various dates between 1972 and 1981	Various dates from 1979 forward
City of Morgan Hill	Various dates beginning 1971	Various dates beginning 1971	Various dates between 1987 and 1994
City of Santa Maria	Various dates beginning 1973	Various dates between 1973 and 1992	Various dates, including 1993
City of Redding	Various dates between 1970 and 1986	Various dates between 1970 and 1986	Various dates between 1977 and 1982

East Bay Municipal Utility District	Various dates between 1970 and 1988	Various dates between 1970 and 1988	Various dates between 1970 and 1994
City of Austin	Various dates between 1972 and 1981	Various dates between 1972 and 1981	Various dates beginning 1984
Marin Municipal Water District	Various dates between 1981 and 1986	Various dates between 1981 and 1986	Various dates, including 1994
Alameda County Water District	Various dates between 1970 and 1973	Various dates between 1970 and 1973	Various dates, including 1989, 1995

Id.

ExxonMobil has resolved the Polybutylene Claims (Heckman Aff., ¶ 7). ExxonMobil resolved the case of *City of San Antonio v Clow Corp., et al.* for $5.25 million (*id*.). ExxonMobil resolved the remaining polybutylene claims for less than $5 million each (*id*.). Thus, each of these remaining 12 claims falls well below the $5 million SIR threshold. ExxonMobil's collective settlement costs for the Polybutylene Claims total $10,477,000 (*id*.). ExxonMobil's collective defense costs for the Polybutylene Claims total $5,307,935 (*id*.). The London Insurers have not indemnified or defended ExxonMobil against the Polybutylene Claims (Answer, ¶ 3).

ExxonMobil also seeks insurance coverage for costs it incurred to resolve 12 lawsuits which alleged that Mobil AV-1 Lubricant, a synthetic aviation lubricant for use in piston engines, caused aircraft engine damage and catastrophic in-flight engine failure (the AV-1 Claims) (Heckman Aff., ¶ 8). ExxonMobil manufactured AV-1 at one plant in Woodhaven, Michigan from 1988 to 1993 (*id*., ¶ 10). In January 1994, ExxonMobil transferred AV-1 production from Woodhaven to Beaumont, Texas (*id*.). Beaumont stopped shipping AV-1 in late May 1994 (*id*.). In June 1994, ExxonMobil discontinued AV-1 (*id*.). AV-1 was first used in aircraft engines as early as 1988 by some claimants and as late as 1994 by other claimants, and at all points in between those dates by still other claimants (McKay Aff., ¶ 13; Exh J).

The class action suit *Gross v Mobil Corporation*, in the U.S. District Court for the Northern District of California, was the single largest AV-1 claim (Heckman Aff., ¶ 9; Exh B). The *Gross* plaintiffs alleged, on behalf of all owners of Teledyne Continental and 520 and 550 Series engines, that AV-1 caused engine damage and catastrophic in-flight engine

failure (*id.*, ¶ 9). Specifically, the *Gross* plaintiffs alleged that ExxonMobil sold AV-1 through retailers at airports and through off-airport dealers and distributors throughout the United States (*Gross* Complaint, ¶ 13). The *Gross* plaintiffs sought to hold Mobil "financially responsible for the tear-down, examination, repair and rebuilding of Plaintiffs' and Class members' engines, which must be done in order to identify and remedy the damage which AV-1 use caused to the engines" (*id.*, ¶ 5). The *Gross* plaintiffs further [*4] alleged that "[b]ecause the damage caused by former AV-1 use does not reveal itself to aircraft owners or operators immediately, it is, in effect, latent" (*id.*, ¶ 44).

Other aircraft owners filed 11 similar claims against ExxonMobil (Heckman Aff., ¶ 9).

ExxonMobil has resolved the AV-1 Claims (*id.*, ¶ 11). The London Insurers defended ExxonMobil against the AV-1 lawsuits, and, therefore, ExxonMobil does not now seek coverage of defense costs for those claims (*id.*). ExxonMobil does, however, seek coverage for $6,849,500 it spent in collective settlement costs to resolve the AV-1 Claims (*id.*). ExxonMobil's liability for any individual AV-1 Claim is less than the $5 million SIR (*id.*). The London Insurers have not indemnified ExxonMobil against the AV-1 Claims (Answer, ¶ 3).

In support of its motion for summary judgment, ExxonMobil contends that neither the AV-1 Claims nor the Polybutylene Claims (except *City of San Antonio v Clow Corp., et al.*) exceed ExxonMobil's self-insured retentions in any given year on a multiple occurrence basis. ExxonMobil argues that, to recover from the London Insurers for either set of collective claims, they must be treated as single occurrences that happened in single policy periods. The definition of "occurrence" in the policies provides that the policies respond to "continuous or repeated exposure to conditions," and treats as one occurrence damages arising out of exposure to substantially the same general conditions. According to ExxonMobil, under this provision, the Polybutylene Claims and the AV-1 Claims each comprise single occurrences, because they involve damages arising out of "continuous or repeated exposure to" the same general conditions ExxonMobil's uniform manufacture and sale of products that failed during use by a third party, resulting in property damage. Thus, ExxonMobil concludes, the policy language and facts of this case mandate aggregating the Polybutylene Claims and the AV-1 Claims into single occurrences, and allocating each occurrence to a single policy period with a single $5 million SIR.

However, New York courts and courts applying New York law have uniformly found

that product liability claims, such as the subject Polybutylene and AV-1 Claims, which arise from the manufacture and distribution of products, constitute multiple occurrences under general liability policies like the ones at issue here. Accordingly, ExxonMobil's motion for summary judgment is denied, and the London Insurers' cross motion for summary judgment is granted.

New York follows the "unfortunate event" test, first set forth in *Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.* (7 NY2d 222 [1959]), to determine the number of occurrences under a liability policy. In that case, the insured constructed two walls in front of two adjacent buildings. Due to unprecedented intense rainfall, one wall collapsed at 5:10 P.M., and the other wall collapsed at 6:00 P.M. on the same day. The insurer claimed that the collapse of the wall involved only one accident under the policy, and that, therefore, only one policy limit was available. The Court of Appeals disagreed, holding that, although the two walls may have collapsed because of the same cause (unprecedented rainfall), there were two unforeseen events separated in time and place, and therefore, two separate "accidents." In reaching its decision, the Court stated that, under the "unfortunate event test," a finding of a single accident is permitted when there has been a single "event of an unfortunate character that takes place without one's foresight or expectation. ... an unexpected, unfortunate occurrence" (*id*. at 228 [citation and quotation marks omitted]).

A number of court have applied New York's unfortunate event test in the context of products liability claims, and have uniformly found that such claims constitute multiple occurrences under policies similar to the policies at issue here. Three recent decisions considering the number of [*5]occurrences with respect to asbestos claims, two involving bodily injury and one involving property damage, make clear that ExxonMobil's single occurrence position has been rejected under New York law.

Appalachian Ins. Co. v General Elec. Co. (Sup Ct, NY County, April 7, 2003, Gammerman, J., Index No. 122807/96], *affd* 19 AD3d 198 [1st Dept 2005], *affd* 8 NY3d 162 [2007]) involved numerous asbestos claims filed against General Electric Co. (GE), alleging bodily injury as a result of exposure to asbestos used to insulate GE's power turbines. The exposures covered a span of many years, and involved numerous job sites. Similar to the occurrence definition in the policies at issue here, the *Appalachian* policy definition of occurrence was "an accident, event, happening, or continuous or repeated exposure to conditions which unintentionally results in injury or damage during the policy period " (*id*. at 9).

Justice Gammerman applied the "unfortunate event" test for calculating the number of accidents or occurrences presented by multiple claims against a particular insured. The court ultimately held that "[e]xposure to asbestos is the last link in the causal chain giving rise to GE's liability" and that "exposure of each claimant" to asbestos in a GE turbine is a separate occurrence for purposes of determining whether GE satisfied its $5 million per occurrence self-insured retention (*id*. at 12, 14). Justice Gammerman concluded that the asbestos claims were "not sufficiently close in either time or space to warrant aggregation" for determining the number of occurrences, and that "[n]either case law, nor the policy language, supports GE's position" of a single occurrence (*id*. at 14).

The First Department affirmed Justice Gammerman's decision, stating that:

For the purpose of determining the attachment point of the excess coverage, the motion court correctly held that such clause is not ambiguous; that the operative "occurrence" is the last link in the causal chain leading to liability, i.e., the exposure of each individual claimant to asbestos contained in the turbines manufactured by the insured, rather than earlier events creating the potential for future injury, i.e., the insured's design, manufacture and sale of the turbines without warnings about asbestos; and that, accordingly, individual claims could not be aggregated.

19 AD3d at 198 (citation omitted).

The Court of Appeals affirmed the First Department's decision, holding that, in distinguishing losses that arise from a single occurrence as opposed to those that constitute multiple occurrences, courts are to consider "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors" (8 NY3d at 171-172).

The Court also determined that the "the term occurrence is synonymous with accident unless the parties include language in the policy indicating otherwise" (8 NY3d at 173). The Court found that there was "nothing in the definition of occurrence in the EMLICO policies that suggests that GE and EMLICO had any such intent [to provide for grouping of claims]," and therefore concluded "that the unfortunate-event standard governs the outcome of this appeal" (*id*.).

In applying that standard, the Court held that, using the language adopted by the parties in policies, "the asbestos exposure claims GE seeks to join as one occurrence ... represent multiple occurrences," because "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 [*6]potential that some unidentified claimant would someday be harmed by GE's alleged failure to warn" (*id*. at 173-174).

The Court then analyzed the temporal and spatial relationship between the incidents, and reasoned that there was a "lack of any spatial or temporal relationship" because "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" (*id*. at 174). The Court concluded that, "[u]nder the circumstances, there were unquestionably multiple occurrences and the excess insurers were entitled to a declaration to that effect" (*id*.).

Similarly, in *Metropolitan Life Ins. Co. v Aetna Cas. & Sur. Co.* (255 Conn 295 [2001]), numerous claimants asserted that a health insurer (Metropolitan) failed to warn them of the dangers of asbestos. In Metropolitan's claim for coverage under its liability policies with Aetna, the Connecticut Supreme Court held that, under Connecticut and New York law, each individual claimant's exposure to asbestos was the occurrence for purposes of determining the applicability of the per occurrence self-insured limits stated in Metropolitan's liability policies with Aetna. While numerous claims were filed against Metropolitan for its failure to warn, Metropolitan claimed that there was only one cause of its liability (failure to warn) and thus only one occurrence. The Aetna policy provided coverage in excess of $25 million per occurrence. Although the Aetna policies did not define the term "occurrence," the following provision, including the "exposure to substantially the same general conditions" phrase contained in the policies at issue here, was incorporated into the policies:

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

Id. at 300-301.

The Connecticut Supreme Court held that "exposure to asbestos was the immediate

event that caused the claimant's injuries" (*id*. at 322), and that "the occurrence in this case was the exposure of the claimants to asbestos, not Metropolitan's alleged failure to warn" (*id*. at 312). Significantly, the Court noted that "if the claimants had never been exposed to the asbestos, there would have been no occurrence at all for which Metropolitan could have been held liable" (*id*. at 322).

Likewise, in *Stonewall Ins. Co. v Asbestos Claims Mgt. Corp*. (73 F3d 1178 [2d Cir 1995], *modified on other grounds* 85 F3d 49 [2d Cir 1996]), the number of occurrences issue arose in the context of property damage claims for buildings containing asbestos products manufactured by National Gypsum Company (NGC) and property damage liability policies containing per occurrence self-insured retentions, and defining "occurrence" as "an accident, or a continuous or repeated exposure to conditions which results, during the policy period, in ... property damage ... neither expected nor intended from the standpoint of the insured" (*id*. at 1187). NCG's policies, like ExxonMobil's policies here, contained large per occurrence deductibles. The property damages claims involved many buildings containing NCG manufactured asbestos and constructed by various owners across the country for many years. The lower court ruled that there was one occurrence NCG's decision to manufacture and sell asbestos. Citing New York's "unfortunate event" rule, the Second Circuit disagreed, and held that each installation of asbestos, causing a new exposure to one of the buildings at issue, constituted a separate occurrence. The Court explained its rationale as [*7]follows:

Each installation created exposure to "a condition which resulted in property damage neither expected nor intended from the standpoint of the insured," and for each installation, there was a new exposure and another occurrence ... Consequently, each location at which NCG's products are present, reflecting a separate installation of those products, is the site of a separate occurrence requiring imposition of another deductible.

Id. at 1213-1214.

Accordingly, these decisions constitute the framework by which I must analyze the definition of occurrence in the policies at issue here to determine whether the product liability claims constitute a single occurrence, or multiple occurrences. However, as set forth in the Court of Appeals' decision in *Appalachian*, before a court applies the "unfortunate event" standard, it must examine the specific definition of "occurrence" that a policy employs to determine whether it contains any provisions that would support grouping multiple claims into a single occurrence.

ExxonMobil contends that, unlike in *Appalachian*, the "occurrence" definition set forth in the policies at issue here identifies circumstances in which multiple claims will constitute single occurrences it expressly combines into a single occurrence "all damages arising out of such exposure to substantially the same general conditions existing at or emanating from each premise location of the Assured," which language did not exist in General Electric's policies in Appalachian. ExxonMobil argues that these aggregating words make both the Polybutylene Claims and the AV-1 Claims single occurrences, as all of the claims allege exposure to the same general conditions defective products that "emanate from" the three locations where polybutylene and AV-1 were manufactured. Thus, ExxonMobil argues, under the "occurrence" definition, the Polybutylene Claims and the AV-1 Claims each comprise single occurrences, as they involve damages arising out of "continuous or repeated exposure to" the same general conditions ExxonMobil's uniform manufacture and sale of products that failed during use by a third party, resulting in property damage.

However, a plain reading of the definition of "occurrence" in the policies reveals that there is nothing to suggest that the parties had any intent to provide for grouping of multiple claims into a single occurrence.

The issue of what constitutes an "occurrence" has generally been a legal question for the court, and a proper subject of a motion for summary judgment (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169 [1973]; *Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.*, 73 F3d 1178, *supra*). An insurance policy is a contract that is construed to effectuate the intent of the parties as expressed by their words and purposes (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351 [1978]). Unambiguous terms are to be given their "plain and ordinary" meaning (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390 [1983]). The determination of whether an insurance policy is ambiguous is a matter of law for the court to decide (*Alexander & Alexander Servs., Inc. v These Certain Underwriters at Lloyd's*, 136 F3d 82 [2d Cir 1998]).

The term "occurrence" has repeatedly been determined to be unambiguous (*see Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, *supra*; *In re Prudential Lines Inc.*, 158 F3d 65 [2d Cir 1998]; *Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.*, 73 F3d 1178, *supra*; *Metropolitan Life Ins. Co. v Aetna Cas. & Sur. Co.* (255 Conn 295, *supra*). The word "occurrence" is ordinarily "understood to denote something that takes place,' especially something that happens unexpectedly [*8]without design'" (*In re Prudential Lines Inc.*, 158 F3d at 79; *see also Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.*, 7 NY2d at 228

[defining "accident"[FN2] as "an event of unfortunate character that takes place without one's foresight or expectation .... That is, an unexpected, unfortunate occurrence"]).

Here, it is inconsistent with the plain and ordinary of the term "occurrence" to characterize ExxonMobil's manufacture of polybutylene and AV-1 as an event "that [took] place ... unexpectedly and without design" (*In re Prudential Lines Inc.*, 158 F3d at 79). Rather, ExxonMobil's manufacture of these products is more easily characterized as a pattern of behavior or conduct that was conscious and purposeful on its part. Thus, in this case, there was never any event that took place unexpectedly and without design, until the property damage occurred.

The per occurrence language is also unambiguous as it is used in the continuous exposure clause. ExxonMobil argues that the Polybutylene and the AV-1 Claims involve damages arising out of "continuous or repeated exposure to" the same general conditions ExxonMobil's uniform manufacture and sale of products that failed during use by a third party, resulting in property damage. However, under the plain reading of the policies, it is difficult to characterize ExxonMobil's manufacturing activity as a "condition" which causes a single occurrence. The underlying claimants' injuries arose from property damage at several locations, at different times, and for varying lengths of times. These circumstances clearly do not constitute the "same general conditions."

Moreover, ExxonMobil's argument regarding the continuous exposure clause is essentially that all related claims emanating from substantially the same *conduct*, i.e., ExxonMobil's manufacture of polybutylene and AV-1, should be aggregated into a single occurrence. The policy, however, provides that "all damages arising out of such exposure to substantially the same general *conditions* existing at or emanating from each premises location of the Assured shall be considered as arising out of one occurrence." The policy is silent as to aggregation of claims based solely on similar conduct; rather, the policies permit the aggregation of claims only on the basis of exposure to a the same general conditions. Indeed, several courts have rejected the theory that a continuous exposure clause permits aggregation of claims based on similar conduct (*see e.g. H.E. Butt Grocery Co. v National Union Fire Ins. Co.*, 150 F3d 526 [5th Cir 1998] [concluding that continuous exposure clause did not combine two sexual assaults on two different children into one occurrence, despite the fact that they were predicated upon employer's negligence in overseeing pedophilic employee]; *Michigan Chem. Corp. v American Home Assur. Co.*, 728 F2d 374 [6th Cir 1984] [concluding that insured's abstract act of negligence, namely its possession of

contaminated livestock feed, did not combine each sale of feed into one occurrence under continuous exposure clause]; *American Red Cross v Travelers Indem. Co. of Rhode Island*, 816 F Supp 755, 761 [D DC 1993] [concluding that despite continuous exposure clause in defendant's life insurance policy, plaintiff's "general, negligent practice in handling HIV-contaminated blood" could not be considered one occurrence; determining [*9]that each distribution of contaminated blood was a separate occurrence]).

It is also important to note that the purpose of a continuous exposure clause is to combine claims that occur "when people or property are physically exposed to some injurious phenomenon such as heat, moisture, or radiation ... [at] *one location*" (*Champion Intl. Corp. v Continental Cas. Co.*, 546 F2d 502, 507-508 [2d Cir 1976] [Newman J. dissenting] [emphasis added]; *cert denied* 434 US 819 [1977]). "The clause simply broadens ... occurrence' beyond the word accident' to include a situation where damage occurs (continuously or repeatedly) over a period of time, rather than instantly, as the word accident' usually connotes" (*id.*). The continuous exposure clause has doubtful application in a case like this, where ExxonMobil is attempting to combine numerous property damage claims that occurred in several different locations at many different points in time.

Accordingly, a plain reading of the policies at issue indicates that they do not contain any provisions that would support the grouping of multiple claims into a single occurrence. As such, the "unfortunate event" test applies. Applying this test, the factual bases underlying the Polybutylene and A-1 Claims against ExxonMobil clearly demonstrate that the claims constitute multiple occurrences under the relevant policies. ExxonMobil manufactured and sold polybutylene resin during the years from 1968 to 1975. ExxonMobil sold the polybutylene resin in pellet form to pipe extruders, who incorporated or installed the pellets into potable water service tubing for municipal utility water systems. ExxonMobil was named in 13 lawsuits alleging premature pipe breakage, leakage and catastrophic pipe failure in municipal utility district piping. Each of these 13 products liability claims alleged installation dates of ExxonMobil's product and resulting property damage at different times, and in different locations.

Under New York's "unfortunate event" test, the polybutylene claims clearly constitute multiple occurrences under the London policies. Similar to *Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.* (73 F3d 1178, *supra*), each installation of ExxonMobil's polybutylene resin into a municipal utility water system "created exposure to a condition which resulted in property damage ... and for each installation, there was a new exposure and another

occurrence" (73 F3d at 1213). In addition, there is no spatial or temporal relationship between the different incidences of property damage, as the polybutylene claims occurred at 13 different municipalities in the United States and Puerto Rico over a relatively long span of time. Thus, "the incidents share few, if any, commonalities, differing in terms of when and where [the damage] occurred" (*Appalachian Ins. Co. v General Electric Co.*, 8 NY3d at 174).

Similarly, ExxonMobil's AV-1 Claims also constitute multiple occurrences under New York law. ExxonMobil's manufacture of AV-1 lubricant over the years from 1988 to 1994 resulted in lawsuits brought by hundreds of claimants alleging property damage caused by AV-1. AV-1 was first installed in aircraft engines as early as 1988 by some claimants, and as late as 1994 by other claimants, and at all points in between those dates. ExxonMobil is liable for the alleged property damage to hundreds of different aircraft located across the United States. Each claimant's introduction of AV-1 into an aircraft engine clearly "created exposure to a condition which resulted in property damage' ... and for each installation, there was a new exposure and another occurrence" (*Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.*, 73 F3d at 1213-1214). Moreover, there is no close temporal and spatial relationship between the incidences of property damage, as the AV-1 lubricant is alleged to have caused damage to hundreds of aircraft at all different places in time.

ExxonMobil contends that, even if the "unfortunate event" test is applicable to this case, the requisite "unfortunate event" can include the manufacture and distribution of defective products. [*10]Thus, ExxonMobil argues, all claims that arise from the same "unfortunate event," here ExxonMobil's manufacture and sale of defective products, must constitute a single occurrence.

This contention is directly contrary to the clear holding of the New York Court of Appeals in *Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.* (7 NY2d 222, *supra*) and *Hartford Accident & Indem. Co. v Wesolowski* (33 NY2d 169, *supra*). Both of these cases by New York's highest court rejected the "cause" test that ExxonMobil appears to argue, in favor of the "unfortunate event" test, defined to mean "an event of unfortunate character that takes place without one's foresight or expectation" (*Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.*, 7 NY2d at 228; *Hartford Accident & Indem. Co. v Wesolowski*, 33 NY2d at 173). This definition of "unfortunate event" does not apply to ExxonMobil's or any other manufacturer's intended and deliberate decision to manufacture and distribute a product (*see e.g. Uniroyal Inc. v American Re-Insurance Co.*, 2005 WL 4934215, * 11 [NJ App Div

2005], *cert denied* 186 NJ 363 [2006] ["in the context of an asbestos manufacturer or distributor, the event is not the corporate decision to engage in the product line but rather is the individual exposure of each claimant to the product that resulted in the injury"]).

Although ExxonMobil relies on three federal court cases in support of its single occurrence argument *National Union Fire Ins. Co. v Stroh Companies, Inc.* (265 F3d 97 [2d Cir 2001]) (*Stroh*); *Uniroyal, Inc. v Home Ins. Co.* (707 F Supp 1368 [ED NY 1988]) (*Uniroyal I*); and *Champion Intl. Corp. v Continental Cas. Co.* (546 F2d 502, *supra*) (*Champion*), each of these cases was decided before the Court of Appeals decision in *Appalachian*, and is clearly distinguishable from the facts surrounding ExxonMobil's manufacture and distribution of polybutylene resin and AV-1 Lubricant and the claims arising therefrom.

The *Stroh* case did not involve general liability policies such as those at issue in this case, but rather dealt with a single "Contaminated Products Insurance" policy that specifically provided for reimbursement of costs incurred by Stroh in the course of recalls of Stroh products resulting from "Accidental Contamination." The number of occurrences was not an issue in *Stroh*. Rather, the issue was whether there was one cause of the "Accidental Contamination," such that all recall costs attributable to that "Accidental Contamination" would be subject to one deductible under the policy. The Second Circuit affirmed the district court's finding that a single production line flaw, i.e., the "thermal shock problem," caused the instances of the defect in the glass bottles that led to the recall. The facts of the *Stroh* case and the insurance policy at issue there bear no resemblance to the facts before this court, and the "unfortunate event" test was neither applicable, nor even mentioned by the Court.

The *Uniroyal I* case is similarly inapplicable to the facts presented in ExxonMobil's motion. Uniroyal manufactured the herbicide Agent Orange, which was sold exclusively to the U.S. military for use in Vietnam. Attempting to find insurance coverage to fund a class action settlement covering 2.5 million Vietnam veterans, the Court held that under the particular facts presented, the manufacture and delivery of Agent Orange by Uniroyal to the Air Force constituted a single occurrence. The Court expressly noted, however, that its ruling might be different where was product was not sold to the U.S. military:

This situation is decidedly different from the context of a civilian sales contract, in which the seller monitors the use of its product and often trains the purchaser's personnel,

and in which the seller has some market power to induce safe conduct by the purchaser and the option of a recall to curtail risky uses of the product. [*11]

707 F Supp at 1383. ExxonMobil's sales of both polybutylene resin and AV-1 lubricant involve such "civilian sales contracts," thereby rendering the *Uniroyal I* decision inapplicable to the present case.

Finally, ExxonMobil mistakenly relies on *Champion* for the proposition that multiple claims arising from a wholesaler's manufacture, sale and delivery of a defective product to another manufacturer constitutes a single occurrence. In fact, plaintiff Champion was not the manufacturer of the defective vinyl-covered panels, but rather, purchased the panels from an entity called Continental Vinyl. In *Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.* (73 F3d 1178, *supra*), the Second Circuit distinguished its prior decision in *Champion* on the ground that Champion was not the manufacturer of the defective vinyl, but simply delivered the product to 26 manufacturers of products such as houseboats and campers, who then distributed the products to consumers (*see also Appalachian Ins. Co. v General Elec. Co.*, slip op at 12 [distinguishing *Champion* on same grounds]). Here, in contrast, it is undisputed that ExxonMobil manufactured both polybutylene resin and AV-1 Lubricant.

Accordingly, it is clear that the Polybutylene Claims and the AV-1 Claims constitute multiple occurrences based on the installation or utilization of ExxonMobil's products in water systems or aircraft engines. In light of this determination, it is unnecessary to address ExxonMobil's argument that the Extended Expiration clause permits it to allocate each occurrence to a single policy year, as that argument rests upon the premise that the Polybutylene Claims and the AV-1 Claims constitute single occurrences As such, ExxonMobil's motion for partial summary judgment is denied, and defendants' cross motion for partial summary judgment that the Polybutylene and AV-1 claims constitute multiple occurrences, and that those claims cannot be allocated to a single policy period, is granted.

Accordingly, it is

ORDERED that plaintiff ExxonMobil Corporation's motion for partial summary judgment is denied; and it is further

ORDERED that the cross motion of defendants Certain Underwriters at Lloyd's London and Certain London Market Insurance Companies for partial summary judgment is granted, and it is

ORDERED, DECLARED AND ADJUDGED that the underlying polybutylene and AV-1 claims constitute multiple occurrences under the policies at issue in this case and, therefore, those claims cannot be allocated to a single policy period; and it is further

ORDERED that the remainder of the action shall continue.

ENTER:

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J.S.C.

Footnotes

Footnote 1: The pleadings in the remaining two lawsuits brought by the City of San Antonio and the Lackland City Water Company were destroyed in a 1997 fire at Mobil's off-site storage facility in West Pittson, Pennsylvania.

Footnote 2: In the context in which they are used in this case, the terms "accident" and "occurrence" are synonymous (*see Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d at 173 ["the term occurrence is synonymous with accident"]; *see also Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, *supra*; *In re Prudential Lines Inc.*, 158 F3d 65, *supra*; *Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.*, 73 F3d 1178, *supra*).