INSURANCE COVERAGE ISSUES IN THE

WAKE OF A MASS SHOOTING

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- Board of Directors (2014 - Present)
- Chair, Amicus and Public Policy Committee (2013 - Present)
- Chair, Extra Contractual Liability Section (2012 - 2014)
- Chair, Appellate Section (2010 - 2012)
- Vice Chair, FDCC Deposition Boot Camp (2014 - Present)
- Vice Chair, Amicus Committee (2008 - 2013)
- Vice Chair, Insurance Coverage Section (2006 - 2012)
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Stacy was also elected to the American College of Coverage and Extracontractual Counsel in 2013 and is a member of the Board of Directors.

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INSURANCE COVERAGE ISSUES IN THE WAKE OF A MASS SHOOTING

Following the tragedy in Aurora, as it was with Newtown, as it was with Virginia Tech, and as it has been at so many sites of mass shootings, investigation of the circumstances of mass shooting events gave rise to lawsuits seeking recovery for losses sustained at the hands of a mentally unstable criminal. These suits have traditionally alleged liability among two types of entities: (1) the supplier of weapons, ammunition, and gear, both personally and corporately; and (2) the owner of the premises at which the mass shooting took place. While Congress has largely immunized the corporate suppliers of weaponry, ammunition, and gear;[1] premise owners are without similar protections. Given the very real potential for premises liability, this paper seeks to explore some of the basic issues related to insurance coverage for premise owners in the wake of a mass shooting.

I. FACTS.

July 20, 2012 marked the nationwide release date of *The Dark Knight Rises*. To capitalize on the anticipated demand, the Century Aurora 16—like many theaters across the country—opted to show the movie as soon as able, at midnight.

Investigation following the incident revealed that shortly before midnight on July 20, 2012 a mentally unstable James Holmes drove to the theater, entered the theater through the front door, presented the ticket he had purchased 12 days earlier, and waited for the movie to start. Sometime between 12:20 and 12:30 a.m., Mr. Holmes exited the theater through theater 9's emergency exit, propped the door open with a piece of plastic, went to his car, donned protective armor, armed himself, and then re-entered the theater through the propped open emergency exit at approximately 12:38 a.m. Several minutes and 76 shots later, 70 people were either injured or dead as a result of gunshot wounds with 12 more injured from other causes.

[1] *See, e.g.*, Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903.

In the wake of the shooting, lawyers for the plaintiffs have alleged that Cinemark was negligent, in part, for the following reasons:

1. Cinemark had information that previous disturbances, incidents disruptions and other criminal activities had taken place at or near the theater;
2. Cinemark had previously hired security personnel for events at the theater, but did not do so for the midnight premier on July 20, 2012;
3. The exterior doors to the theater were lacking any alarm system, interlocking security systems, or any other security alarm features which would have put Cinemark on notice that the door had been propped open;
4. Cinemark failed to have security practices or procedures in place; nor did it employ or adequately train any employees or security personnel to prevent or deter someone from unlawfully re-entering the theater;
5. Cinemark did not have a system for monitoring the parking areas and external doors;

See, e.g., Complaint, *Traynom et al. v. Cinemark, USA, Inc. d/b/a Century Aurora 16*, 12-CV-02514, ECF Doc. 1, September 21, 2012 (D. Colo.).

II. DO MASS SHOOTINGS TRIGGER A CGL POLICY?

As with all coverage analyses, the first issue is whether the loss falls within the insuring agreement of the insurance policy. To assist in that analysis, this paper primarily analyzes the coverage issues from the standpoint of typical forms and language found in modern ISO Commercial General Liability Insurance Forms. The standard CGL insuring agreement, in relevant part, reads:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or

> "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

(ISO Form CG 00 01 04 13 at 1.)

While the policy appears to be triggered by the above, the definition of "occurrence" implicates the question as to whether that is the case. Current CGL policies generally define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." (CG 00 01 04 13 at 15.) Thus, the definition of "occurrence" transforms Section I.b.(1) of the coverage grant to read that "this insurance applies . . . only if: the "bodily injury" . . . is caused by an accident . . .". As a result, the insurer must consider whether plaintiffs' claims were the result of an accident. Common sense tells us that the shooting itself was certainly not an accident. But looking at it from a slightly different perspective, the question becomes whether the shooting was an accident from Cinemark's perspective.

The majority position on "occurrence" as "accident" is that whether the injury was an "accident" is determined solely from the standpoint of the insured without reference the actually injurious conduct. *Nationwide Mut. Fire Ins. Co. of Columbus v. Pipher*, 140 F.3d 222, 226 (3d Cir. 1998) ("the test of whether the injury or damage is caused by an accident must be determined from the perspective of the insured and not from the viewpoint of the person who committed the injurious act . . . The rule seems to be well-settled in other jurisdictions that it is the intentional conduct of the *insured* which precludes coverage, not the acts of third parties.") As applied, the plaintiffs' allegations against Cinemark sound in negligence and are reflective of injury that was not intended from the standpoint of Cinemark.

In addition to the fact that many courts interpret "accident" from the standpoint of the insured, many CGL policies explicitly include this direction and define "occurrence" as:

> [A]n accident, including continuous or repeated exposure to substantially the same general harmful condition, *which results in bodily injury or property damage neither expected or intended from the standpoint of the insured*.

8A Couch on Ins. § 127:21 (emphasis added).

In contrast to the above, the minority view focuses on the nature of the actual injurious conduct. This approach is illustrated in *Mut. of Enumclaw v. Wilcox*, 123 Idaho 4, 843 P.2d 154 (1992). In *Wilcox*, twelve plaintiffs filed suit against Shirley Wilcox, her husband, the state of Idaho and numerous employees of the state of Idaho for sexual abuse they endured while placed in respite or foster care in the Wilcox residence. *Id.* at 4-5. The complaint alleged that Mr. Wilcox perpetrated the abuse. *Id.* at 5. The allegations against Mrs. Wilcox alleged negligence in reporting her husband's tendencies, failing to report abuse, and failing to warn or provide safety for the minors being abused. *Id.* The homeowner's policy at issue contained the same definition of "occurrence" found in the CGL language above. *Id.* at 8. While the court agreed that it must analyze Mrs. Wilcox's conduct separate from her husband's conduct, it held that coverage under the policy turned on whether or not the alleged conduct actually caused the injury. *Id.* at 9. Using this paradigm, the court reasoned that Mrs. Wilcox's negligence was not the cause of the actual injury. *Id.* Instead, "[t]he injury suffered by the minors [was] child molestation" by Mr. Wilcox. *Id.* Therefore, because Mrs. Wilcox's conduct did not injure the children, but was derivative of the actually injurious conduct, the "occurrence" was not an accident and the policy was not triggered. This method is the minority method and has decreased in favor over time. *Compare, e.g., Sweet Home Cent. Sch. Dist. of Amherst & Tonawanda v. Aetna Commercial Ins. Co.*, 263 A.D.2d 949, 695 N.Y.S.2d 445 (1999) ("it is the nature of the underlying acts, not the theory of liability, that governs"), *with NYAT Operating Corp. v. GAN Nat. Ins. Co.*, 46 A.D.3d 287, 847 N.Y.S.2d 179 (2007) (because NYAT's liability in the underlying action was based on its negligent hiring and retention of the employee, not respondeat superior, the

sexual assault was a covered "accident" within the meaning of the policy.") If this test was applied to the Aurora case, the fact that James Holmes committed intentional acts of murder and battery might preclude Cinemark from its insurance coverage.

III. THE ASSAULT AND BATTERY EXCLUSION.

As a second step in any insurance analyses, if the event falls within the insuring agreement, the exclusions must be analyzed. In this case, insurers may not be obligated to defend and indemnify the insured if the policy contains an assault and battery exclusion endorsement. One example of such an endorsement is:

> It is agreed that no coverage shall apply under this policy for any claim, demand or suit based on Assault and Battery, and Assault and Battery shall not be deemed an accident, whether or not committed by or at the direction of the insured.

Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd., 93 F.3d 63, 64 (2d Cir. 1996).

Another example is:

> We have no duty to defend or indemnify any insured or any other person against any claim or suit for bodily injury, property damage, personal injury or advertising injury, including claims or suits for negligence arising out of or related to any:
>
> 1. Assault;
> 2. Battery;
> 3. Harmful or offensive contact; or
> 4. Threat.
>
> This exclusion applies regardless of fault or intent. Coverage is also excluded for any injury or damage committed while using reasonable force or acting in self-defense.

> For purposes of this exclusion, negligence includes but is not limited to claims for negligent:
>
> 1. Hiring;
> 2. Employment;
> 3. Training;
> 4. Supervision; or
> 5. Retention.

Colter v. Spanky's Doll House, 2006-Ohio-408, ¶¶ 14-25.

As the endorsements apply to Aurora, if the policy contained an assault and battery endorsement, it would very likely operate to bar coverage for plaintiffs' claims.

Separately, where assault and battery is excluded by the policy, several insurers offer a separate coverage endorsement for claims arising out of assault and battery. Such coverage endorsements generally offer a separate and lesser sublimit of liability than the general liability limits found in the policy. Just as with the endorsement excluding assault and battery, as applied to Aurora, if the policy contained an assault and battery coverage endorsement, the endorsement would likely provide the sole means of coverage. This coverage would likely provide far lesser limits than standard CGL limits.

IV. OCCURRENCE COUNTING.

If insurance coverage is established, the next important issue to consider is the number of "occurrences" under the insurance policy for the purposes of the policy's "per occurrence" and "aggregate" limits. If a mass shooting event is one "occurrence"—regardless of the number of claims or injuries—then it likely decreases the amount of insurance coverage available to respond to the claim. Limited proceeds are troubling for both the insured and the insurer. For the insured, lesser coverage raises the risk of excess exposure. For the insurer, the existence of potentially insufficient insurance may impose additional obligations on the insurer, a topic which is addressed in the next section.

In determining whether one or multiple occurrences exist, the question is generally one of "cause" and "effect." Some courts have adopted a "cause theory" to occurrence counting, while others have adopted the "effect theory." *Allstate Ins. Co. v. Bonn*, 709 F. Supp. 2d 161, 167 n.5 (D.R.I. 2010); 12 Couch on Ins. § 172:12. As discussed below, while separate theories, varying application of the "cause theory" can make distinguishing between the different theories a difficult task.

> The less complicated of the two theories is the "effect theory." "This theory states, generally, that limits in a liability policy which limit the insurer's liability to a specified amount 'per occurrence' or 'per accident' refers to the effect of the occurrence or accident, thus making the entire policy limits available to each injured or damaged party."

Am. Modern Select Ins. Co. v. Humphrey, No. 3:11-CV-129, 2012 WL 529576, at *4 (E.D. Tenn. Feb. 17, 2012) (citing Michael P. Sullivan, *What constitutes single accident or occurrence within the liability policy limiting insurer's liability to a specified amount per accident or occurrence*, 64 A.L.R.4th 668, § 3). As applied to Aurora, each injured or deceased individuals' claim would constitute a separate "occurrence." Given the large number of claimants, this would likely mean that the policy would be governed by the aggregate limit of liability.

Alternatively, the "cause theory" of occurrence counting focuses on the cause of the injury. While simple in theory, the case of *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003), is illustrative of the difficulties which arise when applying "cause theory". *Koikos* was on review as a certified question from the Eleventh Cicuit Court of Appeals to the Florida Supreme Court. The certified question answered by the Florida Supreme Court is directly on point:

> When the insured is sued based on negligent failure to provide adequate security arising from separate shootings of multiple victims, are there multiple occurrences under the terms of an insurance policy that defines occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions"?

Id. at 264. The factual background of *Koikos* explains that the underlying liability arose after two individuals were injured in a shooting at a restaurant after they were struck by two "separate-but nearly concurrent-rounds." *Id.* at 265. Following their injuries, the two injured parties separately brought suit against the restaurant owner alleging negligent security. *Id.*

In holding that each shot was a separate occurrence, the court first addressed the fact that the definition of "occurrence" includes "continuous or repeated exposure to substantially the same general harmful conditions." Without discussion of the plain meaning of the definition, the court concluded that the purpose of this clause was to expand coverage for "ongoing and slowly developing injuries." *Id.* at 268-69. Therefore, the "continuous or repeated exposure" language was not applicable in limiting coverage.

Next, the court expressly adopted the "cause theory" to occurrence counting and noted the following:

> Determining that the focus of an "occurrence-based policy" is on the "cause" of the damage, however, does not answer the certified question because, as the Eleventh Circuit points out, there are two possible causes that resulted in injury in this case: (1) the underlying tortious omission of the insured-Koikos's failure to provide security and failure to warn; or (2) the intervening intentional acts of the third party-the intruder's gunshots.

Id. at 269. After reviewing two similar cases, *Am. Indem. Co. v. McQuaig*, 435 So. 2d 414, 414 (Fla. Dist. Ct. App. 1983) and *New Hampshire Ins. Co. v. RLI Ins. Co.*, 807 So. 2d 171 (Fla. Dist. Ct. App. 2002), the court held that the "occurrence" meant the act that caused the damage—the shots—reasoning that without those acts no damage would have occurred. 849 So.2d at 271. As a backup, the court then noted that even if it accepted the insurer's construction, the policy was ambiguous as to which act the policy applied to. *Id.*

Finally, having determined that the "occurrence" was the shooting, the court analyzed whether the consecutively fired shots constituted one or two occurrences. In rejecting the insurer's argument that the close proximity in time and place of the individual shots warranted a finding of one occurrence, the court concluded that "using the number of shots fired as the basis for the number of occurrences is appropriate because each individual shooting is distinguishable in time and space." *Id.* at 272. The court then criticized the insurer for not drafting a clearer policy, citing the definition of occurrence found in one of the policies in the World Trade Center cases which added "the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur." *Id.* (quoting *SR International Business Insurance Co. v. World Trade Center Properties LLC*, 222 F.Supp.2d 385 (S.D.N.Y. 2002)).

Applying *Koikos* to a situation like Aurora, given that there were 76 shots, it is likely that the aggregate insurance limit would apply. However, in the event that the "per occurrence" limits apply, *Koikos* injects added burden and uncertainty. For example, the same bullet frequently struck multiple people. Therefore, the *Koikos* approach requires a determination of which bullets struck which people before the applicable limits can be determined. Further, as an example of uncertainty, an injured party may attempt to argue that they are entitled to the "per occurrence" limit for each bullet which struck them. Another example of uncertainty relates to the potential policy limit for claimants which were not shot but instead sustained injury in the attempts to flee the scene.

Setting aside the above, *Koikos* does clarify the two moving parts of "cause theory" analysis: (1) which act(s) constitute the "occurrence"?; and (2) how should the acts which constitute the occurrence be separated? By changing focus on the causative act and by changing the analysis regarding occurrence separation, the results change materially.

As to changing the focus of the causative act, consider *RLI Ins. Co. v. Simon's Rock Early Coll.*, 54 Mass. App. Ct. 286, 287 (2002). *RLI* involves a situation in which a student "went on a shooting spree that lasted eighteen minutes, spanned approximately a quarter of a mile, and resulted in the killing of two and the injuring of four individuals." *Id.* at 287. The court held that the "cause" of the injury giving rise to the "occurrence"

must be considered to be the conduct of the insured reasoning that this is the legal "cause" which creates liability against the insured. *Id.* at 290. As applied to that shooting, since the claim against the college was one of negligence, and since "it [could] not be said that each alleged act of negligence resulted in a discrete injury", there was only one occurrence under the policy. *Id.* at 294-95.

Changing the analysis regarding occurrence separation equally changes the result. In this regard, some courts appear to have adopted an entirely separate test for occurrence counting which focuses on "time and space". Under that test, "if cause and result are simultaneous or so closely linked in time and space as to be considered by the average person as one event," then the injuries will be deemed the result of one occurrence." *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 460, 905 N.E.2d 747, 756 (2009) (quoting *Doria v. Ins. Co. of N. Am.*, 210 N.J. Super. 67, 74, 509 A.2d 220, 224 (App. Div. 1986)). A similar application analyzes whether "(t)here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage." *Bonn*, 709 F. Supp.2d at 167 (quoting *Bartholomew v. Insurance Co. of N. America*, 502 F. Supp. 246, 251 (D.R.I. 1980*), aff'd. sub nom. Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27 (1st Cir. 1981).

V. SETTLING MULTI-CLAIMANT, INADEQUATE INSURANCE CLAIMS.

In a situation such as Aurora, with twelve dead and seventy injured, even conservative estimates of the gross damages could potentially exceed available policy limits. Therefore, as a final issue, if coverage has been established and the court has determined the number of occurrences (and thereby the limits of any applicable insurance), then the insurer must determine whether there is adequate insurance to compensate the claimants and, if possible, how to satisfy the pending claims with available limits. This is a crucial step in the process as when insurance proceeds are inadequate to satisfy all claims, some jurisdictions impose additional obligations on insurers.

The language of the standard CGL policy explains the insurer's obligation in relation to the policy limits:

> **(2)** Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

(CG 00 01 04 13 at 1.)

While an insurer's obligation may terminate after exhaustion of the applicable policy limits, the real question relates to how an insurer reaches the point of exhaustion. And, in that regard, the primary issue an insurer faces is in how it prioritizes claims. Should the insurer settle the claims first come, first paid? Should it offer prorated settlements? Or should some other means of priority be utilized?

The majority of courts follow the "first in time" rule or some variant thereof. Under this rule, "[a] liability insurer. . . 'may in good faith and without notification to others, settle part of multiple claims against its insured even though such settlements deplete or exhaust the policy limits so that remaining claimants have no recourse against the insurer.'" *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.*, 136 F. Supp. 2d 1340, 1355 (N.D. Ga. 2001) (quoting *Miller v. Georgia Interlocal Risk Management Agency*, 232 Ga.App. 231, 231, 501 S.E.2d 589 (1998)). This rule is typically referred to as "first in time, first in right". *World Trade Ctr. Props., LLC v. Certain Underwriters of Lloyd's of London*, 650 F.3d 145, 151 (2d Cir. 2011). So long as the settlement is reasonable or the claim is reduced to judgment, the insurer will be considered to have acted in good faith. *See id.* The only real limit under this approach is that, if the settlement amount is unreasonable, *i.e.* it appears that the insurer is simply settling a claim to exhaust its limits and terminate the duty to defend, the insurer may be found in breach of its obligations. *Maguire v. Ohio Cas. Co.*, 412 Pa. Super. 59, 65, 602 A.2d 893, 896 (1992).

One benefit of this rule is that it permits each insurer to follow the traditional rules for individual settlement demands. That traditional rule is that "a liability insurer owes its insured a duty to effect reasonable

settlement of a claim against the insured within its policy limits when there is a substantial likelihood of recovery in excess of those limits . . ." *Larraburu Bros. v. Royal Indem. Co.*, 604 F.2d 1208, 1211 (9th Cir. 1979). As a result, if the insurer receives a reasonable demand within the policy limit, it may take action to settle the claim without worry.

However, the reason that an insurer must assess whether there is the potential for aggregate excess exposure is that some jurisdictions apply a more stringent rule. These jurisdictions require the insurer to maximize the effect of any settlements in order to minimize the excess exposure of the insured. For example, Florida requires insurers to:

> (1) fully investigate all claims arising from a multiple claim accident; (2) seek to settle as many claims as possible within the policy limit; (3) minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement; and (4) keep the insured informed of the claim resolution process.

TIG Ins. Co. v. Smart Sch., 401 F. Supp. 2d 1334, 1350 (S.D. Fla. 2005). Whether the insurer has violated these duties is a question of fact for the jury. *Farinas v. Florida Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555, 559 (Fla. Dist. Ct. App. 2003).

As an example of the requirements under Florida law, *Farinas v. Florida Farm Bureau* is instructive. In *Farinas*, the insured lost control of his car, crossed a median, and hit an oncoming car. *Id.* at 557. The accident killed five and injured seven. *Id.* The insured maintained insurance with limits of $100,000 per person, $300,000 per occurrence. *Id.* The insurer settled with two of the deceased and one of the injured, exhausted the $300,000 policy, and then sought a declaration that it no longer had a duty to defend the insured. *Id.* at 557-58. After imposing the above standards of settling multiple claimant, inadequate insurance claims, the court explained:

> [W]hether Farm Bureau has met its good faith duty and undertaken a reasonable claims settlement strategy are questions for a jury to decide. Consequently, in answer to the

> third question, there are many factual issues for the jury to resolve, including whether Farm Bureau's quick settlement with three of the possible claimants was reasonable, whether Farm Bureau's rejection of global and other settlement options contemplated the best interests of the insured, whether Farm Bureau adequately investigated the facts of all of the claims, and whether Farm Bureau properly rejected advice of legal counsel and suggested settlement strategies proposed by Farm Bureau employees.

Id. at 561.

As illustrated above, from the perspective of the insurer, Florida's "maximizing" standard imposes more obligations on the insurer than the "first in time" standard. While the "first in time" rule permits insurers to consider and investigate claims as they are received, the "maximizing" standard requires insurers to gather information and investigate all potential claims. Further, the "maximizing" standard requires the insurer to assess, value, and compare all potential claims in relation to one another and then to make settlement decisions based upon those determinations. And, finally, the "maximizing" standard subjects the insurer to second guessing as to whether it has acted in good faith in assessing and settling claims by subjecting the insurer to the retrospective analysis of a jury.

Beyond "maximizing" and "first in time", some courts have also endorsed division of policy proceeds on a pro-rata basis. *See Allstate Ins. Co. v. Ostenson*, 105 Wash. 2d 244, 246, 713 P.2d 733, 735 (1986). The limitation of this option appears to be that it is only feasible where (1) all claimants are joined in one suit, via interpleader or otherwise. *Id.*; or (2) where multiple claimants have obtained judgments in different actions. *State Farm Mut. Auto. Ins. Co. v. Hamilton*, 326 F. Supp. 931, 932 (D.S.C. 1971). Each of the situations in which a *pro rata* award is permitted is troubling. First, plaintiffs are not likely to bring their claims joined in one suit and consolidation may not be an option for the insurer. For example, in Florida, consolidation of claims through interpleader may be considered to violate the "maximizing" rule. Second, as to pro rata allocation of judgments, such a strategy may not be a realistic option. Under the majority rule, if a claimant makes a reasonable demand within the policy

limit, the insurer refuses, and the claimant then obtains an excess judgment, the insurer may be adjudged to have acted in bad faith. Therefore, an insurer may not be able to wait for numerous claims to be reduced to judgment to obtain the benefit of pro rata allocation.

CONCLUSION

Unfortunately, recent headlines suggest that mass tragedies like what happened in Aurora Colorado in July 2012 likely are not going away. Insurers and insureds will be faced with issues related to the number of occurrences and policy limits available to satisfy claims. Insurers will need to be aware of their obligations in the particular jurisdiction regarding satisfaction of multiple claims with often insufficient limits.