

THE DEVILISH DETAILS OF BATCH AND NON-CUMULATIVE CLAUSES

Life science companies commonly experience Product Liability claims that involve several claimants or even very large numbers of claimants alleging the same product defect or adverse reaction. The result can be multiple individual claims, a mass tort claim or a group of claims that are batched together.

How is it decided which way such linked claims are handled? And what difference does it make? The difference can mean millions of dollars either in favor of insurer or insured. The way it is decided depends on the details of your Liability policy – and the details start with the definition and interpretation of “an occurrence.”



OCCURRENCE OR OCCURRENCES

The definition of **occurrence** has been the focus of litigation and interpretation by the courts for years. The term has been found by the courts to apply, among other things, when:

- One injured party is exposed to multiple exposures over time
- Multiple injured parties are exposed to the same condition
- Multiple claims arise out of a similar course of conduct

The variety of interpretations creates uncertainty when a claim is presented involving several claimants injured over time. Say, for example, a drug company manufactures three drugs that have a common action but are prescribed for three different diseases. Users of all three experience a similar adverse reaction and sue. Does this constitute one occurrence for all claimants, three occurrences (one for each disease group) or individual occurrences for each claimant? The policy definition of **occurrence** will not always provide a clear answer.

The determining factor for deciding if a loss is one claim or a number of individual claim is usually the “cause of the loss” rather than the “effect or resulting injury.” The question is: did the loss result from one “cause” or many? The answer to that question dictates when a batch clause will apply.

Standard Product Liability policies provide coverage for bodily injury and/or property damage “caused by an occurrence.” The common policy definition of an occurrence is “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” When a life science product causes injury to several individuals over a period of time, is this one occurrence or would each injury be an individual claim? If the losses are considered one claim, then the insured would likely only pay one deductible or self-insured retention, and the insurer would only have one policy limit at risk. If the loss is considered a series of individual claims, the insured would be subject to multiple deductibles, and the insurer could have several annual policy limits exposed to multiple losses. Additionally, if the claims are batched as one occurrence, the excess Liability insurer would be at risk sooner, because the primary policy limit in one policy period would erode more quickly. Insurer and insured should carefully craft what is called batch language in the Liability policy. Excess/umbrella policies should recognize the batch language of the underlying policies.

The batch language typically revolves around two modifications to Products Liability policies: the batch clause and the non-cumulative clause. The intent of the batch clause is to aggregate the losses that arise from a “related incident” into a single claim covered by one policy period and one policy limit. The insured pays one deductible (which can be greater than a single occurrence deductible) for all claims arising from the batch, and all of the claims fall into one policy year – usually the year of the earliest known claim. Non-cumulative language has a similar effect on coverage. This language typically states that “regardless of the number of insured persons, injured persons, claims, or claimants or policies involved, our total liability for damages covering one loss will not exceed the limit of liability shown on the declaration page of this policy.” The intent is to prevent the stacking of policy limits when claims caused by a single negligent act are made in different policy years.

THE FINANCIAL IMPACT OF BATCHING CLAIMS

Imagine you are a small life science company with one product on the market. You buy a Product Liability policy with a \$10,000 deductible and a \$5 million policy limit. Over a period of time, you receive notice that individuals using your product are experiencing an unexpected adverse reaction. Letters from lawyers begin arriving on your desk. You notify your insurer. The injuries are not serious and it looks like you could settle each loss for \$5,000. You receive 30 claims before you pull the product from the market.

If these losses are determined to be individual claims, your company would be responsible to pay each loss under your per-claim deductible. Your company pays $30 \times \$5,000 = \$150,000$ and your insurer pays nothing. If these claims are batched and treated as one loss, your firm pays one deductible (\$10,000) and your insurer pays the balance of the claims (\$140,000). In this example, batching the claims looks like a good deal for your company.

Now, change the parameters of this scenario. Let’s say you buy a \$10 million policy limit with a \$1 million self-insured retention (SIR) and the claims look like they are going to average \$500,000 to settle. Again, 30 claims are presented ($30 \times \$500,000 = \15 million). The losses straddle two policy periods. If the claims are considered individual losses, your firm is going to pay your SIR for each of two policy periods (\$2 million) and your insurer has two policy limits exposed, resulting in payments of a total of \$13 million. If the claims are batched, you pay one SIR (\$1 million) and your insurer pays one policy limit (\$10 million). However, the claims equal a total of \$15 million and the payment of your self-insured retention and the insurer’s one policy limit equals \$11 million. You pay the remaining balance (\$4 million) from operating revenue.

Is a batch clause favorable or unfavorable to an insured? Insurers often refer to the batch clause as a “limiting endorsement,” implying that it reduces policy coverage. In fact, the impact of a batch clause will depend on its insurance program structure and how the claim is presented. However, it is safe to assume in all cases that the product causing the loss will be excluded from coverage in subsequent years.



ALL BATCH CLAUSES ARE NOT CREATED EQUAL

To add to the confusion around the batch issue, actual policy language varies dramatically from one policy to the next. For example, some policies limit a batch to products that “can be distinguished by the specific date of production or by a batch number, lot number or control number.”

Another policy may more broadly define a batch (or related occurrence) as claims arising from “two or more persons...that are attributable directly, indirectly or allegedly to the same event, defect, hazard, condition, cause, decision or advice in the design, formulation, manufacturing, distribution, sale, use, testing, handling, repair, replacement, maintenance or disposal of your product...”

Even without a batch clause, most Product Liability policies will use the definition of occurrence and the non-cumulative policy language to corral multiple losses from a single cause into one policy period and one policy limit. So what does the life sciences risk manager do? Consider the issue at the next renewal. An optimal Product Liability program should consider:

- An annual aggregate limit on the deductible/SIR. In the event that the losses are considered individual losses, the insured’s out-of-pocket for each policy year would be capped.
- A proper limit of liability that anticipates the insured’s potential exposure to a mass tort claim if it is treated as a single loss.
- Clearly written and completely understood batch language (or the absence of a batch clause) that is compatible with the insured’s risk financing philosophy.

The best time to consider the potential impact of multiple related claims and how your insurance policy will respond is before you have a loss. A discussion with your legal counsel and insurance broker before a claim is presented can help optimize coverage and predetermine how you will present these losses to your insurer.

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