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ALERT

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"Please, Sir, I Want Some More"—Getting Multiple Limits On Fidelity Claims

By Edward J. Stein

The shock of discovering that a trusted employee has secretly robbed the company often leads to an equally troubling aftershock: finding that the limit of coverage on the current crime insurance policy appears insufficient. Many policyholders, like the hungry children in Charles Dickens' "Oliver Twist," meekly accept their meager lot, unaware that they may well deserve more from their standard commercial crime insurance policies, because multiple limits may apply.

Insurers may deride this approach as "stacking," but that term does not appear in commercial crime insurance or any other policies. Instead, the policies often provide coverage up to stated limits for each "occurrence," perhaps subject to "policy period," "non cumulation" and "extended discovery" clauses. Courts construing these provisions recognize that multiple limits may apply to employee dishonesty losses that continued undetected over several successive policy periods. While the current policy is likely to cover the concealed losses from prior policy periods (under "discovery" and "superseded suretyship" provisions), if such losses exceed the limit of the current policy, prior policies provide additional coverage, subject to their own separate limit.

There is a growing body of caselaw supporting a policyholder's rights to an additional policy limit for a separate "occurrence" of continuing employee embezzlement in successive policy periods. Courts in Iowa and California led the way, with Georgia and Oregon recently following suit. Generally, these courts reason that the crime policies' "non cumulation" clause, discovery period, and occurrence definitions, read together, are so ambiguous that the policyholder is entitled to a favorable interpretation.

Two cases applying California law, *Karen Kane Inc. v. Reliance Insurance Co.*, 202 F.3d 1180 (9th Cir. 2000), and *A.B.S. Clothing Collection, Inc. v. Home Ins. Co.*, 34 Cal. App. 4th 1470, 41 Cal. Rptr. 2d 166 (1995), illustrate a policyholder's right to recover a separate limit for separate policies triggered by continuing embezzlement. *Karen Kane* involved three successive fidelity policies, where employee thefts took place over the course of the several policies. The policy limits were on a "per occurrence" basis. The court found ambiguity in the "occurrence" definition, which could refer to either the entire theft conspiracy, *i.e.*, as a "series of acts," or to each theft within the conspiracy, i.e., the multiple steps involved in each theft. Accordingly,

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Anderson Kill & Olick, P.C., created the Financial Services Insurance Coverage Group to serve its various clients in the financial industry and to focus its coverage expertise on the insurance issues common to broker/dealers, commercial banks, investment banks, investment advisors, hedge funds and financial institutions including mutual funds.

the *Karen Kane* court found coverage for a separate "occurrence" and separate limits within each policy period; however, because the policies had a one-year discovery period which had expired under the initial policy, the Court ordered a separate limit to be paid for each of the latter two policies, but not the initial policy.

Insurers may not rely on the "non-cumulation" clause to excuse the obligation to insure the separate "occurrence" claimed under a prior policy. In *A.B.S. Clothing Collection, Inc. v. Home Ins. Co.*, 34 Cal. App. 4th 1470, 41 Cal. Rptr. 2d 166 (1995), the facts were similar to *Karen Kane*: a continuing embezzlement scheme over the terms of several successive policies of employee dishonesty insurance. Based on the issuance of separate insurance policies, each with its own separate documentation, the *A.B.S.* court held that the policies were separate and distinct contracts with separate limits available on each. The *A.B.S.* court rejected the insurance company's attempt to limit liability to a single limit based on a standard non-cumulation clause language, finding that the clause was ambiguous and served merely to prohibit loss carryover from one policy period to the next.

Because employee dishonesty is relatively infrequent and unpredictable, financial institutions and other policyholders often underestimate their exposure to an embezzlement loss; policyholders and their brokers clearly must consider the adequacy of fidelity limits when they procure insurance. However, if long-term losses are discovered that exceed the current policy limit, policyholders and their counsel should not hesitate to pursue additional amounts, as appropriate, under the prior policy's limit. ■

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