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STACKING OF LIMITS—A COSMETIC APPROACH TO THE UNDERINSURED FIDELITY LOSS

Dennis J. Bartlett

I. INTRODUCTION

This article provides a comprehensive analysis of recent cases in which claimants have sought, and sometimes obtained, multiple limits for fidelity bond claims. This includes a review of recent policy wording and how such wording should help curtail efforts to obtain multiple limits.

Stacking of limits is a critical issue in the industry and has been written upon several times in the recent past. This article builds upon rather than duplicates those recent articles.¹ The *Annotated Commercial Crime Policy, Second Edition*² provides a comprehensive summary of applicable cases through 2005.³ This article, therefore, focuses on reported decisions since that work was prepared.

Notwithstanding industry efforts to prevent multiple limits from applying to claims by modifying policy language, because of the dollars

¹ See, e.g., ANNOTATED COMMERCIAL CRIME POLICY 507-08 (2d ed., Cole S. Kain & Lana M. Glovach eds., 2006) [hereinafter Annotated Commercial Crime Policy]. Secondary sources cited include the following: David T. DiBiase, *Fidelity Claims in Excess of Policy Limits—Problems and Solutions*, 52 INS. COUNS. J. 660 (1985); Tracey Haley, *Cumulation of Crime Policy Limits—The Impact of A.B.S. Clothing* (unpublished paper presented at ABA FSLC Mid-Winter Meeting 1998); and Tracey Santor, *Limits of Liability*, in HANDLING FIDELITY BOND CLAIMS, 319 (2d ed., Michael Keeley & Sean Duffy eds., 2005).

² See Annotated Commercial Crime Policy, *supra* note 1, at 496-538.

³ *Id.*

Dennis J. Bartlett is a partner with Kerr, Brosseau, Bartlett, O'Brien, LLC in Denver, Colorado.

involved, creative claimants still try to find avenues of recovery for losses in excess of available limits. Often the amount at issue is simply too much for claimants not to try to expand the contracted for coverage. Courts, faced with a claimant that has suffered a large loss and has paid for fidelity coverage for many years while an embezzlement scheme was ongoing, have in the past applied multiple limits where it was inappropriate to do so. A court that tortures the contract and the law to produce such results works a disservice to the parties to the fidelity insurance contract.

This article focuses on efforts to stack multiple limits. Other tactics claimants facing large fidelity losses employ to increase the available limit include claiming multiple occurrences, ambiguities such that coverage should be read expansively to the insured's benefit, or the reasonable expectations of the insured doctrine. All appear in the cases discussed in this article. The good news, as discussed below, is that recent cases reject claimants' efforts to recover multiple limits.

II.

A.B.S. CLOTHING COLLECTION AND ITS PROGENY

No discussion of this subject can ignore the springboard decisions that have given life to recent efforts to stack policy limits. In 1995 the California Court of Appeals decided *A.B.S. Clothing Collection, Inc. v. Home Assurance Co.*⁴ This case involved two dishonest employees whose scheme ran for approximately three years. The same carrier renewed the same coverage for all three years, but with different policy numbers. The court of appeals framed the issue as follows: "When an employee embezzles funds from an employer over a period of years during which the employer carries insurance against employee dishonesty from the same insurer, may the employer recover up to the insurer's limit of liability for each year in which the embezzlement occurs?"⁵ The court reversed summary judgment for the insurer and the lower court ruling that held that only one limit was available and

⁴ 41 Cal. Rptr. 2d 166 (Ct. App. 1995). See also *Cincinnati Ins. Co. v. Hopkins*, 522 N.W.2d 837 (Iowa 1994) (non-accumulation language held ambiguous and recovery allowed up to limits under consecutive policy periods).

⁵ 41 Cal. Rptr. 2d at 167.

remanded the case for further proceedings. The court articulated a general rule regarding stacking of policies as follows:

Over the years, the rule has developed “that a renewal of a fidelity policy or bond constitutes a separate and distinct contract for the period of time covered by such renewal unless it appears to be the intention of the parties as evidenced by the provisions thereof that such policy or bond and the renewal thereof shall constitute one continuous contract.”

Where indemnity is afforded through separate and distinct contracts for specific policy periods the insurer is generally held liable up to its limit of liability for each policy period. . . . On the other hand, where the terms of the contract, taken as a whole, establish an intention the policy be continued indefinitely, subject to the payment of an annual premium, the contract is a continuous one and the insurer's limit of liability is the amount stated in the contract regardless of the number of years involved or number of premiums paid.⁶

The court also commented, in *dicta*, on the reasonable expectations of the insured doctrine to support stacking limits:

Notwithstanding the arguable benefits of a continuous contract, courts generally have recognized affording a recovery equal to only one year's policy limit when the insured has paid several years' premiums is contrary to the insured's reasonable expectation of coverage. . . . Therefore, courts will not limit the insurer's liability for losses incurred during successive years of its own coverage unless there is clear and unambiguous language showing the parties intended to enter into one continuous contract.⁷

⁶ *Id.* at 168-69 (citations omitted).

⁷ *Id.* at 170 (citations omitted).

The court held, among other things, that key policy terms were ambiguous and the one-year discovery provision was evidence that the parties intended separate, independent annual contracts. Applying the general rule, the court found multiple limits were potentially available.⁸

A.B.S. Clothing Collection was followed by *Karen Kane, Inc. v. Reliance Insurance Co.*,⁹ a Ninth Circuit case. This case involved an employee embezzlement scheme spanning three years. The district court granted summary judgment to the insurer, holding that the definition of “occurrence” and the prior loss provision “clearly limited Kane’s recovery to the liability limit for the last of the three policies.”¹⁰ The Ninth Circuit followed *A.B.S. Clothing Collection* and held that the definition of “occurrence” was ambiguous and had to be interpreted in favor of liability. However, the Ninth Circuit did find the policy’s one-year discovery rule “quite plain” and its application “straightforward.”¹¹ In doing so, the court rejected the insured’s claims that clause conflicted with other policy provisions because it violated the “general rule” articulated in *A.B.S. Clothing Collection*, or that the discovery provision should be equitably tolled.¹² The ultimate result was that the court allowed stacking of the limits of the second and third, but not first, policy because the discovery period had expired under the first policy.¹³

Unfortunately, some other courts have followed this line of reasoning; and cases exist where claimants have obtained multiple limits for large, ongoing embezzlement schemes.¹⁴ Other courts have been

⁸ *Id.* at 174.

⁹ 202 F.3d 1180 (9th Cir. 2000). The continuous versus separate bond issue has now made its way into other contexts. In *Southern Worcester County Reg’l Vocational Sch. Dist. v. Utica Mut. Ins. Co.*, No. 06-40230, 2008 U.S. Dist. LEXIS 107280 (D. Mass. Sept. 16, 2008), the court concluded that a public official’s bond issued for a series of eight years constituted separate bonds, each answerable for the ongoing and long-running embezzlement scheme of the school district’s treasurer.

¹⁰ 203 F.3d at 1183.

¹¹ *Id.* at 1188.

¹² *Id.* at 1188-90.

¹³ *Id.* at 1190.

¹⁴ *See, e.g.*, *Glaser v. Hartford Cas. Ins. Co.*, 364 F. Supp. 2d 529 (D. Mo. 2005) (losses were spread out over three consecutive annual policies and allowed stacking of two annual limits); *Sherman & Hemstreet, Inc. v. Cincinnati*

unwilling to follow the *A.B.S. Clothing Collection* rationale and have found a single limit single occurrence when a scheme goes on for multiple policy periods.¹⁵

III. INDUSTRY RESPONSE

The industry has not sat back and ignored these conflicting precedents. *A.B.S. Clothing Collection* was first addressed with an endorsement. Then, in 2006, the Insurance Services Office¹⁶ promulgated two revised Commercial Crime Policies, a Discovery form and a Loss Sustained form. Similarly, the ISO promulgated Aggregate and Non-Aggregate Financial Institution Crime Policies revised in May of 2007, in addition to the 2004 FIB Form 24 Bond. Attached as Appendix A to this article is a side-by-side comparison of the key policy language from these five relatively new policy forms. Discovery form

Ins. Co., 594 S.E.2d 648 (Ga. 2004) (two three-year policies were in effect during the term of the scheme, each with a \$50,000 limit, and the court allowed recovery under both for a total of \$100,000); *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, 854 A.2d 378 (N.J. 2004) (twenty-seven separate false financial statements in automobile installment contracts found to be 27 separate occurrences, each with its own \$5,000 limit and \$250 deductible).

¹⁵ See, e.g., *Scirex Corp. v. Fed. Ins. Co.*, 313 F.3d 841 (3d Cir. 2002) (same scheme employed four times and court rejected claimant's attempt to obtain four limits); *Wausau Bus. Ins. Co. v. U.S. Motels Mgmt., Inc.*, 341 F. Supp. 2d 1180 (D. Colo. 2004) (court rejected insured's argument the non-accumulation of limits provision was ambiguous); *Omne Servs. Group, Inc. v. Hartford Ins. Co.*, 2 F. Supp. 2d 714 (E.D. Pa. 1998) (same employee involved in same scheme with two different customers and the court held only one occurrence and one limit available); *Bethany Christian Church v. Preferred Risk Mut. Ins. Co.*, 942 F. Supp. 330 (S.D. Tex. 1996) (scheme lasted for three annual policy periods and court held one occurrence so one limit available); *Diamond Transp. Sys., Inc. v. Travelers Indem. Co.*, 817 F. Supp. 710 (N.D. Ill. 1993) (only one limit applied to loss caused by employee that spanned three policy periods); *Reliance Ins. Co. v. Treasure Coast Travel Agency, Inc.*, 660 So. 2d 1136 (Fla. Dist. Ct. App. 1995) (same employee, same scheme for four years; discovery provision barred claims under earlier two policies); and *Landico, Inc. v. Am. Family Mut. Ins. Co.*, 559 N.W.2d 438 (Minn. Ct. App. 1997) (non-accumulation and occurrence provisions properly read together to provide only one limit for multi-year embezzlement loss).

¹⁶ Hereinafter ISO.

policies should prevent any viable stacking argument. Therefore, the increasing use of discovery policy forms should lessen the successful opportunities for claimants to seek stacked limits.

In general, the relevant provisions in all these new policies, despite what they may be called or where they may be found, include the following:

1. The Policy Period—Typically set forth in the Declarations page and defines the coverage period.
2. Policy Coverage Limits and Deductibles—Typically set forth in the Declarations page and set forth the single limit or occurrence loss, the aggregate, if any, and the deductible applicable to a single loss or occurrence.
3. Definition of Single Loss and/or Occurrence—This may be contained as separate definition or in the “Limits of Liability” policy section.
4. Prior Insurance Clause—Typically the policy describes how prior insurance from the same or different carriers is treated in adjusting any discovered loss.
5. Non-accumulation of Liability—Language intended to prevent limits to accumulate from policy period to policy period or year to year.
6. Other Insurance—Describes how the policy will react if more than one policy applies to the loss.

The Appendix is designed to provide a quick reference to the likely policy sections that should be consulted under the new policy forms when faced with a stacking argument. Obviously, it is critical always to read the entire policies and all endorsements when dealing with a stacking limits claim.

IV.
THE EFFORT TO EXPAND LIMITS STILL HAS TRACTION—
A REVIEW OF RECENT CASES

A review of recent cases shows that *A.B.S. Clothing Collection* and its progeny are not dead and cannot yet be relegated to the category of historical anomalies. However, it appears the industry response and common sense are consistently winning. Courts appear either unwilling or unable to contort policy language to find an ambiguity and allow multiple limits recoveries.

*Reliance Insurance Co. v. IRPC, Inc.*¹⁷ involved a \$5.1 million loss caused by the controller's embezzlement scheme that went undetected for four years. The policy was renewed each year by an endorsement to the policy. The insurer tendered its single limit, \$750,000; and the insured sued, seeking recovery of four limits or \$3,000,000. The trial court granted summary judgment to the insurer, holding only one policy limit was available; and that decision was upheld on appeal. The court held that "the evidence supports the trial court's determination that the parties entered into a continuous bonding scheme with a single limit of insurance."¹⁸

*Armbrust International, Ltd. v. Travelers Casualty and Surety Co. of America*¹⁹ involved an embezzlement scheme that lasted for three years, wherein an employee prepared fraudulent paychecks and then forged the employees' endorsements. Two carriers, St. Paul (which was on the risk first by separate policies) and Travelers (which was on the risk second), had provided employee dishonesty coverage. The dishonest scheme began prior to St. Paul's policies and ended during the

¹⁷ 904 A.2d 912 (Pa. Super. Ct. 2006).

¹⁸ *Id.* at 916. In doing so, the court specifically rejected *Karen Kane* as binding or persuasive authority. 904 A.2d at 917. The court also rejected the insured's claim that the non-accumulation and prior insurance clauses created an ambiguity, stating as follows: "The non-accumulation clause clarified that the applicable limit of insurance did not cumulate from year to year, the prior insurance clause explained that if IRPC sustained a loss during a period of any prior insurance held by IRPC or predecessor in interest, Reliance would pay for the loss if certain enumerated conditions were satisfied." 904 P.2d at 916 n.4.

¹⁹ No. 04-212, 2006 U.S. Dist. LEXIS 25640 (D.R.I. May 1, 2006).

term of Travelers' policy upon discovery of the scheme and termination of the employee.²⁰ The court granted Travelers' summary judgment motion, holding that its policy only potentially covered losses occurring during the Travelers policy period and, because those losses were less than the deductible, Travelers owed the insured nothing. Interestingly, the prior insurance coverage of the Travelers policy was not invoked because that policy overlapped with the second St. Paul policy. Because the Travelers policy did not become effective at the time of termination or cancellation of the St. Paul policy, the prior insurance coverage conditions were not satisfied.²¹ The court also rejected an attempt to find coverage by estoppel because all the insured was relying upon were statements by the producing agent, made at a time when the agent was acting as agent for the insured in shopping the account to various carriers, including Travelers and St. Paul. The court held that the agent's statements could not be imputed to Travelers as its representations regarding coverage.²² The court finally concluded that St. Paul's companion motion for summary judgment was not ripe as it had not been fully briefed.

In *JEP Management Inc. v. Federal Insurance Co.*,²³ the insured had insured against employee dishonesty for a number of years under a policy that contained an employee dishonesty package with a \$5 million limit. In 2002 the insured asked its broker to lower its insurance costs, and one way that was accomplished was by lowering the fidelity coverage to \$2 million on a new policy issued effective June 1, 2002.²⁴ The insured, on July 22, 2002, discovered a loss in excess of \$7 million dollars caused by an employee's embezzlement scheme that had gone on for almost seven years. The loss was reported to the insurer on September 18, 2002. The insurer paid the \$2 million limit, and the insured then sued both the insurer and the broker.²⁵ In seeking to recover more than the \$2 million limit against the insurer, the insured made three alternative arguments to increase the recovery. The insured argued as follows: (i) it was also entitled to recover the \$5 million limit on the prior

²⁰ *Id.* at *5-6.

²¹ *Id.* at *29.

²² *Id.* at 20.

²³ No. 4170, 2006 Phila. Ct. Com. Pl. LEXIS 385 (Sept. 20, 2006).

²⁴ *Id.* at *2.

²⁵ *Id.* at *3.

policy; (ii) it was entitled to recover under the prior, not current, policy, so it should be paid an additional \$3 million; or (iii) under the reasonable expectation doctrine, the current policy should be expanded to provide higher levels of coverage.²⁶

The court granted summary judgment to the insurer, disposing of all three of the insured's arguments. As to the request to recover the \$5 million policy in addition to the \$2 million recovery, the court noted the policy clearly stated the coverage under the prior policy terminated as of the inception date of the new policy and provided "such . . . policy shall not cover any loss not discovered and noticed to the Company prior to the inception of this Coverage Section."²⁷ Because the prior loss section of the policy provided that the insurer would pay the lesser of the amount recoverable under the prior or current policy, all the insured was entitled to was the lesser amount.²⁸ The court disposed of the reasonable expectations argument on two bases: (i) reasonable expectations could not be used to vary unambiguous policy terms under Illinois law; and (ii) the representations were made by the insured's broker, not the insurer.²⁹

St. Paul Fire & Marine Insurance Co. v. Whitaker Construction, Inc. is a case with two recent reported decisions.³⁰ The insured was the victim of a long-running embezzlement scheme perpetrated by its controller. It was covered for employee dishonesty by five annual policies, and, while not clear, it appears each policy ended at year end so that the last policy terminated December 31, 2002.³¹ All were discovery policies, and each policy contained an extended discovery provision. The first four allowed the insured one year from policy termination to discover a loss; the last allowed the insured sixty days from policy

²⁶ *Id.* at *3-4.

²⁷ *Id.* at *6.

²⁸ *Id.* at *7.

²⁹ *Id.* at *8-9.

³⁰ No. 07-30171, 2008 U.S. App. LEXIS 15916 (5th Cir. July 24, 2008); and No. 06-1595, 2007 U.S. Dist. LEXIS 4680 (W.D. La. Jan. 23, 2007). The Fifth Circuit opinion affirmed the district court's ruling in favor of the insurer and will not be further discussed herein.

³¹ *Whitaker Construction*, 2007 U.S. Dist. LEXIS 4680, at *10.

termination to discover a loss.³² The issue presented was whether these discovery limitations were enforceable under Louisiana law, as it was undisputed that the insured did not discover its losses until November of 2003, more than a year after termination of the first four policies and more than sixty days past termination of the last policy. The insured, which was in a Chapter 11 bankruptcy, obtained a favorable ruling from the bankruptcy court, which held that all five policies were answerable for losses occurring during their policy period. The district court reversed that holding, and the Fifth Circuit upheld the district court's reversal. The issue was whether the extended discovery provision violated a state statute, which voids any policy condition that gives an insured less than one year from when a cause of action accrues under a policy to sue.³³ The district court concluded that discovery policies are not void as against public policy in Louisiana and that the provisions did not limit the insured's right for an action against the insurer. Rather, it limited the scope of coverage under the policy.³⁴

*Thornburgh Insulation, Inc. v. J.W. Terrill, Inc.*³⁵ involved overlapping coverage for the actions of a shared employee. Two related companies each purchased separate commercial crime policies with \$50,000 limits of liability per occurrence. Each policy defined "occurrence" as follows: "all loss caused by or involving, one or more 'employees,' whether the result of a single act or series of acts."³⁶ Over a two-year period, the employee issued 63 fraudulent checks payable to fictitious corporations and used the owner's signature stamp. The fraudulent checks were deposited into an account controlled by the employee. The employee thereby embezzled \$745,000 from one employer and \$508,000 from the other employer. The insurer tendered

³² *Id.* at *9-10.

³³ *Id.* at *6. The statute in question is LA. REV. STAT. ANN. § 22:629(B) (2006), formerly LA. REV. STAT. ANN. § 22:629(A)(3). It prohibits "any condition, stipulation, or agreement limiting right of action against the insurer to a period of less than twelve months next after the inception of the loss when the claim arises under any insurance . . . , or to a period of less than one year from the time when the cause of action accrues in connection with all other insurances unless otherwise specifically provided in the code." *Id.*

³⁴ *Id.* at *14-17.

³⁵ 236 S.W.3d 651 (Mo. Ct. App. 2007).

³⁶ *Id.* at 653.

separate \$50,000 checks to both employers, and the companies both sued alleging each check was a separate occurrence under each policy.³⁷ While the trial court ruled against the insurer, the court of appeals reversed. The insureds argued the series of acts was all acts involved in issuing a single check and, therefore, each theft by each fraudulent check was a separate occurrence.³⁸ The court disagreed, holding there was no ambiguity in the definition of “occurrence” and each company suffered only one occurrence as “the cause of losses to the Companies was an embezzlement scheme, consisting of a series of acts by one employee.”³⁹

*Pine Belt Automotive v. Royal Indemnity Co.*⁴⁰ involved an embezzlement scheme by an employee acting with others over two policy periods with separate insurers. The scheme involved the credit manager for the insured auto dealership. The employee convinced the dealer to make the first payment on loans secured for customers. The employee would then take the checks issued to make the first payments, obtain money orders, and convert the money orders rather than forwarding those on to the bank. The second carrier tendered the single limit loss amount of \$100,000, and the dealership sued, claiming it was entitled to multiple limits. “Occurrence” was defined as “all loss caused by, or involving, one or more ‘employees,’ whether the result of a single act or series of acts.”⁴¹ The court concluded that the conversion of money orders constituted a single occurrence. The dealership argued that it believed converted money orders were batched and cashed money several times, suggesting the act of cashing each batch of converted money orders would be a separate occurrence.⁴² The court held “occurrence” was unambiguous, and because the injury sustained all came from a “common cause—the ongoing embezzlement,” there was one occurrence and it was irrelevant how the money orders may have been batched and cashed.⁴³ The court also distinguished *Gentilini Ford*, noting that case did not involve an ongoing embezzlement scheme where

³⁷ *Id.* at 654.

³⁸ *Id.* at 655.

³⁹ *Id.* at 656.

⁴⁰ No. 06-5995, 2008 U.S. Dist. LEXIS 84393 (D. N.J. Oct. 21, 2008).

⁴¹ *Id.* at *3.

⁴² *Id.* at *12-13.

⁴³ *Id.* at *13.

the employee “steals cash or checks from an employer as part of an ongoing scheme to defraud.”⁴⁴

In *United Ass’n of Union Local No. 290 v. Federal Insurance Co.*,⁴⁵ the insured union sought multiple limits for losses arising out of investment frauds perpetrated by Capital Consultants, acting through Mr. Grayson, which had provided management services to the union, among others.⁴⁶ The applicable fiduciary dishonesty policy was in effect for the entire ten years that the Capital Consultants’ fraudulent scheme was alleged to have occurred, and the carrier had issued three, three-year term renewals of the policy.⁴⁷ The policy had a \$1,000,000 single loss limit and a non-accumulation of liability provision that provided “the liability of the Company under this policy with respect to *any loss or losses* shall not be cumulative from year to year or from period to period.”⁴⁸ The union claimed losses, after recoveries, in excess of 77 million dollars.⁴⁹ The carrier tendered \$1 million in full settlement of the claim, which the union rejected.⁵⁰ The union claimed as follows: (i) the policy did not establish an annual policy limit, rather it established a per loss limit of \$1 million so, if Grayson/Capital Consultants caused multiple losses, multiple limits were available; (ii) the union could at least make separate recoveries of \$1 million from each of the three policy periods; and (iii) ERISA requires greater coverage, which should be read into the policy.⁵¹

The court ruled for the carrier on all three arguments. With regard to the first, the court rejected the union’s attempt to rely upon *Universal Underwriters Insurance Co. v. Ford*,⁵² noting in this case the policy limit clearly applied to “all loss or losses.” The court stated that

⁴⁴ *Id.* at *14. The court noted that even the *Gentilini Ford* court viewed that circumstance as different from the one it faced, that is, distinct vehicle purchases each with altered credit reports. 854 A.2d at 277.

⁴⁵ No. 07-1521, 2008 U.S. Dist. LEXIS 62746 (D. Or. Aug. 11, 2008).

⁴⁶ *Id.* at *2.

⁴⁷ *Id.* at *2-3.

⁴⁸ *Id.* at *3 (emphasis added).

⁴⁹ *Id.* at *7.

⁵⁰ *Id.* at *8.

⁵¹ *Id.* at *8-9.

⁵² 734 So. 2d 173 (Miss. 1999) (coverage limit was for “ALL LOSS” caused by an employee).

language “supplies the language, missing from *Universal Underwriters* because it includes “the critical phrase ‘or losses.’”⁵³ The union, on its second argument, conceded that the policy was a continuous policy for all three renewals.⁵⁴ The court quickly and easily concluded the non-accumulation clause prevented recovery under the first policy term.⁵⁵ The court also concluded that no recovery was allowed under the third policy term because the loss was discovered during the second policy term and, because the union was aware of Grayson’s fraudulent acts before the third policy began, he was never a covered employee during the third policy term.⁵⁶ Relying in part upon *Joseph Rosenbaum, M.D. v. Hartford Fire Insurance Co.*,⁵⁷ the court rejected the union’s argument that ERISA required higher limits of coverage, stating as follows: “Local 290—not defendant—had the information necessary to determine the required coverage under ERISA and purchase a compliant bond. If ERISA required a greater amount of coverage than that provided by defendant’s policy, it was plaintiff’s responsibility to seek greater coverage.”⁵⁸

In *Madison Materials Co. v. St. Paul Fire & Marine Insurance Co.*,⁵⁹ the insurer issued a series of policies covering an uninterrupted ten-year span; and the court rejected the claimant’s attempt to obtain recovery under multiple policy periods. An employee, using two separate, dishonest schemes, embezzled in excess of \$1.4 million from the insured. The policy period when the loss was discovered had a \$350,000 limit. The insured argued a temporal ambiguity⁶⁰ to support an argument that recovery was allowed under each successive policy period. The court specifically rejected the claimed ambiguity found in *A.B.S. Clothing Collection* and *Karen Kane*, among others, stating as follows: “We recognize that other circuits have found similar definitions of ‘occurrence’ to be ambiguous but we are not persuaded that under

⁵³ *Union Local No. 290*, 2008 U.S. Dist. LEXIS 62746, at *15.

⁵⁴ *Id.* at *18.

⁵⁵ *Id.* at *20.

⁵⁶ *Id.* at *23.

⁵⁷ 104 F.3d 258 (9th Cir. 1996).

⁵⁸ *Union Local No. 290*, 2008 U.S. Dist. LEXIS 62746, at *32.

⁵⁹ 523 F.3d 541 (5th Cir. 2008).

⁶⁰ *Id.* at 544 (citing *Universal Underwriters Ins. Co. v. Ford*, 734 So. 2d 173, 177 (Miss. 1999)).

Mississippi law, the definition of occurrence in this policy is ambiguous.”⁶¹

*American Auto Guardian, Inc. v. Acuity Mutual Insurance Co.*⁶² was a case where the insured suffered embezzlement losses over a six-year period when its controller issued checks to a defunct supplier and deposited those into her husband’s account. The insurer was on the risk for the last three years. The loss was discovered within two months of the termination of the insurer’s last policy.⁶³ The insured argued that each policy issued for the last three years was a continuous policy so that there was coverage for losses occurring in all three years and the discovery period extended for all three policies until one year after the termination of the last policy.⁶⁴ The court concluded that the fact that different premiums were charged, different endorsements were in effect, and different termination dates were specified meant that under Illinois law these were three separate policies. The insured further contended the prior insurance provisions picked up losses occurring in the prior carrier’s coverage terms as well.⁶⁵ The court then analyzed the prior insurance provision and succinctly stated the effect of that provision as follows: “[I]n sum, Acuity Policy 3 covered losses incurred only during its own effective dates and the effective dates of the policy immediately preceding it (Acuity Policy 2). Those losses are the only ones as to which Acuity must indemnify American.”⁶⁶

*Employers Mutual Casualty Co. v. DGG & CAR, Inc.*⁶⁷ examined the question whether the singular term “all loss” in the definition of “occurrence” created an ambiguity in the context of a loss occasioned by a series of thefts committed by one employee. The employee, through a series of forgeries over a five-year period, stole \$500,000 from the employer. The policy in place when the loss was discovered had a \$50,000 limit and defined “occurrence” as “all loss caused by, or involving, one or more ‘employees,’ whether the result of a

⁶¹ *Id.* at 544-45.

⁶² 548 F. Supp. 2d 624 (N.D. Ill. 2008).

⁶³ *Id.* at 626.

⁶⁴ *Id.* at 627.

⁶⁵ *Id.* at 629.

⁶⁶ *Id.* at 630.

⁶⁷ 183 P.3d 513 (Ariz. 2008).

single act or series of acts.”⁶⁸ The trial court ruled for the insured, holding that each theft was a separate occurrence; the court of appeals reversed, holding a series of acts was one occurrence;⁶⁹ and the Arizona Supreme Court reversed again, remanding for further proceedings.⁷⁰ However, in doing so, the Arizona Supreme Court held that the “series of acts” in the definition of “occurrence” was unambiguous, rejecting both *A.B.S. Clothing Collection* and *Gentilini Ford*.⁷¹ There is an interesting discussion of the ramifications of finding each act a separate occurrence. The court noted that such an interpretation would severely limit the coverage available to an insured that suffered a large number of losses from small thefts, each of which under that interpretation would fall below the deductible and therefore would not be aggregated to have a covered loss in excess of the deductible.⁷²

*Superstition Crushing, LLC v. Travelers Casualty and Surety Co. of America*⁷³ involved a multi-year embezzlement loss in excess of \$1 million dollars caused by the insured’s controller whose scheme apparently ran from 2002 through 2006. A commercial crime policy began to run in November 1999 and was continued by one-page renewals every year until November 2006. The policy contained employee dishonesty coverage with an occurrence limit of \$250,000 and defined “occurrence” as “all loss caused by, or involving, one of more ‘employees,’ whether the result of a single act or series of acts.”⁷⁴ The insured submitted proofs of loss for the losses occurring in each of the five implicated policy periods. The carrier paid the limit for the last policy period and denied coverage on all other claimed losses, and the insured sued. The insured relied upon *A.B.S. Clothing Collection* and

⁶⁸ *Id.* at 514.

⁶⁹ *Id.* at 515.

⁷⁰ *Id.* at 519.

⁷¹ *Id.* at 517. The court refused to follow *A.B.S. Clothing Collection* and *Karen Kane* because the issue was whether the insured was entitled to multiple recoveries in a single plan year for acts of one employee discovered in that year. The court also rejected *Gentilini Ford* because this case was an ongoing embezzlement scheme and the insured did not raise or argue the reasonable expectations doctrine. *Id.* at 518.

⁷² *Id.* at 519.

⁷³ C.A. No. 07-cv-0694 (D. Ariz. May 27, 2008) (unpublished but available on PACER).

⁷⁴ *Id.* at *2-3.

Karen Kane and argued that each renewal was a separate policy with separate limits available to the insured under the “general rule” of *A.B.S. Clothing Collection*.⁷⁵ Even though the language at issue was identical to that in *A.B.S. Clothing Collection*, the court declined the opportunity to follow the reasoning of that case or *Karen Kane*, stating that “whether there was a continuous policy or a series of policies is of little concern because the clear and unambiguous language of the Travelers policy resolves the broader liability question.”⁷⁶ Relying on the language of the Loss Sustained During Prior Insurance condition, the court held that section “makes it entirely clear that losses occurring before the current policy period are covered as part of the current insurance, but without any change in the limits of insurance.”⁷⁷ The court’s conclusion is worth repeating here:

Rather, it is the Loss Sustained during the Prior Insurance clause, when read in connection with the other provisions of the policy, that answers the question of how to deal with an occurrence that takes place in more than one policy period. This clause fills out the temporal aspect of the “occurrence” and “policy period” provisions of the policy which, when viewed separately, may be ambiguous as to whether the insured is entitled to multiple policy limits for an occurrence that takes place over several policy periods.⁷⁸

*The PBSJ Corp. v. Federal Insurance Co.*⁷⁹ is a prime example of a case of where an insured facing a large embezzlement loss caused by three employees occurring over many years grasps at straws to try and

⁷⁵ *Id.* at *10-11.

⁷⁶ *Id.* at *12-13.

⁷⁷ *Id.* at *15.

⁷⁸ *Id.* at *16.

⁷⁹ No. 07-22248, 2008 U.S. Dist. LEXIS 66089 (S.D. Fla. Aug. 28, 2008). *PBSJ Corp.* is an opinion that adopts the Report and Recommendation of the magistrate judge, who recommended granting summary judgment to the insurer. The substance of the opinion can be found on PACER at the magistrate judge’s Report and Recommendation (Case 1:07-cv-22248-FAM, Doc. 149, June 2, 2008). Citations herein will be to the Magistrate’s Report and Recommendation.

invoke multiple limits. The insurer had issued a series of policies from 1991 through 2005 providing coverage for employee theft. The losses during the preceding twelve policy periods were alleged to total \$17 million, and the losses in the final policy period alone exceed the \$2 million. The last policy had a \$2 million limit, which the insurer paid.⁸⁰ The losses were discovered during the term of the last policy, and the insurer was timely notified of the loss.⁸¹ The insured argued that it was either entitled to recover all losses occurring in all twelve policy periods up to the limit of each policy or, alternatively, \$4 million, arguing it was entitled to two \$2 million limits, one for losses occurring in the last policy period and a second under the prior losses coverage of the last policy.⁸² Central to the insured's argument was policy general term 10 dealing with Alteration and Assignment of a policy.⁸³ The argument was that the last policy, under General Term 12, provided all prior coverage, if not already terminated, terminated at the inception of the final policy.⁸⁴ The insured argued that termination was not endorsed to the earlier policies and, therefore, could not work a termination of the earlier policies. Accordingly, each of the prior policies provided tail coverage for theft losses, which extended indefinitely.⁸⁵ The court rejected that constructed argument, finding the final policy, while complex, was not ambiguous, and only obligated the insurer to cover losses up to the \$2 million total limit of the final policy.⁸⁶ The court noted the insured's construction of General Condition 10 would nullify and frustrate other clear provisions of the contract and was at odds with the clear language of the policies as a whole.⁸⁷

⁸⁰ *Id.* at *2.

⁸¹ *Id.* at *6.

⁸² *Id.* at *15.

⁸³ *Id.* at *8. That clause, which was apparently the same for all 12 policies, provided that no change or modification of a policy could be made except by a written endorsement to the policy.

⁸⁴ *Id.* at *9.

⁸⁵ *Id.* at *13.

⁸⁶ *Id.* at *23.

⁸⁷ *Id.* at *18.

*Aldridge Electric, Inc. v. Fidelity and Deposit Co. of Maryland*⁸⁸ involved thefts from a pension plan that totaled in excess of \$3,000,000 where the coverage limit per occurrence was \$500,000. The embezzler had used two schemes to steal money from the plan: (i) creating false loan packages to plan participants and then taking the loan proceeds; and (ii) falsely declaring plan terminations for participants and taking their cash out distribution. Forensic accountants determined that these two schemes had resulted in eighty-three separate thefts. The carrier paid a single limit, \$500,000; and the insured sued, claiming there were either two occurrences and two limits (for the two schemes) or eighty-three occurrences and eighty-three limits (for each separate theft). The court entered summary judgment for the insurer, holding there was only one occurrence and one available limit. In so concluding, the court held that Illinois follows the “cause theory” as opposed to the “effect theory” in determining the number of occurrences.⁸⁹

*Adolf Jewelers, Inc. v. Jewelers Mutual Insurance Co.*⁹⁰ presents an interesting fact pattern on calculation of loss as well as dealing with the insured’s attempts to increase available limits. The carrier had been on the risk for a number of years, and the limit in the policy period immediately preceding the discovery of the loss was \$200,000. The limit had been increased to \$500,000 in the year the loss was discovered. A security guard had embezzled from the insured for a number of years.⁹¹ In an interesting twist, the court concluded that the definition of “occurrence” was ambiguous, but then refused to expansively find coverage.⁹² The insured also argued that finding of ambiguity required

⁸⁸ No. 04-4021, 2008 U.S. Dist. LEXIS 85090 (N.D. Ill. Sept. 10, 2008).

⁸⁹ *Id.* at *12-13. The cause theory focuses on the number of causes of the damages; whereas the effect theory focuses number of effects, that is, how many individual claims or injuries resulted from it.

⁹⁰ No. 3:08-233, 2008 U.S. Dist. LEXIS 85060 (E.D. Va. Oct. 22, 2008).

⁹¹ *Id.* at *2.

⁹² *Id.* at *16-17. The court relied upon *Karen Kane, Inc. v. Reliance Ins. Co.*, 202 F.3d 1180 (9th Cir. 2000), and *Spartan Iron & Metal Corp. v. Liberty Ins. Corp.*, 6 Fed. Appx. 176, No. 00-1694, 2001 U.S. App. LEXIS 5120 (4th Cir. 2001) (unpublished), to conclude that an ambiguity was present and held the policy should be read in favor of coverage.

that the entire limit of the last policy be paid.⁹³ The court rejected that argument and held that the occurrence had taken place over several policy periods. The court ruled that the insured was entitled to recover up to the limit of insurance under each policy in effect during the time the employee dishonesty took place for losses occurring in each policy period.⁹⁴ However, the court refused to convert an occurrence policy into a claims-made policy, which is in effect what the insured's expansive coverage reading requested.⁹⁵ The court's ruling meant that the insured could collect the \$200,000 pursuant to the limits of the immediately preceding policy for losses that occurred during prior terms and could recover approximately \$125,000 for losses occurring during the term of the last policy.⁹⁶ In so ruling, the court stated that "other courts, employing the cause theory, have held that an employee's scheme of embezzlement against an employer involving a fairly broad repertoire of tactics constituted a single occurrence of employee dishonesty."⁹⁷

*Beckley Mechanical Inc. v. Erie Insurance Co.*⁹⁸ involved an attempt by an insured to claim that each check that the embezzling employee fraudulently issued was a separate occurrence. The embezzler, over the course of six years, issued 293 fraudulent checks causing a total loss of \$424,024. The policy had a \$10,000 limit per occurrence.⁹⁹ The insured argued "series of acts" was ambiguous, and the court rejected that argument.¹⁰⁰ The court rejected that precedent, holding that "the language of the Policy stating that a series of acts is considered one occurrence is clear and unambiguous."¹⁰¹

⁹³ *Adolf Jewelers*, 2008 U.S. Dist. LEXIS 85060, at *17.

⁹⁴ *Id.* at *19.

⁹⁵ *Id.* at *18.

⁹⁶ *Id.* at *10-23.

⁹⁷ *Id.* at *19.

⁹⁸ No. 5:07-00652, 2009 U.S. Dist. LEXIS 30881 (S.D. W.Va. Apr. 9, 2009).

⁹⁹ *Id.* at *6. "Occurrence" was defined as "[a]ll loss caused by, or involving, one or more 'employees', whether the result of a single act or a series of acts, is considered one occurrence." *Id.*

¹⁰⁰ *Beckley Mechanical*, 2009 U.S. Dist. LEXIS 30881, at *7. The insured cited *Landico, Inc. v. Am. Family Mut. Ins. Co.*, 559 N.W.2d 438 (Minn. 1997), which held identical policy language to be ambiguous. *Id.*

¹⁰¹ *Id.* at *11.

V.
CONCLUSION

Stacking of limits in the fidelity loss context, while attractive to an insured facing a large uncovered fidelity loss and courts willing to rewrite policies, leads to unjust results. Fortunately, it appears that common sense and the industry response is turning the proverbial tide, assuming recent cases are a reliable guide. These cases often correctly stand for an outright rejection of the multiple limits engendered by *A.B.S Clothing Collection*,¹⁰² *Karen Kane*,¹⁰³ and *Gentilini Ford*.¹⁰⁴ Other cases find distinguishing facts so as to not follow precedent that allows stacking of limits. Certainly, with the large losses caused by fraudulent conduct all too frequently in the news lately, and with pressure to find someone to pay and make up these losses, one can easily predict efforts to stack limits will continue with vigor. However, recent cases support the conclusion that limits should not be stacked. Furthermore, as cases are decided under the new policy forms, one can expect the policy changes to help insurers prevent stacking when that was clearly the intent of the parties.

¹⁰² 41 Cal. Rptr. 2d 166.

¹⁰³ 202 F.3d 1180.

¹⁰⁴ 854 A.2d 378.

APPENDIX
FINANCIAL INSTITUTION BOND (Std. Form No. 24, 2004)
Discovery

Section 3 This bond applies to loss first discovered by the Insured during the Bond Period. Discovery occurs when the Insured first becomes aware of facts which would cause a reasonable person to assume that a loss of a type covered by this bond had been or will be incurred, regardless of when the act or acts causing or contributing to such loss occurred, even though the exact amount or details of the loss may not then be known. Discovery also occurs when the Insured receives notice of an actual or potential claim in which it is alleged that the Insured is liable to a third party under circumstances which, if true, would constitute a loss under this bond.

Limit of Liability
Section 4
Aggregate Limit of Liability

The Underwriters' total liability for all losses discovered during the Bond Period shown in Item 2. of the Declarations shall not exceed the Aggregate Limit of Liability shown in Item 3. of the Declarations. The Aggregate Limit of Liability shall be reduced by the amount of any payment made under the terms of this bond.

Upon exhaustion of the Aggregate Limit of Liability by such payments:

- a. The Underwriter shall have no further liability for loss or losses regardless of when discovered and whether or not previously reported to the Underwriter; and
- b. The underwriter shall have no obligation under General Agreement F to continue the defense of the Insured, and upon notice by the Underwriter to the Insured that the Aggregate Limit of Liability has been exhausted, the Insured shall assume all responsibility for its defense at its own cost.

The Aggregate Limit of Liability shall be reinstated by any net recovery received by the Underwriter during the Bond Period and before the Aggregate Limit of Liability is exhausted. Recovery from Reinsurance and/or indemnity of the Underwriter shall not be deemed a recovery as used herein. In the event that a loss of Property is settled by the Underwriter through the use of a lost instrument bond, such loss shall not reduce the Aggregate Limit of

FINANCIAL INSTITUTION BOND (Std. Form No. 24, 2004)

Liability, but any payment under the lost instrument bond shall reduce the Aggregate Limit of Liability under this Bond.

Single Loss Limit of Liability

Subject to the Aggregate Limit of Liability, the Underwriter's liability for each Single Loss shall not exceed the applicable Single Loss Limit of Liability shown in Item 4. Of the Declarations. If a Single Loss is covered under more than one Insuring Agreement or Coverage, the maximum payable shall not exceed the largest applicable Single Loss Limit of Liability.

Single Loss Defined

Single Loss means all covered loss, including court costs and attorney's fees incurred by the Underwriter under General Agreement F, resulting from

- (a) any one act or series of related acts of burglary, robbery or attempt thereat, in which no Employee is implicated, or
- (b) any one act or series of related unintentional or negligent acts or omissions on the part of any person (whether an Employee or not) resulting in damage to or destruction or misplacement of Property, or
- (c) all acts or omissions other than those specified in (a) and (b) preceding, caused by any person (whether an Employee or not) or in which such person is implicated, or
- (d) any one casualty or event not specified in (a), (b) or (c) preceding.

Insured's ERISA Plans

G. If any Employee of the Insured is required to provide a bond to a health, welfare or pension plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) (hereinafter the Plan), the majority of whose beneficiaries are Employees or former Employees of the Insured, the Plan shall be deemed an Insured under this bond for the purposes of Insuring Agreement (A) only and subject, in addition to all other terms and conditions of the bond, to the following:

- (1) The deductible required by Section 13, of the Conditions and Limitations of this bond shall be applicable to the loss suffered by the Plan only after the Plan has received from the Underwriter the lesser of \$500,000 or ten percent (10%) of the assets of the Plan at the beginning of the fiscal year of the Plan in which the loss is discovered;

FINANCIAL INSTITUTION BOND (Std. Form No. 24, 2004)

(2) Notwithstanding Section 3 of the Conditions and Limitations of this bond, loss suffered by the Plan is covered if discovered during the term of this bond or within one year thereafter, but if discovered during said one year period, the loss payable under this bond shall be reduced by the amount recoverable from any other bond or insurance protecting the assets of the plan against loss through fraud or dishonesty.

(3) If more than one plan subject to ERISA is an Insured pursuant to this General Agreement, the Insured shall purchase limits sufficient to provide the minimum amount of coverage required by ERISA for each Plan and shall distribute any payment made under this bond to said Plans so that each Plan receives the amount it would have received if insured separately for the minimum coverage which ERISA required it to have; and

(4) For purposes of this General Agreement only, a director of the Insured shall be deemed an Employee.

**Limit of Liability Under This
Bond and Prior Insurance**

Section 10. With respect to any loss set forth in sub-section (c) of Section 4. of this bond which is recoverable or recovered in whole or in part under any other bonds or policies issued by the Underwriter to the Insured or to any predecessor in interest of the Insured or to any predecessor in interest of the Insured and terminated or canceled or allowed to expire and in which the period for discovery has not expired at the time any such loss thereunder is discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount carried hereunder on such loss or the amount available to the Insured under such other bonds or policies, as limited by the terms and conditions thereof, for any such loss if the latter amount be the larger.

If the coverage of this bond supersedes in whole or in part the coverage of any other bond or policy of insurance issued by an Insurer other than the Underwriter and terminated, canceled or allowed to expire, the Underwriter, with respect to any loss sustained prior to such termination, cancellation or expiration and discovered within the period permitted under such other bond or policy for the discovery of loss thereunder, shall be liable under this bond only for that part of such loss covered by this bond as is in excess of the amount recoverable or recovered on account of such loss under such other bond or policy, anything to the contrary in such other bond or policy notwithstanding.

FINANCIAL INSTITUTION BOND (Std. Form No. 24, 2004)**Other Insurance or Indemnity**

Section 11. Coverage afforded hereunder shall apply only as excess over any valid and collectible insurance or indemnity obtained by the Insured, or by one other than the Insured on Property subject to exclusion (q), or by a Transportation Company, or by another entity on whose premises the loss occurred or which employed the person causing the loss.

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
<p>A. Insuring Agreements</p> <p>Coverage is provided under the following Insuring Agreements for which a Limit of Insurance is shown in the Declarations and applies to loss that you sustain resulting directly from an “occurrence” taking place at any time which is “discovered” by a “designated “person” during the Policy Period shown in the Declarations.</p>	<p>A. Insuring Agreements</p> <p>Coverage is provided under the following Insuring Agreements for which a Single Loss Limit of Insurance is shown in the Declarations and applies to loss that you sustain resulting directly from an “occurrence” taking place at any time which is “discovered” by a “designated person” during the Policy Period shown in the Declarations.</p>
<p>B. Limit of Insurance</p> <p>1. The most we will pay for all loss (including court costs and attorneys’ fees incurred by us as provided under Condition 8.c.) resulting directly from an “occurrence” is the applicable Limit of Insurance shown in the Declarations.</p> <p>2. If any loss is covered under more than one Insuring Agreement or Coverage, the most we will pay for such loss shall not exceed the largest amount available under any one of those Insuring Agreements or Coverages.</p> <p>However, Paragraph B.2. shall not apply to expenses covered under Insuring Agreement 14.</p>	<p>B. Limit of Insurance</p> <p>1. Policy Aggregate Limit of Insurance</p> <p>a. The most we will pay for all loss “discovered” during the Policy Period shown in the Declarations is the Policy Aggregate Limit of Insurance shown in the Declarations. The Policy Aggregate Limit of Insurance shall be reduced by the amount of any payment made under the terms of this policy, regardless of when paid.</p> <p>b. Upon exhaustion of the Policy Aggregate Limit of Insurance by such payments:</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
	<p>(1) We shall have no further liability for loss or losses regardless of when “discovered” and whether or not previously reported to us; and</p> <p>(2) We shall have no obligation under Condition 8.c. to continue your defense, and upon our notice to you that the Policy Aggregate Limit of Insurance has been exhausted, you shall assume all responsibility for your defense at your own cost.</p> <p>c. The Policy Aggregate Limit of Insurance shall be reinstated by any recovery net of the expense of such recovery received by us during the Policy Period and before the Policy Aggregate Limit of Insurance is exhausted. Recovery from reinsurance and/or indemnity of ours shall not be deemed to be a recovery. In the event that a loss of “property” is settled by us through the use of a lost instrument bond, such loss shall not reduce the Policy Aggregate Limit of Insurance, unless a payment under such lost instrument bond is made and then only for the amount of that payment.</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
	<p>2. Single Loss Limited Insurance</p> <p>a. Subject to the Policy Aggregate Limit of Insurance in Paragraph B.1., the most we will pay for each “single loss” is the applicable Single Loss Limit of Insurance shown in the Declarations.</p> <p>b. If a “single loss” is covered under more than one Insuring Agreement or Coverage, the most we will pay for such loss shall not exceed the largest amount available under any one of those Insuring Agreements or Coverages.</p> <p>However, Paragraph 2.b. shall not apply to expenses covered under Insuring Agreement 14.</p>
<p>C. Deductible</p> <p>We will not pay for loss resulting directly from an “occurrence” unless the amount of loss exceeds the applicable Deductible Amount shown in the Declarations. We will then pay the amount of loss in excess of the Deductible Amount, up to the Limit of Insurance.</p>	<p>C. Single Loss Deductible</p> <p>We will only pay the amount by which any “single loss” exceeds the applicable Single Loss Deductible Amount shown in the Declarations. We will then pay the amount of loss in excess of the Single Loss Deductible Amount, up to the Single Loss Limit of Insurance, subject to the Policy Aggregate Limit of Insurance.</p>
<p>E.19. Employee Benefit Plans</p> <p>The “employee benefit plans” (Plans”) shown in the Declarations that are subject to the Employee Retirement Income Security Act of</p>	<p>E.19.—no material differences from non-aggregate form.</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
<p>1974 (ERISA) are included as Insureds under Insuring Agreement 1. subject to the following:</p> <p>a. You are responsible for selecting a Limit of Insurance for Insuring Agreement 1. that is sufficient to provide a limit of insurance for each Plan that is at least equal to the required under ERISA as if each Plan were separately insured.</p> <p>b. Any payment we make for loss sustained by any Plan will be made directly to the Plan.</p> <p>c. We will not apply the Deductible Amount applicable to Insuring Agreement 1. to loss sustained by any Plan up to the amount of coverage required under ERISA for the Plan at the time the loss is “discovered”. However, we will apply the Deductible Amount to that part of any loss which exceeds the amount of coverage required for such Plan.</p> <p>d. If two or more Plans are insured under this policy, any payment we make for loss:</p> <p>(1) Sustained by two or more Plans; or</p> <p>(2) Of commingled “property” of two or more Plans</p> <p>resulting directly from an “occurrence”, will be made to each Plan sustaining loss in the proportion</p>	

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
<p>that the limit of insurance required under ERISA for each Plan bears to the total of those limits.</p> <p>e. We will pay for loss sustained under any Plan prior to the effective date of termination or cancellation of this policy or of any Plan, which is “discovered” by a “designated person” no later than one year from the date of that termination or cancellation.</p>	
<p>E.20. Other Insurance or Indemnity</p> <p>Coverage afforded under this policy shall apply only as excess over any valid and collectible insurance or indemnity obtained by:</p> <p>a. You;</p> <p>b. One other than you on “property” subject to Exclusion 16.;</p> <p>c. A “transportation company”; or</p> <p>d. Another entity on whose premises the loss occurred or which employed the person causing the loss or the messenger conveying the “property” involved.</p>	<p>E. 20. Other Insurance or Indemnity</p> <p>Coverage afforded under this policy shall apply only as excess over any valid and collectible insurance or indemnity obtained by:</p> <p>a. You;</p> <p>b. One other than you on “property” subject to Exclusion 16.;</p> <p>c. A “transportation company”; or</p> <p>d. Another entity on whose premises the loss occurred or which employed the person causing the loss or the messenger conveying the “property” involved.</p>
<p>F. 28. “Occurrence” means:</p> <p>a. Any one act or series of related acts of burglary, robbery or attempt thereat, in which no “employee” is implicated;</p>	<p>F. 28. “Occurrence” means:</p> <p>a. Any one act or series of related acts of burglary, robbery or attempt thereat, in which no “employee” is implicated;</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
<p>b. Any one act or series of related unintentional or negligent acts or omissions on the part of any person (whether an “employee” or not) resulting in damage to or destruction of, or misplacement of “property”;</p> <p>c. All acts or omissions other than those specified in Paragraphs 28.a. and 28.b. caused by any person (whether an “employee” or not) or in which such person is implicated; or</p> <p>d. Any one casualty or event not specified in Paragraphs 28.a. through 28.c.</p>	<p>b. Any one act or series of related unintentional or negligent acts or omissions on the part of any person (whether an “employee” or not) resulting in damage to or destruction of, or misplacement of “property”;</p> <p>c. All acts or omissions other than those specified in Paragraphs 28.a. and 28.b. caused by any person (whether an “employee” or not) or in which such person is implicated; or</p> <p>d. Any one casualty or event not specified in Paragraphs 28.a. through 28.c.</p>
Commercial Crime Discovery Policy (Discovery Form) ISO Rev. May 2006	Commercial Crime Policy Loss Sustained Form ISO Rev. May 2006
<p>A. Insuring Agreements</p> <p>Coverage is provided under the following Insuring Agreements for which a Limit of Insurance is shown in the Declarations and applies to loss that you sustain resulting directly from an “occurrence” taking place at any time which is “discovered” by you during the Policy Period shown in the Declarations or during the period of time provided in the Extended Period To Discover Loss Condition E.1.j.</p>	<p>A. Insuring Agreements</p> <p>Coverage is provided under the following Insuring Agreements for which a Limit of Insurance is shown in the Declarations and applies to loss that you sustain resulting directly from an “occurrence” taking place during the Policy period shown in the Declarations, except as provided in Condition E.1.o. or E.1.p., which is “discovered” by you during the Policy Period shown in the Declarations or during the period of time provided in the Extended Period to Discover Loss Condition E.1.j.</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
<p>B. Limit Of Insurance</p> <p>The most we will pay for all loss resulting directly from an “occurrence” is the applicable Limit of Insurance Shown in the Declarations</p> <p>If any loss is covered under more than one Insuring Agreement or Coverage, the most we will pay for such loss shall not exceed the largest Limit of Insurance available under any one of those Insuring Agreements or Coverages.</p>	<p>B. Limit Of Insurance</p> <p>The most we will pay for all loss resulting directly from an “occurrence” is the applicable Limit of Insurance Shown in the Declarations</p> <p>If any loss is covered under more than one Insuring Agreement or Coverage, the most we will pay for such loss shall not exceed the largest Limit of Insurance available under any one of those Insuring Agreements or Coverages.</p>
<p>C. Deductible</p> <p>We will not pay for loss resulting directly from an “occurrence” unless the amount of loss exceeds the Deductible Amount shown in the Declarations. We will then pay the amount of loss in excess of the Deductible Amount, up to the Limit of Insurance.</p>	<p>C. Deductible</p> <p>We will not pay for loss resulting directly from an “occurrence” unless the amount of loss exceeds the Deductible Amount shown in the Declarations. We will then pay the amount of loss in excess of the Deductible Amount, up to the Limit of Insurance.</p>
<p>E.j. Extended Period to Discover Loss</p> <p>We will pay for loss that you sustained prior to the effective date of cancellation of this policy, which is “discovered” by you:</p> <p>(1) No later than 60 days from the date of that cancellation. However, this extended period to “discover” loss terminates immediately upon the effective date of any other insurance obtained by you, whether from us or another</p>	<p>E.j. Extended Period to Discover Loss</p> <p>We will pay for loss that you sustained prior to the effective date of cancellation of this policy, which is “discovered” by you:</p> <p>(1) No later than 1 year from the date of that cancellation. However, this extended period to “discover” loss terminates immediately upon the effective date of any other insurance obtained by you, whether from us or another</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
insurer, replacing in whole or in part the coverage afforded under this policy, whether or not such other insurance provides coverage for loss sustained prior to its effective date.	insurer, replacing in whole or in part the coverage afforded under this policy, whether or not such other insurance provides coverage for loss sustained prior to its effective date.
(2) No later than 1 year from the date of that cancellation with regard to any “employee benefit plans”.	(2) No later than 1 year from the date of that cancellation with regard to any “employee benefit plans”.
<p>E.1.o. Other Insurance</p> <p>If other valid and collectible insurance is available to you for loss covered under this policy, our obligations are limited as follows:</p> <p>(1) Primary Insurance</p> <p>When this policy is written as primary insurance, and:</p> <p>(a) You have other Insurance subject to the same terms and conditions as this policy, we will pay our share of the covered loss. Our share is the proportion that the applicable Limit of Insurance shown in the Declarations bears to the total limit of all insurance covering the same loss.</p> <p>(b) You have other insurance covering the same loss other than that described in Paragraph (1)(a), we will only pay for the amount of loss that exceeds:</p> <p>(I) The Limit of Insurance and Deductible Amount that other insurance,</p>	<p>E.1.o. Loss Sustained During Prior Insurance Issued By Us Or Any Affiliate</p> <p>(1) Loss Sustained Partly During This Policy and Partly During Prior Insurance</p> <p>If you “discover” loss during the Policy Period shown in the Declarations, resulting directly from an “occurrence” taking place:</p> <p>(a) Partly during the Policy Period shown in the Declarations; and</p> <p>(b) Partly during the Policy Period(s) of any prior cancelled Insurance that we or any affiliate issued to you or any predecessor in interest;</p> <p>and this policy became effective at the time of cancellation of the prior Insurance, we will first settle the amount of loss that you sustained during this Policy Period. We will then settle the remaining amount of loss that you sustained during the Policy Period(s) of the prior</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
<p>whether you can collect on it or not; or</p> <p>(II) The Deductible Amount shown in the Declarations;</p> <p>whichever is greater. Our payment for loss is subject to the terms and conditions of this policy.</p> <p>(2) Excess Insurance</p> <p>(a) When this policy is written excess over other insurance, we will only pay for the amount of loss that exceeds the Limit of Insurance and Deductible Amount of that other Insurance, whether you can collect on it or not. Our payment for loss is subject to the terms and conditions of this policy.</p> <p>(b) However, if loss covered under this policy is subject to a Deductible, we will reduce the Deductible Amount shown in the Declarations by the sum total of all such other insurance plus any Deductible Amount applicable to that other Insurance.</p>	<p>insurance.</p> <p>(2) Loss Sustained Entirely During Prior Insurance</p> <p>If you “discover” loss during the Policy Period shown in the Declarations, resulting directly from an “occurrence” taking place entirely during the Policy Period(s) of any prior cancelled insurance that we or any affiliate issued to you or any predecessor in interest, we will pay for the loss, provided:</p> <p>(a) This policy became effective at the time of cancellation of the prior insurance; and</p> <p>(b) The loss would have been covered under this policy had it been in effect at the time of the “occurrence”.</p> <p>We will first settle the amount of loss that you sustained during the most recent prior insurance. We will then settle any remaining amount of loss that you sustained during the Policy Period(s) of any other prior insurance.</p> <p>(3) In settling the loss subject to this Condition:</p> <p>(a) The most we will pay for the entire loss is the highest single Limit of Insurance applicable during the period of loss, whether such limit was written under this policy or was written under the prior Insurance issued by us.</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
	<p>(b) We will apply the applicable deductible Amount shown in the declarations to the amount of loss sustained under this policy. If no loss was sustained under this policy, we will apply the Deductible Amount shown in the Declarations to the amount of loss sustained under the most recent prior Insurance.</p> <p>If the Deductible Amount is larger than the amount of loss sustained under this policy, or the most recent prior Insurance, we will apply the remaining Deductible Amount to the remaining amount of loss sustained during the prior Insurance.</p>
	<p>We will not apply any other Deductible Amount that may have been applicable to the loss.</p> <p>(4) The following examples demonstrate how we will settle losses subject to this Condition E.1.o.:</p> <p style="text-align: center;">...</p>
<p>E.1.q. Policy Bridge Discovery Re-placing Loss Sustained</p> <p>(1) If this policy replaces insurance that provided you with an extended period of time after cancellation in which to discover loss and which did not terminate at the time this policy became effective:</p> <p>(a) We will not pay for any loss that occurred during the Policy Period of that prior insurance which</p>	<p>E.1.p. Loss Sustained During Prior Insurance Not Issued By Us or Any Affiliate</p> <p>(1) If you “discover” loss during the Policy Period shown in the Declarations, resulting directly from an “occurrence” taking place during the Policy Period of any prior cancelled insurance that was issued to you or a predecessor in interest by another company, and the period of</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
<p>is “discovered” by you during the extended period to “discover” loss, unless the amount of loss exceeds the Limit of Insurance and Deductible Amount of that prior insurance. In that case, we will pay for the excess loss subject to the terms and conditions of this policy.</p> <p>(b) However, any payment we make for the excess loss will not be greater than the difference between the Limit of Insurance and Deductible Amount of that prior insurance and the Limit of Insurance shown in the Declarations. We will not apply the Deductible Amount shown in the declarations to this excess loss.</p> <p>(2) The Other Insurance Condition E.1.o. does not apply to this Condition.</p>	<p>time to discover loss under that insurance had expired, we will pay for the loss under this policy, provided:</p> <p>(a) This policy became effective at the time of cancellation of the prior insurance; and</p> <p>(b) The loss would have been covered under this policy had it been in effect at the time of the “occurrence”.</p> <p>(2) In settling loss subject to this Condition:</p> <p>(a) The most we will pay for the entire loss is the lesser of the Limits of Insurance applicable during the period of loss, whether such limit was written under this policy or was written under the prior cancelled insurance.</p> <p>(b) We will apply the applicable Deductible Amount shown in the Declarations to the amount of loss sustained under the prior cancelled insurance.</p> <p>(3) The Insurance provided under this Condition is subject to the following:</p> <p>(a) If loss covered under this Condition is also partially covered under Condition E.1.o., the amount recoverable under this Condition is part of, not in addition to, the amount recoverable under Condition E.1.o.</p> <p>(b) For loss covered under this Condition that is not subject to</p>

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
	<p>Paragraph (3)(a), the amount recoverable under this Condition is part of, not in addition to, the Limit of Insurance applicable to the loss covered under this policy and is limited to the lesser of the amount recoverable under:</p> <ul style="list-style-type: none"> (i) This policy as of its effective date; or (ii) The prior cancelled insurance had it remained in effect.
<p>F.14. “Occurrence” means:</p> <p>a. Under Insuring Agreement A.1.:</p> <ul style="list-style-type: none"> (1) An individual act; (2) The combined total of all separate acts whether or not related; or (3) A series of acts whether or not related; <p>committed by an “employee” acting alone or in collusion with other persons, during the Policy Period shown in the Declarations, before such Policy Period or both.</p> <p>b. Under Insuring Agreement A.2.:</p> <ul style="list-style-type: none"> (1) An individual act; (2) The combined total of all separate acts whether or not related; or 	<p>F. 14. “Occurrence” means:</p> <p>a. Under Insuring Agreement A.1.:</p> <ul style="list-style-type: none"> (1) An individual act; (2) The combined total of all separate acts whether or not related; or (3) A series of acts whether or not related; <p>committed by an “employee” acting alone or in collusion with other persons, during the Policy Period shown in the Declarations, except as provided under Condition E.1.o. or E.1.p.</p> <p>b. Under Insuring Agreement A.2.:</p> <ul style="list-style-type: none"> (1) An individual act; (2) The combined total of all separate acts whether or not related; or

FI Crime Policy Non-Aggregate ISO-2007	FI Crime Policy—Aggregate ISO-2007
<p>(3) A series of acts whether or not related;</p> <p>committed by a person acting alone or in collusion with other persons, involving one or more instruments, during the Policy Period shown in the Declarations, before such Policy Period or both;</p> <p>c. Under All Other Insuring Agreements:</p> <p>(1) An individual act or event;</p> <p>(2) The combined total of all separate acts or events whether or not related; or</p> <p>(3) A series of acts or events whether or not related;</p> <p>committed by a person acting alone or in collusion with other persons, or not committed by any person, during the Policy Period shown in the Declaration, before such Policy Period or both.</p>	<p>(3) a series of acts whether or not related:</p> <p>committed by a person acting alone or in collusion with other persons, involving one or more instruments during the Policy Period shown in the Declarations, except as provided under Condition E.1.o or E.1.p.</p> <p>c. Under All Other Insuring Agreements:</p> <p>(1) An individual act or event;</p> <p>(2) The combined total of all separate acts or events whether or not related; or</p> <p>(3) A series of acts or events whether or not related;</p> <p>committed by a person acting alone or in collusion with other persons, or not committed by any person, during the Policy Period shown in the Declarations except as provided under Condition E.1.o. or E.1.p.</p>