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HOW MUCH DO YOU OWE?
THE LIMITS OF LIABILITY IN FIDELITY BONDS

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HOW MUCH DO YOU OWE? THE LIMITS OF LIABILITY IN FIDELITY BONDS

The purpose of this paper is to examine and analyze the recent trend of cases across the country that have addressed the attempts of insureds to expand their coverage in fidelity bonds beyond the limitations stated in the bond. There have been two principal lines of recent attacks by insureds:

1) seeking to expand the coverage from one to multiple occurrences, and

2) seeking to accumulate, or stack, coverage in successive policies.[1]

Both have met with some measure of success and threaten the well-settled rulings that have traditionally favored fidelity carriers.

I. ONE OR MULTIPLE OCCURRENCES?

In one of the ways used to provide aid and comfort to their actuaries, whose job it is to try to quantify potential exposure to their employers, fidelity insurers have attempted to tighten the limits of recovery for a loss by employing the concept of an ”occurrence" as the triggering event of coverage. To add some definition to the term, and to prevent multiple claims for the serial acts of one or a group of dishonest employees, fidelity insurers have used clauses defining "occurrence" such as:

> All loss covered by, or involving, one or more “employees”, whether the result of a single act or series of acts[2], or

> All loss or damage . . . involving a single or series of related acts.[3]

It has been the fidelity insurance industry's hope that these definitions of "occurrence" would provide the necessary definiteness to the term to both limit coverage and withstand the predictable judicial attacks on whether the term was ambiguous, and therefore, insufficient to limit the liability to insureds seeking reimbursement for losses which exceed their policy limits.

The majority of courts that have been called upon to interpret these definitions of "occurrence" have found them to be unambiguous and have generally enforced them as

[1] There are two recent papers on this subject, which this paper uses as a beginning point. See Dibiase and Burch, "Stacking Limits on Fidelity Claims: The Exception or the Norm?", presented at the January, 2002 mid-winter meeting of the ABA Fidelity and Surety Committee; and Oeser, "Attacks on Policy Limits of Fidelity Bonds and Policies: Multiple Occurrences and Accumulation of Policy Limits", presented at the April, 2002 meeting of the 13th Annual Southern Surety and Claims Conference.

[2] E.g., Ran-Nan Inc. v. General Accident Insurance Company of America, 252 F. 3d 738, 739 (5th Cir. 2001).

[3] E.g., Valley Furniture & Interiors, Inc. v. Transportation Insurance Company, 26 P. 3d 952 (App. Ct. Wash. 2001).

intended. See, e.g., Business Interiors, Inc. v. Aetna Casualty & Surety Co., 751 F. 2d 361 (10th Cir. 1984) (only one occurrence found in instance where a dishonest employee had forged 40 checks); Appalachian Insurance Co. v. Liberty Mutual Insurance Co., 676 F. 2d 56 (3d Cir. 1982); Omne Services Group, Inc. v. Hartford Insurance Co., 2 F. Supp. 2d 714 (E.D. Pa. 1998) (where the dishonest acts of an employee were similar and connected in time one occurrence was found); Bethany Christian Church v. Preferred Risk Mutual Insurance Co., 942 F. Supp. 330 (S.D. Tex. 1996) (multiple acts of theft by a dishonest employee over a period of several years held to be one occurrence); Reliance Insurance Co. v. Treasure Coast Travel Agency, 660 So. 2d 1136 (Fla. 4th DCA 1995) (a dishonest employee's multiple embezzlements over four year period deemed to be one occurrence); American Commerce Insurance Brokers Inc. v. Minnesota Mutual Fire and Casualty Co., 551 N.W. 2d 224 (Minn. 1996) (a continuous embezzlement scheme in which the dishonest employee converts funds from an employer by a common scheme or series of related acts on a constant basis is deemed to be one occurrence.); and Christ Lutheran Church v. State Farm Fire & Casualty, 471 S.E. 2d 124 (N.C. App. Ct. 1996) (employee's issuance of 24 separate checks to himself on various occasions constituted one occurrence).

On the other side of the ledger, there have been a fewer number of courts that have found the term "occurrence" to be ambiguous, and have refused to enforce its intended limits. See, e.g., A.B.S. Clothing Collection, Inc. v. Home Insurance Co., 34 Cal. App. 4th 1470, 41 Cal. Rptr. 2d 166 (1995) (court found the definition of "occurrence" to be ambiguous because "while defining single 'occurrence' as 'all loss' suggests that there can be only one occurrence during the life of the insurance, the provision restricting liability 'for any one occurrence' suggests there could be more than one occurrence."); Slater v. U.S. Fidelity & Guaranty Co., 400 N.E. 2d 1256 (Mass. 1980) (where a policy does not define the word "occurrence" or give any indication as to what it means, the words give rise to an ambiguity which must be construed against the insurer and therefore each act of employee theft was a separate "occurrence" pursuant to the policy); and Penalosa Co-Op v. Farmland Mutual Insurance, 789 P. 2d 1196 (Kan. 1990) (the court found the term "occurrence" ambiguous because while it was undoubtedly meant to limit the insurance company's liability for all losses caused by a single employee, because it could be read to mean that liability under the policy does not attach to losses of prior periods, the ambiguity must be resolved in favor of the insured).

With this historical development of the case law, we now turn to six cases decided in the last three to four years to examine the current trend of the law in this area.

A. California: Karen Kane, Inc. v. Reliance Insurance Co., 202 F. 3d 1180 (9th Cir. 2000)

In this case, Reliance Insurance Company issued to Karen Kane, Inc. an apparel manufacturer, three successive one-year commercial policies, each containing employee dishonesty coverage, and spanning the period from December, 1993 through December, 1996. Each policy provided a $250,000 coverage limit for employee dishonesty.

Beginning in 1992 and continuing through May, 1996, an employee of the insured defrauded his employer by causing payment to be made on fraudulent invoices for materials that the company had not ordered or received. Thus, each of the three policies was potentially implicated. The stipulated losses to the insured were $435,000 for the first

policy period, $767,000 for the second policy period, and $214,000 for the third policy period. As a result, the insured demanded that Reliance pay $750,000 - the $250,000 coverage limit for each of the three policy periods.

Reliance tendered only one policy limit of $250,000 for the third policy period, claiming that:

(a) there was only one occurrence (defined in the policy as "all loss caused by, or involving, one or more employees, whether the result of a single act or series of acts."),

(b) the prior loss provision of the bond (limiting coverage to only one policy limit where a loss is partly covered by a policy and partly covered by an earlier policy issued by the carrier) limited the insured to only one policy limit, and

(c) the one-year discovery provision (limiting coverage to losses discovered within one year of the end of the policy) precluded any recovery on the first policy.

While the district court sustained Reliance's position in a motion for summary judgment, the Ninth Circuit disagreed with all of Reliance's positions, except the one-year discovery rule which effectively eliminated coverage for the first policy. With respect to the issue of whether the defined term "occurrence" was ambiguous, the Ninth Circuit Court of Appeals adopted the California state court decision in A.B.S., supra, finding an ambiguity on two separate levels. First, the term was found to be ambiguous because:

> While defining “occurrence” as “all loss” suggests that there can be only one occurrence during the life of the insurance, the provision restricting liability “for any one occurrence” suggests there could be more than one occurrence.

In other words "occurrence" could refer to the entire multi-year conspiracy by the dishonest employee (as a "series of acts") or refer to each separate theft.

Second, the court also agreed with the finding of the A.B.S. court that the term "occurrence" is ambiguous with respect to its temporal limitation by each policy period. In this regard, the court found:

> [T]he policy is silent as to whether the term “occurrence” refers to “a single act or service of acts” within a single policy year or across multiple periods. If “occurrence” is construed as limited by policy period, then Dantzler’s [dishonest employee] approximately 150 individual acts of theft spanning over three years, constitute three separate “series of acts,” one for each of the three policy periods and recoverable within each period as such.

As a result, the Ninth Circuit Court of Appeals found that the policy should be construed in favor of liability by reading "occurrence" as limited by each separate policy, thus allowing the insurer to accumulate the losses it had sustained over a several year period.

B. Connecticut: <u>Shemitz Lighting, Inc. v. Hartford Fire Insurance Company</u>, 2000 W.L. 1781840, 28 Conn. L. Rptr. 533 (Super. Ct. Conn. 2000).

In this case, Hartford issued to Shemitz Lighting, a seller of lighting fixtures, two successive one-year policies, containing employee dishonesty coverage, and spanning the period November, 1993 through November, 1995. Each policy provided a $10,000 coverage limit for employee dishonesty. Beginning in February, 1994 and continuing into 1995 the company's bookkeeper issued 63 forged checks, totaling approximately $210,000.

In response to the insured's proof of loss, Hartford tendered payment of $10,000 in full satisfaction of its obligations under the employee dishonesty provisions of the policies. Hartford contended that this was proper because (1) there was only one occurrence (defined as "all loss or damage . . . (a) caused by one or more persons; or (b) involving a single act or series of related acts … "; and (2) the non-cumulation clause (which provides "[w]e will pay only for loss or damage you sustained through acts committed or events occurring during the Policy Period. Regardless of the number of years this policy remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period") precluded recovery for more than the limit on one policy.

With respect to the definition of "occurrence" the plaintiff argued that since the policy did not define the term, and because the policy language of "series of related acts", which is meant to explain what constitutes an "occurrence" is ambiguous, the policy should be construed in favor of the plaintiff as a matter of law. The insurer argued that the term was not ambiguous and it should, therefore, be enforced according to its terms.

The court ultimately ruled in favor of the insured finding:

> The court finds that coverage under the defendant's policy was probably meant to be limited in some circumstances but based upon the policy language, it is difficult for an insured to tell what these circumstances might be. An insured may reasonably interpret a policy which limits liability on "each occurrence" to mean that their recovery is limited to: $10,000 for each act of dishonesty; $10,000 for each employee; $10,000 for each policy period; or $10,000 for each coverage period. The court therefore concludes that because the policy terms restricting the defendant's liability for "each occurrence" are susceptible of more than one reasonable interpretation, the terms are ambiguous …

C. Mississippi: <u>Universal Underwriters Insurance Company v. Ford</u>, 734 So. 2d 173 (Miss. 1999).

In this case Universal Underwriters issued to Buddy Jones Ford-Lincoln-Mercury a garage liability policy, containing employee dishonesty coverage, in five successive one-year policies spanning the period from October, 1984 through October, 1989. Each policy provided a $10,000 coverage limit for employee dishonesty.

Beginning in 1984 and continuing through 1988 a bookkeeper for the insured misappropriated a total of approximately $233,000 in 175 separate incidences of embezzlement. In response to the insured's proof of loss, Universal Underwriters tendered a payment in the amount of $10,000, contending that this amount represented Universal's limit of liability under the provisions of the respective policies. Universal took the position that the $10,000 limit applied to all loss caused by the bookkeeper rather than to each occasion of embezzlement. The insured, naturally, took the opposite position.

In this case the policy language concerning what constituted an occurrence was somewhat different than the other cases discussed in this section of the paper. In this regard, the policy applied its $10,000 limit of liability to "all LOSS caused by one EMPLOYEE or in which the EMPLOYEE is concerned or implicated." The insurer, no doubt, intended this language to limit to $10,000 the coverage for all losses caused by a single employee.

The insured argued that this language did not effectively restrict its recovery to one $10,000 policy limit, but enabled it to apply this limit to each of the separate acts of employee theft. Specifically, the insured argued that the cases in which an insurer's liability is limited are those in which there is a specific policy provision providing that the multiple acts of an employee will constitute only one occurrence of loss. Absent such a provision, the insured argued that the policy limit applied to each separate act of theft by the dishonest employee.

The Mississippi Supreme Court agreed, finding that the lack of policy language that multiple acts may constitute only one occurrence of loss was conclusive and fatal to the insurer's position.

D. South Carolina: Spartan Iron & Metal Corporation v. Liberty Insurance Company, 2001 W.L. 301111 (4th Cir. 2001).

In this case, Liberty Insurance issued to Spartan Metal & Iron two successive one-year policies issued on October 1, 1996 and October 1, 1997, respectively. Each policy was separately numbered and Spartan Iron paid a single annual premium for each. The policies contained coverage for employee dishonesty, and limited coverage to $100,000 per occurrence.

During each of the policy years a single employee of Spartan Iron stole an excess of $100,000. As a result Spartan Iron filed a claim with Liberty Insurance for $200,000. Liberty tendered only $100,000 in settlement, based upon the position that only a single occurrence caused the losses to the insured.

Under the subject policy it provided: “Occurrence means all loss caused by, or involving, one or more 'employees', whether the result of a single act or a series of acts.”

The court noted that the definition does not affirmatively indicate whether a series of acts includes acts occurring outside of the policy term. The court further noted that in both Karen Kane, supra, and A.B.S., supra, the courts had found identical definitions of occurrence to be ambiguous on this point.

After a careful review of the case law, the Fourth Circuit Court of Appeals ruled in favor of the insured, finding:

> Although it is a close question, our review of the policies indicates that the definition of occurrence and the relevant policy terms are independently and collectively ambiguous as to whether a loss occurring over successful policies was intended to be covered under every policy in effect during the time span in which the employee dishonesty occurred or only the first of those policies. As a result, the ambiguity on this issue requires that it be resolved in favor of the insured, Spartan Iron.

E. Texas: Ran-Nan, Inc. v. General Accident Insurance Company of American, 252 F. 3d 738 (5th Cir. 2001)

In this case, General Accident issued an employee dishonesty coverage insurance policy to Ran-Nan, which operates a convenience store that includes a check cashing business. Ran-Nan's policy contained a coverage limit of $25,000 for employee dishonesty, and two successive one-year policies were issued covering the period from April, 1996 through April, 1998.

Toward the end of 1997, Ran-Nan's owners became aware that the store was the victim of employee dishonesty and submitted a claim to General Accident. Two Ran-Nan employees caused losses through entirely different thefts, which totaled approximately $32,000 and $31,000 respectively. The various acts of theft span both policy years, although the court did not break down the losses incurred by policy year.

General Accident paid the policy limit of $25,000 for the second policy, but refused to pay anything on the first policy despite the fact that much of the theft had occurred during the earlier policy period. General Accident reasoned that there had been only one "occurrence" of employee dishonesty. The district court, however, held that there were two separate "occurrences" of employee dishonesty and that Ran-Nan was entitled to recover for both. It, therefore, awarded Ran-Nan the amount due under the first policy as well.

On appeal, the Fifth Circuit Court of Appeals first considered the relevant policy language, which provided that an occurrence is "[a]ll loss caused by, or involving, one or more 'employees', whether the result of a single act or series of acts." The court next considered the argument of General Accident, which urged that there was only one loss, specifically Ran-Nan's loss of a single sum of cash. The insurer also argued that the policy language of "involving one or more employees" means that regardless of the number of employees that steal from the insured, there was only one loss of cash and therefore "one occurrence". The Fifth Circuit Court of Appeals disagreed, finding that the more natural reading of the policy was that the policy language in the "involving" clause signifies a group of employees conspiring together to steal.

As a second basis for affirming the district court, the Fifth Circuit Court of Appeals found that the proper focus in interpreting "occurrence" is on the events that **cause** the injuries and give rise to the insured's liability, rather than on the number of injurious effects. Using this standard the court found that because there were two separate and independent causes of Ran-Nan's total loss, two "occurrences" occurred.

F. Washington: <u>Valley Furniture & Interiors, Inc. v. Transportation Insurance Company</u>, 26 P. 3d 952 (App. Ct. Wash. 2001)

In this case, Valley Insurance purchased a business insurance policy from Transportation Insurance, which provided coverage for employee dishonesty. The coverage limit was stated as $50,000 for each occurrence. An "occurrence" under the policy was defined as "all loss or damage … involving a single act or series of related acts."

During the relevant policy period, Valley Furniture paid its employees on a monthly basis, but allowed mid-month advances against their paychecks on request. The payroll manager would issue these draws to the employees and then submit records of the advances to the outside payroll company, which would make the appropriate deductions from the paychecks it issued. Over a period of six years the payroll manager issued advances to herself and two other employees, but failed to forward notices of these draws to the outside payroll company. As a result of these acts she embezzled approximately $103,000 for herself and approximately $93,000 for the other two employees.

In addition, Valley Furniture also permitted its employees to buy inventory at a discount, with the same general procedure to be followed where the payroll manager would notify the outside payroll company of the cost of the inventory, who in turn would make the appropriate deductions from the paychecks it issued. During this same period the payroll manager "purchased" approximately $9,000 of merchandise, but again failed to notify the payroll company. Thus, damages of approximately $200,000 were sustained by Valley Furniture, and upon discovery it presented its proof of loss. The insurer, however, found that these acts constitute a "series of related acts" and paid one policy limit amount of $50,000.

Litigation ensured. Valley Furniture argued that there were multiple occurrences because three separate employees were involved and there were two separate schemes. In considering this argument the court cited to and approved the rationale of the Minnesota Supreme Court in <u>American Commerce Insurance Brokers v. Minnesota Mutual Fire and Casualty Co.</u>, 551 N.W. 2d 224 (Minn. 1996). There, court found that this identical policy language was not ambiguous, and that the question of whether there was one or more occurrences should be determined by considering whether the acts were connected by time, place, opportunity, pattern and method or modus operandi. The court further found that the policy language "series of related acts" means a "succession of logically or causally connected acts, linked by time, place, opportunity, pattern and method."

Applying this standard to the case it found that there was only one occurrence. While all three employees profited from the embezzlement, the loss would not have occurred but for the acts of the payroll manager. The embezzlement schemes started at the same time, and employed the same modus operandi.

II. STACKING COVERAGE FROM SUCCESSIVE POLICIES

The standard fidelity bond also includes another set of provisions that are designed to prevent insureds from accumulating, or stacking, policy limits in successive policies. These two provisions are generally known as the "prior loss" and "non-cumulation" provisions. The standard "prior loss" provision provides:

> If any loss is covered:
> a. Partly by this Insurance; and
> b. Partly by any prior cancelled or terminated insurance that we or any affiliate had issued to you or any predecessor in interest;
>
> The most we will pay is the larger of the amount recoverable under this insurance or the prior insurance.

The standard "non-cumulation" provision used in most fidelity bonds, provides:

> Non-cumulation of insurance: Regardless of the number of years this insurance remains in force or the number of premiums paid, no limit of insurance cumulates from year to year or period to period. [4]

Over the years, the great majority of courts around the country addressing the issue have found these or similar provisions (collectively referred to as "non-cumulation" provisions) to be unambiguous, and enforceable so as to prevent insureds from accumulating coverage from successive policies to pay for losses which exceed the coverage limits of the bond. United States Fidelity & Guaranty Co. v. Barber, 70 F. 2d 220 (6th Cir. 1934); Leonard v. Aetna Casualty & Surety Co., 80 F. 2d 202 (4th Cir. 1935); Hack v. American Surety Co. of New York, 96 F. 2d 939 (7th Cir. 1938); Montgomery Ward & Co., Inc. v. Fidelity & Deposit Co. of Maryland, 162 F. 2d 264 (7th Cir. 1947); Columbia Hospital for Women in Lying-In Asylum v. United States Fidelity & Guaranty Co., 188 F. 2d 654 (D.C. Cir. 1951); Scranton Volunteer Fire Co. v. United States Fidelity & Guaranty Co., 450 F. 2d 775 (2d Cir. 1971); Massachusetts Bond & Insurance Co. v. Julius Seidel Lumber Co., 279 F. 2d 861 (8th Cir. 1960); Parrish of East Baton Rouge v. Fidelity & Casualty Co. of New York, 373 F. Supp. 440 (M.D. La. 1974); Diamond Transportation System, Inc. v. Travelers Indemnity Co., 817 F. Supp. 710 (E.D. Ill. 1993); Reliance Insurance Co., v. Treasure Coast Travel, 660 So.2d (Fla. 4th DCA 1995); Santa Fe General Office Credit Union v. Gilberts, 299 N.E. 2d 65 (App. Ct. Ill. 1973); Louisiana v. The Aetna Casualty & Surety Co., 417 So. 2d 404 (4th Ct. App. La. 1982); Leonardtown v. Fidelity & Casualty Co. of New York, 870 A. 2d 788 (Ct. App. Md. 1970); and Eddystone Fire Co. v. Continental Casualty Companies, 425 A. 2d 803 (Pa. 1979).

Against this strong weight of authority, several courts have disregarded the non-cumulation provisions in fidelity bonds, and allowed the insureds to stack coverage, generally on the basis that the non-cumulation provisions were ambiguous. A.B.S. Clothing Collections, Inc. v. Home Insurance Co., 34 Cal. App. 4th 1470, 41 Cal. Rptr. 2d 166 (1995); City of Miami Springs v. Travelers Indemnity Company, 365 So. 2d 1030 (Fla. 3d DCA

[4] Insurance Services Office, Inc. Form #CR 10 00 06 95.

1978)[5]; Cincinnati Insurance Co. v. Hopkins Sporting Goods, Inc., 522 N.W. 2d 387 (Iowa 1994); Penalosa Cooperative Exchange v. Farmland Mutual Insurance Co., 789 P. 2d 1196 (Kan. 1990); and Columbia Heights Motors, Inc. v. Allstate Insurance Co., 275 N.W. 2d 32 (Minn. 1979).

Against this backdrop, there has been a flurry of judicial activity on this subject in the last three years - 5 decisions dealing with the enforcement of non-cumulation provisions. This paper will detail the facts and holdings in these decisions, and then discuss the emerging trend lines.

A. California: Karen Kane, Inc. v. Reliance Insurance Co., 202 F. 3d 1180 (9th Cir. 2000)

In this case, Reliance Insurance Company issued to Karen Kane, Inc. an apparel manufacturer, three successive one-year commercial policies, each containing employee dishonesty coverage, and spanning the period from December, 1993 through December, 1996. Each policy provided a $250,000 coverage limit for employee dishonesty.

Beginning in 1992 and continuing through May, 1996, an employee of the insured defrauded his employer by causing payment to be made on fraudulent invoices for materials that the company had not ordered or received. Thus, each of the three policies was potentially implicated. The stipulated losses to the insured were $435,000 for the first policy period, $767,000 for the second policy period, and $214,000 for the third policy period. As a result, the insured demanded that Reliance pay $750,000 - the $250,000 coverage limit for each of the three policy periods.

Reliance tendered only one policy limit of $250,000 for the third policy period, claiming that:

(a) there was only one occurrence (defined in the policy as "all loss caused by, or involving, one or more employees, whether the result of a single act or series of acts."),

(b) the prior loss provision of the bond (limiting coverage to only one policy limit where a loss is partly covered by a policy and partly covered by an earlier policy issued by the carrier) limited the insured to only one policy limit, and

(c) the one-year discovery provision (limiting coverage to losses discovered within one year of the end of the policy) precluded any recovery on the first policy.

While the district court sustained Reliance's position in a motion for summary judgment, the Ninth Circuit disagreed with all of Reliance's positions, except the one-year discovery rule which effectively eliminated coverage for the first policy.

[5] In the later Florida decision in Reliance Ins. Co. v. Treasure Coast Travel, supra, the court found that the addition of the "prior loss" provision, which was missing in the policy in the City of Miami Springs case, rendered a non-cumulation clause unambiguous, which it was not without the "prior loss" provision.

Relative to the non-cumulation provisions, the relevant policy language provided:

> A. General Conditions
>
> 9. Loss Covered Under This Insurance and Prior Insurance Issued by Us or Any Affiliate;
>
> If any loss is covered:
>
> a. Partly by this insurance; and
> b. Partly by any prior canceled or terminated insurance that we or any affiliate have issued to you or any predecessor in interest:
>
> The most we will pay is the larger of the amount recoverable under this insurance or prior insurance.

In closely following the California Court of Appeals for the Second District's decision in A.B.S. Clothing Collection, Inc. v. Home Assurance Co., supra, the court adopted the reasoning of the A.B.S. decision that first defined the issue and then answered it 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?
>
> . . .
>
> Courts in other jurisdictions have generally held if coverage is based on a series of separate, independent contracts, then the employer is entitled to recover up to the limit of liability for each policy period in which a loss occurs. On the other hand, if there is but one continuous contract, then the employer's recovery cannot exceed the limit of liability stated in the contract . . . Under this rule, an insurer **will** be liable up to the policy limit for each separate period, **unless** it can show clear intent by the parties to enter into a single continuous contract.

In an effort to show that the intention of the parties was that the three separate policies constitute a single continuous insurance contract, Reliance cited the “prior loss” provision quoted above. Again, in rejecting this argument, the Ninth Circuit adopted the A.B.S. finding that, even when read in combination with the "non-cumulation" provision of the policy it failed to show a clear and unambiguous intent to enter into a continuous contract.

B. Connecticut: Shemitz Lighting, Inc. v. Hartford Fire Insurance Company, 2000 W.L. 1781840, 28 Conn. L. Rptr. 533 (Super. Ct. Conn. 2000).

In this case, Hartford issued to Shemitz Lighting, a seller of lighting fixtures, two successive one-year policies, containing employee dishonesty coverage, and spanning the period November, 1993 through November, 1995. Each policy provided a $10,000 coverage limit for employee dishonesty. Beginning in February, 1994 and continuing into 1995 the company's bookkeeper issued 63 forged checks, totaling approximately $210,000.

In response to the insured's proof of loss, Hartford tendered payment of $10,000 in full satisfaction of its obligations under the employee dishonesty provisions of the policies. Hartford contended that this was proper because (1) there was only one occurrence defined as “[a]ll loss or damage . . . (a) caused by one or more persons; or (b) involving a single act or series of related acts … " and (2) the non-cumulation clause (which provides "[w]e will pay only for loss or damage you sustained through acts committed or events occurring during the Policy Period. Regardless of the number of years this policy remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period") precluded recovery for more than the limit of one policy.

With respect to Hartford's defense based upon the "non-cumulation" clause the court found that it was susceptible of more than one reasonable interpretation and was, therefore, ambiguous and must be construed against the insurer. In so ruling, the court adopted the insured’s interpretation of this provision that it merely means that insurance which is unused during one policy period cannot be carried over to a subsequent policy period. The court found that the plaintiff's interpretation was reasonable and more in keeping with the reasonable expectations of the insured.

C. Mississippi: Universal Underwriters Insurance Company v. Ford, 734 So. 2d 173 (Miss. 1999).

In this case Universal Underwriters issued to Buddy Jones Ford-Lincoln-Mercury a garage liability policy, containing employee dishonesty coverage, in five successive one-year policies spanning the period from October, 1984 through October, 1989. Each policy provided a $10,000 coverage limit for employee dishonesty.

Beginning in 1984 and continuing through 1988 a bookkeeper for the insured misappropriated a total of approximately $233,000 in 175 separate incidences of embezzlement. In response to the insured's proof of loss, Universal Underwriters tendered a payment in the amount of $10,000, contending that this amount represented Universal's limit of liability under the provisions of the respective policies. Universal took the position that the $10,000 limit applied to all loss caused by the bookkeeper rather than to each occasion of embezzlement. The insured, naturally, took the opposite position.

While the court found that the bond contained the standard non-cumulation provision, it found in favor of the insured because the policy was ambiguous since it contained no language limiting to one occurrence a series of separate acts. Unfortunately, the court did not specifically address how this omission rendered the non-cumulation provision inoperative.

D. New York: Shared-Interest Management, Inc. v. CNA Financial Insurance Group, 725 N.Y.S. 2d 469 (Sup. Ct. NY. 2001)

In this case Continental Insurance Company issued a three-year commercial crime policy, including employee dishonesty coverage, for the period from June, 1993 through June, 1996. During the period of this policy Continental merged with CNA, and thereafter CNA renewed the original Continental policy for the period from June, 1996 through June, 1999. Each policy provided a $100,000 coverage limit for employee dishonesty.

Beginning in April, 1994 and continuing through April, 1997 an employee of the insured committed a series of thefts from the employer which totaled approximately $460,000. CNA paid the insured the policy limit of $100,000. CNA rejected a claim for an additional $100,000 based upon the contention that there were really two separate and independent policies involved - one issued by Continental and one issued by CNA. CNA disputed this argument, interpreting the policy as permitting recovery of no more than the policy limit during the effective period of the policy, including renewals.

A suit by the insured ensued. The court first concluded that the essential predicate of the insured's action was that the policy in effect during the Continental policy period and the one in effect during the CNA policy period constituted separate policies of insurance. The court rejected the insured's position. As an alternative basis for its ruling, the Court stated that even if the Continental and CNA policies should be treated as separate policies it would not change the result because "[t]he unambiguous antistacking provisions . . . [show] the policy's clear overall intent to preclude a stacking of coverage from year to year or period to period."

E. South Carolina: Spartan Iron & Metal Corporation v. Liberty Insurance Company, 2001 W.L. 301111 (4th Cir. 2001).

In this case, Liberty Insurance issued to Spartan Metal & Iron two successive one-year policies issued on October 1, 1996 and October 1, 1997, respectively. Each policy was separately numbered and Spartan Iron paid a single annual premium for each. The policies contained coverage for employee dishonesty, and limited coverage to $100,000 per occurrence.

During each of the policy years a single employee of Spartan Iron stole an excess of $100,000. As a result Spartan Iron filed a claim with Liberty Insurance for $200,000. Liberty tendered only $100,000 in settlement, based upon the position that only a single occurrence caused the losses to the insured.

Suit was filed by Spartan Iron who later obtained summary judgment. On appeal to the Fourth Circuit Court of Appeals, Liberty Insurance defended on the basis that:

(a) only one occurrence had happened; and

(b) the non-cumulation provisions of the policies prevented Spartan Iron from collecting more than one policy limit.

In this regard, the non-cumulation provision involved stated "[r]egardless of the number of years this insurance remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period."

The Fourth Circuit Court of Appeals did not find this argument persuasive and cited with approval to the finding of its sister Circuit Court of Appeals' decision in Karen Kane, supra. While finding that the question was a close one, the court stated:

> Our review of the policies indicates that the definition of occurrence and the relevant policy terms are independently and collectively ambiguous as to whether a loss continuing over successive policies was intended to be covered under every policy in effect during the time span in which the employee dishonesty occurred or only the first of these policies. As a result, the ambiguity on this issue requires that it be resolved in favor of the insured, Spartan Iron.

III. HOW DO THESE PLAY IN FLORIDA?

As a bonus for reading this far into the paper, the likely results of the Florida courts,
when called upon to decide these issues, are provided below.

A. One or multiple occurrences

Divining whether the Florida courts are more likely than not to find the standard definition of "occurrence" in a fidelity bond to be unambiguous requires some imagination since there is no dispositive case law in Florida. The only Florida decision that comes close to this issue is Reliance Ins. Co. v. Treasure Coast Travel Agency, 660 S.2d 1136 (Fla. 4th DCA 1995). There, the appellate court considered whether an embezzlement scheme by a single employee over a four-year period constituted one "occurrence" of four "occurrences" under the four successive one-year policies that covered the period of the embezzlement. The court ultimately determined that there was only one occurrence, but the decision did not involve an interpretation or extended discussion of the definition of "occurrence." The court spent the bulk of the opinion discussing the interplay between the "prior loss" and "non-cumulation" provision, and found that the two in combination restricted the insured to coverage under only one of the policies.

The most heavily litigated group of insurance cases where the question of one or multiple occurrences arises is under general liability policies, where the standard definition of "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[6] The Florida cases interpreting "occurrence" in this or similar contexts have generally found no difficulty with the meaning of the policy language, although many have wrestled with its application. E.g. Koikas v. Travelers Ins. Co., 2003 WL 746816 (Fla. 2003) (Opinion not final); New Hampshire Ins. Co. v. RLI Ins. Co., 807 So.2d 171 (Fla. 3rd DCA 2002); Eagle American Ins. Co. v. Nichols, 814 So.2d 1083 (Fla. 4th DCA 2002); Continental Casualty Co. v. Wendt, 205 F. 3d 1258 (11th Cir. 2000) (The term "related wrongful acts" in a legal malpractice policy is not ambiguous); Utica Mut. Ins. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co., 639 So. 2d 41 (Fla. 5th DCA 1994); and American Indemnity Co. v. McQuaig, 435 So.2d 414 (Fla. 5th DCA 1983).

Based on these authorities, there is a strong likelihood that Florida courts would not find the standard definition of "occurrence" to be ambiguous, particularly if accompanied by "prior loss" and "non-cumulation" provisions.

B. Stacking Coverage from Successive Policies

In City of Miami Springs v. Travelers Indemnity Co., 365 So.2d 1030 (Fla. 3d DCA 1978), the court addressed a case in which Travelers had issued two successive policies to the City of Miami Springs, providing coverage for employee dishonesty with a liability limit of $10,000. During the period of the policies, an employee of the city misappropriated negotiable instruments with a value of more than $10,000 in **each** of the policy years. Travelers tendered only $10,000, claiming that the two policies sued upon were a "single policy renewed from year to year." In support of this argument, the fidelity insurer cited to the non-cumulation provision of the policy, which provided:

[6] Loikos v. Travelers Ins. Co., 2003 WL 746816 (Fla. 2003) (Opinion not final)

> Regardless of the number of years Section V shall continue in force and the number of premiums which shall be payable or paid, the limit of the Travelers' liability as specified in Section V Declarations shall not be cumulative from year to year or period to period.

In overturning the trial court's dismissal of the City of Miami Springs' complaint, the Florida court refused to enforce the non-cumulation provision, citing the the decisions from other courts.

More recently, this same issue was revisited in Reliance Ins. Co. v. Treasure Coast Travel Agency, 660 So.2d 1136 (Fla. 4th DCA 1995). There, Reliance Insurance issued employee dishonesty coverage for its insured for four successive year periods. An embezzlement scheme by a single employee spanned all four policy years. The insured was granted a summary judgment, finding that there was coverage under each of the four consecutive policies for losses resulting from the embezzlements by this one employee.

On appeal, the Florida court reversed, finding that there was only one occurrence under the policies, "for which recovery can be had under only one of the policies." The court noted that the policy in question contained both the standard "prior loss,"[7] and "non-cumulation"[8] provisions. The court noted that it had previously declined to give effect to a non-cumulation clause similar to the one here, in the case of City of Miami Springs v. Travelers Indemnity Co., supra. The court, however, found that the City of Miami Springs case was distinguishable because it contained simply a "non-cumulation" provision without the "prior loss" provision. The court state with the inclusion of the "prior loss" provision: "We think that this insurer has accomplished what insurers with non-cumulative provisions alone apparently alone, but fail to state with sufficient clarity to be given effect . . . "
On this basis, the court reversed the summary judgment in favor of the insured.

In light of these decisions, it is likely that a Florida court will not permit stacking of policy limits on successive insurance policies where the policy contains both a "prior loss" and a "non-cumulation" provision, but will probably permit stacking where the policy simply contains the "non-cumulation" provision alone.

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[7] "Loss Covered Under This Insurance and Prior Insurance Issued by Us or Any Affiliate . . .
If any loss is covered . . .

a. Partly by this insurance; and
b. Partly by any prior cancelled or terminated coverage that we or any affiliate had issued to you or any predecessor in interest

the most we will pay is the larger of the amount recoverable under this insurance or the prior insurance."

[8] "Regardless of the number of years this insurance remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period."