KICKBACKS - KICKED THROUGH OR KICKED OUT

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I. *Introduction*

The objective of this paper is to explore the nefarious and notorious world of kickbacks and bribes. This exploration will address what is a kickback and what is a bribe and who says it is so. Also, the exploration will address whether the recent changes in policy language will affect or change how kickbacks and bribes are addressed by fidelity policies.

II. *Defining Kickbacks and Bribes*

A. WHAT ARE KICKBACKS AND BRIBES

Bribery consists of two broad categories: kickbacks and bid rigging. Kickbacks usually involve the employee buying goods or services from the vendor at an overstated price or giving the customer a lower-than-normal price, and in return the vendor or customer pays the employee a kickback.[2]

What is the difference between a referral fee and a kickback? Lawyers will refer clients to specialist lawyers who, in turn, pay a referral fee or a percentage of the fees earned to the lawyer who referred the client. The difference between a referral fee and a kickback is whether the fee is disclosed and whether the parties making the arrangement hold themselves out as independent.

A claim of independence, whether in fact or in appearance, requires a higher standard be met by the individuals or companies making the independence claim. The claimed independence by brokers caused brokers problems. Whereas agents, who do not hold themselves to be independent, avoided the recent slew of litigation and court cases. Insurance brokers present themselves as independent insurance experts offering specialized services to their clients. The brokers offered analysis of risk and insurance options in obtaining and renewing insurance, clarification of insurance policies, and assistance with claim filing. However, the broker and insurance clients often are not aware of the broker and insurer contingent fee and other arrangements wherein the insurers' billings include concealed fees to the brokers. The fees are based upon volume of premiums and insurance by the brokers' sales of the insurers' products. The fees also include the effect of business upon the profitability of the book of business purchased by the brokers' clients. In exchange for the fees, the brokers refer their clients' business to those carriers with which they have favorable contingent fee arrangements. Thus, the profits of both the brokers and insurers are increased at the expense of their clients and insureds.

Even if the brokers contend they are not influenced by the fee arrangements, the "appearance" of the arrangement negates credibility of the claims of independence. Recent examples of the above lack of independence were illustrated in Attorney General Eliot Spitzer's settlements with the insurer and brokers over contingent commissions.[3]

Referral fees are payments made by service providers to other parties as quid quo pro for referring customers. An example is a real estate agent is rewarded for sending a borrower to a loan provider. The reward, whatever form it takes, is a referral fee. However, if parties do not present themselves as independent, when does a referral fee become a kickback? Experience indicates something must be falsified. Another example of a common referral fee is the arrangement between physicians and MRI centers. When physicians refer patients, a portion of the insurance payment the MRI center receives is forwarded to the physician who made the referral. How the referral deal is arranged seems to be in question in an MRI kickback scheme in Chicago, but the question is whether MRIs were done that should not or would not have been done if the referral fee did not exist.

One of the most famous referral fee arrangements is Amazon's "Associate Program." Amazon offers websites the opportunity to link to the Amazon.Com site and earn up to 15% referral fee on any sales resulting from customers channeled to Amazon.Com.[4] One might ask what is wrong with vertical integration of the business.[5] A number of business authors agree the referral fee system offers incentives that actually improve (patient) welfare[6] and efficiencies in the marketplace.[7]

A kickback is a payment back by the seller of a portion of the purchase price to the buyer or public official to induce purchase or to improperly influence future purchases or leases. Such payments are not tax deductible as ordinary and necessary expenses.[8]

> The key component of the kickback schemes is the vendor's desire to procure more business from the customers. Once vendors pay the fee for the referral, the vendor often takes control of the transaction. When corrupt vendors take over or are in control of the transaction, goods can be sold at higher prices while the quality of the goods deteriorates.[9]

Bid rigging is the benefit of inside influence to ensure a vendor wins a sought-after contract. Many vendors are willing to pay for this influence. Employees who participate in bid rigging schemes (like those in kickback schemes) often have influence over the bidding process.[10] One of the most historically significant bid rigging schemes is the Teapot Dome Scandal in which public oil reserves were leased to private interest in return for bribes during President Warren G. Harding's administration of 1921-23.[11]

The practice of bid rigging continues today with the influence of purchasing agents, contracting official government employees, or anyone with authority over the awarding of contracts such as the City Manager of the City of Berkeley, Missouri, who

rigged the bids for an insurance broker for the city's insurance policies from 2003 through 2006 for approximately $32,000 in payments.[12]

B. Measuring The Amount Of Loss To The Insured

So, what is the loss to the insured? By looking at the example set by the world's biggest retailer,[13] Wal-Mart meets with their vendors in the Bentonville area in a small cramped meeting room with only a poster on the wall. The poster is labeled "Gifts and Gratuities" and states, "It is our policy that associates of the Company, regardless of their capacity, do not accept for their personal benefits, gratuities, tips, cash, samples, etc., from anyone buying from us or selling to us, or in any way serving our company." The poster further defines gifts and gratuities as including entertainment event tickets, money or merchandise kickbacks, discounts, merchandise samples, Christmas gifts, or meals, and even a cup of coffee is prohibited. While this seems harsh, Wal-Mart attempts to prevent business from being done over a night out or copious samples or birthday gifts; rather it is Wal-Mart's intent for its buyers to focus on quality and price.[14]

To measure losses, insureds look at quality and price. However, when guided by the fidelity policy, it is necessary to review "Direct Loss" both in terms of "immediacy cause and pecuniary consequences, not the consequential, future, or potential loss or loss of opportunities, and not the indirect loss of current or future net income.

C. Direct In Cause And Effect

To understand the measurement of loss is to first understand where and who incurred the pecuniary loss. A kickback to an employee can come from a third party or the insured. When the kickback is funded by the third party, the kickback or referral fee is based upon a reduction of the profit margin earned or retained by the third party. There are situations in which the referral fee procures better quality services and discourages monopolistic service providers. When service fees differ greatly between providers, the referral fee may induce the first service provider to refer to a specialist instead of performing lower quality services themselves.[15] It is thus necessary to verify the kickback loss has immediacy in cause and effect to the insured.

D. Direct In Reference To Measurement Of Loss To The Insured

The next portion of the paper reviews the changes in the fidelity policies and how kickbacks have been addressed. A review of the case law indicates kickback losses are measured by:

1. the price differential, and
2. the amount of bribe paid.

The authors also suggest third and fourth measurements should be contemplated – the exclusion of indirect losses, and the offset of gains. The measurement of losses will be addressed in greater detail after a review of cases.

III. *Policy Changes*

When reviewing the case law and precedents relative to kickbacks and bribes, it is helpful to understand that over time (since 1950), the policy and bonds have changed language in three significant areas.

First is the language of loss "through" to "direct" loss. Second is the removal of the earned in the normal course exclusionary language in the Employee Dishonesty policies to the "unlawful taking to the deprivation of the insured" in the definition of employee theft. Third are the language changes relative to the valuation portion of the policies using the replacement language instead of actual cash value language.

IV. *Historical Perspectives of Kickbacks and Bribes Through Cases and Precedent*

Employee bribe and kickback schemes create the unique situation whereby coverage may be afforded under fidelity bonds, even though the employee is not taking money or other property directly from the employer. Usually, such schemes cause an employer to overpay for goods or services, or to charge less for goods or services the employer provides. The issues arising from such schemes have caused insurers and insureds to resort to the courts to answer the questions of coverage and damages arising from kickback schemes under fidelity bonds. The following provides an overview of some of the cases addressing coverage implications related to employee bribe and kickback schemes under fidelity bonds. In particular, we will look at court decisions involving insured losses "arising through" and "directly from" an employee dishonesty policy.

A. Loss Resulting From Or Through An Employee's Dishonest Acts

Boston Securities, Inc. v. United Bonding Ins. Co., 441 F.2d 1302 (8th Cir. 1971), is a case in which the insured's policy did not contain the "direct loss" language. Here, the insured's employee referred potential borrowers to other lenders in exchange for receiving financial kickbacks. The insured sought relief under its fidelity policy, which covered loss resulting from the dishonest or fraudulent acts of the insured's employees. Among other things, the insured sought recovery for the loss arising from the kickback scheme, which included lost income from its potential loan customers that were referred to its competitor. The trial court found that the policy provided coverage for the kickback scheme and awarded the insured $3,200, which was the amount of the bribes received by the dishonest employee.

On appeal, the insurer argued that the insured was not entitled to recover the bribes received by the employee. The Appellate Court upheld the trial court's decision, stating that when an employee's conduct is detrimental to his employer's best interest and a loss occurs, liability may arise under a fidelity bond.

Although involving a statutory bond, the case of *Index Fund v. I.N.A.*, 580 F.2d 1158 (2d Cir. 1978) also illustrates how the "loss through" language in a fidelity bond is

interpreted to provide coverage in kickback and bribe schemes. In *Index Fund*, the insured's employee was bribed in order to purchase securities for the insured at inflated prices, which resulted in a loss to Index Fund of approximately $700,000. Index Fund sought recovery under its fidelity bond, which covered loss "through any dishonest or fraudulent act of any of the [insured's] Employees." The trial court entered a judgment notwithstanding the verdict for the insurer, holding that the insured's loss was excluded by the policy's trading exclusion. However, after finding that the policy's trade exclusion was ambiguous, the Second Circuit also found that the employee's dishonest conduct satisfied the requirement of the statute to invoke coverage. The court therefore held that I.N.A. was liable pursuant to the bond because the insured suffered its losses from the dishonest and fraudulent activities of its employee.

The policies at issue in the case of *James B. Lansing Sound, Inc. v. Nat. Union Fire Ins. Co. of Pittsburgh, P.A.*, 801 F2d 1560 (9th Cir. 1986), provided coverage for "loss of money, securities, and other property through any fraudulent or dishonest act committed by an employee" *Id.* at 1562[16]. In this case, two dishonest employees perpetrated a complex fraud on the employer. With the cooperation of dishonest buyers, the employees submitted fictitious purchase orders for it employer's equipment in the name of the buyers. One of the employees, an accountant, took the orders and caused the shipping documents to show the equipment was being shipped to San Francisco, when, in fact, the equipment was shipped to a firm in Los Angeles, which then shipped the product to Japan. The trucking company that transported the product to Los Angeles charged the employer for fictitious shipments to San Francisco, which were ultimately paid. Further, the scheme caused invoices to be issued applying lower than normal sales prices. The lower pricing permitted a dishonest salesman-employee to sell the equipment to unauthorized Japanese dealers, undercutting sales of legitimate product. The salesman would then take receipts from those sales, and pay the employer the discounted sales price. The salesman would then receive his regular 7% commission on the fraudulent sales.

At trial, JBL sought recovery for losses of merchandise, fraudulent freight payments and commissions paid to its salesman. JBL claimed that the phrase "other property" covers all losses, tangible and intangible, and thus included losses of merchandise at fair market value. National Union argued that JBL paid the commissions and freight from its sales receipts (profits), and that these are not insurable. Further, National Union claimed that the commission payments were excluded pursuant to the policy's requirement that any benefit earned in the normal course of employment is excluded from coverage. The Ninth Circuit held that the policy should cover the fair market value of the equipment sold, however, coverage did not apply to the commissions as they were paid in the normal course of business.

B. Loss Arising Directly From Employee Dishonesty – Payroll Language, Potential Income Exclusion, And Covered Property Losses

Manifest intent language began appearing in fidelity bonds in 1976. Policies that utilize manifest intent language typically require that the insured suffered a loss "resulting directly from" an employee's dishonest or fraudulent acts, and that the employee committed the acts with the manifest intent to cause the insured to sustain a loss and to obtain financial benefit for the employee or others that have colluded with the employee.[17] Although courts typically find that employees engaged in kickback schemes are acting dishonestly, the cases below demonstrate that courts look to other policy provisions in determining coverage related to kickback schemes.

For example, in *Koch Industries v. National Union Fire Ins. Co.*, 1989 U.S. Dist. LEXIS 15703 (D. Kan. Dec. 21, 1989), the court was faced with summary judgment motions from both the insurer and the insured as to the issue of coverage. The insured sought coverage for the loss it sustained when its employee engaged in a scheme accepting kickbacks from customers in exchange for allowing them to purchase oil from the insured at discounted prices. National Union issued a series of successive policies to Koch providing the following coverage:

> Loss of money, securities and other property which the insured shall sustain . . . resulting directly from one or more fraudulent or dishonest acts committed by an Employee, acting alone or in collusion with others.
>
> Dishonest or fraudulent acts . . . shall mean only dishonest or fraudulent acts committed by such Employee with the manifest intent:
>
> (a) to cause the Insured to sustain such loss; and
> (b) to obtain financial benefit for the Employee [or others the Employee intended to receive a benefit], other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment.[18]

In reviewing the motions before it, the court found that the employee submitted special billing forms which enabled non-qualifying buyers to receive Koch's oil at a price lower than the market value. The court then concluded it was "evident [the employee] defrauded Koch by means of a 'calculated scheme by which he used his extraordinary position of trust to enhance his personal financial gain at the expense of his employer'",[19] thus committing a dishonest or fraudulent act within the meaning of the bond.

National Union argued, however, that it would not be obligated to pay for Koch's loss because it did not satisfy the policy's financial benefit language, above, or it was excluded under the policy as an indirect loss. The indirect loss exclusion provided that

the policy did not apply to "potential income, including but not limited to interest and dividends, not realized by the insured because of a loss covered under this Policy".[20]

Without explanation, the court found that it did not have sufficient evidence to determine if the kickbacks received by Koch's employee were not "benefits earned in the normal course of employment." However, the court pointed to the *Lansing* case, set forth above, and found that National Union's potential income exclusion was ambiguous and that the loss sustained by the insured should be measured by the fair market value of the goods lost. Thus, Koch would be entitled to receive the difference between the fair market value of the oil its employee sold to the non-qualifying buyers and the price Koch actually received.[21] *Koch* at *50.

In *Patrick Schaumburg Automobiles, Inc. v. Hanover Insurance Co.*, 452 F. Supp.2d 857 (N.D. Ill. 2006), the court found a distinction between the policy in issue and the one in issue in *Koch* above. In this case, the policy provided that indirect loss was "loss that is an indirect result of any act or occurrence . . . including, but not limited to, loss resulting from: [the insured's] inability to realize income that [the insured] would have realized had there been no loss of . . . Covered Property." The court found that this provision was *not* ambiguous as it was not modified by a reference to interest and dividends, as in *Koch*. However, the result was essentially the same.

In *Schaumburg*, the insured Plaintiffs were automobile dealerships that claimed financial losses resulting from the dishonest activities of their former employee, David Hoffman. As part of their business, Plaintiffs purchased and sold used cars in the wholesale market. It was discovered that Hoffman received kickbacks from certain wholesalers as part of a scheme in which he sold Plaintiffs' cars to those wholesalers for an amount less than the cars' worth and purchased cars from these wholesalers for more than the cars' worth.

With respect to that portion of their claim relating to the overpayments to the wholesalers, the insured argued that they were entitled to coverage under their crime policy with Hanover for the difference between the Black Book estimates of the value of the cars and the price at which they purchased the cars. Hanover argued that the "direct loss" should be calculated based on whether the Plaintiffs "recouped" the initial purchase price in later transactions in which Plaintiffs sold the cars. Thus, if Plaintiffs sold the cars for the same amount or more than the amount they paid, Hanover argued that there was no loss. Alternatively, Hanover argued that Plaintiffs claim constituted a claim for lost profits, which were excluded from coverage.

The Illinois court rejected Hanover's recovery argument, stating that Hanover's deduction of amounts received by Plaintiffs in subsequent transactions "was not correct." The court further held that Plaintiff's overpayment to the colluding wholesalers resulting from Hoffman's dishonest activity was a covered loss under the policy. Citing *RBC Mortg. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 812 N.E.2d 728 at 731, 733 (Ill. App. 1st Dist. 2004), the court found that the overpayment (compared to the Black Book value) was an actual depletion of bank funds caused by the employee's dishonest acts,

and thus was a loss resulting directly from dishonest activity and covered under the policy.[22]

With respect to the potential income exclusion, the court held that, to the extent that Plaintiffs could prove that they paid an amount greater than the amount they would have paid in an arm's-length transaction, that amount is a direct loss of covered property, not an inability to realize income.

However, in *Benchemark Printing, Inc. v. American Manufacturers Mutual Insurance Co.*, 2001 U.S. Dist. LEXIS 619 (N.D.N.Y. Jan. 26, 2001), the court found that the loss sustained by the insured was not covered property under the policy, thus precluding coverage for its loss. Benchemark, a commercial printing company, purchased an insurance policy which insured against "loss of 'money,' 'securities,' and 'property other than money and securities' resulting directly from 'employee dishonesty.'" The policy excluded from coverage "indirect loss," which is defined in pertinent part as "loss that is an indirect result of any act or 'occurrence' covered by this insurance including but not limited to, loss resulting from your inability to realize income that you would have realized had there been no loss of, or loss from damage to, 'Covered Property.'"

Benchemark's sales manager, Eugene Errico, was responsible for obtaining new clients as well as maintaining current clients. After his resignation, Benchemark discovered that Errico had represented to one of Benchemark's clients, the New York State United Teachers ("NYSUT"), that Benchemark was unable to perform their printing jobs and that the jobs would be subcontracted to Dodge Graphics ("Dodge"), a Benchemark competitor, when, in fact, there was no subcontract agreement. Instead, Errico represented to Benchemark that it had lost the NYSUT account to competitors. Under this scheme, Errico requested that Dodge submit a quote for each job. Dodge sent an invoice to Errico, which he then marked up. Dodge invoiced the NYSUT according to the marked-up figures. NYSUT paid Dodge, who then paid Errico the difference between its quoted price and the markup. Errico also engaged in a similar scheme involving a separate printer and customer.

AMMIC denied coverage, and Benchemark brought suit, seeking the kickbacks that the printers paid to Errico as well as its lost profits, claiming these loses were covered property within the meaning of the insurance policy. The policy defined covered property as money, securities and other tangible property, which has intrinsic value, which the insured owns, holds, or is legally liable for. At issue in the case was whether the losses claimed were covered property under the policy.

The court found that Errico's conduct caused Benchemark lost business opportunities or profits. However, since Benchemark could not show that it actually earned, owned, ever held, or had any liability for these profits, the court found that Benchemark's alleged losses were not covered property under the policy.

Interestingly, in dictum, the court also addressed the issue of the whether the loss sustained was excluded under the policy's indirect loss exclusion as unrealized income.

The court stated that for the exclusion to apply, Benchemark would have to be seeking to recover the income it would have realized from the lost profits, such as interest. Since that was not what Benchemark was seeking, then the indirect loss exclusion would not apply.

The case of *Auburn Ford v. Universal Underwriters*, 967 F.Supp.475 (M.D. Ala. 1997), *aff'd without op.,* 130 F.3d 444 (11th Cir. 1997), illustrates the impact of the payroll language in the Commercial Crime Policy's Employee Dishonesty form. In *Auburn Ford*, the insured was a Ford Motor Company dealership. Its employee, Kearse, managed the fleet sales program that provided government price concessions to qualified government agencies and corporations. Ford's approval of the concession was required. If Ford denied approval, the concession was charged back to the dealer. Substantial chargebacks were incurred by the insured as a result of the dishonest actions of Kearse who allegedly entered incorrect state codes while applying for the concessions in order to offer customers lower prices. Kearse also allegedly sold vehicles at concession rates to individuals who were not authorized to purchase them. Among other reasons, Universal denied coverage on the basis that the only financial gain to Kearse was an increase in commissions. Citing the payroll exclusion the court agreed with Universal and granted summary judgment in its favor.

See also, *Morgan, Olmstead, Kennedy & Gardner, Inc. v. Federal Ins. Co.,* 637 F.Supp.973 (S.D.N.Y. 1986), *aff'd,* 833 F.2d 1003 (2d Cir. 1986). In *Morgan* the insured alleged its employee was induced into a fraudulent scheme with an outside vendor to loan securities to other dealers and financial institutions. According to the insured, the employee's scheme allowed him to increase his income under a profit-sharing plan contained in his employment contract, and argued this as a bribe, covered under the bond. The court ruled the payment was received from his employer, via an authorized compensation plan, rather than from an outside source or vendor. Thus, the loss was earned in the normal course of employment and excluded from coverage under the bond.

C. EMPLOYEE THEFT POLICIES

A case decided in Alberta, Canada recently addressed the issue of an Employee Theft policy and the coverage afforded for loss sustained as a result of an employee taking bribes from its employer's supplier. In *Agrium Inc. v. Chubb Insurance Company of Canada,* 2007 ABQB 140 (Court of Queens Bench of Alberta Feb. 27, 2007), an employee of Agrium, a fertilizer manufacturer, was found to have accepted bribes in exchange for causing its employer to overpay for raw material needed for its operations. The policy's insuring clause provided that the

> Company shall be liable for direct losses of Money, Securities or other property caused by the Theft or forgery by any Employee of any Insured acting alone or in collusion with others.

Theft was defined in the policy as "the unlawful taking of Money, Securities or other property to the deprivation of the Insured."

Chubb determined the bribes paid were covered under the policy and reimbursed Agrium on that basis. However, Agrium, sought additional recovery based upon the amount it paid for its raw material pursuant to new agreements negotiated by its dishonest employees, as opposed to an available option of merely extending its existing agreements with its supplier. The court ultimately found 1) the amount of the bribe is the proper measurement of damages in this case, and 2) if the insured alleges damages beyond this, it must be proven by the insured. It should also be noted that although Chubb provided coverage for the amount of the bribe, the court determined the insured failed to show that its employee's conduct constituted "Employee Theft" as defined in the policy.

V. *Measurement of the Loss*

As noted in the aforementioned cases, kickbacks are addressed in one of two ways – the amount of the bribe, or the price differential.

First, let's review the amount of the bribe. In most situations, the kickback referral fees are paid out of the vendor's profit margin. If there is no measurable price differential, and service and products were delivered, is there a direct loss to the insured? If there is no direct loss, should the minimal bribe amount be addressed? If there is a price differential and the price differential is measurable, the courts have indicated the differential is the loss amount.

However, the authors suggest the price differential may not be the proper and ultimate measurement of direct loss. The price differential amount includes a portion of income. The price differential amount includes an amount for indirect loss, which should be excluded.

> l. Indirect Loss[23]
>
> Loss that is an indirect result of any act or "occurrence" covered by this insurance including, but not limited to, loss resulting from:
>
> (1) Your inability to realize income that you would have realized had there been no loss of or damage to "money," "securities" or "other property."

Given the aforementioned exclusion for indirect loss and a simplified example of electronic equipment sold with a 10% discount applied, the equipment should be sold for approximately $100 but is sold for $90. The cases indicate the price differential of $10 ($100 - $90) is addressed. However, additional review needs to be undertaken. Assume the equipment costs $80 to manufacture or to purchase by the insured. We know the insured should make income of $20 ($100 - $80), but in this situation, the insured only makes income of $10 ($90 - $80). Does the policy address the loss resulting from the inability to realize income because of the loss?

Another way to look at the above computation is:

	Actual	Should Be	Loss of Profit
Sales	$90	$100	
Cost	80	80	
Income	$10	$20	($10)

The fourth concept is offset of income. Assume the above situation of discounts is given by an employee in collusion with the buyer, who resells and splits the profits with the employee. We find the employee sells to the buyer at a number of different prices, sometimes above cost and sometimes below cost.

	Deal #1	Deal #2	Net
Sales	$90	$60	
Cost	80	80	
Income	$10	($20)	($10)

Without an offset for the $10 profit made on Deal #1, the loss of $20 is the claim. The insured has no incentive to mitigate or stop the loss. The insured will allow the employee to continue working. The insured will retain the profits of $10 and claim the losses of $20. The courts, through the above rulings, have allowed the moral hazard to occur in that "rainmakers" and "risk takers" are allowed and encouraged to continue such activities in their employment because the insured can claim the losses and retain the gains.

VI. *Conclusion*

What the future holds for the measurement of kickbacks and bribes may be dictated by whether the courts determine bribes and kickbacks constitute employee theft as defined in the policies.

Policies that provide coverage for employee theft define theft as the unlawful taking of money, securities or other property to the deprivation of the insured.

In Williams Electronics Games, Inc. v. Barry, 2000 W.L. 106672 (N.D. Ill. Jan. 13, 2000), the court concluded that an employee's actions did not constitute theft within the meaning of a policy defining theft as an "unlawful taking . . . to the deprivation of the Insured." In that case the employee bribed the purchasing agent of his employer's customer, which resulted in the customer purchasing goods from the employer at inflated prices. The customer sued the employer for the illegitimate profits the employer realized from the sales at inflated prices. The employer, in turn, sought reimbursement for this loss under its crime policy. Without any analysis, the court denied coverage on the grounds that the employee's actions did not constitute theft as defined in the policy.

Thus, at least one court has held that there was no theft, no "unlawful taking . . . to the deprivation of the Insured" in a situation in which the employee perpetrator's acts benefited both himself and the employer.

Whether employee theft policies will address kickbacks and bribes where the employee's conduct resulted in a benefit to the employee and no benefit to the employer remains to be seen.

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[1] The presentors would like to thank Mr. Keith Flanagan, of Clausen & Miller in Chicago, for his significant contribution and assistance.

[2] W. STEVEN ALBRECHT & CHAD O. ALBRECHT, FRAUD EXAMINATION AND PREVENTION 385 (2004). B. CURTIS, SECURITY CONTROL: INTERNAL THEFT 50 (1977).

[3] Chad Bray and Lavonne Kuykendall, *MetLife to Pay $19 Million in Settlement over Commissions*, THE WALL STREET JOURNAL, Eastern Edition, December 30, 2006, at B.4. *Wells Fargo & Co. Firm, Acordia Unit Accused Of Illegally Steering Business*, THE WALL STREET JOURNAL, Eastern Edition, December 20, 2006, at D.5. Tom Lauricella, *ING Group Is Sued Over Funds' Fees*, THE WALL STREET JOURNAL, Eastern Edition, January 11, 2007, at C.17.

[4] Libai et al., *Setting Referral Fees in Affiliate Marketing*, JOURNAL OF SERVICE RESEARCH, 5 at 307 (2003).

[5] David Armstrong, *Illinois Enters Lawsuit Over Alleged MRI Kickbacks*, THE WALL STREET JOURNAL, Eastern Edition, January 18, 2007, at A.15.

[6] Mark W. Pauly, *The Ethics and Economics of Kickbacks and Fee Splitting*, THE BELL JOURNAL OF ECONOMICS, Vol. 10, No. 1, pp. 344-352.

[7] Bruce M. Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, STANFORD LAW REVIEW, Vol. 29, No. 5, pp. 931-967.

[8] Black's Law Dictionary, 6th ed., West Publishing Company (1990).

[9] W. STEVEN ALBRECHT & CHAD O. ALBRECHT, FRAUD EXAMINATION AND PREVENTION 330 (2004).

[10] W. STEVEN ALBRECHT & CHAD O. ALBRECHT, FRAUD EXAMINATION AND PREVENTION 330 (2004).

[11] Kelly McParland, *A Long, Sad Parade of Failed U.S. Presidents*, NATIONAL POST, December 29, 2006.

[12] Catherine L. Hanaway, *Berkeley City Manager Pleads Guilty To Receiving Kickbacks/Bribes From Insurance Broker For Berkeley's Insurance Policies*, DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY'S OFFICE, EASTERN DISTRICT OF MISSOURI, October 24, 2006.

[13] James Covert, *Retailers Ring Up a Solid Start to Year*, THE WALL STREET JOURNAL, Eastern Edition, February 9, 2007, at A.7.

[14] Alan Murray, *Wal-Mart's Lesson for Wall Street*, THE WALL STREET JOURNAL, Eastern Edition, December 13, 2006, at A.2.

[15] Libai et al., *Setting Referral Fees in Affiliate Marketing*, JOURNAL OF SERVICE RESEARCH, 5 at 307 (2003).

[16] *Id.* at 1564.

[17] The following bonds utilize such language: 1) *Comprehensive Dishonesty, Disappearance & Destruction (1979 edition),* 2) *Bankers Blanket Bond Standard Form No. 24 (Revised to July 1980),* 3) *Savings & Loan Blanket Bond Standard Form No. 22 (Revised to December 1982),* 4) *Financial Institution Bond Standard. Form No. 24 (Revised to January 1986),* and *5) Commercial Crime Policy (Loss Sustained Form CR 00 21).*

[18] *Id.* at *40-41.

[19] Id. at *43.

[20] *Id.* at *44.

[21] Koch at *50.

[22] We note that in reaching its decision, the Illinois Court relied on one line from *FDIC v. United Pacific Ins. Co.,* 20 F.3d 1070 (10th Cir. 1994), wherein the court noted in the context of a loan loss that a direct loss occurs when the funds are improperly diverted. However, the Tenth Circuit also conceded that "if the collateral is finally determined in favor of the insured, under the terms of the bond, it becomes a 'recovery' applicable against the loss." The *Schaumburg* decision also appears to be inconsistent with a pronouncement in *Central National Chicago Corp., et al. v. Lumbermens Mutual Cas. Co.*, 359 N.E.2d 797 (Ill. App. 1977) that "there can be no recoverable loss where plaintiffs have been compensated for the injury suffered."

[23] Insurance Services Offices, Form CR 00 21 07 02.