Employers Required to Establish Employee Theft for Coverage under Crime Policies

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Although no business wants to deal with the issue, companies are increasingly being forced to deal with losses from theft, fraud and embezzlement in the workplace. The losses in these situations can be enormous and companies are taking measures to protect their assets. Since first-party property policies typically do not cover crime-related losses, companies are purchasing Commercial Crime Policies, also called fidelity insurance, to fill this gap. Commercial Crime Policies provide employers with protection from losses that arise from employee dishonesty, forgery, and counterfeiting. While the language in crime policies varies by insurer, two examples of typical coverage grants are as follows:

> The Company will pay the Insured for the Insured's direct loss of, or direct loss from damage to, Money Securities and Other Property directly caused by Theft or Forgery committed by an Employee, whether identified or not, acting alone or in collusion with other persons.
>
> The Company shall pay the Insured for direct loss of Money, Securities or Property sustained by an Insured resulting from Theft or Forgery committed by an Employee acting alone or in collusion with others.

Under both coverage grants, there are several consistent and important elements that are required, including 1) losses of money, securities, or property, 2) theft or forgery by an employee, and 3) acting alone or in collusion with others. Policyholders must satisfy all three requirements to obtain coverage. Therefore, even when the policyholder has experienced a loss, it may have difficulty obtaining coverage in situations where the policyholder cannot definitively attribute the loss to employee theft.

Courts have consistently held that inventory calculations and assumptions about the cause of loss are insufficient to establish coverage under a crime policy. *Performance Autoplex II. Ltd. v. Mid-Continent Cas. Co.,* 322 F.3d 847 (5th Cir. 2003); *Ernie Von Schledorn Ltd. v. United Fire & Cas. Co.,* 635 N.W.2d 27 (Wisc. 2001); *United States Smelting Ref. & Mining Co. v. Aetna Cas. & Sur. Co*., 372 F. Supp. 489 (S.D.N.Y. 1974). It is not enough for the policyholder to have inventory shortages or evidence that an employee was near the missing items prior to their disappearance. Commercial Crime Policies require the policyholder to possess sufficient evidence that the only reasonable conclusion that can be drawn is that an employee committed the theft. Accordingly, the policyholder must have evidence that creates more than a mere suspicion or supposition that an employee is responsible for the loss.

The policyholder does not need to be able to identify the employee that committed the crime, and it is not necessary that the policyholder know all the facts surrounding a loss. But, the policyholder must have considered other potential causes for the loss and eliminated them as possibilities. When courts have analyzed whether the policyholder established that employee theft was responsible for the loss, they have focused on various factors, including: 1) whether the policyholder accurately identified the amount or number of items that was stolen; 2) whether the policyholder identified a probable date and time of the theft; 3) whether the policyholder's employees were the only persons with access to the items; 4) the policyholder's manner of recordkeeping; and 5) the policyholder's procedure for investigating the potential loss. The policyholders most successful in obtaining coverage for their losses specifically detailed their basis for believing that an employee caused the loss. Thus, if a policyholder wants to obtain coverage under its crime policy when it cannot definitively attribute the loss to an employee, the policyholder must have as much information as possible to provide to the insurance company.

Conclusion

Employers are encouraged not only to obtain a crime policy, but also to read the policy carefully to understand what claims are covered. The policy may provide coverage that is quite different from the employer's general expectations, or the policy may require the policyholder to provide specific information that it was unaware that it needed to have. Further, if a loss occurs, policyholders should determine the facts surrounding the theft, determine when they discovered the crime, and carefully document all information obtained. By following these procedures, employers can ensure that they have insurance coverage in the unfortunate event that they are victims of employee theft.

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