

**WHO IS AN EMPLOYEE
— KNOWN OR UNKNOWN —
UNDER THE CRIME POLICY?**

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I. INTRODUCTION

The question presented to us in the context of coverage for the dishonest acts of employees is simple enough: Who is an Employee — Known or Unknown — Under the Crime Policy?

In responding to that question, and given that in reality it constitutes two questions wrapped into one, for the purposes of our analysis we will go forward from this point by breaking the question down into the following two separate and distinct queries:

- (1) Who is an Employee Under the Crime Policy?
- (2) Who is an Unknown – or Unidentifiable – Employee Under the Crime Policy?

As the assigned scope of this analysis is focused exclusively on the Crime Policy, the Financial Institution Bond Employee definition will not be examined here.¹ Suffice it to say that *the* significant distinction between the Financial Institution Bond and the Crime Policy is that the latter empowers the employer to govern and control an employee, whereas the former does not.

In an effort to answer the posited queries, the scope of this presentation encompasses a discussion of:

- A. The historic definition of the word Employee as etched out over the years by the jurisprudence at large;
- B. The definition of “Employee,” as that term is utilized in the Commercial Crime package policies and in Commercial Crime policies themselves, as typified by the definitions of Employee found in the Crime General Provisions general definitions, the Employee Dishonesty Coverage Form (Coverage Form A - Blanket) , and the Employee Dishonesty Coverage Form (Commercial Crime Coverage Form A - Schedule) , as found in Appendix A;

1. For a comprehensive discussion of the definition of “Employee” under the Financial Institution Bond, see *Who is a Covered “Employee” Under the Financial Institution Bond*, authored by Armen Shahinian and Scott D. Baron for presentation at the ABA National Institute on Financial Institution Bonds to be held in New York City on November 2 and 3, 1995. That paper updates and edits the paper entitled *Fidelity Coverage: Who is Covered?* prepared by Bernard A. Reinert which was presented as part of the 1992 National Institute Program on Financial Institution Bonds in London, England April 22-24, 1992. Mr. Reinert’s paper was originally written to update and edit the paper entitled *Fidelity Coverage: Who is Covered?* prepared by James A. Black, Jr. which was presented as part of the 1989 National Institute Program on Financial Institution Bonds in Washington, D.C. on April 17, 1989 and in San Francisco, California on November 16, 1989.

- C. The definitions of Employee found in the December 20, 1990 *policy-changing* ERISA Endorsement, Provision 1, which applies to the Crime General Provisions Form and all Crime Coverage Forms forming part of the policy, and the also *policy-changing* endorsement applying to the Crime General Provisions and all Crime Coverage Forms forming part of the Policy, entitled “Include Designated Agents as employees covered for Employee Dishonesty only,” as found in Appendix B;
- D. A Crime Policy provision entitled “Loss Caused by Unidentifiable Employees or Directors” as actually offered in a Crime Policy currently being written, as found in Appendix C; and
- E. Modern day jurisprudence dealing with the crime policy’s “Employee” definition.

And, given the richness of the publications on the very topic of this presentation since 1978,² the footnoted exemplars will serve as part of the backdrop for our journey in search of the answers we seek. In so proceeding, in addition to analyzing pertinent crime policy provisions and jurisprudence dealing with them, we will also examine how each of the cited commentators approached the subject matter, and the lessons that can be learned at each point along the way from that blending of crime policy contractual provisions, case law and interpretive analysis.

We will then conclude by merging the two questions back into the one we commenced with, answering the question, in the context of 1995, “Who Is an Employee — Known or Unknown — Under the Crime Policy.”

II. WHO IS AN EMPLOYEE?

A. *The Jurisprudential Pre-Crime Policy Definition of “Employee”*

As we shall ultimately see, the word “employee” was with us long before the advent of bonds and policies defining that word. How employee was

2. Samuels and Butash, *ERISA: The Basics*, LITIGATION, Summer 1995, Volume 21, Number 4 (Section of Litigation, American Bar Association); Pflapsen, *ERISA Fiduciary Issues for Insurers in the Handling of Employee Benefits Plan Claims*, TORT & INSURANCE LAW JOURNAL (Summer 1995); Gallagher, Editor, *A Complete Guide to the ERISA Bonding Requirement*, American Bar Association, Tort and Insurance Practice Section, 1994; McNamara and Petro, *Unidentifiable Employee Coverage*, American Bar Association Tort and Insurance Practice Section, Proceedings of the Fidelity and Surety Committee (New Orleans, LA 1994); DiBiase, *Who is an Employee and What is Unidentifiable Employee Coverage Under the Fidelity Bond*, FIDELITY BONDS (Gilbert J. Schroeder, Ed. 1991) — papers presented at the 1991 American Bar Association National Institute, New York, New York; Hull, *The ABC's of Unidentifiable Employee Coverage*, XV THE FORUM 958 (No. 5, Summer 1980); Elliott, *Who is an Employee Under Fidelity Coverage*, American Bar Association Tort and Insurance Practice Section, Proceedings of the Fidelity and Surety Law Committee (New York, NY 1978); Annotation, “Who Is an Employer Within Fidelity Bond or Insurance?” 140 A.L.R. 699 (1942).

defined by the courts prior to the earliest form of such instruments is therefore introduced at this point in order to lay a foundation on which we can build our overall analysis.

In fact, the word employee “is from the French, but has become somewhat naturalized in our language. Strictly and etymologically, it means ‘a person employed,’ but, in practice in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though perhaps not confined to any official employment, it is understood to mean some permanent employment or position. ” In fact, the word employee may extend beyond “clerk” or “officer,” and may be said to be anyone “in place,” or fulfilling a function, as well as one holding an office.³

An employee has also been held to be one who works for an employer; a person working for salary or wages; applicable to anyone so working, but *usually* only to clerks, workmen, laborers and the like, but rarely to the higher officers of a corporation or government or to domestic servants.⁴

Generally, when the person for whom services are performed has the right to control and direct the individual who performs services, not only as to result to be accomplished by work, but also as to details and means by which the result is to be accomplished, the individual subject to such direction is an “employee.”⁵

In addition, “employee” must be distinguished from “independent contractor,” “officer,” “vice-principal,” “agent,” etc. As “employee” is often found to be specifically defined by statute, whether one is an employee or not within a particular statute will depend upon the controlling facts and circumstances.⁶

Therefore, from a general jurisprudential perspective, we now have the answer to the question of “Who is an Employee,” outside of the Crime Policy frame of reference.

3. *Black’s Law Dictionary*, Fifth Edition, 1979; *Hopkins v. Cromwell*, 89 App.Div. 481, 85 N.Y.S. 839 (N.Y. App. Div. 1903).

4. *Keefe v. City of Monroe*, 120 So. 102, 9 La.App. 545 (La. App. 2nd Cir. 1924); *State ex rel. Gorczyca v. City of Minneapolis*, 174 Minn. 594, 219 N.W. 924 (Minn. 1928).

5. *Young v. Demos*, 70 Ga.App. 577, 28 S.E.2d 891, 893 (Ga. Ct. App. Div. 2 1944).

6. Fair Labor Standards Act, *Fleming v. Demeritt Co.*, D.C.Vt., 56 F.Supp. 376, 378, 390 (D.C. Ut. 1944); *Schroepfer v. A. S. Abell Co.*, 48 F.Supp. 88, 94, 95, 98 (D.C. Md. 1942); Motor Carriers Act, *United States v. American Trucking Ass’n*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940).

B. Employee Definitions Found in Currently Available Crime Policies

Having laid a foundation of prior at-large pre-Crime Policy “employee” definition law, we now turn to “employee” definitions appearing in Commercial Crime Coverage Packages and Commercial Crime Policies, and endorsements thereto, being currently offered in the national marketplace, as typified by the “employee” definitions as contained in the Standard Forms of the Surety Association of America.⁷

1. Crime General Provisions to Determine Who Is, and Who Is Not, an Employee Under The Terms of Such Policies

The Crime General Provisions define “employee” as meaning:

- a. Any natural person:
 - (1) While in your service (and for 30 days after termination of service) ; and
 - (2) Whom you compensate directly by salary, wages or commissions; and
 - (3) Whom you have the right to direct and control while performing services for you; or
- b. Any natural person employed by an employment contractor while that person is subject to your direction and control and performing services for you excluding, however, any such person while having care and custody of property outside the “premises”.

But “employee” does not mean any:

- (1) Agent, broker, factor, commission merchant, consignee, independent contractor or representative of the same general character; or
- (2) Director or trustee except while performing acts coming within the scope of the usual duties of an employee.⁸

See Appendix A.

2. *The Commercial Crime Coverage Form A - Schedule*

But compare that with the Commercial Crime Coverage Form A - Schedule,⁹ which in its Employee Dishonesty Coverage Form provides a schedule for listing the names of covered “Employees,” the titles of covered positions, the location of covered positions, the number of “Employees” for each position, the limit of insurance for each “Employee” and deductible amounts. In addition, the Commercial Crime Coverage Form A - Schedule provides the following Additional Definition:

7. Current standard forms of fidelity and forgery bonds, policies, riders, endorsements and applications promulgated by the Surety Association of America, through June 1994.

8. *Ibid.*, footnote 7, at page CR-7, and Appendix A.

9. *Ibid.*, at CR-10.

- a. “Employee” means
 - (1) Any person named in the SCHEDULE, if coverage applies on a Name Schedule basis; or
 - (2) Any person you engage to perform the duties of a position shown in the SCHEDULE if coverage applies on a Position Schedule basis.

The “Employee” General Definition does not apply to this Coverage Form.

See Appendix A.

3. ERISA Compliance Endorsement

We now consider the Welfare and Pension Plan Employee Retirement Income Security Act (ERISA) Compliance Endorsement¹⁰ which changes the Commercial Crime Employee Dishonesty Coverage Form A - Blanket Policy, and, through Provision 1, changes the definition of “Employee” to read as follows:

- 1. “Employee” also includes any natural person who is:
 - a. A trustee, an officer, employee, administrator or a manager, except an administrator or a manager who is an independent contractor of any Employee welfare or Pension benefit Plan (hereafter called Plan) insured under this insurance, and
 - b. Your director or trustee while that person is handling funds or other property of any Plan insured under this insurance.

See Appendix C.

4. Crime General Provisions and All Crime Coverage Forms

The second, and final, policy-changing endorsement¹¹ applies to the Crime General Provisions and all Crime Coverage Forms forming part of the Policy to include designated agents as employees covered for “employee dishonesty” only, which in Provision 1 thereof defines “Employee” as follows:

- 1. “Employee” also includes each natural person, partnership or corporation you appoint in writing to act as your agent in the capacity shown in the SCHEDULE while acting on your behalf or while in possession of Covered Property. These natural persons, partnerships or corporations are not covered for faithful performance of duty, even in the event that this Policy may have been amended by endorsement to provide such coverage on “employees” as they are defined in the Crime General Provisions. The only covered cause of loss for the Agents scheduled above is “employee dishonesty” as defined in the EMPLOYEE DISHONESTY COVERAGE FORM.

10. *Ibid.*, footnote 7 at CR-B-27.

11. *Ibid.*, footnote 7 at CR-B-24 and Appendix C.

Each such agent and the partners, officers and employees of that agent are considered to be, collectively, one "employee" for the purposes of this insurance. However, the Cancellation As To Any Employee Additional Condition in the EMPLOYEE DISHONESTY COVERAGE FORM applies individually to each of them.

C. History of the Development of the Crime Policy "Employee" Definition

One of the earlier policies containing a definition of "Employee" is found in the June 1940 Dishonesty, Disappearance and Destruction Policy ("3D Policy"), as follows:

"Employee" or "Employees" means, respectively, one or more of the natural persons (except a director or trustee of the Assured, if a corporation, who is not also an officer thereof in some other capacity) who, on the effective date of this Policy, or at any other time during the Policy Period, are in the regular service of the Assured in the ordinary course of the Assured's business, and who are compensated by salary, wages or commissions, and whom the Assured has the right to govern and direct at all times in the performance of any such services, and who are engaged in such service in any of the States of the United States of America, the District of Columbia, Alaska, Hawaii, Canada or Newfoundland, but does not mean brokers, factors, commission merchants, consignees, contractors or other agents or representatives of the same general character.¹²

Prior to the introduction of this blanket bond form, bonds were generally written on a name schedule basis.¹³ Over the years the blanket form has grown in popularity, although as seen in the bond forms currently in use, both name schedule and blanket forms are available.

D. *The "Who is an Employee?" Jurisprudence Analyzed*

"Employee" Definitions in Case Law

One of the best catalogues of Employee Definition cases is "Who is an Employee Under Fidelity Coverage" written in 1978 by Thomas Elliott.¹⁴

In a thorough discussion of who is an employee, the article delves into the essentials of the employee relationship, and then gives individual treatment to the subjects of regular or temporary employees; the effect of dual employment; location of employees; particular person consignees; attorneys; joint venturers; salesmen; corporate directors; officers or stockholders; interlopers or usurpers; employees of predecessor and subsidiary corporations; the "Alter Ego" doctrine and waiver and estoppel.

12. A specimen copy of that policy is on file with the Surety Association of America in Iselin, New Jersey.

13. DiBiase, *supra*, note 2 at 1.

14. Elliott, *supra*, note 3.

The article examines sixty-one reported decisions and seven articles dealing with the subject. On the completion of his analysis, Mr. Elliott draws the following four conclusions which have a familiar ring even in 1995:

- (1) Absent other requirements in the policy “control” is the essential element in determining the employer-employee relationship;
- (2) Compensation, whether it is required under the policy or used to show absence of right to control, is an effective means of demonstrating the non-existence of the employer-employee relationship;
- (3) The Alter Ego Doctrine is most effective when asserted to establish lack of control and therefore to defeat coverage — its effectiveness may be diminished when other technical defenses such as lack of timely notice or failure to file timely proof of loss are interposed with it.
- (4) The maxim “good facts make good law — bad facts make bad law” is particularly applicable to a coverage case — you can win a coverage case with good facts, but you are going to lose and more than likely make bad law, if your facts are marginal.

One of the most interesting of Mr. Elliott’s conclusions is the one to the effect that the policy requirement regarding “control” is *the* essential element determining the employer-employee relationship, a theme which harks back to our initial discussion of *Young v. Demos*.¹⁵ One of the leading cases supporting Mr. Elliott’s control conclusion was *William H. Sills Mortgages, Inc. v. Ohio Casualty Insurance*.¹⁶ In that case, the court found that the definition of employee had been satisfied, stating:

Whether Stockford was an employee is a question of fact. The principal test of an employer and employee relationship is control. Under the findings of the trial judge, we find not to be clearly erroneous, Mr. Sills had a very close supervision and control over Stockford.

In view of the fact that the Elliott commentary provides a very thorough analysis of a number of critical areas which insurers and insureds deal with every day, that article is highly recommended reading.

Control and More Control

As David DiBiase¹⁷ points out in his 1991 article, the courts pay much attention to the control factor, considering it a key indicator of the em-

15. *Supra*, note 5.

16. 412 F.2d 341 (6th Cir. 1969).

17. DiBiase, *supra*, note 3 at 5.

ployer/employee relationship in determining whether one should be treated as an employee for bond coverage purposes.¹⁸

Although elements such as compensation have sometimes led the courts to an employee determination,¹⁹ the truly discernable trend is for the courts to be swayed by the presence of control²⁰

Before leaving the control issue, your attention is again directed to David DiBiase's comprehensive analysis of the control issue, where, in a two-step process, he examines who is an employee by studying the bond definition, explores the key elements to determining employee status (which he refers to as "control, control and control," but apparently not necessarily in that order!) ; part-time employees; after-hours dishonesty; dual employment and location of loss issues; loss caused by directors; and "special circumstances."²¹

*The Employee Retirement Income Security Act (ERISA)²²
and the "Employee" Definition*

The ERISA Endorsement

As we have seen, the 1990 ERISA Endorsement, Provision 1 (Crime General Provisions Form and all crime coverage forms forming part of the policy) expands the traditional definition of "Employee" to "(1) trustees, officers, employees, administrators or managers of any Employee Welfare or Pension Benefit Plan and a Plan director or trustee while that person is "handling funds or other property of any Plan insured under this Insurance."

ERISA "Fund Handlers"

The "handling funds" language is a concept born of the ERISA statute which specifies that every person who "handles funds" or other property of an employee benefit Plan be bonded, and is unique.²³

*A Complete Guide to the ERISA Bonding Requirement,
Edward G. Gallagher, editor and co-author, 1994²⁴*

This commentary is in monograph form with an extensive appendix consisting of the text of the ERISA bonding requirements, applicable regula-

18. *William H. Sills Mortgages, Inc. v. Ohio Casualty Ins. Co.*, 412 F.2d 341 (6th Cir. 1969); *Third Federal Savings and Loan Association of Cleveland v. Fireman's Fund Ins. Co.*, 548 F.2d 166 (6th Cir. 1977).

19. *Fortunoff Silver Sales, Inc. v. Hartford Accident and Indemnity Co.*, 92 A.D.2d 880, 459 N.Y.S. 866 (1983).

20. *Radiology Associates v. Aetna Casualty & Surety Co.*, 1 Ark. App. 22, 613 S.W.2d 106 (1981).

21. DiBiase, *supra*, note 3.

tions, Financial Institution Bond Provisions and Commercial Crime Policy Employee Dishonesty Coverage Form A with the ERISA Endorsement and Agents Endorsement, and is highly recommended.

The ERISA monograph fits into this discussion because of the previously referenced ERISA endorsement defining “employee.”

In addition to being an invaluable guide to ERISA bonding requirements, a number of insightful comments are made regarding the employee definition issue and would have to be considered as invaluable to anyone dealing with a crime policy subject to ERISA.

While on the subject of ERISA, although not about the definition of the term employee, *ERISA: The Basics*²⁵ is indispensable to anyone trying to grapple with ERISA for the first, second or third time, and will certainly lay the groundwork for delving into some of the more complex ERISA issues.

*ERISA Fiduciary Issues for Insurers in the Handling of Employee Benefits Plan Claims, by Pflepsen, 1995*²⁶

Mr. Pflepsen’s commentary provides excellent insight into the test for determining if a person is a fiduciary with respect to a plan “to the extent (i) he exercises any discretionary authority or discretionary control respecting management of plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.”²⁷

The Pflepsen commentary is an outstanding resource for anyone wishing to better understand ERISA fiduciary issues for insurers when it comes to handling of Employee Benefits Plan Claims. The commentary is even more significant given that it has just been published.

“WHO IS AN EMPLOYEE?” OVERVIEW

Having completed our “Who is an Employee?” analysis of (1) former and current crime policy employee provisions and endorsements definitions; (2) jurisprudence dealing with “who is an employee” under the term of the

23. 29 U.S.C. § 1112, Section 412.

24. *Supra*, note 3.

25. Samuels and Butash, *supra*, note 3.

26. Pflepsen, *supra*, note 3.

27. *Supra*, note 3 at 901, citing 29 U.S.C.A. § 1002 (21)(a) (West Pamph. 1995) (emphasis added).

current crime policy and its predecessor; and (3) the interpretive analyses of commentators versed in the subject, the following conclusions can be drawn:

1. The crime coverages offered in the marketplace today are either of the general provisions or scheduled names variety and offer a good deal of certainty to the parties of those contracts as to who an employee is:

A. The scheduled names leave no room for doubt, or argument, as to who is considered an employee under such a policy provision: an employee is a named person;

B. The blanket provisions contain a definition of “employee” that should leave no doubt, or at least less doubt than in crime policies of the past, as to who is an employee.

2. The control issue continues to be critical and will be determinative in cases involving substantial factual gray areas as to the employer-employee relationship, thus bringing clarity to an otherwise potentially murky scenario.

3. Compensation, like control, remains an effective means for determining the existence or non-existence of the employer-employee relationship, and, when there is doubt, will aid in resolving it.

4. The Alter Ego Doctrine is still a viable vehicle for testing for control and for the Presence or absence of the employer-employee relationship.

We now turn to the remaining question: “Who is an Unidentifiable Employee?”

WHO IS AN UNIDENTIFIABLE EMPLOYEE?

The History of Unidentifiable Employee Coverage

In setting out to define, or identify, the unidentifiable, or to divine who is a Crime Policy unidentifiable employee, we must first examine, from a Crime Policy claims handling perspective, how the unidentifiable employee issue arises in the first instance.

As a practical matter, what happens is that an insured submits a proof of loss to its blanket crime policy insurer asserting a loss of money or property allegedly caused by the dishonesty of an employee or employees, but, claiming that it is unable to identify the specific employee, or employees, committing the dishonest act, or acts (as dishonesty is defined in the pertinent Crime Policy). The insured does not actually name the employee, or employees, who allegedly committed the dishonest act leading to the actual loss.

This scenario immediately raises the question of whether or not the specific crime policy under which the claim is made provides coverage for the

acts of unidentifiable employees. As to that concept, specific coverage of that nature and description was introduced by the insurance industry in the early part of the 20th century.²⁸

An interesting development along the way to developing such coverages was a Group Loss Letter which insurers issued to insureds in a Comprehensive Dishonesty, Disappearance and Destruction Policy, such as is used in connection with Primary Commercial Blanket Bonds, referred to as an “Interpretive Letter,” which provided as follows:

Interpretive Letter

In reply to your inquiry as to whether or not the above described Policy gives indemnity against the loss or losses caused where you are not able to identify the particular Employee or Employees causing the loss, we have to say, that if you are not able to designate or identify the particular Employee or Employees causing the loss, recovery may, nevertheless, be made, provided you establish reasonably the fact that the loss was due to an act or acts on the part of an Employee or Employees causing such loss through acts coming within the provisions of the Policy and according to its terms and conditions.²⁹

See Appendix D.

From that pioneering effort, the Blanket Position Bond that was developed during that era came to stipulate that if an alleged loss was said to have been caused by one or more covered employees:

... and the Insured shall be unable to designate the specific Employee or Employees causing such loss, the Insured shall nevertheless have the benefit of this bond, provided that the evidence submitted reasonably established that the loss was in fact due to Dishonesty of one or more of the said Employees of said group, and provided further than the aggregate liability of the Underwriter for any such loss shall not exceed the amount of insurance earned hereunder on any one Employee in said group, to wit, the amount stated in ... this bond.³⁰

In due course, the cited provision came to be known as the Unidentifiable Employee Coverage, and ultimately made its way into the 1980 Com-

28. For three commentaries on the history of the development of crime policy unidentifiable coverage, see: McNamara and Petro, *supra*, note 3; DiBiase, *supra*, note 3; and Hull, *supra*, note 3.

29. The quoted Interpretive Letter is on file with the Surety Association of America, Iselin, New Jersey. See Appendix D of this presentation for a copy of that letter.

30. A copy of this policy is on file with the Surety Association of America, Iselin, New Jersey.

mercial Blanket Bond and the Blanket Crime Policy and the Comprehensive Dishonesty, Disappearance and Destruction Policy of the 1980's.³¹

These predecessors to the Commercial Crime Policy were issued in various forms and combinations until 1986, when the Commercial Crime Policy itself was introduced to the marketplace, being revised in 1990.³²

That brings us to 1995, and the following is the text of a Crime Policy provision appearing in a Crime Policy being currently written by at least one insurer:

**LOSS CAUSED BY UNIDENTIFIABLE
EMPLOYEES OR DIRECTORS.**

If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the employees or directors and the Insured shall be unable to designate the specific employee or employees, director or directors, causing such loss, the Insured shall nevertheless have the benefit of Insuring Clause A, provided that the evidence submitted reasonably proves that the loss was in fact due to fraud or dishonesty of one or more of the said employees, or directors, and provided further, that the aggregate liability of the company for any such loss shall not exceed the sum stated in the Declarations as the limit of the company's liability.

Although, as normally issued, no Loss Caused by Unidentifiable Employees provision is found in the Commercial Crime Policy as such, in the definition of "Employee Dishonesty" contained in the Employee Dishonesty Coverage Form, employee dishonesty is defined as follows:

Employee Dishonesty ... means only dishonest acts committed by an "employee," *whether identified or not*, acting alone or in collusion with other persons...

(Emphasis added.)

In addition, in the Employee Dishonesty Coverage Form, denoted "Coverage Form A-Schedule," the definition of "employee dishonesty" is limited to dishonest acts committed by an *identified employee* only. Given the fact that this is a schedule form, no coverage is afforded under this form for losses caused by unidentifiable employees.

Now we turn to an examination of how unidentifiable employees are defined in actual practice.

31. McNamara and Petro, *supra*, note 3 at page 1.

32. The Commercial Crime Policy, as revised, is on file with the Surety Association of America, Iselin, New Jersey.

Unidentifiable Employee Defined

As we have seen, the term “Unidentifiable Employee,” unlike the term “Employee,” is not a defined term in the standard Crime Policy. Rather, “Unidentifiable Employee” appears in the Crime Policy as a term in order to identify a limitation on that policy’s coverage.³³ Neither does the Crime Policy related jurisprudence define “Unidentifiable Employee.”

In seeking out a definition of “Unidentifiable Employee,” the best course of action is to provide an example, based on the overall language of the Crime Policy. From that perspective, in order for there to be a Crime Policy “Unidentifiable Employee” loss, it is this commentator’s position that all three of the following elements must be present:

- (1) There must be a loss of money, or property, by the insured;
- (2) The loss must be as a result of provable and irrefutable employee dishonesty; and
- (3) More than one employee must have had exclusive access to the insured’s money or property.

In his cited article, David DiBiase provides a perfect example encompassing all three criteria:

Three employees are locked in a vault one evening with a large chocolate cake which they are admonished not to consume. There is electronic surveillance through the evening, and the vault remains locked. The following morning, the vault was opened and the chocolate cake is gone. None of the three employees would admit to its consumption, and none of them are found with chocolate on their chin. The loss of the cake might be construed as one caused by unidentifiable employee because there is no explanation for its loss other than at the hand (and in the mouth) of an employee.³⁴

And there you have one answer to who is an unidentifiable employee, while satisfying all three aforesaid criteria for establishing an unidentified employee loss in a Crime Policy affording such coverage.

“Unidentifiable Employee” and the Jurisprudence

Now we turn to the jurisprudence for guidance. In *Hartford Accident & Indemnity Co. v. Collins-Dietz-Morris Co.*,³⁵ a commercial blanket bond in the amount of \$10,000.00 was issued to the insured, a wholesale grocer, insuring it against loss as the result of the theft, embezzlement, misappro-

33. For a full discussion of this point, see Hull, *supra*, note 3.

34. DiBiase, *supra*, note 3.

35. 80 F.2d 441 (10th Cir. 1935)

priation, or other dishonesty, of the insured's employees. The bond provided that losses caused by the fraud or dishonesty of one or more of a group of employees were covered, and that if the insured could not identify the specific employees who caused the loss, then the insured would "still have the benefit of the bond," but that the aggregate liability under the bond was limited to the face amount of the policy, which was \$10,000.

A claimed loss occurred and coverage was declined. Trial evidence showed that numerous of insured's employees had participated in an elaborate theft scheme, culminating in the sale of the insured's goods for the benefit of the thieving employees. The court found for the insured, and stated:

The argument that plaintiff failed to bring itself within the provision in the bond relating to group loss cannot avail. That provision is that if a group of employees cause loss and plaintiff is unable to designate the specific employee or employees, it shall nevertheless be indemnified, but the aggregate liability shall not exceed the face of the bond. Plaintiff established a concert of action among its employees and it identified many who were parties thereto, but it manifestly could not segregate and specify the amount of loss any one of them caused. The provision clearly applies to such a situation; otherwise it is meaningless and has no place in the bond.

Here the court provides us with a judicial definition of unidentifiable employee for our consideration.³⁶

"Who is an Unidentifiable Employee" Overview

From the foregoing analysis and discussion of (1) the Crime Policy's treatment of losses caused by Unidentifiable Employees; (2) the practical definition of Unidentifiable Employee; and (3) the inferred definition of Unidentifiable Employee by the court, the following conclusions can be drawn:

- (1) Neither the Crime Policy nor the courts provide a per se definition of the term Unidentifiable Employee or Unknown Employee;
- (2) If the following three criteria are met, an Unidentifiable Employee has been identified:
 - (a) There must be a loss of money, or property, by the insured;
 - (b) The loss must be as a result of provable and irrefutable employee dishonesty; and
 - (c) More than one employee must have had exclusive access to the insured's money or property.

36. See McNamara and Petro, supra, note 3, for a discussion of this and related reported decisions.

CONCLUSION

The three conclusions to be drawn from the foregoing analysis are as follows:

- I. The question “Who is an Employee — Known or Unknown — Under the Crime Policy?” is best analyzed as “Who is an Employee,” on the one hand, and “Who is an Unidentifiable Employee,” on the other hand, and in that light,
- II. The following conclusions can be drawn as to Who is an Employee under the Crime Policy:
 1. The crime coverages offered in the marketplace today are either of the general provisions or scheduled names variety and offer a good deal of certainty to the parties of those contracts as to who an employee is:
 - (a) The scheduled names leave no room for doubt, or argument, as to who is considered an employee under such a policy provision: an employee is a named person;
 - (b) The blanket provisions contain a definition of “employee” that should leave no doubt, or at least less doubt than in crime policies of the past, as to who is an employee.
 2. The control issue continues to be critical and will be determinative in cases involving substantial factual gray areas as to the employer-employee relationship, thus bringing clarity to an otherwise potentially murky scenario.
 3. Compensation, like control, remains an effective means for determining the existence or non-existence of the employer-employee relationship, and, when there is doubt, will aid in resolving it.
 4. The Alter Ego Doctrine is still a viable vehicle for testing for control and for the presence or absence of the employer-employee relationship.
- III. An Unknown Employee can be said to exist if all of the following three criteria are met:
 1. There must be a loss of money, or property, by the insured;
 2. The loss must be as a result of provable and irrefutable employee dishonesty; and
 3. More than one employee must have had exclusive access to the insured’s money or property.

Above all, when analyzing a claim under the Crime Policy, the policy’s definition of employee should be the starting point, and if that definition is precise and clear enough, it could well also be the stopping point.

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APPENDIX A.

Crime General Provisions general definitions

The Employee Dishonesty Coverage Form (Coverage Form A – Blanket)

The Employee Dishonesty Coverage Form (Commercial Crime Coverage Form A – Schedule)

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COMMERCIAL CRIME POLICY
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FORM	NO.	PAGE
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Crime Policy Declarations Form A	CR DA 1	CR-2
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Common Policy Conditions	I_ 00 17 11 85	CR-4
Crime General Provisions	CR 10 00 10 90	CR-5
Employee Dishonesty Coverage Form A-Blanket	CR 00 01 10 90	CR-9
Employee Dishonesty Coverage Form A-Schedule	CR 00 02 10 90	CA-10
Forgery or Alteration Coverage Form B	CR 00 03 01 80	CR-12
Public Employee Dishonesty Coverage Form O-Per Loss	CR 00 16 10 90	CA-13
Public Employee Dishonesty Coverage Form P-Per Employee	CR 00 17 10 90	CR-14

COVERAGE PART/POLICY STRUCTURE

I. COMMERCIAL CRIME COVERAGE PART OF THE COMMERCIAL PACKAGE POLICY

- A. When the *Commercial Package Policy* is written for a **mercantile entity** with Employee Dishonesty Coverage and/or Forgery or Alteration Coverage, the *Commercial Crime Coverage Part* is comprised of:
 - 1. Common Policy Declarations;
 - 2. Common Policy Conditions;
 - 3. Crime Declarations Form B;
 - 4. Crime General Provisions;
 - 5. Coverage Form A-Blanket, or Coverage Form A-Schedule;
 - 6. Coverage Form B; and
 - 7. Any combination of appropriate Coverage Forms under the jurisdiction of the Insurance Services Office.

- B. When the *Commercial Package Policy* is written for a **governmental entity** with Employee Dishonesty Coverage and/or Forgery or Alteration Coverage, the *Commercial Crime Coverage Part* is comprised of:
 - 1. Common Policy Declarations;
 - 2. Common Policy Conditions;
 - 3. Crime Declarations Form B;
 - 4. Crime General Provisions;
 - 5. Coverage Form O-Per Loss, or Coverage Form P-Per Employee;
 - 6. Coverage Form B; and
 - 7. Any combination of appropriate Coverage Forms under the jurisdiction of the Insurance Services Office.

COMMERCIAL CRIME COVERAGE PART and
COMMERCIAL CRIME POLICY
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II. COMMERCIAL CRIME POLICY

- A. When the *Commercial Crime Policy* is written for a **mercantile entity** with Employee Dishonesty Coverage and/or Forgery or Alteration Coverage, the *Policy* is comprised of:
1. Crime Policy Declarations Form A;
 2. Common Policy Conditions;
 3. Crime General Provisions;
 4. Coverage Form A-Blanket, or Coverage Form A-Schedule;
 5. Coverage Form B; and
 6. Any combination of appropriate Coverage Forms under the jurisdiction of the Insurance Services Office.
- B. When the *Commercial Crime Policy* is written for a **governmental entity** with Employee Dishonesty Coverage and/or Forgery or Alteration Coverage, the *Policy* is comprised of:
1. Crime Policy Declarations Form A;
 2. Common Policy Conditions;
 3. Crime General Provisions;
 4. Coverage Form O-Per Loss, or Coverage Form P-Per Employee;
 5. Coverage Form B; and
 6. Any combination of appropriate Coverage Forms under the jurisdiction of the Insurance Services Office.

- b. Recoveries do not include any recovery:
- (1) From insurance, suretyship, reinsurance, security or indemnity taken for our benefit; or
 - (2) Of original "securities" after duplicates of them have been issued.
16. **Territory:** This insurance covers only acts committed or events occurring within the United States of America, U.S. Virgin Islands, Puerto Rico, Canal Zone, or Canada.
17. **Transfer of Your Rights of Recovery Against Others to Us:** You must transfer to us all your rights of recovery against any person or organization for any loss you sustained and for which we have paid or settled. You must also do everything necessary to secure those rights and do nothing after loss to impair them.
18. **Valuation-Settlement**
- a. Subject to the applicable Limit of Insurance provision we will pay for:
 - (1) Loss of "money" but only up to and including its face value. We may, at our option, pay for loss of "money" issued by any country other than the United States of America:
 - (a) At face value in the "money" issued by that country; or
 - (b) In the United States of America dollar equivalent determined by the rate of exchange on the day the loss was discovered.
 - (2) Loss of "securities" but only up to and including their value at the close of business on the day the loss was discovered. We may, at our option:
 - (a) Pay the value of such "securities" or replace them in kind, in which event you must assign to us all your rights, title and interest in and to those "securities";
 - (b) Pay the cost of any Lost Securities Bond required in connection with issuing duplicates of the "securities". However, we will be liable only for the payment of so much of the cost of the bond as would be charged for a bond having a penalty not exceeding the lesser of the:
 - i. Value of the "securities" at the close of business on the day the loss was discovered; or
 - ii. Limit of Insurance.
 - (3) Loss of, loss from damage to, "property other than money and securities" or loss from damage to the "premises" for not more than the:
 - (a) Actual cash value of the property on the day the loss was discovered;
 - (b) Cost of repairing the property or "premises"; or
 - (c) Cost of replacing the property with property of like kind and quality.
 - b. We may, at our option, pay for loss of, or loss from damage to, property other than "money":
 - (1) In the "money" of the country in which the loss occurred; or
 - (2) In the United States of America dollar equivalent of the "money" of the country in which the loss occurred determined by the rate of exchange on the day the loss was discovered.
 - c. Any property that we pay for or replace becomes our property.
- C. GENERAL DEFINITIONS**
1. **"Employee"** means:
 - a. Any natural person:
 - (1) While in your service (and for 30 days after termination of service); and
 - (2) Whom you compensate directly by salary, wages or commissions; and
 - (3) Whom you have the right to direct and control while performing services for you; or
 - b. Any natural person employed by an employment contractor while that person is subject to your direction and control and performing services for you excluding, however, any such person while having care and custody of property outside the "premises".
- But "employee" does not mean any:
- (1) Agent, broker, factor, commission merchant, consignee, independent contractor or representative of the same general character; or
 - (2) Director or trustee except while performing acts coming within the scope of the usual duties of an employee.
2. **"Money"** means:
 - a. Currency, coins and bank notes in current use and having a face value; and

Who Is An Employee – Known or Unknown – Under The Crime Policy?

COMMERCIAL CRIME
COVERAGE FORM A-SCHEDULE

EMPLOYEE DISHONESTY COVERAGE FORM
SCHEDULE

Item No.	Name Schedule Coverage	Position Schedule Coverage			Limit of Insurance Each "Employee"	Deductible Amount
	Names of Covered "Employees"	Titles of Covered Positions	Location of Covered Positions	No. of "Employees" Each Position		

A. COVERAGE

We will pay for loss of, and loss from damage to, Covered Property resulting directly from the Covered Cause of Loss.

1. **Covered Property:** "Money", "securities", and "property other than money and securities".
2. **Covered Cause of Loss:** "Employee dishonesty".

B. LIMIT OF INSURANCE

1. The most we will pay for loss in any one "occurrence" is the applicable Limit of Insurance shown in the SCHEDULE.
2. Regardless of the number of years this insurance applies as respects a specific "employee", the most we will pay in the aggregate is the largest Limit of Insurance applicable to that "employee" even though:
 - a. The coverage for that "employee" is not continuous because it has been cancelled for one or more periods; or
 - b. The Limit of Insurance applicable to that "employee" as changed.
3. If this insurance applies on a **Position Schedule** basis, the following provisions also apply:
 - a. The most we will pay for an "employee" serving in more than one position is the largest

Limit of Insurance in effect and applicable to any one of those positions at the time loss is discovered.

- b. If at the time loss is discovered there are more "employees" serving in a covered position than the number of "employees" listed opposite that position in the SCHEDULE, the Limit of Insurance applicable to that position will be reduced.

The reduced Limit of Insurance will be computed by multiplying the limit shown in the SCHEDULE by a factor obtained by dividing the number of "employees" shown in the SCHEDULE by the actual number of "employees" serving in that position at the time loss is discovered.

C. DEDUCTIBLE

1. We will not pay for loss in any one "occurrence" unless the amount of loss exceeds the Deductible Amount shown in the SCHEDULE. We will then pay the amount of loss in excess of the Deductible Amount, up to the Limit of Insurance.
2. You must:
 - a. Give us notice as soon as possible of any loss of the type insured under this Coverage Form even though it falls entirely within the Deductible Amount; and

- b. Upon our request, give us a statement describing the loss.
- D. ADDITIONAL EXCLUSIONS, CONDITIONS AND DEFINITIONS:** In addition to the provisions in the Crime General Provisions Form, this Coverage Form is subject to the following:
1. **Additional Exclusions:** We will not pay for loss as specified below:
- a. **Employee Cancelled Under Prior Insurance:** loss caused by any "employee" of yours, or predecessor in interest of yours, for whom similar prior insurance has been cancelled and not reinstated since the last such cancellation.
- b. **Inventory Shortages:** loss, or that part of any loss, the proof of which as to its existence or amount is dependent upon:
- (1) An inventory computation; or
- (2) A profit and loss computation.
2. **Additional Conditions**
- a. **Cancellation As To Any Employee:** This insurance is cancelled as to any "employee":
- (1) Immediately upon discovery by:
- (a) You; or
- (b) Any of your partners, officers or directors not in collusion with the "employee";
- of any dishonest act committed by that "employee" before or after becoming employed by you.
- (2) On the date specified in a notice mailed to you. That date will be at least 30 days after the date of mailing.
- The mailing of notice to you at the last mailing address known to us will be suf-

ficient proof of notice. Delivery of notice is the same as mailing.

- b. **Consolidation-Merger:** The Consolidation Merger General Condition does not apply to this Coverage Form.

3. Additional Definitions

- a. **"Employee"** means
- (1) Any person named in the SCHEDULE, if coverage applies on a **Name Schedule** basis; or
- (2) Any person you engage to perform the duties of a position shown in the SCHEDULE if coverage applies on a **Position Schedule** basis.
- The "Employee" General Definition does not apply to this Coverage Form.
- b. **"Employee Dishonesty"** in Paragraph A.2 means only dishonest acts committed by an identified "employee" acting alone or in collusion with other persons, except you or a partner, with the manifest intent to:
- (1) Cause you to sustain loss; and also
- (2) Obtain financial benefit (other than employee benefits earned in the normal course of employment, including: salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions) for:
- (a) The "employee"; or
- (b) Any person or organization intended by the "employee" to receive that benefit.
- c. **"Occurrence"** means all loss caused by each "employee", whether the result of a single act or series of acts.

APPENDIX B.

December 20, 1990 *policy-changing* ERISA Endorsement, Provision 1, which applies to the Crime General Provisions Form and all Crime Coverage Forms forming part of the policy, and the also *policy-changing* endorsement applying to the Crime General Provisions and all Crime Coverage Forms forming part of the Policy, entitled “Include Designated Agents as employees covered for Employee Dishonesty only.”

**SUBJECT INDEX OF GENERAL ENDORSEMENTS
FOR COVERAGE FORMS A, B, O and P
of the
COMMERCIAL CRIME COVERAGE PART and
COMMERCIAL CRIME POLICY**

SUBJECT	ENDORSEMENT	PAGE
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Coindemnity	CR 50 04 07 88	CR-A-5
Contributing insurance	CR 50 03 01 86	CR-A-4
Policy Change	CR 50 01 10 90	CR-A-1
Territorial Limits, Amend	CR 50 02 01 86	CR-A-3
II. EMPLOYEE DISHONESTY - COVERAGE FORM A - BLANKET		
A. General Use Endorsements		
Agents, Covered for "Employee Dishonesty" Only, Include Designated as Employees	CR 10 24 10 90	CR-B-24
Cancellation, Notice of (See also Stale Endorsements Section)	CR 10 35 01 89	CR-B-32
Deductible, Limit to Specified Positions	CR 10 03 01 89	CR-B-3
Directors or Trustees on Committees, Include Specified as Employees	CH-10 19 10 90	CR-B-19
Employee Dishonesty Coverage Form as Excess Insurance	CR 10 16 01 89	CR-B-16
Employees, Exclude Designated Persons or Classes of Persons	CR 10 02 01 89	CR-B-2
Excess Limit of Insurance for Specified Employees or Positions - Add Schedule	CR 10 15 01 89	CR-B-15
Excess Limit of Insurance for Specified Joint Insured - Add Blanket	CR 10 10 01 89	CR-B-10
Joint Insured, to Add or Delete	CR 10 43 01 89	CR-B-39
Loss Payable	CR 10 46 01 89	CR-B-42
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Loss Payable to Banks for Cooperatives and Federal Intermediate Credit Banks, Require	CR 10 36 01 86	CR B-33
Non-Compensated Officers, Include Specified as Employees	CR 10 26 10 90	CR-B-26
Partners, Include as Employees	CR 10 20 01 86	CR-B-20
Schedule Change, to Make Changes in the Endorsement Providing Excess Limits of Insurance for Specified Employees or Positions	CR 10 51 01 89	CR-B-46
Trading Losses, Exclude	CR 10 04 01 89	CR-B-4
Warehouse Receipts Losses, Exclude	CR 10 05 01 86	CR-B-5
Welfare and Pension Plans, ERISA Compliance	CR 10 27 01 86	CR-B-27
B. Class of Business Endorsements		
Automated Clearing Houses Officers and Employees of Federal Reserve Bank Acting as EFTS Agents, Include as Employees	CR 10 21 01 86	CR-B-21
Commodity Brokers Trading Losses, Limit Amount of Insurance for	CR 10 31 01 86	CR-B-30
Fraternal Orders (For other Applicable Endorsements, See also Non-Profit Organizations) Excess Limit of Insurance for Specified Employees or Positions for Dishonest Acts Only - Add Schedule	CR 10 37 01 89	CR-B-34
Faithful Performance of Duty, Include as Covered Cause of Loss	CR 10 09 01 86	CR-B-9
Unauthorized Advances, Exclude; Annual Audit, Require	CR 10 06 01 86	CR-B-6

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WELFARE AND PENSION PLAN ERISA COMPLIANCE

Provision I. of this endorsement applies to the CRIME GENERAL PROVISIONS FORM and all Crime Coverage Forms forming part of the Policy. The other provisions of this endorsement apply only to the EMPLOYEE DISHONESTY COVERAGE FORM A -BLANKET.

PROVISIONS

In compliance with certain provisions of the Employee Retirement Income Security Act (ERISA):

1. "Employee" also includes any natural person who is:
 - a. A trustee, an officer, employee, administrator or a manager, except an administrator or a manager who is an *independent contractor* of any Employee Welfare or Pension Benefit Plan (hereafter called Plan) insured under this insurance, and
 - b. *Your director or trustee* while that person is handling funds or other property of any Plan insured under this insurance.
2. If any Plan is insured jointly with any other entity under this insurance, you or the Plan Administrator must select a Limit of Insurance for the EMPLOYEE DISHONESTY COVERAGE FORM that is sufficient to provide an amount of insurance for each Plan that is at least equal to that required if each Plan were separately insured.
3. If the Insured first named in the Declarations is an entity other than a Plan, any payment we make to that Insured for loss sustained by any Plan will be held by that Insured for the use and benefit of the Plan(s) sustaining the loss.
4. If two or more Plans are insured under this insurance, any payment we make for loss:
 - a. Sustained by two or more Plans or
 - b. Of commingled funds or other property of two or more Plansthat arises out of one "occurrence" is to be shared by each Plan sustaining loss in the proportion that the amount of insurance required for each such Plan under ERISA provisions bears to the total of those amounts.
5. The **Deductible** provision of the EMPLOYEE DISHONESTY COVERAGE FORM does not apply to loss sustained by any Plan subject to ERISA which is insured under this insurance.

COMMERCIAL CRIME

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**INCLUDE DESIGNATED AGENTS AS EMPLOYEES
COVERED FOR "EMPLOYEE DISHONESTY" ONLY**

This endorsement applies to the CRIME GENERAL PROVISIONS and all Crime Coverage Forms forming part of the Policy.

A. SCHEDULE

Capacity of Agent

Limit of Insurance

B. PROVISIONS

1. "Employee" also includes each natural person, partnership or corporation you appoint in writing to act as your agent in the capacity shown in the SCHEDULE while acting on your behalf or while in possession of Covered Property. These natural persons, partnerships or corporations are not covered for faithful performance of duty, even in the event that this Policy may have been amended by endorsement to provide such coverage on "employees" as they are defined in the Crime General Provisions. The only covered cause of loss for the Agents scheduled above is "employee dishonesty" as defined in the EMPLOYEE DISHONESTY COVERAGE FORM.

Each such agent and the partners, officers and employees of that agent are considered to be, collectively, one "employee" for the purposes of this insurance. However, the Cancellation As To Any Employee Additional Condition in the EMPLOYEE DISHONESTY COVERAGE FORM applies individually to each of them.

2. The most we will pay under this Policy for loss caused by an agent included as an "employee" by this endorsement is the Limit of Insurance shown in the SCHEDULE. That Limit of Insurance is part of, not in addition to, the Limit of Insurance shown in the Declarations as applicable to the EMPLOYEE DISHONESTY COVERAGE FORM.

APPENDIX C.

A Crime Policy provision entitled “Loss Caused by Unidentifiable Employees or Directors” as actually offered in a Crime Policy currently being written

LOSS CAUSED BY UNIDENTIFIABLE EMPLOYEES OR DIRECTORS. If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the employees or directors and the Insured shall be unable to designate the specific employee or employees, director or directors, causing such loss, the Insured shall nevertheless have the benefit of Insuring Clause A, provided that the evidence submitted reasonably proves that the loss was in fact due to fraud or dishonesty of one or more of the said employees, or directors, and provided further, that the aggregate liability of the company for any such loss shall not exceed the sum stated in the Declarations as the limit of the company's liability.

APPENDIX D.

Group Loss Letter which Member Companies may issue to Insureds in a Comprehensive Dishonesty, Disappearance and Destruction Policy, such as is used in connection with Primary Commercial Blanket Bonds. (Approved by Drafting Committee and the Joint Committee).

Interpretive Letter

In reply to your inquiry as to whether or not the above described Policy gives indemnity against the loss or losses caused where you are not able to identify the particular Employee or Employees causing the loss, we have to say, that if you are not able to designate or identify the particular Employee or Employees causing the loss, recovery may, nevertheless, be made, provided you establish reasonable the fact that the loss was due to an act or acts on the part of an Employee or Employees causing such loss through acts coming within the provisions of the Policy and according to its terms and conditions.