

TWO FOR THE PRICE OF ONE:
THE IMPACT OF THE *KAREN KANE* DECISION

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I. INTRODUCTION

If *A.B.S. Clothing Collection, Inc. v. Home Insurance. Co.*,¹ is a dark cloud over fidelity insurers doing business in California, the decision in *Karen Kane, Inc. v. Reliance Ins. Co.*,² is a storm front hovering over those doing business in the jurisdictions comprising the Ninth Circuit. In 1995, the California Court of Appeal in *A.B.S.* held that the standard non-cumulation and prior loss provisions of a commercial crime policy did not unambiguously evidence intent on behalf of the contracting parties to enter into a continuous policy. As a result, the court held that an insured could stack the limits of each separate policy issued by the insurer over successive years. In *Karen Kane*, the Ninth Circuit followed and expanded upon the holding in *A.B.S.*, finding the occurrence definition to be ambiguous as well -- such that an insured could conceivably stack policy limits within a policy year as well as over successive policy years. The *Karen Kane* court did, however, affirm the application of the one-year discovery provision contained in the crime policy, so as to bar coverage under more than one prior policy.

While the “separate vs. continuous” policy analysis has been used by courts for the last century to determine whether an insured can recover multiple policy limits, many fidelity insurers believed that the issue of stacking had largely been resolved through changes in the policy language³ coupled with the courts’ obligation to honor the plain language of the contract. The *A.B.S.* decision demonstrated that there could be no complacency on the issue of stacking policy limits over successive policy periods. However, the impact of *A.B.S.* was unclear. The decision did not generate much of a following in California or other jurisdictions and, as discussed below, it was susceptible to a narrow construction. *Karen Kane* has rescued *A.B.S.* from potential obscurity. It not only follows *A.B.S.*, but arguably provides additional grounds for an insured to seek multiple policy limits.

¹ 41 Cal. Rptr. 2d 166 (Cal. Ct. App. 1995).

² 202 F.3d 1180 (9th Cir. 2000).

³ See William J. Hacker, *Limit of Liability*, in COMMERCIAL CRIME POLICY ch. 14 (Gilbert J. Schroeder ed. 1996).

II. THE RELEVANT POLICY PROVISIONS

Both *A.B.S.* and *Karen Kane* involved interpretation of a standard Commercial Crime Policy.⁴ In particular, the court in *A.B.S.* determined that the non-cumulation and prior insurance provisions did not evidence an intent by the parties that the policy be “continuous.” Those provisions are as follows:

9. Loss Covered Under This Insurance and Prior Insurance Issued by Us or Any Affiliate: If any loss is covered:
 - a. Partly by this insurance; and
 - b. Partly by any prior canceled or terminated insurance that we or any affiliate had issued to you or any predecessor in interest;

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

10. Non-Cumulation of Limit of Insurance: Regardless of the number of years this insurance remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period.⁵

The *Karen Kane* court further held that the term occurrence was ambiguous, but that the policy’s discovery provision was unambiguous and would preclude coverage for loss not discovered within one year of the expiration of the policy. The relevant policy provisions are as follows:

⁴ See David A. Lewis, *History of Fidelity Coverage; Types of Commercial Crime Policies*, in COMMERCIAL CRIME POLICY ch. 1, *supra* note 3.

⁵ Crime General Provisions, Form CR 10 00 1090, in COMMERCIAL CRIME POLICY ex. G, *supra* note 3.

A. *Limit of Insurance*

The most we will pay for loss in any one “occurrence” is the applicable Limit of Insurance shown in the DECLARATIONS.⁶

Occurrence is defined as “all loss caused by, or involving, one or more “employees”, whether the result of a single act or series of acts.”⁷

The standard discovery provision is as follows:⁸

3. Discovery Period for Loss:

We will pay only for covered loss discovered no later than one year from the end of the policy period.

III. THE A.B.S. DECISION

A discussion of the *Karen Kane* decision cannot proceed without a thorough understanding of its direct predecessor, *A.B.S.*⁹ A.B.S. Clothing Collection, Inc. was a manufacturer and retailer of women’s clothing. In approximately May 1991, A.B.S. discovered that two of its employees had embezzled \$1.4 million from A.B.S.’s checking account over a three year period. The insurer, Home Insurance Company issued a crime policy (or policies) to A.B.S. covering the periods April 4, 1989 to April 4, 1990; April 4, 1990 to April 4, 1991; and April 4, 1991 to April 4, 1992.

Home argued that the policy and its renewals constituted a single, continuous policy with only one policy limit. The insured argued that each renewal of the policy constituted a separate policy, and that if the policies were separate it was entitled to recover up to the policy limit for each successive policy. Home

⁶ Commercial Crime Coverage Form A - Blanket, Form No. CR 00 01 10 90, *reprinted in* COMMERCIAL CRIME POLICY ex. K, *supra* note 3.

⁷ *Id.*

⁸ Crime General Provisions, Form CR 10 00 1090, *in* COMMERCIAL CRIME POLICY ex. G, *supra* note 3.

⁹ As noted in *A.B.S.*, the question of whether an insured can recover multiple policy limits for employee dishonesty spanning multiple policy periods is one that courts have been attempting to answer for more than a century. 41 Cal. Rptr. 2d at 168. This article does not attempt to recount the full and varied history of the “separate v. continuous” issue. For a more comprehensive discussion, *see* H.D. Warren, Annotation, *Extent of Liability on Fidelity Bond Renewed from Year to Year*, 7 A.L.R. 2d 946 (1949 & Supp. 1999).

prevailed on summary judgment at the trial court level, and A.B.S. appealed. The California Court of Appeal framed the question before it as follows:

When an employee embezzles funds from an employer over a period of years during which the employer carries insurance against employee dishonesty from the same insurer, may the employer recover up to the insurer's limit of liability for each year in which the embezzlement occurs?

This is a question of first impression in California. Courts in other jurisdictions have generally held if coverage is based on a series of separate, independent contracts, then the employer is entitled to recovery up to the limit of liability for each policy period in which a loss occurs. On the other hand, if there is but one continuous contract, then the employer's recovery cannot exceed the limit of liability stated in the contract regardless of the number of years the coverage has been in force, the number of policies issued or the number of premiums the employer has paid.¹⁰

In contrast to the typical approach, the *A.B.S.* court did not begin its opinion by setting forth the rules of policy interpretation and then analyzing the policy language to determine whether the policy language was clear or ambiguous. Rather, the court first discussed competing policy considerations with regard to finding "separate vs. continuous" policies. On the one hand, the court acknowledged that contracts for fidelity coverage are entered into between sophisticated business persons, who may have bargained for non-cumulative liability limits in exchange for lower premiums.¹¹ In addition, a continuous contract relieves the insurer from the burden of proving when a loss has occurred, so long as the loss occurs during the pendency of the policy. The court noted:

If the insured took out a new policy with a different company each year, it would have to prove the exact time when a particular loss occurred so as to place it under the coverage of the policy issued for a specific year. The insured might fail to recover altogether if it did not discover and report the loss under a particular policy within the period specified in that policy. In contrast, under a continuing contract the period for discovering

¹⁰ 41 Cal. Rptr. 2d at 167.

¹¹ *Id.* at 169 (citing *United States Fidelity & Guar. Co. v. Barber*, 70 F.2d 220, 226 (6th Cir. 1934); *Columbia Hosp. v. United States Fidelity & Guar. Co.*, 188 F.2d 654, 659-660 (D.C. Cir. 1951); *State ex rel. Guste v. Aetna Cas. & Sur. Co.*, 417 So.2d 404, 406, (La. Ct. App. 1982); and *Santa Fe Gen. Office Credit Union v. Gilberts*, 299 N.E.2d 65, 71 (Ill. App. Ct. 1973).

and reporting losses follows the total period during which the contract has been in effect.¹²

The *A.B.S.* court further acknowledged that by limiting coverage for an employee's dishonesty to a single policy limit, employers were encouraged to be vigilant in preventing and/or ferreting out employee dishonesty. This in turn would hold down insurance rates and ultimately reduce the insured's costs, and the resulting costs of the insured's goods and/or services.¹³

On the other hand, the court cautioned, a finding of a continuous policy might produce an unfair result. For example, an insurer who sustained a loss over four policy periods might potentially recover a policy limit for each year in the event of separate policies, but could only recover single policy limit in the event of a continuous policy -- despite having paid the same amount in premiums over four years.¹⁴ Foreshadowing its eventual conclusion, the court said:

[C]ourts generally have recognized affording a recovery equal to only one year's policy limit when the insured has paid several years' premiums is contrary to the insured's reasonable expectation of coverage. Therefore, courts will not limit the insurer's liability for losses incurred during successive years of its own coverage unless there is clear and unambiguous language showing the parties intended to enter into one continuous contract.¹⁵

Only after discussing the insured's perceived reasonable expectations did the *A.B.S.* court turn to the question of whether the subject policies contained "clear and unambiguous language showing the parties intended to enter into one continuous contract." Significantly, the court at no time purported to engage in a plain-reading of the policy to determine how the provisions of the policy, as written, applied to the claimed loss. Instead, the court again foreshadowed its conclusion by stating:

¹² 41 Cal. Rptr. 2d at 169.

¹³ *Id.* at 169-70.

¹⁴ Of course, this result is highly unlikely. Most crime policies require discovery within one year or less following the policy expiration. Moreover, they only provide coverage for losses sustained during the policy period.

¹⁵ 41 Cal. Rptr. 2d at 170 (citations omitted). *But see* Warren, *supra* note 9 (the weight of authority tips in favor of continuous contracts and in most cases, provisions against aggregate liability will be enforced).

Courts called upon to construe “non-cumulation” clauses similar to the one in Home’s policies have found them ambiguous at best. While the clause might be construed to mean the insurer’s liability is limited to a maximum aggregate amount, it can also reasonably be read to mean the limit of liability in one policy year cannot be carried over and added to the limit of liability in the succeeding policy year; nor can a loss in excess of the policy limit in one year be carried over and applied against the limit of liability in a succeeding year.¹⁶

The cases relied upon by *A.B.S.* for that sweeping generalization are inapposite. For example, in *Columbia Heights*,¹⁷ the policy contained a provision which stated that the insurer’s aggregate limit of liability “shall apply separately to each consecutive annual period.” This provision directly conflicted with the policy’s non-cumulation provision. Similarly, in *Penalosa*,¹⁸ the court focused on the policy’s occurrence provision which provided that dishonest acts of an employee “during the policy period shall be deemed to be one occurrence for applying the limit of liability.”¹⁹ In contrast, as set forth above, the standard-form occurrence provision refers to all dishonest acts of an employee without regard to a period of time or a specific policy period.

The *A.B.S.* court’s analysis of whether the prior loss provision evidenced an intent that the policy be continuous is even more puzzling. The court acknowledged that the prior loss provisions operated to provide an insured with coverage for loss occurring during a prior policy period (whether issued by the same or a different insurer). However, the court disagreed that the prior loss provision together with the non-cumulation provision demonstrated an intention that the policies be non-cumulative, pointing out that in some circumstances, coverage under the prior loss provision would be for the lesser of the current or prior policy limits.

Perhaps in recognition of the weakness of its prior loss argument, the *A.B.S.* court argued that the Home policies bore further indicia of the intent to have separate policies. In particular, the court focused on Home’s issuance of different

¹⁶ 41 Cal. Rptr. 2d at 171 (citing *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 36 (Minn. 1979); *Penalosa Coop. Exch. v. Farmland Mut. Ins.Co.*, 789 P.2d 1196, 1200 (Kan. Ct. App. 1990); *City of Miami Springs v. Travelers Indem. Co.*, 365 So.2d 1030, 1031-1032 (Fla. Dist. Ct. App. 1978); *Great Am. Indem. Co. v. State*, 229 S.W.2d 850 (Tex. Civ. App. 1950).

¹⁷ *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32 (Minn. 1979)

¹⁸ *Penalosa Coop. Exch. v. Farmland Mut. Ins. Co.*, 789 P.2d 1196 (Kan. Ct. App. 1990).

¹⁹ *Id.* at 1199.

policy numbers in each of the three years it issued policies to the insured, and that each of the policies provided specific beginning and ending dates for coverage (e.g. April 4, 1989 to April 4, 1990). In fact, the *A.B.S.* court distinguished cases which found successive policies to be continuous, on the ground that those cases involved insurance contracts with no expiration date.²⁰

Finally, the *A.B.S.* court rejected the insured's argument that, because the policy provided it would pay no more than the Limit of Liability for any one occurrence, the insured was entitled to only a single Limit of Liability. The court concluded:

These provisions create an ambiguity as to the extent of the Home's liability because while defining "occurrence" as "all loss" suggests there can be only one occurrence during the life of the insurance, the provision restricting liability "for any one occurrence" suggests there could be more than one occurrence.²¹

The *A.B.S.* court's reasoning is flawed. The definition of the term occurrence does not imply there can be only one occurrence during the policy period. Rather, it provides that there can be only one occurrence involving the same employee or employees and/or the same act or series of related acts. Unrelated acts of dishonesty by different employees may still result in more than one occurrence. In addition, the *A.B.S.* court again cited to the *Penalosa* case even though, as discussed above, the definition of occurrence in the *Penalosa* case included the words "during the policy period."

A.B.S. concluded by explaining that the non-cumulation and prior loss provisions did not clearly and unambiguously demonstrate that the contract was intended to be continuous, such that Home was not entitled to summary judgment upon payment of a single policy limit.²²

²⁰ 41 Cal. Rptr. 2d at 171-72.

²¹ *Id.* at 174.

²² The dissent by Justice Wood provides a cogent and detailed critique of the *A.B.S.* decision. Among other things, Justice Woods decries the majority's improper search for ambiguity when the policy's plain meaning is clear. *Id.* at 1488. He also asks the salient question, "[W]hy would a policy address the issue of noncumulation if it only relates to a single period?" *Id.* at 181.

IV. THE KAREN KANE DECISION

In *Karen Kane, Inc. v. Reliance Insurance Co.*,²³ yet another California apparel manufacturer was victimized by a faithless employee. In late 1996, Karen Kane's president discovered that an employee, Norris Dantzler, had been defrauding the company by padding and/or fabricating suppliers' invoices, with the cooperation of conspirators, since 1992. Reliance stipulated to issuing three crime policies to Karen Kane,²⁴ effective December 19, 1993 to December 19, 1994; December 19, 1994 to December 19, 1995; and December 19, 1995 to December 19, 1996. Each of the employee dishonesty policies contained identical language, and identical limits of insurance of \$250,000. Karen Kane sustained losses in excess of the policy period during the first two policy periods, and a loss just under the policy limits during the last policy year. Karen Kane filed separate proofs of loss with Reliance for each of the policy periods for the following amounts:

Year 3 1995-1996	\$222,481.15
Year 2 1994-1995	\$250,000
Year 1 1993-1994	\$434,978.07

By letter dated August 21, 1996, relying on the California Court of Appeal's decision in *A.B.S.*, Karen Kane contended that Reliance was obligated to pay up to its policy limits under each of its policies for the employee dishonesty claim. In response, Reliance contended that pursuant to the occurrence and prior loss provisions²⁵ in its policy, only the 1995-1996 policy was implicated by the claim, and it was only obligated to pay a single policy limit of \$250,000.

A. *The Lower Court Decision*²⁶

Karen Kane sued Reliance. On cross-motions for summary judgment regarding the number of policy limits implicated by Karen Kane's employee dishonesty claims, the district court granted summary judgment in favor of Reliance and held that only the policy limit afforded by the 1995-1996 policy was required to be paid.

The district court held that Reliance properly denied coverage in excess of a single policy limit based upon a determination that the fraudulent scheme

²³ 202 F.3d 1180 (9th Cir. 2000).

²⁴ Reliance conceded that the three policies were separate, in an apparent attempt to avoid the "separate vs. continuous" analysis relied upon by the *A.B.S.* court.

²⁵ The provisions are set forth *supra* in Section II.

²⁶ *Karen Kane, Inc. v. Reliance Ins. Co.*, No. CV 97-3295-WMB, 1998 U.S. Dist. LEXIS 22743 (C.D. Cal. Feb. 18, 1998).

constituted a single occurrence for which only a single limit of insurance would apply. Possibly taking its cue from Justice Wood's dissent in *A.B.S.*, the district court did not ask whether the prior loss, or occurrence provisions manifested a clear and unambiguous intent by the parties to enter into continuous or separate policy. Rather, the court focused on the plain meaning of policy terms, and the application of said terms to the facts of the case.²⁷

The district court did not find the occurrence definition to be ambiguous, and rejected the insured's argument that its employee's repeated fraudulent acts (in paying hundreds of false invoices to co-conspirators) each constituted a separate occurrence under the policy. Instead, the court held that the employee's conduct fell squarely within the policy's definition of occurrence, i.e. "all loss caused by, or involving, one or more 'employees,' whether the result of a single act or series of acts." Relying on *EOTT Energy Corp. v. Storebrand International Insurance Co.*,²⁸ the district court noted that plaintiff's employee had admitted he was engaged in a scheme with his confederates, and therefore his series of acts undertaken in furtherance of the scheme constituted one occurrence.

The district court relied on *A.B.S.*'s own interpretation of the "prior loss provision," in finding the provision unambiguous. The court explained:

In *A.B.S.*, the court found that the policy's "prior loss provision," which used identical language to the one at issue here, was ambiguous; the court reached this decision, however, in the context of determining whether the defendant had issued separate policies or a continuous one. The Court observed, however, that "the true purpose of this type of 'prior loss' provision is to prevent the insured from recovering for the same loss under both the previous policy and the current policy." Indeed, with this purpose in mind, it appears that Reliance's prior loss provision precludes recovery for "any loss" partly covered by the current policy (1995-96) and prior policies (1994-95 and

²⁷ The district court recognized that the *A.B.S.* decision was reached "in the context of determining whether the defendant had issued separate policies or a continuous one," and did not follow the traditional analytical framework. *Id.* at *20.

²⁸ 52 Cal. Rptr. 2d 894 (Cal. Ct. App. 1996). In *EOTT*, although the term occurrence was not defined in the policy, the appellate court held that the number of occurrences was properly determined by reference to the cause of the loss. Accordingly, the court held that if the insured could establish that 650 separate fuel thefts were part of a "systematic and organized scheme to steal" its diesel products, then the thefts would constitute a single occurrence, subject to a single policy deductible.

1993-94), as Dantzler's fraud constitutes one occurrence of loss rather than multiple ones.²⁹

The district court further held that even if the insured were permitted to recover under the second policy (1994-95), it was not entitled to payment under the first policy (1993-94) based on the application of the one-year discovery provision.³⁰ Specifically, because the insured did not discover Dantzler's fraud until May 1996 (more than one year after the expiration of the first policy), it could not recover under the first policy period. As the court recognized:

“California has long recognized the validity of discovery of loss provisions in fidelity insurance policies.’ *Admiralty Fund v. Peerless Ins. Co.*, 143 Cal.App.3d 379, 384, 191 Cal.Rptr. 753 (1983); see also *id.* at 387, 191 Cal.Rptr. 753 (‘Public policy, as well as basic notions of fairness, dictate that a claimant who does not take action within the specified period acquiesces to the wrong committed. In such cases the courts properly show no hesitation in enforcing the discovery clause.’).”

The district court rejected Karen Kane's argument that the discovery provision should have been tolled. There were no facts to support the application of the narrow exception to the discovery provision for “adverse domination and control, in which the very persons that control a company also perform the wrongdoings.”³¹

The district court granted summary judgment to Reliance, concluding that Reliance had neither breached the policy nor acted in bad faith, and Karen Kane appealed.

B. The Ninth Circuit's Opinion

The district court's opinion was affirmed in part and reversed in part by the United States Court of Appeals for the Ninth Circuit. The determination that the one-year discovery provision barred coverage under the first policy was affirmed on the grounds identified above. However, the district court's findings with regard to the occurrence and prior loss provisions were reversed.

²⁹ *Karen Kane*, 1998 U.S. Dist. LEXIS 22743 at *20-21 (citations omitted).

³⁰ The Reliance policy provided it would “pay only for covered loss discovered no later than one year from the end of the policy period.” *Id.* at *25.

³¹ *Id.* at *28 (quoting *Admiralty Fund*, 191 Cal. Rptr. 2d at 755).

The Court of Appeals held that the district court should have followed *A.B.S.* because *A.B.S.* involved similar facts, identical policy provisions, and the same basic question, i.e. the number of applicable policy limits. Although the Court recognized that the *A.B.S.* analysis was framed in the context of the “separate v. continuous” analysis (while Reliance had stipulated to issuing separate policies), it rejected the district court’s attempt to distinguish its holding from that in *A.B.S.*³² The court stated:

While this argument has a certain appeal, a careful examination of *A.B.S.* suggests that such a narrow reading of the opinion is unpersuasive. Although strictly speaking the *A.B.S.* court decided only whether the policies at issue in that case constituted separate policies or a single continuous policy, reading the *A.B.S.* opinion as a whole makes clear that the very reason the *A.B.S.* court concerned itself with this issue was to answer a more fundamental question. . . . The abstract, essentially academic question of ‘whether a series of one-year policies issued to the insured were separate or continuous’ possessed no interest to the *A.B.S.* court independent of its bearing on the underlying question of the insurer’s liability.³³

The Court concluded that because *A.B.S.* had found identical occurrence and prior loss provisions to be ambiguous, the district court should have reached the same conclusion and the same result -- i.e. liability under the successive policies. Interestingly, the Court made no attempt to explain or otherwise support the conclusion by the *A.B.S.* court that the prior loss provision was ambiguous. However, it did separately determine that the term “occurrence” was ambiguous.

1. Interpretation of “Occurrence.”

Specifically, Karen Kane found that the term “occurrence” was ambiguous as to whether it was “temporally limited by each policy period, in which case [the principal’s] ongoing fraudulent scheme would be recoverable as a separate ‘occurrence’ within each period.”³⁴ The Court followed *A.B.S.*’s reasoning, i.e., that the occurrence definition implied there could be only one occurrence, while the limit of liability provision implied there could be multiple occurrences. In support

³² *Karen Kane*, 202 F.3d at 1185-1186.

³³ *Id.* at 1186.

³⁴ *Id.* at 1188.

of this interpretation, the *Karen Kane* court relied upon *Stonewall Insurance Co. v. City of Palos Verdes Estates*.³⁵

In fact *Stonewall* is completely inapposite. It contains a definition of occurrence which bears no resemblance to the standard crime policy definition,³⁶ and it involves a “continuous trigger” theory of coverage under a general liability policy. In contrast, the lower court in *Karen Kane* relied upon a California case where the term “occurrence” was undefined -- underscoring the reasonableness and lack of ambiguity in the occurrence definition at issue.³⁷

The Ninth Circuit also found the term “occurrence” to be ambiguous because:

“Occurrence” could either (1) refer to the entire [employee] conspiracy (as a “series of acts,” namely thefts), the position urged by Reliance; or (2) refer to each theft within the [employee] conspiracy (as a “series of acts,” namely, the multiple steps involved in each theft).³⁸

However, the Court did not pursue this theory. At first blush, such an interpretation unreasonably ignores the plain language of the definition, since there can only be one occurrence per employee such that multiple thefts by one or more of the same employees would still constitute one occurrence. Moreover, this interpretation conflicts with the general rule that the number of occurrences are determined by the number of causes.³⁹

In *Business Interiors, Inc. v. Aetna Casualty and Surety Co.*,⁴⁰ the insured argued that it had sustained forty separate occurrences, each subject to the policy’s \$10,000 limit, each time its employee had forged or altered a check. The court held

³⁵ 54 Cal. Rptr. 2d 176 (1996).

³⁶ In the general liability policy at issue in *Stonewall*, “occurrence” was defined as “an event or continuous or repeated exposure to conditions which causes . . . damage to property during the policy period that is neither knowingly nor intentionally caused. . . .” *Id.* at 188.

³⁷ See *EOTT Energy Corp. v. Storebrand Int’l Ins. Co.*, 52 Cal. Rptr. 2d 894, 900-01 (Cal. Ct. App. 1996) (courts have concluded that a series of related acts attributable to a single cause may be treated as a single occurrence).

³⁸ *Karen Kane*, 202 F.3d at 1185.

³⁹ *EOTT*, 52 Cal. Rptr. 2d at 900-01.

⁴⁰ 751 F.2d 361 (10th Cir. 1984).

that an occurrence is determined by the cause or causes of the resulting injury, and since the cause in this case was the continuing dishonesty of one employee, there was only a single occurrence, and therefore a single loss.⁴¹ Similarly, in *Omne Services Group, Inc. v. Hartford Ins. Co.*,⁴² the court held that an employee's conduct in defrauding his employer by placing the workers of co-conspirators on his employer's payroll constituted a single occurrence. As in *Business Interiors*, the court focused on the cause of the loss as being the conduct of a single employee.⁴³

2. Enforceability of the Discovery of Loss Provision.

The Ninth Circuit left the district court's ruling with regard to the one-year discovery provision intact. It agreed that the language of the discovery provision providing that the insurer would "pay only for covered loss discovered no later than one year from the end of the policy period" was unambiguous. It further agreed with the district court that such provisions are generally valid and strictly enforceable, except in situations of "adverse . . . domination and control."

The Ninth Circuit also upheld the district court's grant of summary judgment on the claim of bad faith, finding that Reliance's interpretation was reasonable.⁴⁴

V. CONCLUSION: THE IMPACT ON MULTIPLE POLICY IMPACT CLAIMS

Whether *Karen Kane* will influence other jurisdictions to revisit the archaic "separate vs. continuous" analysis is unclear. Thus far, it has not been followed in California or elsewhere. It is possible that *Karen Kane* could be called into question if other California courts decline to follow *A.B.S.* This paper has attempted to reveal the weaknesses inherent in both decisions.

It is inappropriate for the courts to answer questions about a policy's application by reference to an academic construct (regardless of its age), rather than

⁴¹ *Id.* at 363.

⁴² 2 F.Supp. 2d 714 (E.D.Pa. 1998)

⁴³ In *Omne*, the fact that the employee entered into the scheme with two different customers of the insured did not result in the finding of multiple occurrences. *Id.* at 719. *But see American Commerce Ins. Brokers, Inc. v. Minnesota Mutual Fire and Cas. Co.*, 551 N.W.2d 224 (Minn. 1996) (a dishonest employee's utilization of two general methods of stealing (converting cash payments from customers and issuing unauthorized checks to herself) found to constitute two separate occurrences).

⁴⁴ *Id.* at 1190.

through a reasoned interpretation and application of the specific policy's provisions. *A.B.S.* and *Karen Kane* failed to follow the well-established rules of policy interpretation. Instead, those courts engaged in a result-oriented analysis based upon the conclusion that, in general, insureds should be permitted to recover insurance proceeds for each year they are insured against employee dishonesty -- regardless of policy language to the contrary.

A.B.S.'s conclusion that an insured would reasonably expect insurance to be available for employee dishonesty spanning multiple policy periods is no more compelling than the reverse argument. Crime policy premiums are typically inexpensive, such that permitting an insured to recover multiple policy limits arising out of one dishonest scheme is an unfair windfall to the insured. Moreover, insureds, not insurers, are in the best position to prevent and/or discover employee dishonesty. While some insureds may benefit from lax management and oversight by potentially being permitted to obtain multiple policy limits, the public interest is not served by encouraging businesses to rely on insurance to the detriment of prudent security and oversight by management.

The net result of *A.B.S.* and *Karen Kane* is that insureds who sustain employee dishonesty losses which span more than one policy period will potentially be permitted to recover two limits of liability (assuming a one-year discovery provision). Of course, in the event the policy requires that discovery take place during the policy period, the insured will be limited to a single policy limit -- unless the court agrees as in *Karen Kane*, that the "occurrence" provision may result in a finding of numerous occurrences within a policy year.