

A Dishonest Employee: A Single Cause of Loss or
A Man of a Thousand Occurrences? An Analysis
of Single Loss Limitations in Modern Crime Policies
in the Wake of *Auto Lenders Acceptance
Corporation v. Gentilini Ford, Inc.*

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I. Introduction

There is an old French proverb, *Le Diable chie toujours au même endroit*, a PG version of which has become a staple of American crime dramas: “a criminal always returns to the scene of the crime.” In the context of commercial crime policies providing coverage for employee dishonesty, this adage takes on special significance. This is because dishonest employees will *literally* return to the scene of the crime, that is, the workplace, five days a week, month after month, possibly for years, all the while exposing their employers to loss in the form of continuous and multiple thefts, embezzlement, kickback schemes, and the like.

Protecting against this type of long-term risk¹ is one of the primary reasons for employee theft insurance.² Knowing the amount of

¹ It has been documented statistically that there is a direct correlation between the tenure of a dishonest employee and the magnitude of the employer’s loss due to his dishonesty. *Report to the Nation on Occupational Fraud and Abuse*, 2004 ASS’N OF CERTIFIED FRAUD EXAMINERS at 31. This correlation is attributed to the fact that, the longer an employee works for an organization, the more trust and responsibility the organization will tend to place in the employee, thereby creating greater opportunities for that employee to commit fraudulent acts without detection. *See id.*

² This article addresses issues concerning single or multiple losses/occurrences as they relate to policy limits and deductibles in crime and

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coverage available in the event of such losses is essential to both insureds, in deciding how much insurance to purchase, and to underwriters, in calculating premiums.³ In order to provide certainty as to that issue, modern commercial crime policies contain a single loss limitation.⁴ Such provisions typically define as a single “occurrence” all loss caused by (i) one or more dishonest acts by a single employee, and/or (ii) an ongoing scheme by one or more employees to defraud, or steal from, the employer.

To that end, the standard Commercial Crime Policy,⁵ which provides for a single loss limitation per “occurrence,” defines “occurrence,” as it respects employee theft coverage, as follows: “‘Occurrence’ means all loss caused by, or involving, one or more ‘employees’, whether the result of a single act or a series of acts.”⁶ The Financial Institution Bond⁷ approaches this issue using somewhat different language, defining “Single Loss” (as opposed to “occurrence”) as all covered loss resulting from . . . “all acts or omissions . . . caused by any person (whether an Employee or not) or in which such person is

fidelity policies. In this context, distinctions between policies insuring against “employee dishonesty” and “employee theft” are not particularly relevant, and those terms will thus be used interchangeably. For a discussion of employee dishonesty versus employee theft coverage, see Toni Scott Reed and Kevin White, *What is Employee Dishonesty*, in COMMERCIAL CRIME POLICY 31, (Randall I. Marmor & John J. Tomaine eds., 2d ed. 2005). For a discussion of who is an “employee” subject to coverage, see Armen Shahinian and Scott D. Baron, *Who is a Covered “Employee” Under the Financial Institution Bond?* in FINANCIAL INSTITUTION BONDS 103 (Duncan Clore ed., 2d ed. 1998).

³ See Edward Gallagher, *Limit of Liability*, in COMMERCIAL CRIME POLICY, *supra* note 2, at 451.

⁴ See *id.*

⁵ Commercial Crime Policy (Discovery Form), Form No. 00 22 07 02, *reprinted* in COMMERCIAL CRIME POLICY, *supra* note 2, at 691 [hereinafter Commercial Crime Policy].

⁶ *Id.* at § F.14.a.

⁷ Financial Institution Bond, Standard Form No. 24 (revised Jan. 1986), *reprinted* in STANDARD FORMS OF THE SURETY ASSOCIATION OF AMERICA [hereinafter Financial Institution Bond].

implicated[.]”⁸ Note, however, that with respect to crimes *not* involving employees of the insured, the Financial Institution Bond defines “Single Loss” as all covered loss resulting from “any one act or series of related acts of burglary, robbery,”⁹ etc. As discussed below, other crime policies have employed terms defining as a single occurrence all loss caused by or resulting from a “series of acts” or, alternatively, a “series of related acts.”¹⁰ Each such “occurrence” (or, in the case of the Financial Institution Bond, “single loss”) is subject to (i) a “per occurrence” limit of insurance and (ii) a “per occurrence” deductible amount, both of which are typically set forth on the declarations page of the policy.

The per occurrence limit of insurance and deductible amount are central to the bargain struck between the insurer and the insured and are primary factors, together with the size of the insured and its loss history, in determining the premium to be charged for the policy.¹¹ Predictability in the application of these policy terms is needed in order for the insured to know what it is buying, for the insurer to know what it is selling, and for agents and brokers to know what recommendations to make as to the amount of coverage and the appropriate deductible for their specific accounts. Take, for example, an insured that deals in large sums of money, but believes that its own safeguards provide adequate protection against petty thefts. Such an insured may primarily wish to insure

⁸ *Id.* at *Single Loss Limit of Liability*, Conditions and Limitations, § 4(c).

⁹ *Id.* at *Single Loss Limit of Liability*, Conditions and Limitations, § 4(a).

¹⁰ See, e.g., Crime Protection Policy Standard Form No. SP 0001 (Surety Association of America, revised March 2000) § 10.a., reprinted in COMMERCIAL CRIME POLICY, *supra* note 2, at 677 (defining “occurrence,” for purposes of employee dishonesty coverage, as “all loss or losses caused by, or involving, one or more employees, whether the result of a single act or series of related acts”) [hereinafter Crime Protection Policy].

¹¹ Federal Deposit Insurance Company, *Risk Management Manual of Examination Policies* § 4.4, available at http://www.fdic.gov/regulations/safety/manual/section4-4_toc.html (discussing considerations for banks in determining how much fidelity coverage to purchase and explaining how higher deductibles result in lower premiums, but also require the insured bank to absorb greater risks).

against the risk of large-scale insider-frauds and, for that reason, may seek a policy with a \$10,000,000 per-occurrence limit of insurance. Of course, the higher the limit of insurance, the higher the premium will be for the policy. However, by absorbing the risk of smaller-scale employee thefts and accepting, for example, a \$50,000 per-occurrence deductible, that insured may be able to obtain the insurance it wants at an acceptable premium. The business of another insured, such as a retailer or warehouse, may primarily consist of small-scale transactions in consumer goods of less than \$500. Such an insured may be concerned chiefly about petty theft. Purchasing a crime policy with a deductible of less than \$500, however, would naturally be relatively expensive. Fortunately, because crime policies treat multiple thefts by the same employee as one occurrence, that insured may be able to obtain appropriate, affordable crime coverage, providing for a \$2,500 per-occurrence deductible.

The plurality of courts have found such single loss provisions to be unambiguous and have interpreted them in a manner so as to find a single occurrence in cases involving long-term and repeated acts of dishonesty by employees.¹² Unfortunately, there are exceptions, the

¹² See, e.g., *Wausau Bus. Ins. Co. v. U.S. Motels Mgmt., Inc.*, 341 F. Supp. 2d 1180 (D. Colo. 2004) (wide variety of thefts and frauds by a single employee over a four-year period found to constitute a single occurrence); *Omne Servs. Group, Inc. v. Hartford Ins. Co.*, 2 F. Supp. 2d 714 (E.D. Pa. 1998); *Bethany Christian Church v. Preferred Risk Mut. Ins. Co.*, 942 F. Supp. 330 (S.D. Tex. 1996) (employee's thefts through altered and unauthorized checks over a three-year period held to be a single occurrence); *Diamond Trans. Sys., Inc. v. Travelers Indem. Co.*, 817 F. Supp. 710, 711-12 (N.D. Ill. 1993) (holding that an employee's three-year fraudulent check-cashing scheme was a single occurrence); *Reliance Ins. Co. v. Treasure Coast*, 660 So. 2d 1136, 1137 (Fla. Dist. Ct. App. 1995) ("although this employee's embezzlements occurred over a four year period, they constitute a single occurrence"); *Jefferson Parish Clerk of Court Health Ins. Trust Fund v. Fid. & Dep. Co. of Maryland*, 673 So. 2d 1238, 1245 (La. Ct. App. 1996) (repeated dishonest acts by the same employee held to be one occurrence); *Christ Lutheran Church v. State Farm Fire and Cas. Co.*, 471 S.E.2d 124 (N.C. Ct. App. 1996), *aff'd*, 477 S.E.2d 33 (N.C. 1996) (employee's two-year embezzlement scheme was held to constitute one occurrence); *Valley Furniture & Interiors, Inc. v. Trans. Ins. Co.*, 26 P.3d 952 (Wash. Ct. App. 2001) (six years of embezzlement by payroll manager, for himself and for two other

most recent and notable of which is the decision by the New Jersey Supreme Court in *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*,¹³ a case which, if followed and applied broadly, could adversely affect the interests of both insurers and insureds in understanding and making business decisions regarding per-occurrence limits and deductibles in crime policies.

II. An Analysis of the Facts, the Policy Terms, and the Holding in Gentilini

In *Gentilini*, a dishonest credit manager at an auto dealership, Mr. Carpenter, assisted twenty-seven separate customers in falsifying their credit applications in order to purchase vehicles under installment sales contracts.¹⁴ The fraud consisted of providing the customers with phony or altered paystubs and, in some cases, false drivers licenses, copies of which would be submitted to an auto financing company. Contemporaneous with each sale, the dealer would assign the installment sales contracts to the financing company, which would fund the credit portion of the purchases.¹⁵ The contract between the dealer and the financing company, however, required the dealer to repurchase the installment sales contracts in the event, among other things, of any inaccuracies in the subject credit applications.¹⁶ When the fraud was discovered, the financing company sued the dealer.¹⁷ The dealer settled the case and sought to recover its loss from its insurer under an employee dishonesty extension to a commercial property policy.¹⁸

employees, was a single occurrence). *See also* *Bus. Interiors, Inc. v. The Aetna Cas. and Sur. Co.*, 751 F.2d 361 (10th Cir. 1984) (thirty-one forgeries and nine material alterations to checks by same employee over seven-month period was one occurrence).

¹³ 854 A.2d 378 (N.J. 2004). While *Gentilini* involved numerous coverage issues, this article examines only the parts of the decision relating to the single versus multiple occurrence issue.

¹⁴ *See id.* at 381.

¹⁵ *Id.* at 381-82.

¹⁶ *Id.*

¹⁷ *Id.* at 382.

¹⁸ *See id.* at 252-53.

At issue in *Gentilini*, among other things,¹⁹ was whether the auto dealership's alleged loss was one "occurrence" for purposes of the policy's per-occurrence limitation of insurance or, alternatively, whether the claim implicated twenty-seven separate "occurrences." The policy in *Gentilini*, which contained a \$5,000 per-occurrence limitation for employee dishonesty claims, defined "occurrence" in a manner that is similar, although not identical, to the standard Commercial Crime Policy:

All loss or damage:

- (1) Caused by one or more persons; or
- (2) Involving a single act or series of related acts; is considered one occurrence.²⁰

Citing to subparagraph (1) of the above-quoted provision, the insurer argued that this provision "limits occurrences to one per employee/wrongdoer."²¹ The *Gentilini* court did not directly address the insurer's proffered interpretation of this provision of the policy. Instead, the court stated that it would not read the subject provision "literally," concluding that to do so would always limit all losses to a single recovery "because losses of that type must, by their very nature, be 'caused by one or more persons.'"²² The court, therefore, determined to restrict the meaning of the subject provision "so as to enable fair fulfillment of the stated policy objective."²³ Applying that doctrine, the *Gentilini* court concluded that "a fair reading" of the subject provision "simply means that for each loss of property covered by the policy there can only be one recovery, regardless of the number of employees that may have caused the loss."²⁴ In adopting that "fair" interpretation, however, the *Gentilini* court

¹⁹ As noted, the *Gentilini* decision also dealt with other important issues of interest to fidelity insurers, including the standards for proving an employee's "manifest intent" to harm the employer, what constitutes "direct loss," and whether the insured may recover its attorneys' fees from the insurer. A discussion of those issues is beyond the scope of this article.

²⁰ 854 A.2d at 396.

²¹ *Id.*

²² *Id.* at 397.

²³ *Id.*

²⁴ *Id.*

ignored the fact that the subject loss limitation expressly applied to “all loss or damage,” rather than to “each loss.” The *Gentilini* court also ignored a basic maxim of contract construction by rendering the “caused by one or more persons” clause entirely superfluous.²⁵ By way of example, if ten employees got together and stole the contents of their employer’s safe, that loss would clearly be viewed the result of “a single act or series of related acts.” Even in the absence of the “caused by one or more persons” clause, as interpreted by the *Gentilini* court, the subject example would be deemed to be one “occurrence,” and the insured’s recovery would be subject to the applicable single loss limitation. It is difficult to imagine a scenario in which a single (employee dishonesty) loss caused by multiple persons would not involve “a single act or series of related acts.” Thus, under the *Gentilini* court’s reading, the policy’s “caused by one or more persons” language would appear to have no practical effect.

The *Gentilini* court also ruled, as a matter of law,²⁶ that the subject claim, repeated similar dishonest acts by the same employee, “did not involve ‘a single act or series of related acts.’”²⁷ On this issue, the *Gentilini* court quoted and stated its agreement with a point made by

²⁵ See generally 17A AM. JUR. 2D *Contracts* § 377, noting as follows:

It is a fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions, including the signatures, must be given meaning, and force and effect, if that can consistently and reasonably be done. An interpretation which gives reasonable meaning to all of its provisions will be preferred to one which leaves a portion of the writing useless, meaningless, or inexplicable.

²⁶ Another court that reviewed the issue of whether certain losses were caused by a “systematic and organized scheme,” and therefore constituted a single “loss,” observed that the issue was “a mixed issue of law and fact, but one primarily involving a factual, practical application.” *Pasternack v. Boutris*, 99 Cal. App. 4th 907, 924 (Cal. Ct. App. 2002). The decision in *Pasternack* involved the construction of a statute, rather than an insurance policy, but the *Pasternack* court cited and largely based its analysis upon case law involving crime or fidelity policies with per-occurrence limits and deductibles.

²⁷ 854 A.2d at 397.

the dissenting judge in the Appellate Division decision on appeal²⁸ that “the common pattern of these transactions cannot fairly be said to transform them into a single event.”²⁹ Of course, the policy at issue defined “occurrence,” not as a “single event,” but as all loss or damage involving “a series of related acts[.]” In equating “occurrence” with a “single event,” both the *Gentilini* court and the dissenting appellate division judge below appear to have based their understanding of the term “occurrence,” not upon the policy definition before it, but upon how the term is used or understood, with or without a definition, in entirely different types of policies, which equate “occurrence” with an “event” or “incident.”³⁰

Illustrative of this mistake in reasoning is the fact that the only “occurrence” case cited by the dissent in the Appellate Division’s

²⁸ In New Jersey state court, a litigant has an automatic right to appeal to the New Jersey Supreme Court if the intermediate appellate court’s decision included a dissent.

²⁹ 854 A.2d at 397 (quoting *Auto Lenders Acceptance Corp. v. Gentilini*, 816 A.2d 1068, 1080 (N.J. Super. Ct. App. Div. 2003)).

³⁰ See *EOTT Energy Corp. v. Storebrand Int’l Ins. Co.*, 45 Cal. App. 4th 565, 574-75 (Cal. Ct. App. 1996) (observing that “courts interpreting *property* insurance policies have held that the plain meaning of ‘occurrence’ is an ‘event,’ or ‘incident’”). See also *World Trade Center Properties v. Hartford Fire Ins. Co.*, 345 F.3d 154, 186-90 (2d Cir. 2003), which contains a detailed analysis of how, under New York law, the term “occurrence,” when left undefined, is understood and applied differently in third-party liability cases and in first-party property cases, and holds with respect to the latter that the parties’ intent, and whether the collapse of the Twin Towers was one occurrence or, alternatively, “was a single, continuous planned event,” were issues of fact precluding summary judgment. Cf. *SR Int’l Bus. Ins. Co. v. World Trade Center Props., LLC*, 222 F. Supp. 2d 385, 398 (S.D.N.Y. 2002), holding the Twin Towers disaster to be a single “occurrence” under a different policy, which defined “occurrence” as follows:

“Occurrence” shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.

Id. at 398.

decision in *Gentilini*, which the dissent found “entirely inapposite,” had to do with whether, under a liability policy, the drowning death of two brothers was one occurrence “where one had jumped in to save the other.”³¹ The cited case, for its part, had defined “occurrence” as “an accident, including injurious exposure to conditions which results, during the policy term, in bodily injury or property damage.”³² The term “accident,” however, was not defined in the policy, and the court therefore applied the “generally accepted definition” that “an ‘accident’ is a sudden and fortuitous event, unexpected by the person to whom it happens.”³³ Harmonizing *that* policy’s definition of “occurrence” with its understanding of the undefined term “accident,” the court concluded that the two deaths were “so closely linked in time and space as to be considered by the average person to be one event,” and therefore constituted a single “occurrence.”³⁴ The express policy terms at issue in *Gentilini*, in contrast, did not define “occurrence” as an “accident” or a “single event.” Nevertheless, because the *Gentilini* court apparently imported those concepts into its understanding of the term “occurrence,” the court was unwilling to view one employee’s ongoing scheme, involving twenty-seven acts of credit fraud, as one occurrence, notwithstanding the policy’s definition of one “occurrence” as including a “series of related acts.”

In finding multiple occurrences, the *Gentilini* court also emphasized its view that, under the facts of the case, the auto dealer suffered a direct loss of property each time that it parted with an automobile in exchange for a fraud-induced and “faulty” installment sales contract, noting that the “purchaser and the terms of each sale are unique”³⁵ On this point, the *Gentilini* court cited the case of

³¹ 816 A.2d at 108, citing *Doria v. Ins. Co. of N. Amer.*, 509 A.2d 220, 224 (N.J. Super. Ct. App. Div. 1986). The authors of this article note that the dissenting judge in the *Gentilini* appellate court incorrectly referenced the *Doria* decision as a case relied upon by the insurers in the *Gentilini* case. Actually, it was the insured that relied upon *Doria*; the insurers argued that *Doria* was wholly inapplicable.

³² *Doria*, 509 A.2d at 221.

³³ *Id.* at 223.

³⁴ *Id.* at 224.

³⁵ *Gentilini*, 854 A.2d at 398.

*Appalachian Insurance Co. v. Liberty Mutual Insurance Co.*³⁶ for the proposition that the number of occurrences “is determined by reference to cause of loss.”³⁷ The *Gentilini* court’s citation to *Appalachian* is curious, however, because that decision would appear to compel the opposite result than that which the *Gentilini* court ultimately reached. *Appalachian*, which concerned a liability insurance policy, stated the “general rule” that an “occurrence is determined by cause or causes of the resulting injury.”³⁸ Applying that “general rule,”³⁹ the court in *Appalachian* found only one cause (that is, the insured’s adoption of certain discriminatory employment practices) and, hence, a single “occurrence” underlying a multi-plaintiff class-action suit based on numerous employee complaints spanning a period of several years. Thus, despite its reference to the *Appalachian* case, the *Gentilini* court appears to have counted “occurrences” based, not by the cause of injury (a single dishonest employee), but upon the *effect*, or number of injuries allegedly sustained by that cause (the sale of twenty-seven automobiles to twenty-seven uncreditworthy people).

The *Gentilini* court, however, did not expressly reject the long line of cases finding a single “occurrence” in “embezzlement-type cases where an employee steals cash or checks from an employer as part of an ongoing scheme to defraud.”⁴⁰ Rather, the *Gentilini* court simply rejected the analogy between embezzlement-type cases and the facts of

³⁶ 676 F.2d 56 (3d Cir. 1982).

³⁷ *Gentilini*, 854 A.2d at 397 (citing *Appalachian*, 676 F.2d at 61).

³⁸ *Appalachian*, 676 F.2d at 61.

³⁹ The *Appalachian* court found further support for its holding based upon the definition of “occurrence” in the policy before it:

[A]n accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

Id. at 59.

⁴⁰ *Gentilini*, 854 A.2d at 398.

the case before it.⁴¹ In the view of the *Gentilini* court, Mr. Carpenter's repeated acts of fraud "did not involve 'a single act or series of related acts'" because each act of fraud involved "distinct sales to separate purchasers, for separate automobiles" and "the terms of each sale are unique."⁴² In support of that conclusion, the *Gentilini* court cited to the case of *North River Insurance Co. v. Huff*,⁴³ noting that the court in *Huff* had found "that several loan transactions involving the same manner of financing were separate occurrences because [the] transactions 'occurred at separate times, involved different borrowers, were for different purposes, and had separate collateral.'"⁴⁴

Huff, for its part, concerned a directors and officers liability policy, which defined "occurrence" as "any claim or claims made involving one or more insureds arising out of the same act, interrelated acts, errors, omissions or scheme."⁴⁵ The case involved the alleged negligence of certain bank officers in approving four unprofitable loans. Each of the subject loans was underwritten and approved on its own merits. The only similarity between the loans was that they all involved the same method of financing, a "loan swap." During the time period in question, the same bank officers had considered and rejected proposals for six to twelve other loan swaps. Noting that the four unprofitable loans were made to "different borrowers, were for different purposes, and had separate collateral," the *Huff* court concluded that the subject loans "cannot be found to be *interrelated*."⁴⁶ In reaching this conclusion, the *Huff* court emphasized that it was not the bank's loan swap program that caused the subject damage, but the insured's alleged negligence in approving the unprofitable loans.⁴⁷ Thus, *Huff* concerned separate and independent business decisions, some of which were allegedly negligent, others of which were not. The transactions in

⁴¹ *See id.*

⁴² *Id.*

⁴³ 628 F. Supp. 1129 (D. Kan. 1985).

⁴⁴ *Gentilini*, 854 A.2d at 398 (citing *Huff*, 628 F. Supp. at 1133-34).

⁴⁵ *Huff*, 628 F. Supp. at 1133. Note that, while the policy clearly defined the term "occurrence," the *Huff* court observed that "the terms 'incident' and 'occurrence' are synonymous and can be used interchangeably." *Id.*

⁴⁶ *See id.* (emphasis added).

⁴⁷ *Id.* at 1134.

Gentilini, in contrast, were all linked by a common element—Mr. Carpenter’s continued criminal intent.

Apparently, the *Gentilini* court read *Huff* to hold that “separate” loans to separate borrowers could not be “interrelated.”⁴⁸ Based on that analysis, the *Gentilini* court concluded that separate car sales, to separate buyers, could not constitute a “a series of *related acts*.” As discussed in greater detail below, this disconnect between “separate” transactions and “related” acts may be of significance for claims under the standard Commercial Crime Policy because that policy does not use the term “related” in defining “occurrence.”⁴⁹

The distinction apparently drawn by the *Gentilini* court, between “related acts” (embezzlement schemes constituting “an ongoing scheme to defraud”) and cases involving “separate” transactions is problematic at best. Few fair-minded lay people would consider Mr. Carpenter’s actions *unrelated*. After all, Mr. Carpenter used the exact same means and method to perpetrate his ongoing scheme. One has to wonder whether the court would have viewed Mr. Carpenter’s acts as “unrelated” if, instead of deciding an insurance coverage case, it were deciding whether Mr. Carpenter’s acts were sufficiently “related” to support a criminal RICO conviction against him. Moreover, from the standpoint of the reasonable expectations of the insured, it is absolutely insignificant whether an employee causes injury to his employer through repeated dishonest transactions or through repeated thefts of checks or cash. *Gentilini* offers literally no guidance as to where courts should draw the line between “a series of related acts” and cases involving so-called “separate” transactions. Kickback schemes, for example, where an employee makes purchases at inflated prices in exchange for secret payments to the employee, are a well-known form of employee fraud.⁵⁰

⁴⁸ *Id.* It has been observed that the term “interrelated” in insurance policies is more apt to be perceived by courts to be ambiguous than the term “related,” which is a “more commonly understood term in everyday language.” See *Am. Home Assurance Co. v. Allen*, 814 N.E.2d 662, 667-70 (Ind. Ct. App. 2004), and cases cited therein.

⁴⁹ See *supra*, notes 5-6 and accompanying text.

⁵⁰ See United States Small Business Administration, *Curtailing Crime—Inside and Out*, available at <http://www.sba.gov/library/pubs/cp-2.doc> (n.d.).

Each such kickback, however, could be said to arise from a “separate” transaction and/or involve a separate vendor. Under the rationale of *Gentilini*, the employer’s losses might not be viewed a series of related acts. That would be a very unfortunate result for the insured employer, if coverage for its aggregate loss were reduced or eliminated by multiple applications of a per-occurrence deductible. Thus, to maintain the level of coverage that they thought they were already getting, insureds may now have to obtain more expensive policies with lower deductibles.

In sum, the *Gentilini* decision is bad for insurers and bad for insureds. The holding is inconsistent with how other courts across the nation have ruled in similar cases, construing similar policy terms. The stated rationale for the decision is undermined, rather than supported, by the cases cited therein. *Gentilini* turned on its head a policy provision the clear and obvious intent of which was to *limit* the insurer’s liability,⁵¹ rendering it either meaningless or as actually expanding the insurer’s liability. Finally, the *Gentilini* court’s determination, as a matter of law, that Mr. Carpenter’s crime spree did not involve a “series of related acts,” deviates sharply from how the average person, or the average insured, would understand that clause.

III. Distinguishing Gentilini

It is virtually inevitable that insureds seeking to avoid per-occurrence limitations in fidelity policies will cite *Gentilini* as authority for finding multiple occurrences for losses caused by the fraudulent acts of a single employee or by the ongoing scheme of several employees, except, of course, in cases where multiple applications of a per-occurrence deductible would result in less coverage.

Outside of New Jersey, an insurer will be able to respond to such claims by arguing that that the decision in *Gentilini* is against the clear weight of authority from other jurisdictions, as discussed in the next section of this article,⁵² and that it ignored the plain language and the purpose of the policy at issue in the case.

⁵¹ See *Scirex Corp. v. Fed. Ins. Co.*, 313 F.3d 841, 852 (3d Cir. 2002).

⁵² See also *supra*, note 12.

In New Jersey, however, or in other jurisdictions not bound by local precedents on the single/multiple occurrence issue in this context, it may also prove advantageous to develop arguments to distinguish *Gentilini* and/or to narrow its application. First and foremost, as discussed in the preceding section, the *Gentilini* court drew a distinction between “embezzlement-type” cases and cases involving “separate” transactions.⁵³ Thus, in cases involving “embezzlement-type” losses, *Gentilini* would arguably not apply, even in New Jersey.

It is also important to note that the policy at issue in *Gentilini* was *not* a crime or fidelity policy, but rather was a commercial property insurance policy. The subject employee dishonesty coverage in *Gentilini* appeared in an optional endorsement, entitled “Master Pak for Property,” modifying and providing various upgrades to the terms of a “Business and Personal Property Coverage Form.”⁵⁴ Thus, the \$5,000 per-occurrence limitation in *Gentilini* was part of a pre-printed form. In contrast, per-occurrence limitations and deductibles in standard crime and fidelity policies are negotiated and customized to the needs, desires, and budget of the particular insured.⁵⁵ The fact that these per-occurrence limits and deductibles are negotiated and are largely determinative of the premium charged is highly significant in the context of determining the reasonable expectations of the insured.⁵⁶ In such cases, it may be advisable to examine the underwriting history of the insured’s account. The facts of a particular case may show, for example, that an insured purposely opted for a higher per-occurrence deductible in order to save on the premium, with the understanding that losses caused by a single employee would be aggregated and viewed as a single occurrence.⁵⁷

⁵³ 854 A.2d at 398.

⁵⁴ *Id.* at 382-83.

⁵⁵ See *supra*, note 11 and accompanying text.

⁵⁶ Likewise, the reasonable expectations of a business that deliberately seeks out and purchases crime coverage may differ from the reasonable expectations of a business that purchases broader commercial property insurance in which employee dishonesty coverage appears only in one of many endorsements, as did the car dealership in *Gentilini*.

⁵⁷ Similarly, an examination of the insured’s claims history might also show that the insured may previously have experienced a multi-theft loss, which may have been submitted and adjusted on a single-occurrence, one deductible, basis.

Even in the absence of such specific facts in the underwriting file, the presence of a relatively high deductible would tend to support the conclusion that the parties intended and expected that multiple (related) losses would be aggregated and treated as a single occurrence. As explained by one court:⁵⁸

Assume an employee embezzles \$100 from a company on 155 separate occasions for a total embezzlement of \$15,500. Further assume that, as in this case, the deductible for the insurance policy is \$250 and the coverage limit \$10,000 for each occurrence. If all 155 acts constitute one occurrence because they are part of a “series of related acts,” the insurance company would pay \$10,000. However, if we were to adopt American Commerce’s position and determine that 155 occurrences arose, the insurance company would pay nothing because the monetary value of each act of embezzlement would be lower than the deductible.⁵⁹

The amount of premium paid, as compared with the magnitude of an alleged multi-occurrence claim, could also be a factor for consideration by a court in determining the reasonable expectations of the parties with respect to the application of per-occurrence limits. The issue of premium was not discussed in the *Gentilini* decision. The court in *American Commerce*, however, did consider the issue and rejected as “unreasonable” the insured’s multiple-occurrence argument, explaining as follows:

Under American Commerce’s interpretation, an insured could receive \$10,000 for each separate act of

⁵⁸ Am. Commerce Ins. Brokers v. Minn. Mut. Fire & Cas. Co., 551 N.W.2d 224 (Minn. 1996).

⁵⁹ *Id.* at 229. Note that this argument, and this example, from the *American Commerce* case was raised by the insurer in *Gentilini* and was referenced in the decision, but was not addressed in the *Gentilini* court’s analysis, other than to note that *American Commerce* was an “embezzlement-type” case that the *Gentilini* court did not find analogous to the case before it. *See Gentilini*, 584 A.2d at 398.

embezzlement, without limit. The record reflects that its total premium for business protection, which included coverage for business personal property and data processing equipment, in addition to coverage for employee dishonesty, was \$563 per year. We conclude that American Commerce's interpretation would allow a potentially unlimited windfall of recovery and is simply incommensurate with the \$563 per year premium under the policy.⁶⁰

Note that the above analysis from the *American Commerce* case, comparing the policy premium with the policy limits, would appear to be of less force under the standard Financial Institution Bond which, in addition to single loss limits, also includes an aggregate limit of liability. In contrast, the standard Commercial Crime Policy and the standard Crime Protection Policy⁶¹ generally include only per-occurrence limits of insurance. Thus, as noted in *American Commerce*, an interpretation that renders ineffectual those policies' per-occurrence limits would lead to the absurd result of removing all monetary limits to coverage.⁶²

Gentilini may also be distinguishable based upon variations in language between the single loss provision in that case and the single loss provision appearing in other policies. By way of example, whereas the policy in *Gentilini* defined "occurrence" with reference to "all loss or damage," the same term is defined in the Crime Protection Policy with reference to "all loss or losses." Arguably, the reference to "losses" in

⁶⁰ *Id.* at 230.

⁶¹ See *supra*, note 10.

⁶² As a "firewall" against such a result, and in view of *Gentilini* and other cases finding multiple "occurrences" in contravention of single loss provisions, insurers may wish to consider amending their crime policy forms, or issuing policy endorsements, to include an aggregate limit of liability, in much the same manner as appears in the Financial Institution Bond. Such a change may also be advisable in view of the movement in crime coverage away from loss sustained policies to discovery policies, as the longer time-span covered by discovery policies could potentially increase exponentially an insurer's aggregate liability.

the Crime Protection Policy more clearly conveys that a single “occurrence” may consist of multiple and separate thefts or frauds.⁶³

It is also noteworthy that the Commercial Crime Policy and the Crime Protection Policy both use the phrase “series of acts,” rather than “series of *related* acts” as was used in the policy in the *Gentilini*. While that distinction may seem minor, a close analysis of the *Gentilini* decision and the *Huff* decision cited therein reveals that both courts shared the perception that “separate” transactions could not accurately be described as “related” or “interrelated.” Also, the decision in *Reedy Industries, Inc. v. Hartford Insurance Co. of Illinois*⁶⁴ briefly notes, in *dicta*, that the two subject clauses, with and without the term “related,” are “similar, but not identical.”⁶⁵ In the same brief discussion, the *Reedy* court observed that the Minnesota Court of Appeals’ decision in the *American Commerce* case (which by then had been reversed by the Minnesota Supreme Court) had “held that the phrase ‘series of related acts’ in a fidelity policy was ambiguous because the term ‘related’ is susceptible of more than one reasonable interpretation.”⁶⁶ In so noting, the court in *Reedy* clearly rejected the insured’s argument that the phrase “single act or series of acts” is ambiguous. Thus, insurers defending

⁶³ In *Universal Underwriters Ins. Co. v. Buddy Jones Ford, Lincoln-Mercury, Inc.*, 734 So.2d 173 (Miss. 1999), the court found ambiguous, and construed against the insurer, a single loss limitation that expressly applied to “all LOSS caused by one EMPLOYEE or in which the EMPLOYEE is concerned or implicated.” *Id.* at 176. In that case, the court found that each of 175 acts of embezzlement by the same employee constituted a separate “loss.” *Id.* In the view of the court, the subject policy was ambiguous in that it did not expressly define the term “loss” to extend to multiple losses caused by multiple acts by the same employee. *Id.* In so holding, however, the *Buddy Jones* court noted the absence of any “series of related acts” provision (such as the one in *Gentilini*) in the subject policy, observing that such provisions “unambiguously” state “that multiple acts may constitute one occurrence of loss.” *Id.* at 177.

⁶⁴ 715 N.E.2d 728 (Ill. App. Ct. 1999).

⁶⁵ *Id.* at 732.

⁶⁶ *Id.* (discussing *Am. Commerce Ins. Brokers v. Minn. Mut. Fire & Cas. Co.*, 535 N.W.2d 365 (Minn. Ct. App. 1995), *rev’d*, 551 N.W.2d 224 (Minn. 1996)). Note that the Minnesota Supreme Court in *American Commerce* found that the phrase “series of related acts” as used in the subject policy was “not ambiguous.” *Id.* at 228.

claims under the Commercial Crime Policy or the Crime Protection Policy may fairly argue that the clause “single act or series of acts” is both broader than the parallel provision in *Gentilini* and is less likely to give rise to ambiguities as it applies to the facts of a given claim.

The “Single Loss” provision in the Financial Institution Bond is even more different from that in *Gentilini* as it does not use the term “occurrence” at all and hence should be less apt to be viewed by courts as implicating a “single event.”⁶⁷ Also, with respect to multiple dishonest acts by the same employee, the Financial Institution Bond treats as a single loss all covered loss resulting from all acts or omissions “caused by any person (whether an Employee or not) or in which *such* person is implicated . . .” This language very clearly and unambiguously applies to multiple acts involving the *same* person. The provision is not susceptible to the strained interpretation applied in *Gentilini*, in which the policy provision rendering one occurrence “all loss or damage” . . . “caused by one or more persons” was construed to limit recovery only where a *single* loss of property was caused by *multiple* employees.⁶⁸

Finally, in the case of a claim brought by a sophisticated insured, it may be possible that the court should be less zealous interpreting perceived ambiguities in insurance policies than was done in favor of the insured (a local auto dealer) by the court in *Gentilini*. The Supreme Court of New Jersey has itself noted that a “sophisticated insured . . . cannot seek refuge in the doctrine of strict construction pretending it is the corporate equivalent of the unschooled, average consumer.”⁶⁹

⁶⁷ But see *Buddy Jones Ford*, 734 So. 2d 173, discussed *supra*, note 63.

⁶⁸ *Gentilini*, 854 A.2d at 383. It should be noted that the subject policy language in the Commercial Crime Policy, i.e., “caused by, or involving, one or more ‘employees,’” is also arguably distinguishable on this point from the less specific “caused by one or more persons” clause appearing in *Gentilini*.

⁶⁹ *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 991 (N.J. 1994). See also *SR Int’l Bus. Ins. Co. v. World Trade Center Props.*, 222 F. Supp. 2d 385, 398-99 (S.D.N.Y. 2002) (explaining that commercial insurance policies are to be interpreted according to “the understanding of someone engaged in the insured’s line of business”).

IV. Other Decisional Law

The plurality of courts considering the issue herein have enforced single loss provisions as intended and have allowed one recovery, and one application of the deductible, for loss caused by the same employee(s) or the same scheme.⁷⁰ As set forth below, however, the *Gentilini* decision was not the first time that a court awarded multiple recoveries in such cases. Like the court in *Gentilini*, some other courts have construed against insurers in this context such terms as “occurrence” and “related,” and/or have disregarded defined policy terms in favor of “general” rules or understandings of such terms in other contexts. Such decisions, however, remain in the minority and/or are aberrations.

A. LOSS CAUSED BY A SINGLE EMPLOYEE OR GROUP OF EMPLOYEES

As stated, one goal of the subject single loss provision is to apply a single loss limitation to situations where one employee or common group of employees caused loss through multiple and even varied acts of dishonesty. Decisional law construing one-loss-per-employee provisions is scarce and inconsistent. An examination of available case law reveals that courts are more apt to base their rulings in this context on whether a crime claim arises from a “series of (related) acts.”

A leading and often-cited case is the decision of the United States Court of Appeals for the Tenth Circuit in *Business Interiors, Inc. v. The Aetna Casualty and Surety Co.*⁷¹ The subject policy included a provision stating: “As respects any one employee, dishonest or fraudulent acts of such employee during the policy period shall be deemed one occurrence for the purpose of applying the deductible.”⁷² It is unclear from the decision whether the policy included a similar definition of “occurrence” with respect to the policy’s limit of insurance, although the decision references the insured’s contention that the policy

⁷⁰ See *supra*, note 12.

⁷¹ 751 F.2d 361 (10th Cir. 1984).

⁷² *Id.* at 362.

limit applied separately for “each separate loss.”⁷³ The insured further contended that “each of” its “employee’s forty acts of forgery or material alteration constitutes a separate loss and should be deemed a separate occurrence.”⁷⁴ The court rejected that contention and held that “the employee’s fraudulent acts constituted a single loss[.]”⁷⁵ In so holding, the *Business Interiors* court applied the “general” rule that an “occurrence is determined by the cause or causes of the resulting injury.”⁷⁶ Under that rule, the court observed that the “cause” of the insured’s loss was “the continued dishonesty of one employee.”⁷⁷ The court further noted its agreement with the district court’s observation that “the probable intent of the employee with respect to the last thirty-nine checks was essentially the intent to continue the dishonesty, not to commit an entirely new and different act of dishonesty.”⁷⁸

The case of *Ran-Nan, Inc. v. General Accident Insurance Co. of America*⁷⁹ involved a policy defining “occurrence” as “all loss caused by, or involving, one or more ‘employees,’ whether the result of a single act or series of acts.”⁸⁰ There, the insurer took the position that there was only one occurrence with respect to losses that, as described by the court, arose from “independent pilfering schemes by two different employees working separately.”⁸¹ The court rejected the insurer’s interpretation, observing that “[t]he more natural reading of the policy . . . is that the ‘involving’ clause signifies a group of employees

⁷³ *Id.*

⁷⁴ *Id.* at 363.

⁷⁵ *Id.* The decision in *Business Interiors* appears to use the terms “occurrence” and “loss” interchangeably.

⁷⁶ *Id.* (citing *Appalachian*, 676 F.2d at 61). The *Gentilini* court cited to the same rule, and the same case, to reach the directly opposite result. *See also supra*, notes 36 through 39 and accompanying text.

⁷⁷ *Id.*

⁷⁸ *Id.* at 363.

⁷⁹ 252 F.3d 738 (5th Cir. 2001).

⁸⁰ *Id.* at 739.

⁸¹ *Id.* Note that according to the *Ran-Nan* decision, the position taken by the insurer in that case mirrored the “literal” reading of the policy language that was raised, rhetorically, and rejected in favor of a “fair reading” by the court in *Gentilini*. 854 A.2d at 397-98.

conspiring to steal together.”⁸² Although the result would have been the same by simply applying the policy’s express definition of “occurrence,” the *Ran-Nan* court then entered into a discussion concerning, and based its holding upon, “general principles” of law applied in liability insurance cases in which the number of “occurrences” is determined by counting the “causes” of the insured’s total loss.⁸³ Because there were “two independent causes” of the insured’s loss, the *Ran-Nan* court concluded that there had been “two ‘occurrences’ of employee dishonesty.”⁸⁴

The court in *Omne Services Group, Inc. v. Hartford Insurance Co.*⁸⁵ held that, under either New Jersey or Pennsylvania law, a several month payroll fraud/kickback scheme involving a single employee constituted a single “occurrence,” where the subject crime policy defined “occurrence” as “all loss caused by, or involving, one or more ‘employees.’”⁸⁶ The court’s emphasis on the words “all loss,” “one,” and “employees” appeared to indicate the court’s satisfaction that the issue before it could be resolved based upon the plain language of the policy. Nevertheless, the court then turned its analysis to the *Appalachian, Doria*, and *Business Interiors* cases for the proposition that the number of occurrences is determined by the number of causes of the resulting injuries.⁸⁷

The case of *Wausau Business Insurance Co. v. U.S. Motels Management, Inc.*⁸⁸ involved an employee who, over the course of approximately four years, cheated her employer out of hundreds of thousands of dollars, employing “a fairly broad repertoire of tactics.”⁸⁹ The subject policy defined “occurrence” as “all loss caused by, or involving, one or more ‘employees,’ whether the result of a single act or

⁸² 252 F.3d at 739.

⁸³ *Id.* at 740.

⁸⁴ *Id.*

⁸⁵ 2 F. Supp. 2d 714 (E.D. Pa. 1998).

⁸⁶ *Id.* at 719.

⁸⁷ *Id.* The court in *Omne* also held, in the alternative, that the subject loss was caused by a “series” of acts.

⁸⁸ 341 F. Supp. 2d 1180 (D. Colo. 2004).

⁸⁹ *Id.* at 1182.

series of related acts,”⁹⁰ as to which the court observed that it “finds nothing ambiguous in this definition.”⁹¹ Rejecting the insured’s argument that “its dishonest employee’s various embezzlement ploys were separate and distinct occurrences,” the court cited to the “cause” analysis from the *Business Interiors* and *Appalachian* cases and explained as follows:

[T]he question is not whether the employee’s various methods of embezzling were related, as defendant suggests, but whether the cause of loss was related. The cause of defendant’s loss was the dishonesty of one employee. Although the employee appears to have been particularly creative in finding ways to bilk the defendant, her intent throughout undoubtedly was the same: to steal the defendant’s money.⁹²

As is readily apparent, a common theme in the above-cited cases, as well as in *Gentilini*, is that the courts in those cases sought to determine the number of “occurrences” based upon a general rule of law equating the number of occurrences with the number of causes of loss, rather than simply following the policy’s express definition of occurrence. Courts applying this approach have generally concluded that a single dishonest employee, or group of employees conspiring together, or a single scheme,⁹³ represents a single “cause” of loss and,

⁹⁰ *Id.*

⁹¹ *Id.* at 1184.

⁹² *Id.* at 1183-84. This reasoning from *U.S. Motels Management* was found persuasive, quoted, and followed on this point in the case of *Glaser v. Hartford Casualty Ins. Co.*, 364 F. Supp. 2d 529 (D. Md. 2005). The court in *Glaser*, however, in contrast to the *U.S. Motels Management* court, found an ambiguity in the term “occurrence” as it applied to successive policy periods. *Glaser* thus held that a single employee’s multiple dishonest acts within a single policy period constituted one occurrence, but permitted a separate recovery for each year the subject policy was in force.

⁹³ *See, e.g., Peco Energy Co. v. Boden*, 64 F.3d 852 (3d Cir. 1995). The dispute involved whether thefts extending over a period of six years constituted a single occurrence, or multiple occurrences, under an “all risks” policy including a per-occurrence deductible. The policy did not define “occurrence” in this context. The court, citing to the *Appalachian* and *Business*

hence, a single “occurrence.” While the result in these cases conforms to the intentions expressed in the single loss provision, the approach is inherently problematic. This is because courts that use their own understanding of the term “occurrence,” which is not grounded in the policy’s express definition thereof, may import into their analysis concepts that are foreign to, and at variance with, the language and purpose of a crime policy.

A prime example is the tendency of some courts to equate, as a general rule of law, the term “occurrence” with the terms “accident,” “incident,” or “event.” That rule works well with respect to property and casualty coverage, or liability insurance, which insure against accidents. A ten-car pile-up may be regarded as a single accident or event, as would an earthquake that destroys five homes. A drunk driver striking two pedestrians in the span of five minutes, or an earthquake followed an hour later by an aftershock, however, may present a closer case. All courts would presumably agree, however, that two collisions, or two earthquakes, each a month apart, represent more than one occurrence, despite the fact that there may only have been one “cause” for the resulting injuries, i.e., a habitually careless driver, or an earthquake-prone fault-line. In *this* context, the dividing line between one “cause”, or multiple “causes,” is whether the resulting injuries are “closely linked in time and space.”⁹⁴

Fidelity policies, in contrast to property, casualty, or liability insurance, do not protect against accidents; they insure against the volitional acts of dishonest employees. The risk posed by a dishonest employee is entirely different than the risk posed by an unplanned accident or event. A dishonest employee has the ability and propensity to plan, to cover his tracks, to “lie in wait” for extended periods, and to seek out and exploit various weaknesses in his employer’s risk management systems. The risk is long-term, and the injuries to the employer may be numerous. What links such injuries to a single “cause” is not their proximity “in time and space,” but rather the employee’s

Interiors cases, held “that when a scheme to steal property is the proximate and continuing cause for a series or combination of thefts,” the losses constitute “part of a single occurrence.” *Id.* at 856.

⁹⁴ *Doria*, 509 A.2d at 221.

malevolent intent. The courts in *Business Interiors* and *U.S. Motels Management* recognized that link; the court in *Gentilini* did not.

That common element of intent was also disregarded by the Supreme Judicial Court of Massachusetts in *Slater v. United States Fidelity and Guaranty Co.*⁹⁵ *Slater* concerned a physician's equipment policy, with endorsements extending coverage to losses due to theft, as well as losses of currency, subject to a \$250 per-occurrence limit. The policy did not define "occurrence."⁹⁶ The claim concerned multiple petty thefts committed by a single employee over a two-year period.⁹⁷ Drawing upon the "time and distance" analysis from car accident cases and construing ambiguities in favor of the insured, the *Slater* court permitted multiple recoveries, reasoning as follows:

In the present case, the "occurrence" which occasioned Dr. Slater's losses was not the common scheme, and the subject matter of the policy was losses, not schemes. Although the receptionist may have taken the money pursuant to a common scheme, each act of appropriating money for her own use necessarily was preceded by a decision to adhere to and effectuate that scheme, which could have been interrupted at any time before the \$9,000 was taken. The scheme, without more, could not have caused the losses.⁹⁸

The better approach to counting occurrences in this context, and one more in keeping with basic tenants of contract law, is simply to enforce the plain language of the policy, defining "occurrence" to include "all loss caused by, or involving, one or more 'employees', whether the result of a single act or a series of acts."⁹⁹ There is "nothing

⁹⁵ 400 N.E.2d 1256 (Mass. 1980).

⁹⁶ *Id.* at 1256.

⁹⁷ *Id.* at 1258.

⁹⁸ *Id.* at 1261.

⁹⁹ *See, e.g.,* *Sherman & Hemstreet, Inc. v. Cincinnati Ins. Co.*, 594 S.E.2d 648, 651 (Ga. 2004) (held policy per-occurrence limit unambiguously applied to a "series of embezzlements by a single employee over the course of several years"); *Landico, Inc. v. Am. Family Mut. Ins. Co.*, 559 N.W.2d 438,

ambiguous in this definition,”¹⁰⁰ and, therefore, there is no need for courts to expound upon how the term “occurrence” is used in other contexts where such a definition is lacking. From the standpoint of the reasonable expectations of the insured, it is simply unrealistic to conclude that a businessperson purchasing crime coverage, when reading such a single loss provision, would draw an analogy to single- or multiple-car accidents. To the contrary, a reasonable businessperson will more likely be concerned with the risk of multiple thefts by a dishonest employee or employees and will focus closely on that exposure when considering different premiums for different levels of coverage and higher or lower per-occurrence deductibles.

B. LOSS CAUSED BY A “SERIES OF (RELATED) ACTS”

The Commercial Crime Policy defines as one “occurrence” all loss . . . “whether the result of a single act or a series of acts.” Other policies, including the policy at issue in *Gentilini*, employ the phrase “series of *related* acts.”

A majority of courts construing and applying such provisions have found a single “occurrence” in situations involving multiple thefts or embezzlements by a single employee or group of colluding employees, even where the schemes extended over the course of months or years.¹⁰¹ Certain courts, however, have found the terms “occurrence” and/or “series of (related) acts” to be ambiguous in the context of fidelity claims and, resolving perceived ambiguities against the insurer,

411 (Minn. Ct. App. 1997) (held that the subject policy “unambiguously limits the insurer’s exposure regarding any one employee’s theft to \$100,000 notwithstanding the fact that the thefts of that one employee may continue for several years”). *See also* *Kinzer v. Fid. and Deposit Co. of Md.*, 652 N.E.2d 20, 25 (Ill. App. Ct. 1995) (rejected the insured’s argument that a single loss limitation applied to each separate “loss,” where the policy limited the insurer’s “total liability . . . for any loss caused by any Employee or in which such Employee is concerned or implicated”).

¹⁰⁰ *U.S. Motels Management*, 341 F. Supp. 2d at 1184.

¹⁰¹ *See supra*, note 12. Note, however, that the reasoning of a number courts on this issue appears to have been based more on the single “cause” analysis employed in *Business Interiors* than grounded in enforcing the unambiguous terms of the subject policies.

have found multiple occurrences in situations involving a single ongoing scheme to defraud.

The unreported case of *Shemitz Lighting, Inc. v. Hartford Fire Insurance Co.*¹⁰² concerned multiple forged checks, as well as diverted third-party checks, by the insured's bookkeeper. The subject policy included a \$10,000 per-occurrence limitation, providing (identically to *Gentilini*) as follows: "All loss or damage: (a) Caused by one or more persons; or (b) involving a single act or series of related acts; is considered one occurrence." The court, while acknowledging that the above language "elaborates on the company's limits of liability per 'occurrence,'" nevertheless viewed the term "occurrence" as "undefined." The court therefore applied its own legal interpretation of the term. The court reviewed a number of cases from different jurisdictions, which applied different approaches in various contexts (that is, fidelity policies, professional liability policies, auto policies) in finding single or multiple "occurrences." The court then noted that "the very fact that in so many jurisdictions other courts have considered the same, or similar, policy language in so many contexts" supported the conclusion that the subject policy language was ambiguous. The court, applying the "doctrine of reasonable expectations," observed that the insured would find it "difficult" to understand whether liability was limited to "\$10,000 for each act of dishonesty; \$10,000 for each employee; \$10,000 for each policy period; or \$10,000 for each coverage period." Construing the perceived ambiguity against the insurer and noting that "each of the plaintiff's losses were caused by a separate act of embezzlement," the court held that each act of embezzlement was a separate occurrence.

Other courts have found the subject single-loss limitation language ambiguous in the context of successive insurance policies and have held that a series of dishonest acts extending through two policy periods represented two covered occurrences.¹⁰³ However, in none of

¹⁰² No. CV960052970, 2000 WL 1781840 (Conn. Super. Ct. Nov. 9, 2000).

¹⁰³ See *Karen Kane, Inc. v. Reliance Ins. Co.*, 202 F.3d 1180 (9th Cir. 2000) (applying California law); *Glaser v. Hartford Cas. Ins. Co.*, 364 F. Supp. 2d 529 (D. Md. 2005) (applying Maryland law); *Spartan Iron & Metal*

these cases did the court find multiple occurrences in a given scheme within a single policy period. Rather, these courts permitted one recovery per policy period.¹⁰⁴

An issue exists as to whether the insertion of the term “related” in the phrase “series of . . . acts” makes it more or less likely that a court will find multiple occurrences within a single scheme to defraud.¹⁰⁵ On the one hand, without the term “related,” the phrase “series of acts” is arguably more broad and could bring a wider variety of dishonest acts within the ambit of a single “occurrence.” On the other hand, the use of the term “related” would appear to make the phrase more specific and, therefore, less prone to being perceived as ambiguous. A review of relevant case law, however, reveals that the term “related” in this context may be regarded as superfluous, as ambiguous,¹⁰⁶ or, alternatively, limiting the applicability of the single loss provision to acts that are closely connected in some manner.

Corp. v. Liberty Ins. Corp., 6 Fed. Appx. 176, 2001 U.S. App. LEXIS 5120 (4th Cir. 2001). While *Spartan Iron* is unpublished, it was cited and followed in *Glaser*. *Spartan Iron* was also cited, but *not* followed in *U.S. Motels Management*, 341 F. Supp. 2d at 1185, in which the court noted that “under Colorado law, ambiguity cannot be evaluated at this level of abstraction.” For a detailed analysis of this issue, see Gallagher, *Limit of Liability*, in COMMERCIAL CRIME POLICY, *supra* note 2, at 454-67.

¹⁰⁴ Such was also the holding in *Robein & Sons Heating, Inc. v. Mid-Century Ins. Co.*, 74 P.3d 1141 (Or. Ct. App. 2003), although the court in that case couched its reasoning in terms of construing the policy as a whole, rather than resolving an ambiguity in favor of the insured.

¹⁰⁵ See *infra*, notes 106-09, and accompanying text.

¹⁰⁶ The Supreme Court of California in *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.*, 855 P.3d 1263 (Cal. 1993), construed an attorney malpractice policy which treated “as a single claim” all claims “arising out of a single act, error or omission or series of related acts, errors or omissions[.]” The court concluded that in the context of that policy, the term “related” was not ambiguous and broadly encompassed both logical and causal connections. This decision is advisable reading for all insurance practitioners in that it includes a thorough and well-reasoned analysis of what does, and what does not, give rise to an “ambiguity” in an insurance policy, observing, *inter alia*, that a undefined term, even one with “multiple or broad meanings” does not, in the context of a given policy or given set of facts, necessarily create ambiguity.

In *Valley Furniture & Interiors, Inc. v. Transportation Insurance Co.*,¹⁰⁷ the court looked at the dictionary definitions of “series” and “related” and found the phrase “series of related acts” unambiguous.¹⁰⁸ However, because the definition of the word “series”¹⁰⁹ itself used the term “relationship,” it is unclear whether inserting the term “related” adds anything of substance to the phrase “series of acts.” In any event, the court in *Valley Furniture* construed the phrase to implicate “a succession of logically or casually connected acts, linked in time, place, opportunity, pattern, and method.”¹¹⁰ Applying that standard, the court found a six-year payroll fraud scheme involving three employees to be a “series of related acts.”

The Minnesota Supreme Court in the *American Commerce* case adopted a similar understanding of the phrase “series of related acts,” that is, acts that are “connected by time, place, opportunity, pattern, and, most importantly, modus operandi.”¹¹¹ By that measure, the court in *American Commerce* found *two* occurrences where the same employee repeatedly used two separate methods of embezzlement.¹¹² Rejecting the contention that the term “related” was ambiguous as used in the policy in that case, the court explained as follows:

We cannot so restrict the plain and ordinary meaning of the word “related” such that acts of embezzlement

¹⁰⁷ 26 P.3d 952 (Wash. Ct. App. 2001).

¹⁰⁸ *Id.* at 955.

¹⁰⁹ The subject definition of “series” was “a group of usually three or more things or events standing or succeeding in order and having a like relationship to each other.” *Gregory v. Home Ins. Co.*, 876 F.2d 602 (7th Cir. 1989), quotes the same definition of “series,” adding alternatively “a spatial or temporal succession of things; a group that has or admits an order or arrangement exhibiting progression.” *Id.* at 606 n.4. Commenting upon these definitions of “series,” the *Gregory* court noted that “[t]he inclusion of this term could require a temporal connection.” *Id.*

¹¹⁰ *Valley Furniture*, 26 P.3d at 108.

¹¹¹ *American Commerce*, 551 N.W.2d at 231. Note that COUCH ON INSURANCE, 3d ed., at § 185:60, *Determining Number of Occurrences of Defalcation By Employee*, adopts this understanding of the phrase “series of related acts.”

¹¹² *Id.*

which follow each other in time, take place at the same business, and are committed by the same employee are not “related” as that word is commonly used.¹¹³

By the standards set forth in *Valley Furniture* and *American Commerce*, the multiple acts of dishonesty committed by Mr. Carpenter in *Gentilini*, occurring in the same place, in the same manner and using the same modus operandi, would very clearly constitute a “series of related acts.” The *Gentilini* court, however, based upon its expansive reading of the *Huff* case, drew a distinction between “separate” transactions and “related acts.”¹¹⁴ That distinction, which was quite tenuous under the facts in *Gentilini*, cannot represent a general rule of law.¹¹⁵ Depending upon the facts of a case, at some point even otherwise “separate” transactions must be viewed as “related.”

Scirex Corp. v. Federal Insurance Co.,¹¹⁶ for example, concerned a group of dishonest nurses, who falsified data and thereby rendered worthless “four clinical studies for three different sponsors,”¹¹⁷ conducted by their employer. The subject policy stated as follows:

The most we will pay for any loss under Blanket Employee dishonesty for any loss caused by an employee whether acting alone or in collusion with others, either resulting from a single act or any number of acts, regardless of when those acts occurred during the period of this insurance or prior insurance, is the amount of loss, not to exceed the Limit of Insurance for

¹¹³ *Id.* at 228.

¹¹⁴ See *supra*, notes 42 through 49 and accompanying text.

¹¹⁵ See *Eureka Fed. Sav. & Loan Assoc. v. Am. Cas. Co. of Reading, Pa.*, 873 F.2d 229 (9th Cir. 1989), which cited to and followed the holding in *Huff*, but which also noted “[w]e do not foreclose the possibility, however, that loans to separate borrowers may be aggregated as a single loss in an appropriate fact situation.” *Id.* at 235.

¹¹⁶ 313 F.3d 841 (3d Cir. 2002) (applying Pennsylvania law).

¹¹⁷ *Id.* at 844.

Blanket Employee Dishonesty shown in the
Declarations.¹¹⁸

The policy also stated that “[a]ll losses resulting from an actual or attempted fraudulent or dishonest act or series of related acts at the premises . . . whether committed by one or more persons will be deemed to be one occurrence or event.” However, nowhere did the policy expressly state that its single loss limitation, or “Limit of Insurance,” applied to one “occurrence” or “event.” The court nevertheless observed that “the accepted purpose of defining ‘an occurrence or event’ is to limit liability,” and that “in the insurance industry ‘occurrence’ is commonly understood to mean all loss caused by a single act or related events.”¹¹⁹ Noting that the “the nurses themselves did not seem to distinguish among the four studies in terms of their responsibilities,” the *Scirex* court affirmed as not clearly erroneous the lower court’s finding that the insured’s losses resulted from a “series of related acts.”¹²⁰

***V. Using Gentilini as a Shield: What’s Good for the Goose
is Good for the Gander***

While insurers may justifiably believe that *Gentilini* was wrongly decided, it is, unfortunately, now binding precedent in the State of New Jersey; and it may ultimately be followed by some courts, particularly in jurisdictions that are especially zealous in favor of finding or expanding coverage in favor of insureds.

Splitting loss, however, by multiplying occurrences may also reduce coverage due to the application of the per-occurrence deductible. On this point, while *Gentilini* permitted the insured “to recover up to \$5000 for each fraudulently induced sale,” the ruling also reflected that

¹¹⁸ *Id.* at 845.

¹¹⁹ *Id.* at 852, citing *Business Interiors*. The *Scirex* court, unlike the *Gentilini* court, understood and enforced the “commonly understood” and “accepted” purpose of single loss language, i.e., to limit, rather than expand, the insurer’s liability.

¹²⁰ *Id.*

that those recoveries would be “subject to any applicable deductibles under the policy.”¹²¹

The rule should be applied no differently in cases where it would result in less coverage. As poignantly observed by the Supreme of California in the *Bay Cities* case:

To construe a policy provision narrowly so as to find only one claim and thus limit the deductible, but to construe the same language expansively so as to find multiple claims and thereby increase coverage, would be a result-oriented approach that we decline to follow.¹²²

Or, as one court articulated the general principle of law:

They cannot have it both ways. They can't have their cake and eat it too. What's good for the goose is good for the gander. It's a two way street. It takes two to tango. These aphorisms about double standards and reciprocity are not often jurisprudential, but they articulate an aspect of fair play and substantial justice.¹²³

Indeed, just a few months before its ruling in the *Gentilini* case, the New Jersey Supreme Court, in *Benjamin Moore & Co. v. Aetna Casualty & Surety Co.*,¹²⁴ discussed the application of per-occurrence deductibles in the context of liability claims arising from long-term environmental hazards. In such cases, science does not provide an accurate method of determining when the subject “occurrence” took place. The New Jersey courts, therefore, apply a “continuous-trigger” rule that regards such claims as arising from separate “occurrences” under each of the successive insurance policies that were in force during the years of the environmental contamination. Loss is then shared pursuant to a pro-rata formula between the respective insurers, that is, the carrier for one of ten years is allocated ten percent of the loss, up to

¹²¹ *Gentilini*, 854 A.2d at 398.

¹²² 855 P.3d at 862.

¹²³ *Stoman Realty v. Antt*, 20 F. Supp. 2d 1050, 1154 (S.D. Tex. 1998).

¹²⁴ 843 A.2d 1094 (N.J. 2004).

that carrier's policy limits. At issue in *Benjamin Moore* was whether insurers in such cases could take the benefit of the full amount of the policy deductibles, or whether insureds could pro-rate the deductibles. Rejecting the position of the insureds, the court explained as follows:

Benjamin Moore and CSR cannot have it both ways. There is simply no principled basis to treat progressive environmental damage as separate occurrences in order to access insurance coverage but as a fractionalized single occurrence in determining the applicability of deductibles.¹²⁵

Splitting loss into multiple occurrences *à la Gentilini* may also have ramifications on when a loss is "discovered." The Commercial Crime Policy (discovery form) covers "loss that you sustain through acts committed or events occurring at any time and discovered by you . . . during the policy period." "Discovery" for this purpose is defined as occurring "when you first become aware of facts which would cause a reasonable person to assume that a loss covered by this policy has been or will be incurred, even though the exact amount or details of loss may not then be known."

Suppose, for example, under facts similar to those in *Gentilini*, an insured under a Commercial Crime Policy "discovers" during the policy period that an employee committed fraud in three "separate" transactions. An investigation ensues, but it is not until several months after the policy period that the insured learns that the same employee committed similar frauds in connection with twenty-four other "separate" transactions. Would coverage exist with respect to the later-discovered transactions? Under the *Gentilini* rationale, evidently not. If each of the twenty-seven transactions is deemed to be a separate "occurrence" under *Gentilini* for purposes of policy limits defining "occurrence" to include "all loss" caused by a "series of acts," then, by the same logic, those "separate" transactions could not fairly be viewed as mere "details" of one large "loss" for the purposes of the timeliness of

¹²⁵ *Id.* at 1106. Two justices dissented in *Benjamin Moore*, including the same justice who wrote the opinion in *Gentilini*.

the “discovery” thereof. As observed by the New Jersey Supreme Court in *Benjamin Moore*, an insured “cannot have it both ways.”¹²⁶

Regarding each transaction as involving a separate loss under *Gentilini*, an insurer could argue that, in order for there to “discovery of loss” under the applicable policy language, “there must be discovery of both the loss and the dishonesty.”¹²⁷ Ironically, such an argument would run counter to what insurers have more commonly argued in “discovery” cases, that is, that “discovery,” and the notice and suit deadlines that begin to run upon discovery, occurred earlier than as contended by the insured.¹²⁸

A case that comes fairly close to the above-discussed hypothetical is *FDIC v. Fidelity & Deposit Co. of Maryland*.¹²⁹ That case concerned a fidelity claim arising from twenty-seven suspect loan transactions and primarily involved the actions of a single dishonest employee. The insured learned of dishonest acts of that employee in connection with various loan transactions and filed a proof of loss with the insurer that detailed “some” of the subject suspect loans.¹³⁰ Among the issues on appeal was whether, for purposes the policy’s discovery period, the insured had timely “discovered” two specific loan losses that were not referenced on the (otherwise timely) proof of claim. The insurer argued that the insured did not discover the subject loan losses during the policy period. The insured, however, argued that because the policy limited liability for all loss resulting from a single employee’s dishonest actions, the loans were all “part of one huge loss.” The insured thus maintained that it satisfied the policy’s “discovery”

¹²⁶ *Id.*

¹²⁷ *California Union Ins. Co. v. American Diversified Sav. Bank*, 948 F.2d 556, 564 (9th Cir. 1991).

¹²⁸ See *RTC v. Fid. & Dep. Co. of Maryland*, 205 F.3d 615, 631 n.8 (3d Cir. 2000), in which the court appears to criticize insurers for taking inconsistent positions on the issue of when “discovery” occurs.

¹²⁹ 45 F.3d 969 (5th Cir. 1995).

¹³⁰ *Id.* at 972.

requirement with respect to the entirety of its “loss” when it discovered the employee’s basic scheme.¹³¹

Observing that “loss” is “a broad term that covers all losses arising from the acts of an employee,” the Fifth Circuit concluded that the “proof of loss need not have pinpointed every single loan loss.”¹³² However, the Fifth Circuit limited the scope of its ruling by noting that it was “unwilling to create a situation in which, as long as [the insured] can find some acts or omissions during the bond period committed by the same actor, it has unlimited time to investigate and add later losses caused by unrelated actions.” Instead, the Fifth Circuit reasoned, it would “look for loans that arose out of the same pattern of conduct or scheme that was originally discovered.”¹³³

The *FDIC* case thus stands for the proposition that timely discovery of a scheme brings into the policy period only loss arising out of “related” transactions. Under *Gentilini*, however, losses arising out of separate transactions do not constitute “a series of related acts.” Applying the logic of both cases, it would appear that the discovery by an insured of an employee’s fraud in one or more “separate” transactions during a given policy period would not trigger coverage for additional fraudulent transactions uncovered after the policy period. Again, the insured cannot (or should not) have its cake and eat it too.

The possibility of permitting multiple “discoveries” within the same scheme demonstrates some of the unfortunate fallout that can result from bad decisional law such as *Gentilini*. Such an approach would undermine the general rule that “discovery” occurs only once, in a single policy year,¹³⁴ thus raising the possibility of separate claims against successive insurers. That approach would also provide a strong incentive for insurers to cancel or decline to renew coverage at the first sign of a claim, so as to avoid having to cover subsequently discovered fraudulent transactions involving the same employee. Additionally, the

¹³¹ *Id.* at 974.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See, e.g., Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co.*, 595 N.Y.S.2d 999, 106-07 (N.Y. App. Div. 1993).

approach would make it very difficult for the former employers of a dishonest employee to obtain new crime coverage, because insurers may not wish to cover newly “discovered” losses tracing back to the earlier activities of that former employee.

VI. Conclusion

It is too still early to know whether *Gentilini* will be followed by other courts or, if so, whether it will be broadly applied or viewed as restricted to the facts and the precise policy terms at issue in the case. *Gentilini* was not the first time, nor will it be the last, that a court will accommodate an insured’s efforts to avoid a single loss limitation provision by perceiving ambiguities in policy language that other courts have found clear and unambiguous. It is hoped that this article will be of assistance to practitioners in understanding where *Gentilini* went wrong, and how it may be distinguished, or, alternatively, some of the implications to insurers and insureds if *Gentilini* gains a following in other jurisdictions.

