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Insurance Coverage Law News Alert

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Florida Federal Court Holds That Insurance Policy's "Employee Dishonesty" Exclusion Bars Coverage For Employer's Losses Proximately Caused By Employee's After-Hours Theft

In *Arch Creek Yacht Sales v. Great American Insurance Co.*, 2009 WL 1154115 (S.D. Fla. April 24, 2009), the Southern District of Florida found that an insurance policy's exclusion for "employee dishonesty" bars coverage for an insured's losses proximately caused by an employee's after-hours theft.

In *Arch Creek*, a boat salesman employed by the insured used his office key to enter the business after hours. The employee located the engine key to a 40' monterey motor vessel and took his friends on an unauthorized ride that ended abruptly when he grounded the boat on the rocks as he attempted to leave the Port of Miami. After the employee and his friends were rescued, a dispute arose among competing salvage companies that had been called to the scene. While the salvors argued, nothing was done to secure the vessel or remove it from the jetty. The wind and tide eventually knocked the boat off the rocks and it sank.

After the insurer denied coverage, the employer filed suit, and the parties subsequently filed cross-motions for summary judgment. The employer argued that an exclusion for losses caused by the "dishonest acts" of the insured's employees barred coverage. The insured countered that the boat salesman was not an "employee" for purposes of the exclusion because he had returned to the workplace and committed the theft after hours.

Although the parties agreed that New York law applied, the district court found no New York cases addressing the status of an employee whose shift had ended. The court reasoned, however, that the exclusion would be pointless if it did not apply to employees who had acted outside the scope of their employment by committing crimes. The court found:

In reality, the clear intent of the exclusion is to prevent recovery for losses caused by "employees" because they tend to be the individuals who "have more familiarly with the surroundings and, therefore, be better able to steal from [their employer] because of that familiarity than a [non-employee].

Although the boat salesman was unambiguously an employee, and the insurance policy exclusion applied, the court found that a disputed issue of fact remained as to whether the proximate cause of the loss of the boat was the employee's theft or the salvors' failure to rescue the vessel.