

## **Extra Salary Payments Illegally Obtained by Employee Not Covered by Fidelity Policy**

### ***Insurance Law Update***

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### ***U.S. Court of Appeals for the Eighth Circuit***

In *R&J Enterprizes v. General Cas. Co. of Wisconsin*, \_\_\_ F.3d \_\_\_, 2010 WL 5111677 (8<sup>th</sup> Cir. (Iowa) December 16, 2010), the Eighth Circuit Court of Appeals rejected an insured's claim that an employee dishonesty provision in a commercial marketplace policy covered more than \$100,000 in extra salary paid to an employee who overstated his hours worked on timecards. The provision stated that the insurer would pay for losses resulting from the dishonest acts of employees with the intent to "obtain financial benefit (other than salaries ... or other employee benefits earned in the normal course of employment)."

The insured filed a suit for declaratory relief and breach of contract. Applying Iowa law, the district court granted summary judgment for the insurer, and the Eighth Circuit affirmed. The court held that the policy language unambiguously excluded coverage for unauthorized salary amounts obtained by the insured's employees. The court explained: "Unearned salaries and commissions are nevertheless still salaries and commissions and therefore belong to the generic category of employee benefits that are normally earned in the course of employment."

The court also rejected attempts by the insured to obtain coverage under the doctrine of reasonable expectation and the implied warranty of particular purpose based on the affidavits of the insured's insurance agents that the policy covered the type of theft at issue. The court explained that abstract understandings of insurance agents, without evidence of specific assurances of coverage, cannot establish a circumstance that fosters an

expectation of coverage. Moreover, the erroneous opinion of an insurance agent does not establish that the insured purchased the dishonesty provision for a particular purpose, or that the insurer knew of such purpose. Finally, the court rejected the insured's assertion that the salary limitation in the provision was in any way unconscionable.

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