FIFTH DIVISION
May 10, 2013

No. 1-11-3039

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

INDIANA INSURANCE COMPANY, an Indiana corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 10 CH 46785
BROWN PACKING COMPANY, INC., an Illinois corporation, JOHN A. OEDZES, BRIAN G. OEDZES, and BRYAN S. OEDZES,	)	Honorable Mary L. Mikva,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *HELD*: The trial court's order granting summary judgment to plaintiff insurer is affirmed because the forfeiture of $2 million ordered when defendant pled guilty to illegally using hormones in the production of veal is not covered under insurance policy issued by plaintiff.

¶ 2 Defendants Brown Packing Company, Inc., John A. Oedzes, Brian G. Oedzes, and Bryan S. Oedzes (collectively Brown) appeals from a circuit court order granting summary judgment in favor of plaintiff Indiana Insurance Company (Indiana), finding Indiana did not owe Brown a duty to defend it and provide coverage where federal criminal information alleged that defendant illegally used hormones in the production of veal.

¶ 3 Brown argues that the trial court improperly entered summary judgment for Indiana because Indiana breached a duty to defend it, therefore, Indiana is estopped from claiming coverage defenses. Brown also argues there was a potential for coverage because: (1) someone could have potentially been injured, (2) the criminal information alleged wrongful entry, (3) there was an advertising injury, (4) there was slander and libel damages, and (5) a civil forfeiture of $2 million was damages within the meaning of the Indiana policies. For the reasons set forth below, we affirm the decision of the circuit court.

¶ 4 BACKGROUND

¶ 5 Defendant Brown Packing Company, Inc., is in the business of producing meat for human consumption. One product they produce is veal. Prior to 2004, the U.S. Food and Drug Administration allowed the use of hormones in veal production and set acceptable tolerance levels for hormone use in veal

production. In June of 2004, the federal government ordered that the use of steroids and hormonal implants in veal be discontinued and calves already implanted could be used in veal production only after a 63-day withdrawal period.

¶ 6 In April of 2009, Brown learned it was under investigation by the federal government concerning whether it illegally continued the use of hormones and steroids in its veal production in violation of the new guidelines. Brown forwarded this information to Indiana.

¶ 7 On August 10, 2009, the federal government filed a criminal information against Brown and its principals in the United States District Court for the Eastern District of Wisconsin. The criminal information accused Brown of felony conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343, and 1349, by unlawfully implanting veal calves with hormones and steroids, concealing that fact from customers, competitors, and the federal government, and making fraudulent claims that its veal does not contain steroids.

¶ 8 The criminal information alleges Brown actively used illegal hormones and steroids in its veal production while publicly opposing efforts to obtain FDA approval for the use of these substances. In addition, websites for its consumer brands "Dutch Valley Veal" and "Tracy Lynn's Veal," falsely claimed: (1)

no hormones or artificial chemical treatments were used in raising the veal, and (2) the veal products exceeded all USDA food safety standards.

¶ 9 On the day the criminal information was filed, Brown entered a plea agreement with the federal government. Brown pled guilty to the charged offenses and agreed to a civil forfeiture of $2 million. This sum represented the proceeds obtained by Brown from the sale of the illegal hormone-enhanced veal.

¶ 10 Indiana filed a complaint for declaratory judgment in October of 2010 seeking a declaration it did not owe a duty to defend or indemnify Brown, John Oedzes, Brian G. Oedzes, or Bryan S. Oedzes, for the allegations set forth in the federal criminal information. In granting Indiana's motion for summary judgment, the trial court held: (1) the $2 million civil forfeiture did not constitute "damages" within the meaning of the insurance policies, as that amount represented the proceeds obtained by Brown as a result of its criminal conduct; (2) even if the $2 million civil forfeiture was found to constitute "damages," it was not "bodily injury," "property damages" or "personal and advertising injury" as defined by the policies; (3) there was no coverage under the "Commercial Crime Coverage Part" of the policies; (4) defendants' affirmative defenses of estoppel and bad faith were not applicable because there was no coverage and

Indiana did not have an opportunity to defend as the case was over the day it began; and (5) there was no need for discovery as the defendants did not suggest, by way of Supreme Court Rule 191 affidavit or otherwise, what discovery could have been provided.

¶ 11 Brown filed this timely appeal of the trial court's order granting summary judgment to Indiana.

¶ 12 ANALYSIS

¶ 13 We review a trial court's grant of summary judgment under the *de novo* standard. *Chandler v. Doherty*, 299 Ill. App. 3d 797, 801 (1998). Summary judgment is proper when the pleadings, affidavits, and depositions on file reveal no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Lorenzo v. Capitol Indemnity Corp.*, 401 Ill. App. 3d 616, 619 (2010). The construction of an insurance policy is a question of law and is also reviewed *de novo*. *United Services Automobile Association v. Dare*, 357 Ill. App. 3d 955, 963 (2005).

¶ 14 At issue here is: (1) whether Indiana breached a duty to defend and, therefore, the estoppel doctrine is applicable, (2) whether Indiana is obligated to pay the $2 million civil forfeiture because the forfeiture is damages in the general sense of bodily injury, wrongful entry, advertising injury, or property damage under the policies, (3) whether Brown is covered under the

"Commercial Crime Coverage" portion of the Indiana policy, and (4) whether the trial court erred by not allowing discovery before granting Indiana's motion for summary judgment.

¶ 15 I. Duty to Defend/Estoppel Doctrine

¶ 16 We first consider Brown's claim that Indiana breached its duty to defend. Brown claims it notified Indiana of the federal investigation a year before Indiana filed its motion for declaratory judgment. Indiana did not proffer a defense. As a result, Brown claims Indiana is estopped from raising policy defenses. We disagree.

¶ 17 Under Illinois law, an insured contracts for and has a right to expect two separate and distinct duties from an insurer: (1) the duty to defend him if a claim is made against him; and (2) the duty to indemnify him if he is found legally liable for the occurrence of a covered risk. *Doherty*, 299 Ill. App. 3d at 801. The duty to defend an insured is much broader than the duty to indemnify. *Id.* In Illinois, an insurer may be required to defend its insured even when there will ultimately be no obligation to indemnify. *Id.*

¶ 18 Our preliminary inquiry is: (1) whether the insurer had a duty to defend, and (2) whether the insurer breached that duty. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151 (1999).

¶ 19 Two conditions must be met before an insurer's duty to defend arises: (1) an action must be brought against an insured, and (2) the allegations of the complaint must disclose potential coverage under the policy. *Employers Mutual Companies/Illinois Emcasco Insurance Co v. Country Companies*, 211 Ill. App. 3d 586, 591 (1991). If the allegations of the complaint reveal that the action was not brought against an insured or that there was no potential for coverage under the policy, there is no duty to defend the underlying action, and the insurer can justifiably refuse to defend. *Id.*

¶ 20 The general rules of estoppel provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured. Rather, the insured has two options: (1) defend the suit under a reservation of rights or (2) seek a declaratory judgment that there is no coverage. If the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage. *Employers Insurance of Wausau*, 186 Ill. 2d at 150-51.

¶ 21 The application of estoppel is not appropriate when the insurer had no duty to defend or the duty is not properly triggered. *Id.* A duty to defend is triggered by a lawsuit filed

against the insured. See *Country Companies*, 211 Ill. App. 3d at 591; *Lorenzo v. Capitol Indemnity Corp.*, 401 Ill. App. 3d 616, 619 (2010); *Illinois National Insurance Co. v. Universal Underwriters Insurance Co.*, 261 Ill. App. 3d 84, 88 (1994).

¶ 22 We find instructive the Illinois Supreme Court case *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520 (1995).

¶ 23 In that case, Lapham-Hickey received notice that a facility it owned in Minnesota was under investigation by a state agency for possible environmental contamination. *Lapham-Hickey*, 166 Ill. 2d at 523. Shortly thereafter, the state agency sent Lapham-Hickey a proposed consent order stating the facility was contaminated and Lapham-Hickey was strictly liable for clean up and damages caused by hazardous substances. *Id.* at 524. Lapham-Hickey did not agree or sign the proposed consent order. *Id.*

¶ 24 Lapham-Hickey investigated the facility for alleged contamination and negotiated with the government agency.

¶ 25 Lapham-Hickey was insured by Mutual Insurance Company (Protection). *Id. at* 523. The policy required that any suit against Protection be commenced within 12 months after the occurrence of which gave rise to the claim, if the 12-month period was reasonable under the law of the jurisdiction where the property was located. *Id.*

¶ 26 Lapham-Hickey filed a declaratory judgment and breach of contract action against Protection, alleging it owed a duty to reimburse Lapham-Hickey for the investigative costs. Lapham-Hickey claimed Protection breached its duty to defend. Protection claimed that the declaratory judgment action had not been commenced within the 12-month suit limitation provision of the policy. *Id.* at 525.

¶ 27 The supreme court found: "[w]hether an insurer's duty to defend has arisen is determined by looking to the allegations in the underlying complaint and comparing these allegations to the policy provisions [citation]. If the facts alleged in the underlying complaint fall within or even potentially within policy coverage, the insurer has a duty to defend its insured against the complaint. [citation]. Thus, the duty to defend extends only to suits and not to allegations, accusations or claims which have not been embodied within the context of a complaint. In the instant case, a complaint alleging liability for property damage has never been filed against Lapham-Hickey. Without a complaint, there is no 'suit.' And without a 'suit,' Protection's duty to defend Lapham-Hickey is not triggered." *Id.* at 532.

¶ 28 In this case, like *Lapham-Hickey*, when Brown first notified Indiana of the federal investigation, no suit had

been filed, only a letter which alleged Brown violated the law. As the supreme court stated in *Lapham-Hickey*, without a suit, the insurer's duty to defend is not triggered. *Id.* Thus, when Brown first notified Indiana of the investigation, Indiana's duty to defend was not triggered because no suit had been filed. *Id.*

¶ 29 Brown argues in its appellate reply brief that Indiana was obligated to defend it and provide coverage as soon as it was notified of the federal investigation, based on the following clause in the Indiana policies:

> "2. Duties In The Event Of Occurrence, Offense, Claim Or Suit
>
> a. You must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim. ***
>
> b. If a claim is made or 'suit' is brought against any insured, you must: ***
>
> c. You and any other involved insured must:
>
> (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit', ***
>
> (3) Cooperate with us in the investigation or settlement of the

claim."

¶ 30 Brown argued that the language of the policy implies Indiana would defend Brown because there is no other purpose for them getting prompt information about the claim. Brown claims that under this policy section, Indiana is estopped from providing coverage defenses because it failed to act when it was presented with information it required under the policies.

¶ 31 Brown's claim is not persuasive. We cannot say the above clause requires Indiana to undertake any action. Instead, the clause requires Brown to notify Indiana of any claim and to cooperate with Indiana in an investigation or settlement of a claim. Indiana is not expressly required to undertake any action to defend Brown under this clause.

¶ 32 Brown has not identified any clause in the various Indiana insurance policies where Indiana would be required to act in any manner during a federal investigation of Brown's criminal activity. Therefore, we cannot say that the letter advising of the investigation triggered a duty on the part of Indiana to defend Brown during an investigation.

¶ 33 In respect to the criminal information, it was filed on the same day that Brown pleaded guilty and settled with the federal government. The federal case was over the day it began. Indiana was not given an opportunity to defend once the federal

case was filed and, therefore, did not breach a duty to defend. See *Employers Insurance of Wausau*, 186 Ill. 2d at 151; *Lapham-Hickey*, 166 Ill. 2d at 531-33.

¶ 34 II. Obligation To Cover $2 Million Civil Forfeiture

¶ 35 A. Damages

¶ 36 Indiana alleged in its motion for summary judgment that the criminal information did not seek damages, rather, it was penal in nature. The trial court found that the $2 million civil forfeiture did not constitute damages within the meaning of the insurance policies, as that amount represented the proceeds obtained by Brown as a result of its criminal conduct. Brown claims the civil forfeiture of $2 million to the federal government is "damages" within the meaning of the Indiana policy.

¶ 37 However, "[a] criminal complaint does not seek damages. It is penal in nature." *Spiegel v. State Farm Fire and Casualty Co.*, 277 Ill. App. 3d 340, 341 (1995) (quoting *Shelter Mutual Insurance Co. v. Bailey*, 160 Ill. App. 3d 146, 156 (1987)).

¶ 38 There is no insurable interest in the proceeds of fraud. *Ryerson, Inc., v. Federal Insurance Co.*, 676 F. 3d 610, 613 (7th Cir. 2012). In *Ryerson*, the plaintiff sold a group of subsidiaries to EMC Group, Inc. (EMC). *Ryerson*, 676 F. 3d at 612. After the sale, EMC filed suit claiming plaintiff fraudulently concealed the fact that the largest customer of one

of the subsidiaries was threatening to pull its business. *Id.* The plaintiff's insurer, Federal Insurance Company (Federal), refused to reimburse plaintiff for costs associated with defending EMC's lawsuit and a subsequent settlement where the plaintiff agreed to give back $8.5 million from the original purchase price of the subsidiaries. *Id.*

¶ 39 The 7th Circuit found the $8.5 million refund was proceeds the plaintiff procured through fraud. *Id.* The court stated, "If disgorging such proceeds is included within the policy's definition of 'loss,' thieves could buy insurance against having to return money they stole. No one writes such insurance." *Id.* at 612-13. The court further stated, "You can't, at least for insurance purposes, sustain a 'loss' of something you don't (or shouldn't) have." *Id.* at 613.

¶ 40 In the instant case, like *Ryerson*, we cannot say the $2 million dollar civil forfeiture is damages within the meaning of the Indiana policies because those funds are the product of the illegal activity of injecting its veal with steroids and hormones and concealing this fact from the public. The criminal information alleges the $2 million civil forfeiture represents the amount of funds Brown gained through its illegal activity. Therefore, like the court in *Ryerson*, we cannot say Brown has sustained "damages" for something it should not have. *Id.*

¶ 41 Brown, on the other hand, cites several cases in support of its claim that the civil forfeiture is indeed damages, including: *Standard Mutual Insurance Co. v. Lay*, 2012 IL App (4th) 110527; *United States Fidelity and Guaranty Co. v. Specialty Coatings Co.*, 180 Ill. App. 3d 378 (1989); and *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90 (1992).

¶ 42 We cannot say any of these cases apply here. In *Lay*, the 4th District Appellate Court found that damages under the federal Telephone Consumer Protection Act (TCPA) were punitive in nature, thus, a statutory penalty, and not insurable as a matter of Illinois law and public policy and not recoverable from Lay's insurer.

¶ 43 Brown claims the civil forfeiture here is damages and not a penalty because under the court's definition in *Lay*, a penalty must: (1) impose automatic liability for a violation of its terms; (2) set forth a predetermined amount of damages; and (3) impose damages without regard to the actual damages suffered by the plaintiff. *Lay*, 2012 IL App (4th) 110527 at ¶36.

¶ 44 Brown claims the civil forfeiture is damages and not a penalty because: (1) the amount of the forfeiture was based on "gross proceeds traceable to the commission of the offense," (2) it was not a recognized statutory penalty as it did not impose

automatic liability, (3) it did not set forth a predetermined amount of damages, and (4) the $2 million was not imposed without regard to the actual damages suffered.

¶ 45 Brown's claim is not persuasive because the rule in Lay is based on the facts of that case and not applicable here. The underlying complaint in *Lay* was a federal complaint for a violation of a regulatory statute. The court in *Lay* noted that the TCPA creates a private right of action permitting recipients of unwanted fax advertisements to seek injunctive relief and damages if a court finds the sender acted "willfully or knowingly." *Lay*, 2012 IL App (4th) 1110527 at ¶29 (quoting 47 U.S.C. §227(b)(3) (2006)). Punishment for violation of the TCPA is a fine.

¶ 46 Here, unlike *Lay*, Brown was charged under a criminal statute for engaging in criminal activity, not a regulatory statute where there is a private right of action and the penalty is merely a fine without the potential for prison. As such, we cannot say the criminal activity of which Brown engaged and the resulting civil forfeiture are insurable as a matter of Illinois law and public policy and recoverable from Brown's insurer. *Id.* at ¶30.

¶ 47 Similar to *Lay*, *United States Fidelity and Guaranty Co. v. Specialty Coatings Co.*, 180 Ill. App. 3d 378 (1989), and

Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90 (1992), involve an underlying complaint for a violation of a regulatory statute, unlike the instance case, where Brown is the subject of a criminal prosecution.

¶ 48 As the trial court stated, *Specialty Coatings* and *Outboard Marine* are both environmental pollution cases where the defendants were required by the government to spend money to clean up environmental contamination. The costs of mandatory environmental cleanups were damages because they constituted an "estimated reparation in money for detriment or injury sustained." *Specialty Coatings*, 180 Ill. App. 3d at 391-92.

¶ 49 We agree with the trial court's finding that there is no requirement here, unlike *Specialty Coatings*, to pay the costs to repair an injury caused by Brown because Brown was forced to forfeit its illegal gains, which falls outside the realm of damages.

¶ 50 B. Bodily Injury

¶ 51 Brown argues the allegations in the criminal information suggest a potential bodily injury within the meaning of the Indiana policies because the public might have been injured from eating doctored veal.

¶ 52 "Bodily injury" is defined in the Indiana policies as a "physical injury, sickness or disease, sustained by a person,

including mental anguish, mental injury, shock, fright or death."

¶ 53 In support of its claim, Brown cites *International Insurance Co. v. Rollprint Packaging Products, Inc.*, 312 Ill. App. 3d 998 (2000).

¶ 54 In *International Insurance Co.*, we found the underlying lawsuit was not required to specifically state a cause of action that would bring it under the insurance policy, but merely suggest the cause of action arose from a clause covered in the policy. *Id.*

¶ 55 We cannot say *International Insurance Co.* supports Brown's claim because the underlying civil complaint in *International Insurance Co.* alleged an employee was forcibly removed from the premises, an element of wrongful eviction which was covered under International's policy. Here, unlike *International Insurance Co.*, there are no allegations in the criminal information that we can say are an element of "bodily injury" as defined by the Indiana policies.

¶ 56 The criminal information does not allege a physical injury, sickness or disease occurred here, rather it alleges Brown engaged in criminal conduct. The criminal information alleges Brown conspired to deceive the public and the federal government into believing that its veal did not contain illegal steroids and hormones. Thus, the criminal information, unlike

the complaint in *International Insurance Co.*, does not suggest the cause of action arose from a clause covered in the policy. *Id.*

¶ 57 Brown claims that there should be coverage because someone potentially could have been injured. However, the court in *International Insurance Co.* found an *actual* cause of action, not a *potential* cause of action, arose from a clause covered in the policy. The Indiana policy does not provide coverage for potential bodily injury.

¶ 58 C. Wrongful Entry

¶ 59 Next, Brown claims count I of the criminal information alleges personal injury arising out of the offense of wrongful entry as defined by the policies.

¶ 60 Under the Indiana policy:

> "13. 'Personal injury' means injury, other than 'bodily injury', arising out of one or more of the following offenses:
>
> ***
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or an behalf of its owner, landlord, or lessor[.]"

¶ 61 Brown claims the federal government alleged that Brown entered the property of those raising the calves owned by Brown and injected the calves with hormones and steroids. Brown argues count I is essentially alleging wrongful entry.

¶ 62 However, a review of count I shows that there is no allegation of wrongful entry of the premises of "its owner, landlord, or lessor." Under count I of the criminal information, the federal government alleges that Brown conspired to deliver prohibited substances to labor lease farms housing its cattle. There are no allegations suggesting that Brown entered the property of those raising its veal calves without authority. Therefore, we cannot say count I implicates the Indiana policy coverage for wrongful entry.

¶ 63 D. Advertising Injury

¶ 64 Next, Brown claims an advertising injury because federal authorities alleged Brown sent letters to others regarding its opposition to industry efforts to obtain federal approval for injecting calves with hormones and steroids. Brown claims an advertising injury also occurred when the federal government alleged Brown presented false certifications to the Food and Safety and Inspection Service of the U.S. Department of Agriculture. Brown claims these allegations resulted from Brown's oral and written publications, thus, it suffered an

advertising injury within the meaning of the Indiana policy.

¶ 65 The Indiana policy states:

> "b. This insurance applies to:
>
> ***
>
> (2) 'Advertising injury' caused by an offense committed in the course of advertising your goods, products or services[.]"
>
> "Advertising injury" is defined under the policy as "injury arising out of one or more of the following offenses:
>
> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business; or
>
> d. Infringement of copyright, title or slogan."

¶ 66 We cannot say Brown's opposition to efforts to obtain

federal approval for the use of steroids and other chemicals in veal production can be identified as the slander or libel of a person, organization, a disparage of a person's goods, products or services, or a violation of a person's right of privacy. The criminal information does not suggest Brown slandered or libeled anyone rather it alleges Brown conspired to deceive consumers when it published advertisements claiming its products were steroid-free and when it published materials stating an opposition to the use of steroids, all the while actively implanting steroids into its veal.

¶ 67 We are also not persuaded by Brown's claim that the intentional criminal act of presenting false certificates to the federal government is somehow an advertising injury.

¶ 68 In addition, as the trial court noted, the policies contain an exclusion for "personal and advertising injury arising out of a criminal act committed by *** the insured."

¶ 69 The criminal information alleges that Brown lied about the use of steroids in its veal, deceptively opposed an industry movement to make the use of steroids in veal a lawful practice, and maintained a website making false claims about its veal products. These are criminal activities, not innocent or accidental advertising injury, as Brown claims, and excluded from coverage under the policies.

¶ 70 E. Property Damage

¶ 71 In its appellate reply brief, Brown alleges it suffered "Property Damage" as defined by the Indiana policy.

¶ 72 Under the Indiana policy, Indiana agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies" only if the "'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory[.]'"

¶ 73 The policy defines "property damage" as:

> "a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

¶ 74 The policy defines an "occurrence" as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶ 75 Brown claims that the veal is tangible property and

suffered a physical injury when implanted with hormones.

¶ 76 Brown's claim is not persuasive because it ignores the policy's definition of "occurrence." Under the policy, an "occurrence" requires an accident. The criminal information alleges the veal was intentionally implanted with hormones, not accidentally, as required by the policy. Therefore, we cannot say there was an "occurrence" of "property damage" within the meaning of the Indiana policy.

¶ 77 III. Commercial Crime Coverage

¶ 78 Brown claims it is covered under the "Commercial Crime Coverage Part" of the Indiana insurance policy because it provides coverage for losses due to employee dishonesty.

¶ 79 The Commercial Crime Coverage part of the policy provides:

> "A. COVERAGE
>
> We will pay for loss of, and losses from damage to, Covered Property resulting directly from the Covered Cause of Loss.
>
> a. Covered Property: 'Money,' 'securities,' and 'property other than money and securities.'

b. Covered Cause of Loss:

'Employee dishonesty.'

***

4. ADDITIONAL EXCLUSIONS, CONDITION AND DEFINITIONS: ***

3. Additional Definitions

(1) 'Employee Dishonesty' in paragraph A.2. means only dishonest acts committed by an 'employee,' whether identified or not, acting alone or in collusion with other persons, except you or a partner, with the manifest int

(1) Cause you to sustain loss; and also

(2) Obtain financial benefit (other than employee benefits earned in the normal course of employment, including: salaries, commissions, fees, bonuses, promotions, awards profit sharing or pensions)

for:

(A) The 'employee'; or

(b) Any person or organization intended by the 'employee' to receive that benefit."

¶ 80 We cannot say there is coverage for Brown under the "Commercial Crime Coverage Part" because this section of the Indiana policy provides coverage when Brown is victimized by an illegal act of an employee. The criminal information does not allege that a Brown employee violated federal criminal law, rather it alleges the principals in the Brown company engaged in criminal activity.

¶ 81 Furthermore, under the exclusions, the policy provides that the employee must have the intent to cause Brown to sustain a loss. There is no evidence here that the fraudulent practices alleged in the criminal information were undertaken with the intent to cause Brown to sustain a loss. Rather, the criminal information alleges the criminal activity was undertaken for Brown's financial benefit.

¶ 82 However, Brown argues that because there are cases of criminal conduct where coverage has been found, Indiana had a duty to provide coverage to Brown here. Brown's claim is not persuasive because the policies here clearly exclude coverage.

¶ 83 IV. Discovery

¶ 84 Next, Brown claims, without citing to any legal authority, that the trial court erred when it granted Indiana's motion for summary judgment because Indiana had yet to respond to Brown's discovery requests.

¶ 85 Brown claims a response to its discovery requests would have informed the trial court of the lack of action Indiana undertook when Brown notified it of the federal investigation.

¶ 86 However, Brown has not alleged what action Indiana could have undertaken or how it was harmed by Indiana's lack of response to Brown's notification of the federal investigation. As previously noted, Brown has not identified anything in the Indiana policies that would require Indiana to act in any manner once it was notified of the federal investigation. Furthermore, no case had been commenced against Brown when it learned it was under investigation, thus, coverage was not triggered.

¶ 87 As far as the criminal information and Brown's settlement, as previously stated, Indiana was given no opportunity to defend because as soon as the criminal information was filed, Brown settled. As Indiana states, instead of tendering the defense of the newly filed criminal information to Indiana and allowing it to review the criminal information to make a determination as to whether it had a duty to defend, Brown

pleaded guilty, settled, and the case ended.

¶ 88 As a result, we cannot say discovery was necessary here. The criminal information alleged Brown and its principals undertook criminal activity. The policies do not show any coverage for such criminal activity. Therefore, we cannot say discovery was necessary here or that the trial court erred when it granted Indiana's motion for summary judgment.

¶ 89 CONCLUSION

¶ 90 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 91 Affirmed.