

# Breach of Oral Promise to Pay Retiring Employees Extra in Stock Repurchase Does Not Constitute an Employment Wrongful Act

---

July 2006

In an unreported decision, the United States District Court for the Eastern District of Wisconsin, applying Wisconsin law, has held that a breach of an oral modification to a stock buy-back agreement does not constitute an employment wrongful act. *Krueger Int'l, Inc. v. Royal Indemnity Co.*, 2006 WL 1440852 (E.D. Wis. 2006).

The insurer issued a policy to a company that provided coverage for "employment wrongful acts."

The company had a shareholder agreement with four employees who retired in the fourth quarter of 2000. Under the written shareholder agreement, the company had the option to repurchase the retired employees' company stock at the share price of the last day of the previous quarter. Although the employees retired in the fourth quarter, the company waited until the new year to repurchase the shares. By waiting until the new year, the company was only obligated to repurchase the stock at the fourth quarter price, resulting in a net savings to the company of some \$4,000,000. The retiring employees brought suit against the company for the difference between the share price of the third and fourth quarters. The employees alleged in their suit that the CFO orally promised them that the company would repurchase their stock at the third quarter price if they retired in the fourth quarter. Ultimately, a jury awarded the employees the difference in stock price, and the company sought indemnification from its insurer for the judgment.

The court held there was no coverage for the judgment. The insurer had argued that breach of contract damages are not recoverable under liability policies "because otherwise a party would be free to ignore his contractual obligations with impunity, knowing that his liability insurer would be there to pick up the tab." The company argued in response that the wrongful act was not the company's failure to honor the oral modification, but the CFO's act of orally modifying the contract. However, the court concluded that "a promise to pay a higher price for the company stock of departing employees [was] simply not an 'employment wrongful act' within the meaning of the policy." According to the court, there was nothing wrongful about the CFO's promise to pay the retiring employees more money. The court therefore concluded that there was no coverage regardless of whether one viewed the loss as resulting from a breach of contract or the CFO's promise regarding valuation.