Intentional Act Exclusion and an Insurer’s Right to Intervene

It is well-settled in Ohio that if a determination is made as to the culpable mental state of a tortfeasor, the tortfeasor’s insurer is precluded from relitigating this same issue in a subsequent coverage action. In other words, if an insurer wants a determination made as to whether its insured’s alleged actions were willful or intentional (and therefore excluded under its policy) then the insurance company must seek to intervene in the tort action and ask the judge and/or jury to resolve this issue. What has perplexed insurers in this state for years is what happens to an insurer’s ability to enforce its coverage position when its motion to intervene is denied.

In Gehm v. Timberline Post & Frame, 112 Ohio St.3d 514, 2007-Ohio-607, the Supreme Court of Ohio answered this question by holding that when a party has sought and been denied intervention, collateral estoppel will not prohibit future litigation of similar issues. This holding resolves a conflict between Ohio’s appellate courts and relieves the insurer of appealing a trial court’s denial of its motion to intervene without jeopardizing its ability to prosecute a declaratory judgment action at a later date.

When the liability insurer of a defendant in a tort action disputes coverage, the insurer has an interest in the outcome of the tort action independent of its insured’s interests. In Howell v. Richardson (1989), 45 Ohio St.3d 365, the Ohio Supreme Court held that in this situation, the insurer must move to intervene in the tort action and participate as a third-party defendant so as to defeat any liability on its part (i.e., by demonstrating that the acts of the insured/tortfeasor were intentional or otherwise not covered). As noted by the Court, “[i]t is this opportunity that must be seized. Otherwise, whether seized or not, the opportunity to litigate in the original action will preclude relitigation of liability in the supplemental proceeding.” Id. at 367-368.

In Howell, the defendant fired a gun into a truck occupied by the plaintiff, causing him serious injury. The plaintiff filed suit against the defendant for intentional tort and negligence. After a trial, the court determined that the defendant had acted negligently and not intentionally, and entered judgment for the plaintiff based on the negligence theory. Unable to obtain satisfaction of the judgment, the plaintiff then instituted a supplemental action against the defendant’s insurer. After a trial, both parties filed motions for directed verdict. The court determined that the defendant’s culpable mental state had been conclusively resolved in the earlier action. On appeal, the insurer argued that the doctrine of collateral estoppel should not have been applied to it with regard to its desire to relitigate the defendant’s culpable mental state. The Ohio Supreme Court disagreed noting: “Inasmuch as [the insurer] possessed a contractual relationship with [the defendant] and, in any event, could have intervened in the prior proceeding, it is precluded from relitigating the issue of [the defendant’s] mental state. Id. at 367.

As a result of Howell, insurers now routinely move to intervene in underlying actions to fully develop the facts needed to demonstrate their coverage position. Often, those motions to intervene are denied and there was no clear indication from the appellate courts as to whether the denial of the motion to intervene was a final appealable order, or that if the insurer did not appeal, the Howell decision would preclude the opportunity for the insurer to develop the facts it needed in a subsequent declaratory judgment action.

The Supreme Court’s decision in Gehm clarifies this issue. In Gehm, the Court held that the denial of the insurer’s [Westfield] motion to intervene would not preclude it from litigating the issue of intent at a later date. Specifically, the Court held, “Westfield misconstrues Howell, which imposed collateral estoppel against an insurer when it ‘could have intervened in the prior proceeding.’ When a party has sought and been denied intervention, collateral estoppel will not prohibit future litigation of similar issues. As Westfield has sought and been denied intervention here, it will not be stopped from litigating its claims in another case. Id. at 519.

The Gehm decision is particularly useful to insurers in that it provides a measure of protection to those insurers whose motions to intervene are denied, by ensuring that the insurer is still entitled to enforce its coverage defenses at a later date. The ruling also saves insurers the time and expense of appealing a trial court’s denial of its motion to intervene.

For more information about this decision, or to discuss any insurance coverage issues, feel free to contact any of Reminger & Reminger’s Insurance Coverage Group attorneys.