Stop Gap Coverage Does Not Provide A Duty To Defend Employer Intentional Torts

In Ward v. United Foundries, Inc., Slip Opinion No. 2011-Ohio-3176, the Ohio Supreme Court held that an insurer does not owe a duty to defend an employer-insured for an intentional tort claim or a substantial-certainty employer intentional tort claim. This significant opinion resolves a previous conflict amongst Ohio’s appellate courts and offers clarity to insurers with respect to their duty to defend insureds against employer intentional tort actions.

By way of background, David Ward filed a complaint against his employer, United Foundries ("United"), alleging claims for employer intentional tort. United filed a declaratory judgment against Gulf Underwriters Insurance Company ("Gulf") claiming that Gulf owed a duty to defend United for the claims asserted by Ward based upon a commercial general liability policy issued by Gulf to United. Specifically, the CGL policy contained a Stop Gap Endorsement which excluded coverage for “bodily injury” intentionally caused or aggravated by you, or ‘bodily injury’ resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur.”

The Stop Gap Endorsement historically provides limited employers liability coverage for work-related injuries to their employees arising out of incidental operations or exposures. The Endorsement negates the "employee exclusion" usually found in the employer's CGL policy and provides coverage for so-called third-party-over actions, consequential injury claims such as loss of consortium to an injured employee's family members, so-called dual capacity claims (wherein an employer is held liable as both as an employer and a manufacturer, for example) and claims for injury or disease not otherwise covered by workers' compensation laws.

Over the past decade, there has been a significant amount of litigation related to the Stop Gap Endorsement in Ohio and the extent to which the Endorsement provides a defense and/or indemnity obligation for a substantial-certainty employer intentional tort claim. In the Ward case, the trial court concluded that if the Stop Gap Endorsement excluded a defense obligation for such employer intentional torts, then the Gulf policy was illusory and ordered Gulf to defend United against Ward’s claims.

In reversing the trial court’s decision, the Fifth Appellate District rejected United’s argument that it was entitled to a defense because the underlying tort claim had not yet been “determined to have been committed.” Instead, the court concluded that because the underlying claim was neither potentially nor arguably covered under the terms of the policy, Gulf had no duty to defend or indemnify United. The Fifth Appellate District’s decision conflicted with other appellate courts with respect to an insurer’s duty to defend under the Stop Gap Endorsement, and the Ohio Supreme Court accepted the case for review.

In affirming the decision of the Fifth District, the Supreme Court found that the plain language of the Stop Gap Endorsement precluded coverage for substantial-certainty intentional torts. This meant that because the allegations in Ward’s complaint fell within this category of injury claim, the court concluded that if the Stop Gap Endorsement excluded a defense obligation under the CGL policy, it was illusory and ordered Gulf to defend United against Ward’s claims.

The United Foundries decision is particularly useful in that it provides a concise and easy to understand analysis of an insurer’s duty to defend against employer intentional tort claims. For more information about this decision, or to discuss any insurance coverage issues, feel free to contact any of Reminger’s Insurance Coverage Group attorneys.

Cleveland

Holly Marie Wilson
hwilson@reminger.com
101 W. Prospect Ave., 1400 Midland Bldg.
Cleveland, OH 44115
Phone: 216-430-2238
Fax: 216-687-1841

Columbus

Nicole M. Norcia
nnorcia@reminger.com
65 East State St., 4th Floor
Capitol Square
Columbus, OH 43215
Phone: 614-232-2432
Fax: 614-232-2410

Lexington, KY

Matthew T. Lockaby
mlockaby@reminger.com
269 West Main Street, Suite 700
Lexington, KY 40507
Phone: 859-428-4831
Fax: 859-233-1312

Louisville, KY

Emily W. Newman
enewman@reminger.com
One Riverfront Plaza
401 W. Main St., Ste. 710
Louisville, KY 40202
Phone: 502-625-7300
Fax: 502-589-5436

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