

From: John Travis
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Gallagher Sharp Newsflash: No Duty to Defend Intentional Tort Claim

Today, July 6, 2011, the Supreme Court of Ohio held in *Ward v. United Foundries, Inc.*, 2011-Ohio-3176, that a stop-gap insurer need not defend a substantial-certainty intentional tort claim by an employee.

The insured/employer purchased a CGL policy with a stop-gap endorsement. That endorsement deleted the exclusions in the CGL policy with respect to 'bodily injury' included within the 'employer's liability hazard' and replaced them with other exclusions listed in the stop-gap endorsement. The exclusion at issue in the stop-gap endorsement barred 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."

When the insured was sued by an employee for an employer intentional tort, the insurer denied any duty to defend based on the foregoing exclusion. The insured filed a declaratory judgment action against the insurer for a declaration of coverage. The insured also sued the insurance agency and broker for failing to obtain the coverage the insured had requested. The insured won in the trial court but lost in the court of appeals. The Supreme Court heard the case after determining that there was a conflict between two courts of appeals on this issue.

The insured advanced two arguments. First, that a defense was owed until a trier of fact determined that an act was committed with the belief that injury was substantially certain to occur. Second, if the exclusion was given effect, any coverage would be illusory. The Supreme Court rejected both arguments.

The court reasoned that there is no language in the exclusion that implies a determination by a fact-finder is required before the exclusion can be enforced. Any purported ambiguity has no legal significance because there is no set of facts under which coverage could exist—all potential claims fall within the exclusion, and the policy provides that there is no duty to defend against any suit to which the insurance does not apply.

As to the claim that any coverage was illusory, the court noted that the endorsement added coverage for "employer's liability hazards" that were expressly excluded in the CGL policy. Thus coverage was afforded for consequential bodily injury (claims by relatives of an employee for their injuries), dual capacity claims (where the employer is sued both as an employer and in another capacity), and contribution and indemnification claims of third parties. When there is some benefit to the insured from the face of the endorsement, it is not an illusory contract.

The insured also argued that it did not receive the coverage it intended. The Supreme Court observed that the insured could make that argument against the agency and broker who procured the policy, not the insurer whose policy language is plain, unambiguous, and not misleading.

The opinion joined in by six of the seven justices (Justice Pfeifer concurred in judgment only) can be viewed at: <http://www.supremecourtsohio.gov/rod/docs/pdf/0/2011/2011-ohio-3176.pdf>

If you have any questions, please contact:

John Travis
Insurance Practice Group Manager
Timothy J. Fitzgerald
Appellate Practice Group Manager
Gallagher Sharp
Sixth Floor, Bulkley Bldg.
1501 Euclid Avenue
Cleveland, OH 44115
Phone: (216) 241-5310
jtravis@gallaghersharp.com
tfitzgerald@gallaghersharp.com
www.gallaghersharp.com