Weston Hurd LLP
Attorneys at Law

Weston Hurd Client Advisory - July 2011

Ohio Supreme Court Rules That Insurers Owe No Duty To Defend Intentional Tort Claims Under A Stop Gap Endorsement

Prepared by Ronald A. Rispo, Esq.

On July 6, the Ohio Supreme Court released an opinion in ***Ward v. United Foundries, Inc.*** 2011-Ohio-3176, which finally settles the question which has been in dispute for 20 years, relating to the matter of Insurance Coverage for Employer's Intentional Torts under the standard form Stop Gap Endorsements.

The court has concluded that there is No Duty to Defend the Employer's Intentional Tort case against the insured employer, **even where the employer has purchased an endorsement** which was written and designed to eliminate the exclusion in the CGL policy for claims by employees in the course and scope of employment, subject to an exclusion for intentional injuries.

In the United Foundries policy, the Stop Gap Endorsement contained the standard and typical exclusion for intentional injuries, which was written as follows:

"This insurance does not apply to:

e. 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. " (emphasis supplied)

The certified question was whether the language in bold requires that an insurer provide a defense until some independent body **has determined** that the conduct occurred, as defined. The court answered in the negative.

Further, the court held that the language of the stop gap endorsement was clear and unambiguous, and further that the endorsement was not illusory, because it does provide some limited form of coverage.

The court then dealt with the insured's complaint that the coverage does not provide him with the coverage he intended to purchase. In response, the court stated:

'BUT THIS IS AN ARGUMENT FOR UNITED (the insured) TO ASSERT AGAINST THE INSURANCE AGENCY OR BROKER WHO PROCURED THE POLICY, NOT AGAINST THE INSURER"

Now, we can anticipate that the unhappy insureds will be redirecting their attack against the agents and brokers and they, in turn, will be defending themselves with whatever they have been advised in offering bulletins by the insurers. Instead of a direct claim against the insurer, we can expect errors and omissions claims against the agents, who then may have to invoke the marketing bulletins distributed to them by insurers and/or verbal advices they may have been provided by the underwriters and/or claims representatives.

Since many insurers have been providing a courtesy defense under reservations of rights, over the past 20 years, there also could be an issue whether there has been a "course of conduct" established.

Ohio Supreme Court Opinion:
Ward v. United Foundries, Inc.

Ronald A. Rispo concentrates his practice on insurance, medical malpractice, product liability, zoning and subdivision regulation, and real estate law. He has served as the Regional Vice President and a member of the Board of the Defense Research Institute. Ron is the former President of the Ohio Association of Civil Trial Attorneys, and was instrumental in the drafting and passage of Ohio's Tort Reform Legislation in 1987 and 1996. He was recently named to the "Best Lawyers in America" and since 2007 has been selected as an Ohio Super Lawyer in the category of Insurance Coverage by Law & Politics Media, Inc. Ron has also been the recipient of Westfield Insurance Company's "Golden Gavel Award" for his successful trial and defense work for Westfield. Ron can be reached at (216) 687-3217 or RRispo@westonhurd.com.

About Weston Hurd LLP

With offices in Cleveland, Columbus, Akron and Beachwood, Weston Hurd LLP provides comprehensive legal counsel to Fortune 500 companies, insurance carriers, banks, healthcare providers, small- and medium-sized businesses, the real estate industry, governmental agencies, non-profit enterprises and individuals.

For additional information regarding Weston Hurd's Insurance Coverage publications, please visit the Publications page on Weston Hurd's web site. Information on Weston Hurd's Insurance Coverage Practice Group and its attorneys, can be found on the Practice Areas page.

www.westonhurd.com