Update on Insurance in Ohio for Employer Intentional Torts

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Introduction

• Brief History of Employer Intentional Torts in Ohio
• Brief History of Insurance Coverage for Intentional Torts
• Impact of Recent Court Decisions on Insurance for these Torts
• The Future
Historical Tension

- Between insurance that historically does not provide coverage for intentional misconduct.
- Intentional torts committed by employers against employees where Workers’ Compensation did not provide enough benefits to injured worker.
1924 Amendment to Section 35, Article II of the Ohio Constitution:

• Seemingly abolished the employer’s remaining “open liability,” specifying that a workers’ compensation award “shall be in lieu of all other rights to compensation[.]”

• Provided for punishment of employers that violated safety requirements within workers’ compensation system through creation of VSSR proceedings.
Historical Overview (cont’d)

Between 1924 and 1982, employers were immune from civil suit but:

• Paid workers’ compensation premiums; and

• Could be required to pay an additional amount of between 15% and 50% of the total compensation awarded to an injured employee as a VSSR penalty.
Historical Overview (cont’d)

Creation of intentional tort liability

• *Blankenship v. Cincinnati Milicron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, devised an intentional tort exception to workers’ compensation exclusivity.

• *Blankenship* liability extended to “direct intent” torts as well as acts committed by the employer with knowledge that injury is “substantially certain to occur.”

• Three-part test for “substantial certainty” tort refined in *Fyffe v. Jeno’s, Inc.* (1991), 59 Ohio St.3d 115.
Historical Overview (con’t)

• Three part test:
  – Employer knew of the danger;
  – knew that exposure to the danger meant that harm to employee was “substantially certain to occur”; and
  – acted to require the employee to perform the task despite the danger and substantial likelihood of harm.
Historical Overview (cont’d)

The legislative response:

- General Assembly passes R.C. 4121.80, which is declared unconstitutional in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624.

- General Assembly passes R.C. 2745.01, which is declared unconstitutional in *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298.

- General Assembly passes current R.C. 2745.01, which upheld in *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027.
Historical Overview (con’t)

- R.C. 2745.01; *Kaminski v. Metal & Wire Products, Co.*, (2010), 125 Ohio St.3d 250.
  - (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
  - (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
Historical Overview of Insurance for Intentional Torts

  - The Supreme Court of Ohio holds that a CGL policy does not provide insurance for the *Blankenship* tort for two reasons:
    - The “expected or intended” language barred coverage as it excluded intentional acts and;
    - Ohio public policy barred insuring against one’s own intentional conduct.
Harasyn v. Normandy Metals, Inc. (1990), 49 Ohio St.3d 173.

- The Supreme Court of Ohio distinguished *Wedge Products*, the case it had decided only two years earlier and said if Employers had an Ohio Stop Gap Employers Liability Coverage Endorsement, public policy would not prohibit insurance where the employer’s act was performed with the knowledge that the injury was “substantially certain to occur.”
Insurance-Historical Overview (con’t)

- *Kaminski*-discussed earlier finds that the new statute is constitutional and it is permissible to define “substantial certainty” to mean acting with “deliberate intent.”

- This case called into question the continued validity of the Ohio Stop Gap Endorsement that provided certain coverage for these torts.
Impact of Recent Decisions

  - Language in a commercial liability insurance policy stating that the insurance does not apply to bodily injury resulting from an act that is “determined” to have been committed by an insured with the belief that the injury is substantially certain to occur does not require a final determination before insurer can refuse to defend.
Impact of Recent Decisions

- *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d (2015)
  - “An insurance provision that excludes coverage for actions committed with deliberate intent to injure an employee precludes coverage for employer intentional torts, which require a finding that the employer intended to injure the employee.”
What is Next

- Do Stop Gap Endorsements in CGL policies still provide any coverage for Employer Intentional torts under R.C. 2745.01?
- If so, what do they or can they cover?
What is Next

- Examine your insurance policy with your broker and/or agent.
- Do you have Ohio Employer Stop Gap Endorsement?
  - If so, what does it purport to cover?
    - Intentional torts?
    - Dual Capacity?
    - Third Party over?
- Does it provide a defense?
- Does it have sub-limits?
What’s Next

• Further Refinement by Ohio Supreme Court?
• Permit the purchase of insurance against one’s intentional acts?
• Repealing the right of an employee to sue in Ohio for an intentional tort outside the scope of the Worker’s Compensation Framework?
• Carving out exception for the purchase of insurance the “Blankenship tort”?