



July 6, 2011

RE: NEW OHIO SUPREME COURT DECISION ON DUTY TO DEFEND

Today the Ohio Supreme Court released a new decision addressing and clarifying an insurer's duty to defend its insured. Although this decision addressed an insurer's duty to defend within the context of a policy's stop-gap endorsement and a substantial-certainty employer intentional tort, it has broader implications for other types of coverage questions. To obtain a copy of the decision, click the link below.

<http://www.sconet.state.oh.us/rod/docs/pdf/0/2011/2011-ohio-3176.pdf>

Plaintiffs sued United Foundries, alleging a substantial-certainty employer intentional tort. United Foundries in turn sought coverage under their CGL policy with Gulf Underwriters. The Gulf Underwriters policy had stop-gap endorsement which expressly excluded bodily injury "resulting from an act which is considered to have been committed by you with the belief that an injury is substantial certain to occur."

Gulf denied coverage to United Foundries and a declaratory judgment action ensued. The parties agreed if United Foundries was liable to plaintiffs on the substantial-certainty employer intentional tort, then Gulf had no obligation to indemnify its insured. United Foundries argued until such time as its liability was determined, Gulf Underwriters was obligated to provide it with a defense.

The Supreme Court disagreed with United Foundries and held there was no duty to defend. They noted the exclusion within the stop-gap endorsement contained no provision requiring a determination of liability before the exclusion could be enforced. Further, nothing in the exclusion was found to be ambiguous. The Supreme Court also noted there was no set of facts involving an allegation of a substantial-certainty employer intentional tort which could possibly lead to coverage under the policy.

United Foundries also argued if the stop-gap endorsement did not provide a duty to defend on these types of claims, then the endorsement itself was illusory. This argument was also rejected as even if the endorsement and exclusion is enforced as found by the Supreme Court, the endorsement still allowed for coverage for other types of claims potentially asserted against an employer. The Supreme Court noted if United Foundries felt the endorsement did not provide them the coverage they wanted, they could pursue claims against the broker who secured the policy for them.

July 6, 2011
Page 2

This decision has two implications. First, it makes it clear in substantial-certainty employer intentional torts, there is no duty to defend an insured where the policy contains a specific exclusion along the lines of what was contained in the Gulf Underwriter's policy. Second, on a broader perspective, this decision can be interpreted to mean on claims involving other types of intentional torts, depending upon how the complaint is pled, there does not necessarily need to be any type of factual determination of liability before an exclusion can be applied and a definitive determination of coverage made.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Tom F. Glassman', written in a cursive style.

Thomas F. Glassman