Your Coverage Advisor

Coverage for Punitive Damages

By Andrew P. Moses – amoses@brouse.com

Whether liability insurance policies provide coverage for punitive damages depends not only on the language of the policies, but also on public policy considerations as expressed in both state statutes and case law handed down by state courts.

The starting point for every coverage analysis is the language of the insurance policy. With respect to coverage for punitive damages, it may also be the end point. Some insurance policies contain explicit exclusions for punitive or exemplary damages. Other insurance policies contain definitions of "Loss"

* *Andrew Moses acknowledges, gratefully, Gabrielle T. Kelly and Amanda M. Leffler for their contributions to this article.*

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Insurance Coverage Basics for Contractors

By James T. Dixon – jdixon@brouse.com

Construction contracts inevitably contain detailed insurance provisions intended to allocate risk and provide for coverage. Contractors must have a basic understanding of insurance terminology and insurance coverage principles when presented with contracts for execution, or when preparing their own contracts for their subcontractors and suppliers. All too often, insurance misunderstandings results in trouble down the road.

What Types of Insurance Should Be Purchased?

Contractors generally obtain commercial general liability ("CGL") insurance, along with commercial auto and workers'

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or "Ultimate Net Loss" that explicitly carve out punitive or exemplary damages. Courts will give effect to such explicit policy language.

Many policies, however, are silent when it comes to punitive damages, neither explicitly providing coverage for them, nor explicitly excluding them. Insurers who have issued such policies may nonetheless take the position that such damages are not covered on the grounds that coverage would violate public policy.

Under Ohio law and under the law of many states, the nature of the punitive damages determines whether insurance for such damages violates public policy, and courts have not articulated a clear rule of law that would apply in every case. Generally, where punitive damages are awarded against a party to punish that party for its own malicious or egregious conduct, that party will not be able to obtain insurance coverage for such punitive damages. In other situations, however, such as when an employer is vicariously liable for punitive damages, or when the damages are awarded pursuant to a statute that does not require proof of malice, courts have refused to preclude coverage on public policy grounds.

Typically, one looks to the law of the state where the underlying claim is brought to determine the nature of the punitive damages. For example, in New Jersey, an award of punitive damage is governed by statute, specifically the Punitive Damages Act, N.J.S.A. 2A: 15-5.9 through 5.17. New Jersey law requires that in order for punitive damages to be awarded, the plaintiff must prove by clear and convincing evidence that:

the harm suffered was the result of defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who may foreseeably be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

N.J.S.A. 2A:15-5.12.

A different state's law may apply to the question whether coverage for the punitive damages violates public policy. The law that applies to this coverage question may be the law of the state of which the policyholder is a citizen, the state where the insurance contracts were negotiated and delivered, or another state that has a significant interest in the coverage question. Because insurance coverage law varies dramatically from state to state, counsel for policyholders and insurers alike should fully analyze the choice-of-law issue before reaching any conclusion on the substantive coverage question.

The law of different jurisdictions as to the insurability of punitive damages varies and, even within some states, the insurability of punitive damages can vary depending on the type of insurance at issue and the elements of the punitive damages claim. In Ohio, for example, both statutory and common law govern the insurability of punitive damages. The Ohio legislature has enacted R.C. 3937.182, which provides as follows:

(B) No policy of automobile or motor vehicle insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code, including, but not limited to, the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in such a policy as authorized by section 3937.18 of the Revised Code, and that is issued by an insurance company licensed to do business in this state, and no other policy of casualty or liability insurance that is

covered by sections 3937.01 to 3937.17 of the Revised Code and that is so issued, shall provide coverage for judgments or claims against an insured for punitive or exemplary damages.

Ohio Rev. Code § 3937.182(B).

Ohio case law also prohibits coverage for punitive damages awarded where the insured's actions were malicious. ***Wedge Prods., Inc. v. Hartford Equity Sales Co.***, 31 Ohio St.3d 65, 67 (1987); ***see also Neal-Pettit v. Lahman***, 125 Ohio St.3d 327, 331 (2010) ("It is true that public policy prevents insurance contracts from insuring against claims for punitive damages based upon an insured's malicious conduct."). Because the purpose of punitive damages is "to punish an offender for the wanton, reckless, malicious or oppressive character of the act committed and to deter others from committing similar acts," there is a public policy interest against allowing offenders to transfer responsibility to its insurance company. ***Casey v. Calhoun***, 40 Ohio App.3d 83, 84 (8th Dist. 1987); ***see also Ruffin v. Sawchyn***, 75 Ohio App. 3d 511, 518 (8th Dist. 1991)(settlement that purported to satisfy punitive damages award with payments from codefendant's insurer was void.); ***Stephens v. Grange Mut. Ins. Co.***, 2nd Dist. No. 2011 CA 102, 2012-Ohio-4980, 28 ("Punitive damages are not insurable, and the use of insurance proceeds to satisfy an award of punitive damages is against public policy."); ***World Harvest Church v. Grange Mut. Ins. Co.***, 10th Dist. No. 13AP-290, 2013-Ohio-5707.

The question is less settled in other jurisdictions. For example, in New Jersey, some courts have held that punitive damage awards intended to punish the insured for the insured's malicious acts are not insurable. In ***Johnson & Johnson v. Aetna Cas. & Sur. Co.***, 285 N.J. Super. 575, 585, 667 A.2d 1087 (N.J. App. 1995), the court stated that "New Jersey sides with those jurisdictions which proscribe coverage for punitive damage liability because such a result offends public policy and frustrates the purposes of punitive damage awards. ***Id.***, 583, ***citing Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co.***, 172 N.J. Super. 10, 13, 410 A.2d 696 (App. Div. 1980); ***Leimgruber v. Claridge Assocs.***, 73 N.J. 450, 454, 375 A.2d 652 (1977). There, however, also is some authority in New Jersey that punitive damages

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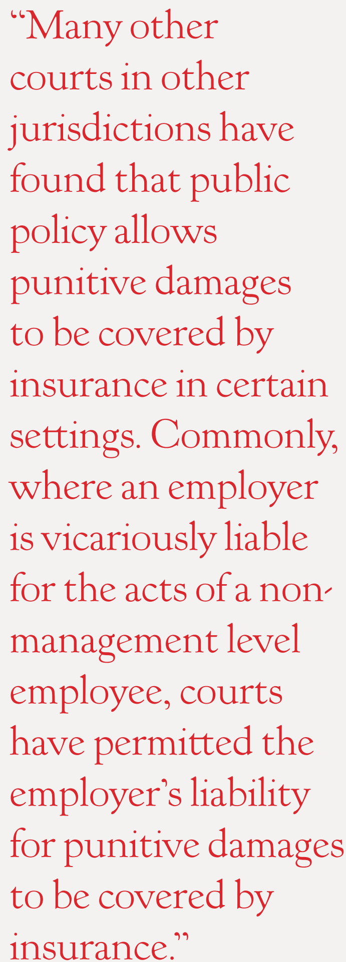

may, in some situations, be insurable. ***Chubb Custom Ins. Co. v. Prudential Ins. Co. of America***, 195 N.J. 231 (N.J. 2008).

In other states, the courts have held that it does not violate public policy to insure punitive damage awards. For example, Georgia courts have repeatedly held that it does not violate public policy to insure punitive damages. ***See, e.g., Greenwood Cemetery, Inc. v. Travelers Indem. Co.***, 238 Ga. 313 (1976); ***Lunceford v. Peachtree Cas. Ins. Co.***, 230 Ga.App. 4 (1997).

Even those states that have found it against public policy to insure punitive damages awarded against an insured directly, to punish the insured for its own wrongful conduct, may not find that all punitive damage awards are uninsurable. This is the case in Ohio where, despite the language of Ohio Rev. Code 3937.182(B), several courts have held that punitive damages *are* insurable when there is no finding of malice or ill will. These courts look beyond the breakdown of damages to the reason punitive damages were imposed to determine their insurability. In cases where punitive damages were imposed by statute and the policyholder did not commit malice or ill will, an Ohio court will allow insurance coverage. For example, in ***The Corinthian v. Hartford Fire Ins. Co.***, 143 Ohio App.3d 392 (8th Dist. 2001), the Eighth District Court of Appeals analyzed the insurability of punitive damages in a personal injury and wrongful death suit arising from a violation of a patient's statutory rights. The court contrasted the case with ***Casey v. Calhoun, supra,*** and held that although Ohio public policy precludes coverage when an individual seeks to insure "against his own intentional or malicious acts," indemnification is permitted when there is a statute at issue and no actual malice. ***Id.***

Additionally, in ***Foster v. D.B.S. Collection Agency***, Case No. 01-CV-514, 2008 WL 755082 (S.D. Ohio Mar. 20, 2008), the Southern District of Ohio considered whether punitive damages stemming from the insured's debt collection actions were covered. In that case, the policyholder was a debt collection agency that was sued for its methods of collecting debts. The plaintiff alleged fraud, violation of the Ohio Consumer Sales Practices Act, and other related claims. Relying on ***The Corinthian***, the court held that "Ohio law does not prohibit insurance

coverage of punitive damages in all cases," particularly those pursuant to a statute and without any finding of malice. ***Foster***, at *9. Furthermore, the court noted that the policy language at issue in the case was more persuasive than in ***The Corinthian***, because the insured's policy explicitly included coverage for punitive damages. ***Id.*** Thus, policies construed under Ohio law may provide coverage for punitive damages, particularly when the policies expressly provide such coverage and punitive damages are assessed against the policyholder without a finding of malice or ill will.

Many other courts in other jurisdictions have found that public policy allows punitive damages to be covered by insurance in certain settings. Commonly, where an employer is vicariously liable for the acts of a non-management level employee, courts have permitted the employer's liability for punitive damages to be covered by insurance. For example, in ***Celotex Corp. v. AIU Ins. Co.***, 152 B.R. 652 (Bankr.M.D.Fla.1993), the court found that "insurance coverage will not be available for punitive damages related to asbestos-related property damage where those punitive damages are imposed upon Debtor for wrongs committed directly by Debtor. However, coverage is available where punitive damages are incurred by Debtor based upon Debtor's vicarious liability provided the relevant insurance policy affords coverage for punitive damages." Applying Florida and Ohio law, the court reasoned that in those states:

[P]ublic policy bars coverage for punitive damages where those damages were imposed due to wrongdoing committed by the insured. ***U.S. Fire Ins. Co. v. Beltmann N. Am. Co.****, 695 F. Supp. 941 (N.D. Ill. 1988), rev'd on other grounds, 883 F.2d 564 (7th Cir. 1989);* ***Beaver v. Country Mut. Ins. Co.****, 95 Ill. App. 3d 1122, 420 N.E.2d 1058, 51 Ill. Dec. 500 (Ill. App. Ct. 1981);* ***Casey v. Calhoun****, 40 Ohio App. 3d 83, 531 N.E.2d 1348 (Ohio Ct. App. 1987);* ***State Farm Mut. Ins. Co. v. Blevins****, 49 Ohio St. 3d 165, 551 N.E.2d 955 (Ohio 1990). Both states, however, create a vicarious liability exception.* ***U.S. Fire Ins. Co.****, 695 F. Supp. at 949;* ***Beaver****, 420 N.E.2d at 1061;* ***Blevins****, 551 N.E.2d at 958.*

Other states also recognize such an exception. ***See, e.g., First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co.***, 283 Md. 228, 389 A.2d 359 (Md.1978); ***Continental Ins. Co. v. Hancock***, 507 S.W.2d 146 (Ky.1973). The rationale in such decisions is that the public policy does not prohibit insurance coverage for punitive damage awards against parties who did not engage in the reprehensible conduct because the purpose of punitive damages -- deterrence and punishment of the wrongdoer -- would not be thwarted in such situations. That was the point in ***Chubb Custom Ins. Co. v. Prudential Ins. Co. of America***, 195 N.J. 231, 245, fn.3 (2008), in which the court observed that statutory and case law in New Jersey provided some authority that where an insurance policy provides coverage for punitive damages, and where the punitive damages award does not fulfill the purpose of punishing the wrongdoer, it would not violate the public policy of New Jersey to allow coverage for the punitive damages.

Punitive damage awards are often calculated by tripling the amount of compensatory damages and are a significant risk in many types of litigation. The evaluation of whether insurance will extend to such damages requires a careful examination of the policy language, a thorough choice-of-law analysis, and an up-to-the-minute evaluation of the law of the applicable jurisdiction. Don't just take your insurer's word for it. ■

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compensation insurance. Design professionals typically also obtain errors and omissions ("E&O") liability insurance. These policies provide protection, including both defense and indemnity, from liability in the event of an accident or "occurrence" which results in property damage or injury. Owners of the property being developed should have first-party property insurance, which protects the owner in the event of loss or damage to the owner's property. For a specific development or building project, an owner may elect to purchase, or require the contractor to purchase, a Builder's Risk policy. For large projects, a more comprehensive Owner-Controlled Insurance Program ("OCIP") or a Contractor-Controlled Insurance Program ("CCIP"), which provides insurance for all project participants, may be appropriate. Such insurance programs are sometimes referred to as "wraps."

What are Policy Limits?

The limit of a policy is the amount it will pay in the event of a loss. Limits are usually expressed as being for "each occurrence" and/or in the aggregate for the term of the policy. Sometimes an aggregate limit is provided for a particular construction project. A policyholder can obtain additional limits of insurance by purchasing umbrella insurance which may provide broader coverage as well. Limits can also be extended higher with excess insurance.

The limits of the policy are typically set forth on the declarations page of the policy. Construction contracts generally will specify the limits, or the amount of coverage, the parties are required to maintain.

What is the Difference Between Claims-Made and "Occurrence" Policies?

A "claims-made" policy generally will provide coverage for claims first asserted against the insured and reported to the insurance company during the period of the policy. An "occurrence" policy generally will provide coverage if the injury or property damage takes place during the period of the policy, regardless of when the claim is made. Both types of policies are available, and contractors should be very careful not to inadvertently create gaps in coverage when switching from one kind to another.

What Should I Do If I Have A Claim?

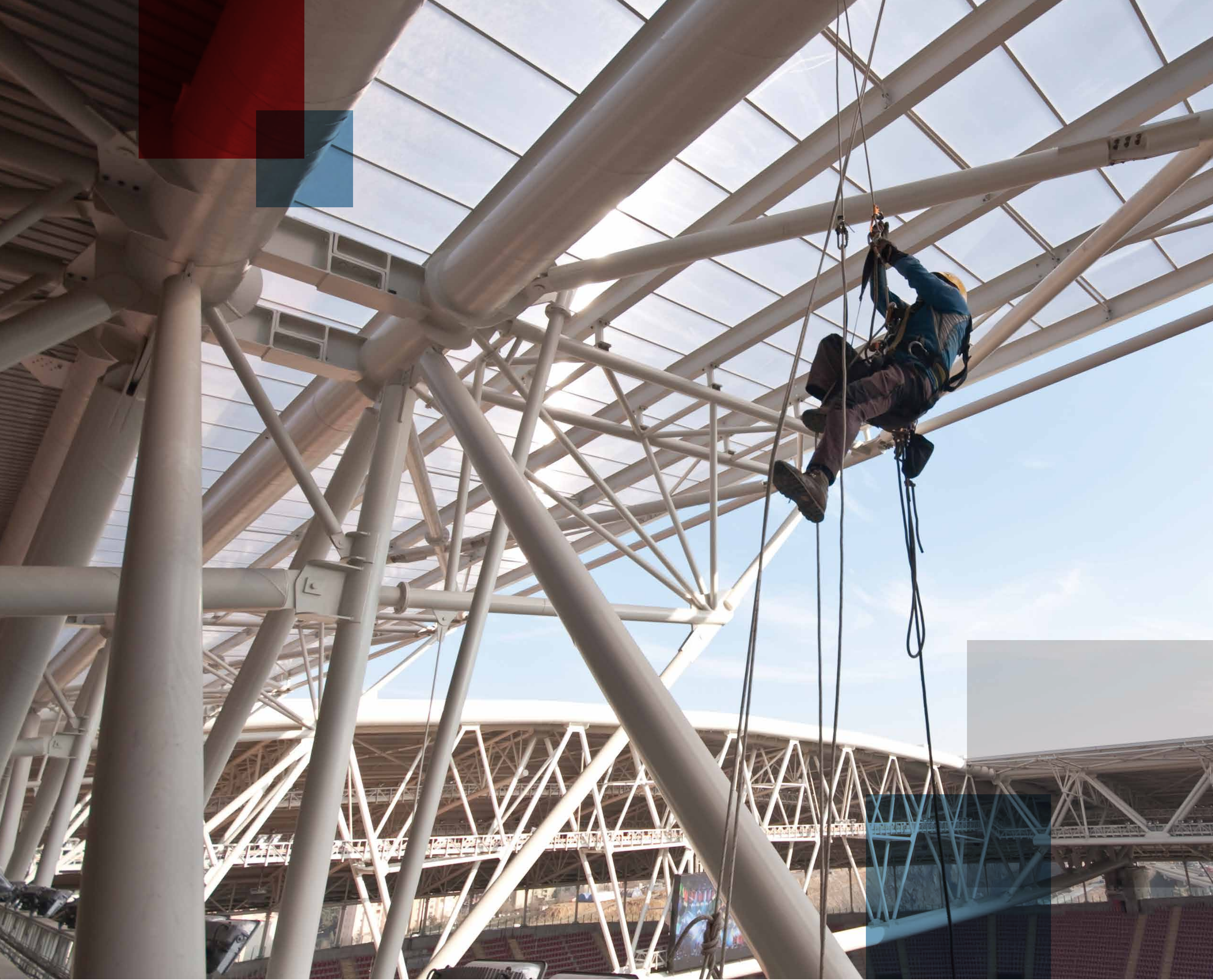
Insurance policies always include provisions obligating you to provide prompt notice to the insurance company, and to cooperate with the insurance company's handling of the matter. You should notify your insurer as soon as possible after you become aware of a problem that may be covered by the insurance. If you are sued, you should send the suit papers to your insurer immediately and request that your insurer defend and indemnify you. It is a good idea to also include your insurance broker or agent on these communications. In many instances, your broker or agent may provide your insurer notice on your behalf.

What Does Defend and Indemnify Mean?

Even groundless lawsuits can be expensive to defend. If your insurance policy provides that your insurer is obligated to defend you, that usually means retaining and paying an attorney to represent you, and paying other costs and expenses incurred for the defense. In the unfortunate event you are found liable, or you and your insurer decide to settle, your insurer indemnifies you by paying the amount of the settlement or judgement, up to the limits.

What Should I Expect After I Notify My Insurer Of A Claim?

Once you submit a claim, your insurer should either (1) unconditionally acknowledge its insurance obligations, (2) acknowledge its defense



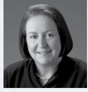
obligation, but reserve its right to disclaim coverage for reasons that it should explain in writing in what is called a "reservation of rights" letter, or (3) decline to provide coverage, again for reasons that it should explain in writing. Unless there has been a denial, your insurer should then appoint a lawyer to defend the contractor and pay that attorney's bills. In some instances, the reasons in a reservation of rights letter may mean that you can *and should* hire your own attorney and submit his or her bills to the insurance company for payment.

The insurance company may hire its own attorney to analyze any coverage issues. The insurance company may also decide to intervene in the lawsuit in order to have the court decide any dispute over coverage. Or, you or the insurance company may file a separate lawsuit for the same purpose.

Should I Respond to a Reservation of Rights?

Always carefully review and respond, in writing, to a reservation of rights letter. Where the amount at stake is significant, consult with an independent attorney who is experienced with insurance coverage disputes from *your* perspective. ■

Decision Points



By Sallie Conley Lux
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Legal decisions interpreting laws, statutes, and insurance policies provide guidance on the meaning of various provisions in insurance policies and whether or not a particular happening may or may not be covered. A few recent legal decision points of note follow:

The Rest of the Story:

The most recent issue of "Your Coverage Advisor" included an article about the "Impact of 'Presumptive Intent' on Coverage." Subsequently, on March 14, 2015, the Ohio Supreme Court issued a decision in ***Hoyle v. The Cincinnati Ins. Co.***, 2015-Ohio-843 reversing prevailing Ohio Court of Appeals law that an employer's "presumptive intent" intentional torts were covered under the employer's insurance policy.

THE FACTS:

Hoyle was injured in the workplace when he fell from a "ladderjack" scaffold, landing on a concrete floor. Although the ladders were typically secured in place by a bolt, Hoyle claimed that his supervisor "kept the bolts in [an] office and told employees they did not need them because they take too much time to use."

Under RC 2745, an employee may recover for an employer intentional tort injury either through direct evidence (the employer's deliberate intent to injure or belief that injury is substantially certain to occur), RC 2745(A) and (B), or through proof that establishes a statutorily created rebuttable presumption of intent to injure where the employer deliberately removes an equipment safety device. RC 2745(C). Hoyle had asserted a "presumptive intent" claim under RC 2745(C).

THE POLICY:

Cincinnati issued a CGL policy to the employer that included, for an additional premium,

Ohio form Employers Liability Insurance ("ELI"). The Ohio ELI form covered employee workplace injuries "caused by an 'intentional act' to which this insurance applies." "Intentional" was defined as "an act which is substantially certain to cause 'bodily injury.'" The Ohio ELI form explicitly excluded from coverage "liability for acts committed ... with the deliberate intent to injure." Thus, the Ohio Form purported to provide coverage for "substantial certainty," or "presumptive intent" claims, but not direct intent claims.

THE RESULT:
Notwithstanding the distinction between intentional acts and intentional injury in the Ohio ELI form, the Ohio Supreme Court found no such distinction in the language of the statute. Thus, regardless of whether a claim is brought under RC 2745(C) instead of RC 2745(A) or (B), "intent to injure" is an essential element of the claim. Accordingly, "[a]n insurance provision that excludes coverage for acts committed with the deliberate intent to injure an employee precludes coverage for [all] employer intentional torts, which require a finding that the employer intended to injure the employee." *Id., syllabus.*

Only three Justices joined in the opinion, with two others concurring only in the judgment and syllabus. Two Justices dissented: *"Can this court truly countenance an insurance company's assertion that it should be permitted to collect a premium for an event that is never going to happen?" Hoyle* at 44. The dissenting opinion found it significant that the Ohio ELI form at issue did not limit the definition of intent to mean deliberate intent, thus observing that an employer could be found liable for an intentional tort under RC 2745, and still be covered by the language of the policy.

THE "PRACTICAL EFFECT":
A majority of the Justices (the two concurring and the two dissenters) agreed that "as a result of this decision, '[t]here is now nothing less than deliberate intent[.]'" *Id.* at 41. The practical effect of Hoyle is that while injured employees have a very difficult burden of proof, if they meet that burden, their employers will have not have the coverage they thought they purchased.

Who is a "Resident Relative"?

The adult son (Robert) of the insureds (Jean and James) was involved in a car accident that resulted in a death. He sought additional coverage in a subsequent wrongful death suit under his parents' umbrella policy, claiming to be a "resident relative." Robert lived in Ohio in a house he co-owned with Jean. Jean also owned a home in Florida, where she lived permanently. James lived part-time in Florida, and part-time in Ohio. James considered Florida his residence and home (he voted there, had his social security deposited in his bank accounts there, had a Florida driver's license, did not pay Ohio taxes, was careful to comply with Ohio law limiting time in Ohio to avoid a presumptive tax domicile, etc.), but he spent significant time, approximately 2 weeks per month, in Ohio, running his business. When in Ohio, he lived at Robert and Jean's house, for which James paid the insurance and utilities. James also used that Ohio address for one of his businesses.

> ... a person's domicile is "where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning."

Cincinnati issued an umbrella policy, naming Jean and James as the "insureds," and the Ohio house as their

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address. The policy extended coverage to the insureds, and to "resident relatives" for an "occurrence" involving a car owned by the resident relative. A "resident relative" included a person "that is a resident of 'your' household and whose legal residence of domicile is the same as [the insured's]."

Coverage for Robert's accident boiled down to whether James was domiciled in Ohio or Florida, which under Ohio law is a very fact-intensive inquiry. Ultimately finding that James was domiciled in Florida, which meant Robert's accident was not covered, the Ohio Supreme Court explained that a person's domicile is "where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." A person's intent is essential, as a person can reside in one place, but be domiciled in another. The Court further cautioned that the motive behind the intent to establish a domicile is immaterial. ***Schill v. Cincinnati, Ins. Co.***, 2014-Ohio-4527

Are Bicyclists Pedestrians?

Ohio courts have reached different results. The Court of Appeals for the Fifth District, which includes much of central Ohio, recently said "No." ***Dye v. Grose***, 2015-Ohio-1001 (March 12, 2015). Dye was injured in a collision with a car while riding his bicycle. Nationwide issued an auto policy to Dye that extended coverage "for medically necessary services, regardless of who was at fault, for treatment of accidental injury suffered by insureds, 'as pedestrians if hit by any motor vehicle.'" Although the term "pedestrian" was not defined in the policy, the court observed that that did not mean that the policy was ambiguous, which would have mandated construction in favor of the insured (***Westfield Ins. Co. v. Hunter***, 2011-Ohio-1818). The court concluded that a bicyclist was not a pedestrian for purposes of coverage under the policy. In reaching its decision, the court recognized, but attempted to distinguish, ***Schroeder v. Auto Owner's Ins., Co.,*** 2004-Ohio-5667, a decision from the Sixth District Court of Appeals which includes Toledo and much of northwestern Ohio. That court reached the opposite conclusion, determining the term "pedestrian" to be ambiguous and to include a bicyclist. The dissenting Judge in ***Dye*** agreed with ***Schroeder***, observing that using the definition advanced by Nationwide could result in the conclusion that "a person struck while traveling in a wheelchair" would not be covered. Or "a person pushing a baby in a stroller would be covered if struck by a car while the baby would not."

The inconsistent decisions by these two Courts of Appeals could mean that the Ohio Supreme Court will agree to consider this issue. ■

Attorney Profile:

Caroline L. Marks

Caroline L. Marks - a graduate of the University of Virginia and Case Western Reserve University School of Law - joined Brouse McDowell in 2006, after having clerked for both the Ohio Supreme Court and the Ohio Ninth District Court of Appeals. As a member of the Insurance Recovery and Litigation Practice Groups, Caroline devotes her practice to representing clients in complex insurance recovery litigation involving a wide range of coverage issues and in appellate proceedings.

Caroline is certified as a Specialist in Insurance Coverage Law by the Ohio State Bar Association and was appointed to the Insurance Coverage Law Specialty Board. She has been recognized as either a Rising Star or an Ohio Super Lawyer every year since 2012, through a peer- and achievement-based review. In addition, Caroline regularly authors insurance-related articles for various publications and is an active member in the Cleveland legal community, participating in the Cleveland Metropolitan Bar Association's Insurance Coverage Law Section and the Judge John M. Manos Inn of Court.

When Caroline is not advocating on behalf of her clients, she enjoys playing racquet sports and captains a USTA team for the Cleveland Racquet Club. She also enjoys hiking with Harry, her Golden Retriever, and spending time with her family in Chautauqua, NY. ■

Attorney Highlights

Keven Drummond Eiber was one of the luncheon speakers at the American Bar Association 2015 Insurance Coverage Law Seminar in Tucson, Arizona, speaking on issues relating to litigating coverage questions in federal courts. Paul A. Rose also was a speaker on issues related to forum selection. Caroline L. Marks attended the three-day seminar, as well.

Paul A. Rose addressed the Ohio Chapter of the Society of Corporate Secretaries & Governance Professionals in March, 2015, addressing litigation planning and privilege issues.

James T. Dixon has stepped up as one of Brouse McDowell's two "Partners in Justice," along with David Sporar. Jim and David serve as the firm's ambassadors to the Legal Aid Society of Cleveland.

Andrew P. Moses, a member of the Regional Leadership Council for the American Lung Association, helped create the Cleveland Asthma Games. In its second year, the Asthma Games is a free event which provides pulmonary function testing for children, consultation with pulmonologist and nurses, education for parents about asthma and lung health, and provides a play day of various sports and fun activities with former Ohio State and NFL football players. The Games take place on June 6, 2015 at Cleveland Central Catholic High School.

Lucas M. Blower welcomed their new baby girl, Lucy Marie, on February 20, 2015.

Lucy Marie Blower, born on February 20, 2015.

Keven Drummond Eiber (L) and Caroline L. Marks (R) at the ABA 2015 Insurance Coverage Law Seminar in Tucson.

Save the date!

Insurance Coverage Conference

October 1, 2015 | 1:30 P.M. to 5:30 P.M.

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