By Robert J. Prahl, CPCU

STOP GAP COVERAGE
What is it? ... Who needs it?

To understand what stop gap coverage is and who needs it, one must first understand how workers compensation and employers liability insurance interact. A key coverage of standard workers compensation insurance is the payment of benefits to employees injured on the job. These benefits are paid without regard to fault in exchange for the employee's giving up his/her right to sue the employer.

Even though workers compensation insurance generally is regarded as the *exclusive remedy* for injury to employees, in some situations an employer can be held liable (and sued) for injuries to his/her employees. These include third-party-over actions, consequential injury (loss of consortium, loss of services, etc.) to an injured employee's family members, dual capacity claims, intentional tort claims, and claims for injury or disease not covered by workers compensation laws. (The dual capacity concept holds that an employer can be said to occupy another capacity, one that involves its relationship to the public in general, and thus can be held responsible for employee damages under liability or tort principles.)

To obtain coverage for these exposures (all of which are specifically excluded under commercial general liability insurance), the employer needs *employers liability insurance.* Standard workers compensation policies include this coverage in addition to coverage for the payment of workers compensation benefits.

Monopolistic state funds: the gap

In five states, however, workers compensation insurance is provided by a state fund, rather than by private insurance. The state fund is the *exclusive* source of workers compensation insurance in these states. *North Dakota, Ohio, Washington, West Virginia,* and *Wyoming* have monopolistic state funds. (Nevada recently abolished its state fund, and private insurers can now provide workers compensation insurance there.)

Employers liability insurance is not offered by these state funds. And that is the problem! Employers in these states need insurance protection for those claims or suits by employees (referred to earlier) that fall outside the immunity provided to employers under workers compensation statutes. To fill this gap, "stop gap" coverage is needed.

Stop gap coverage provides a form of employers liability insurance for employers who do not have the coverage because they operate in a so-called monopolistic state. Coverage for defense costs is typically included. Employers can buy stop gap coverage from private insurers. The National Council on Compensation Insurance (NCCI) also has sample forms for providing this coverage. Because this is a non-standard coverage, policies will vary in content and must be carefully reviewed.

A common way to arrange stop gap coverage is to add it as an endorsement to a commercial general liability policy. If an employer operates in several states, in one or more of which a standard workers compensation policy applies, employers liability coverage for operations in the monopolistic state may be obtained by purchasing a stop gap endorsement and adding it to the workers compensation policy.

The Ohio situation

Over the past decade, one of the most judicially and legislatively active states, with respect to the stop gap coverage issue, has been Ohio. To be candid, the various court decisions and legislative enactments involving this coverage may have created some confusion.

First, considerable attention was drawn to the subject in 1982 as a result of the ruling in the *Blankenship vs. Milacron* case. The court held that an employee has a right of recourse against his/her employer when the latter has committed an employment-related intentional tort. This is

so regardless of the fact that workers compensation insurance is intended to be the exclusive remedy against the employer. Insurers responded by introducing a multitude of stop gap forms in Ohio.

Later, in *Harasyn vs. Normandy Metals,* 1990, the Ohio Supreme Court distinguished between an intentional and deliberate tort (uninsurable) and one committed by an employer in the belief that injury is "substantially certain to occur," yet not with a deliberate intent to injure. The court said the latter is insurable.

Subsequent to this decision, however, the Ohio legislature enacted an Intentional Tort Fund, which helped protect employers by raising the standard of proof necessary for employees to recover from their employers. With the Intentional Tort Fund in effect, the only way employees could recover from their employers was to prove, by clear and convincing evidence, that the employer deliberately and intentionally caused the employee's injury.

A year later, however, the Fund was declared unconstitutional. Then, in a continuing series of rejections and re-enactments, it was enacted again in 1993, struck down in 1994, re-enacted in 1995, and struck down again in 1999. At present, the Ohio Intentional Tort Fund does not exist.

Impact on Ohio employers

What does this mean for Ohio employers? It means that an employee injured by an act of the employer that is considered to have been committed in the belief that an injury was substantially certain to occur, but not caused deliberately and intentionally, can recover damages from the employer. If the employer's stop gap coverage contains an exclusion with the "substantially certain to occur" language*, however, no coverage will be available to the employer.

The changing situation in Ohio makes it imperative for agents and companies to review pertinent stop gap coverage forms to ensure that all parties to the insurance contract fully understand the coverage being provided.

For more information about AAIS insurance programs, contact Robert Schnoll, AAIS marketing manager, at (800) 564-AAIS (2247), ext. 222, or e-mail: BobS@AAISonline.com. ■

*The latest version of the AAIS stop gap endorsement (11/99 edition) excludes bodily injury that is intentionally caused or aggravated by the named insured, but does not include the more restrictive reference to " … substantially certain to occur."

The author

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