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CLIENT ALERT

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**THE CONTINUING VALIDITY OF THE
“EMPLOYER STOP-GAP” ENDORSEMENT IN OHIO**

Employer’s Stop-Gap Endorsements were designed to provide defense and sometimes indemnification for employee intentional tort claims against the employer occurring in the workplace. The actions were first known as “Blankenship torts.” Under the “Blankenship” doctrine, an employee could sue his or her employer for injuries outside the scope of traditional workers compensation claims by alleging either direct intent to injure the employee or that the employer put him or her in a position where “injury was substantially certain to occur.”

A recent Ohio Supreme Court decision has potential widespread implications on the continued viability of these claims, as well as the continued effectiveness of the Employer Stop-Gap Endorsement. In *Kaminski v. Metal & Wire Products Co.*, 2010-Ohio-1027, the Court upheld as constitutional a 2005 employer intentional tort statute that required an employee to prove that the employer acted with actual or “direct intent” to injure the employee and removed the “substantially certain to occur” prong of the *Blankenship* doctrine. Applying the 2005 statute to existing Ohio law, insurance companies may no longer be able to insure for employee alleged intentional torts through the use of the

Employer’s Stop-Gap Endorsements attached to the CGL Policy. This Alert will discuss some of these issues.

By way of background, Ohio’s employer intentional tort law has been ever changing over the past few decades. In *Blankenship v. Cincinnati Milacron Chems, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572, the Court found that neither the Ohio Constitution nor workers compensation laws preclude employees from bringing common law actions against their employers for intentional torts. Two years later, the Court not only affirmed its decision, it broadened intentional tort claims to encompass “an act committed with the intent to injure another, *or* committed with the belief that such injury is *substantially certain to occur.*” *Jones v. VIP Co.* (1984), 15 Ohio St.3d 90, 15 OBR 246, 472 N.E.2d 1046. (Emphasis added)

In 1987, the Supreme Court interpreted the *Blankenship* intentional tort doctrine for application to a CGL Policy in *Wedge Products v. Hartford Equity Sales Co.* (1987), 31 Ohio St.3d 65, 509 N.E.2d 74. The Court found that the insurer had no duty to defend the alleged intentional tort by the employer because the insurance policy did not provide

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coverage for injuries “expected” or “intended.” But more importantly, the Court found that it was contrary to public policy in Ohio to insure against intentional torts.

Two years later, the Court interpreted an “Employer’s Stop-Gap Endorsement” (not at issue in *Wedge Products*) and modified its holding by finding that it is not against public policy to insure against intentional torts that are “substantially certain to occur.” *Harasyn v. Normandy Metals, Inc.* (1989), 49 Ohio St.3d 173, 551 N.E.2d 962. The Court found that it was only against public policy to insure against a “direct intent” tort. The Court noted that the public policy argument did not exist when insuring against “inferred” intentional torts or torts committed when the harm was substantially certain to occur. Under *Harasyn*, employers could seek coverage for substantially certain intentional torts and insurance companies wrote Employer’s Stop-Gap Endorsements to that effect.

Since *Harasyn*, the Ohio legislature has attempted to limit *Blankenship* intentional tort claims to only those actions where the employer possessed actual intent to injure. Previous statutory attempts were found unconstitutional by the Ohio Supreme Court. See *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 1999-Ohio-267; *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722.

The legislature’s third attempt proved a success when the Court held R.C. 2745.01 constitutional in *Kaminski*. R.C. 2745.01(A) states that an employer is liable for an intentional tort if “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.” The key change, however, is in the statute’s definition of “substantially certain,” which means the employer acted “with *deliberate intent* to cause an employee to suffer an injury, a disease, a condition, or death.” R.C. 2745.01(C). Therefore, under R.C. 2745.01 (A), to impose liability upon an employer for an intentional tort, an employee must establish that the employer actually intended to injure the employee. It is no longer sufficient to allege that the injury was “substantially certain” to occur. Intent is now required. The Court found the statute to be consistent with the Ohio Constitution and an appropriate exercise of the legislature’s broad authority to legislate.

In applying the *Kaminski* decision to *Harasyn* and *Wedge Products*, the question is what, if anything, is left of the Employer’s Stop-Gap Endorsements and how should insurance companies and businesses in Ohio handle these types of torts in the future? *Harasyn* found it permissible to insure against “substantially certain” intentional torts, but specifically precluded insuring against employer acts taken “with deliberate intent.” Now that an employee can only establish an employer’s intentional tort through direct intent, under R.C. 2745.01 and *Harasyn*, it may be against public policy for insurance companies to insure against employer’s intentional torts through the traditional Stop-Gap Endorsement.

What does this mean for businesses and insurance companies in Ohio? It is recommended that businesses contact

their insurance agents or insurance companies and inquire about how their carrier plans to address employee intentional tort actions under Stop-Gap Endorsements in the future. It is also recommended that insurance carriers review their Stop-Gap Endorsements and develop a policy as to how they will treat these issues in the future. How will pending claims be handled? What is the impact on existing policies? What is the future of the Stop-Gap Endorsement? These and many other issues will be worked out in the next several months.

For more information regarding the insurance impacts of the recent Supreme Court of Ohio decision, please contact:

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