

## Insurance Coverage

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### Insurance Coverage For *Mandolidis*-Type Claims

Workplace injuries and illnesses can create significant exposure for employers. Although in West Virginia, as in other jurisdictions, an injured employee generally is limited to benefits available under the workers' compensation system, there is a significant exception to this rule. In West Virginia, a company's workers' compensation immunity may be lost and the employer may be held liable in a court action for damages where an injured employee—or the employee's family—brings a tort action against the company alleging that the injuries resulted from the company's "deliberate intention." See W. Va. Code § 23-4-2(c)(2). "Deliberate intent" can be proven by establishing that the employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee" or by satisfying a five-part test, which includes proving that the employer had a "subjective realization and an appreciation" of an unsafe working condition. These types of tort claims commonly are referred to in West Virginia as *Mandolidis*-type claims, after a judicial decision interpreting the workers' compensation statute.

Considering the potential for significant exposure from *Mandolidis*-type claims, employers should consider the potential for insurance coverage that may be available to provide protection against such claims. Although *Mandolidis*-type claims by their nature do not fall within a workers' compensation policy and insurers often argue that they are excluded from coverage under commercial general liability coverages, these claims may be covered under a company's "employers' liability" coverage.

Indeed, a main purpose of employers' liability insurance is to protect employers against their legal liability for injuries to employees that might not be compensable under a state's workers' compensation program. This Update discusses employers' liability coverage for *Mandolidis*-type claims under current West Virginia law.

Employers' liability coverage typically covers the employer-policyholder against alleged "bodily injury by accident" or "bodily injury by disease" that arises "out of and in the course of the injured employee's employment." Coverage for defense costs is typically included. Because employers' liability insurance is not written on an industry-wide standard form, policies will vary in content and must be carefully reviewed.

In non-monopolistic fund states, where workers' compensation insurance is generally purchased through private insurers, the standard workers' compensation policies typically include employers' liability coverage in addition to coverage for the payment of workers' compensation benefits. In West Virginia (and five other so-called monopolistic fund states), where workers' compensation insurance must be purchased from the state fund, employers' liability insurance is not included with workers' compensation coverage. In these monopolistic states, the employers' liability coverage is frequently purchased separately through a private commercial insurer and may be added by a "stop-gap" endorsement to the company's commercial general liability insurance policy or as stand-alone coverage.

In West Virginia, insurers sometimes take the position that *Mandolidis*-type claims are not covered under employers' liability insurance because such claims necessarily allege conduct that is excluded from coverage under an "intentionality" exclusion in the policy. In many cases, such denials of coverage for *Mandolidis*-type claims may be meritless. Many such claims may be covered. West Virginia's highest court has recognized that employers' liability policies are intended to fill a potential gap in coverage that may arise when an employee's bodily injury claim does not fall within a workers' compensation policy and may be excluded under a general commercial liability policy's employment exclusion:

Between [commercial general liability coverage and workers' compensation coverage] lies a "gap" in coverage. In this gap are claims made against a business by injured employees whose claims are not generally compensable under the workers' compensation system. An "employers' liability" policy therefore exists to "fill the gaps" between workers' compensation coverage and an employers' general liability policy.

*Erie Insurance Property and Casualty Co. v. Stage Show Pizza, JTS, Inc.*, 553 S.E.2d 257 (W.Va. 2001). The *Stage Show Pizza* Court further recognized that the employers' liability insurance is "designed to protect" companies "from tort liability for injuries to employees who do not come under the exclusive remedy provisions of workers' compensation."

Accordingly, insurer interpretations of so-called "intentionality" exclusions in employers' liability policies that bar coverage for *Mandolidis*-type claims defeat a principal purpose of employers' liability coverage and threaten to render employers' liability coverage illusory in significant part.

Following *Stage Show Pizza*, West Virginia courts may view insurer disclaimers of employers' liability coverage for *Mandolidis*-type claims with disfavor.

Corporate policyholders may find it prudent to take a close look at their insurance programs and understand what coverage is and is not provided for *Mandolidis*-type claims, what can be done to enhance the protection provided, and what can be done to minimize efforts by insurers to reduce the coverage.

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