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STOP-GAP ENDORSEMENT EXCLUDED COVERAGE IT SAID IT PROVIDED. WEST VIRGINIA'S TOP COURT SAID THAT WAS AMBIGUOUS.

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The Supreme Court of Appeals of West Virginia has found coverage for a statutory "deliberate intent" action when an employer's commercial general liability insurance policy was amended by a "Stop Gap – Employers Liability Coverage Endorsement – West Virginia" that expressly provided coverage for bodily injury to employees, notwithstanding that the endorsement also included an exclusion for deliberate intent claims.

The Case

After Jeffrey Russell was injured while working for Kimes Steel, Inc., Mr. Russell and his wife Anita Russell sued Kimes Steel, alleging that it had acted with "deliberate intention" as defined in W. Va. Code § 23-4-2. The Russells alleged that Kimes Steel had required Mr. Russell to perform his job duties without required safety equipment, instructions, and precautions for working with table saws, and had subjected him to a specific unsafe working condition that presented a high degree of risk and strong probability of serious injury or death.

Kimes Steel's commercial general liability ("CGL") insurer, First Mercury Insurance Company, Inc., issued a denial of coverage letter to Kimes Steel. The letter informed Kimes Steel that First Mercury would "not provide . . . a legal defense to the lawsuit, nor [would] it indemnify Kimes Steel as to any damages for which Kimes Steel may be liable to Jeffrey or Anita Russell."

The Russells amended their complaint by adding a declaratory judgment claim against First Mercury alleging that First Mercury was obligated to provide a defense and indemnification to Kimes Steel.

Kimes Steel also filed a cross-claim against First Mercury asserting breach of contract and bad faith arising from First Mercury's denial of coverage to Kimes Steel with respect to the Russells' claims.

The trial court found coverage, concluding that the CGL policy's standard exclusion for employer's liability for injuries to employees was modified by a Stop Gap endorsement that was ambiguous with respect to covering the Russells' deliberate intent action.

First Mercury appealed to the Supreme Court of Appeals of West Virginia.

The First Mercury Policy

The Stop Gap endorsement provided:

A. The following is added to Section I — Coverages:

COVERAGE — STOP GAP — EMPLOYERS LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated by West Virginia Law to pay as damages because of "bodily injury by accident" or "bodily injury by disease" to your "employee" to which this insurance applies. . . .

It also provided:

2. Exclusions

This insurance does not apply to:

....

I. West Virginia Workers Compensation Law, Sect. 23-4-2

"Bodily injury by accident" or "bodily injury by disease" caused by any action determined to be of deliberate intention as specified under West Virginia Workers Compensation Law, Sect. 23-4-2.

The Supreme Court of Appeals Decision

The West Virginia Supreme Court of Appeals affirmed.

In its decision, the court explained that "stop gap" insurance provided coverage for employers when employees were able to bring an action for injury despite workers' compensation immunity.

The court then examined the First Mercury policy, observing that it "expressly" utilized the term "Stop Gap" in its heading: "Coverage – Stop Gap – Employers Liability." The court found that the use of the term "Stop Gap" in the heading "plainly indicate[d] that the policy provide[d] Kimes Steel with coverage for a deliberate intent action brought by an employee."

The court noted that the language that followed attempted to limit coverage to "'bodily injury by accident' or 'bodily injury by disease' to your 'employee' to which this insurance applies. . . ." (Emphasis added). Thus, it said, "the more prominently displayed heading" conveyed "a clear, yet different, message than the policy language" that followed.

According to the court, the heading indicated that the policy provided stop gap coverage, which, under West Virginia law, meant coverage for claims made against a business by injured employees whose claims generally were not compensable under the workers' compensation system. "Nevertheless," the court continued, the policy language purported to limit employee claims to only those arising "by accident" or "disease." The court then ruled that "this portion of the Stop Gap endorsement" was "ambiguous." Therefore, it held, this provision had to be interpreted in favor of Kimes Steel, and it provided coverage for the Russells' deliberate intent claims.

The court next pointed out that the Stop Gap endorsement contained its own exclusionary language that excluded coverage for deliberate intent actions. In the court's opinion, the inclusion of both the Stop Gap endorsement and the deliberate intent exclusion created "an additional ambiguity."

The court ruled that, by purporting to exclude deliberate intent actions from the Stop Gap endorsement, the First Mercury policy largely nullified the purpose of the coverage, which was to fill the gap in the CGL policy and provide protection for employees' bodily injury claims. "Such ambiguous policy language must be construed against the insurance company and in favor of the insured so as to support the purpose of indemnity," it declared.

The court concluded that the First Mercury's "explicitly titled Stop Gap endorsement" operated to provide coverage for the deliberate intent claims of the Russells against Kimes Steel, "and the conflicting exclusion may not be enforced."

The case is *First Mercury Ins. Co. v. Russell*, No. 16-0596 (W.Va. Oct. 19, 2017). Attorneys involved include: For the Petitioner, First Mercury Insurance Company: Don C. A. Parker, Charity K. Lawrence, Spilman Thomas & Battle, PLLC, Charleston, West Virginia. For the Respondents, Jeffrey and Anita Russell: Brent K. Kesner, Ernest G. Hentschel, II, Kesner & Kesner, PLLC, Charleston, West Virginia. For the Respondent, Kimes Steel, Inc.: Kevin A. Nelson, Ashley W. French, Dinsmore & Shohl, LLP, Charleston, West Virginia.

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