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Attorney Highlights

Christopher J. Carney, Keven Drummond Eiber, Kerri L. Keller, Amanda M. Leffler, Caroline L. Marks and **Paul A. Rose** were listed as **2016 Super Lawyers®** Ohio Super Lawyer through a peer- and achievement-based review conducted by the research team at Super Lawyers, a service of Thomson Reuters legal division.

Lucas M. Blower, Alexandra V. Dattilo, Gabrielle T. Kelly, P. Wesley Lambert and **Anastasia J. Wade** were listed as **2016 Ohio Super Lawyers® Rising Stars™** Ohio Super Lawyer through a peer- and achievement-based review conducted by the research team at Super Lawyers, a service of Thomson Reuters legal division.

Keven Drummond Eiber and **Amanda M. Leffler** were named in the Top 25: 2016 Women Cleveland Super Lawyers Top List and Top 50: 2016 Women Ohio Super Lawyers Top List.

Amanda M. Leffler received the Distinguished Alumnus Award from Torchbearers.

Bridget A. Franklin and **Gabrielle T. Kelly** were elected as Partners of the firm.

Amanda M. Leffler was elected Vice-Chair of the Board of United Disability Services.

Kerri L. Keller is now President of the Victim Assistance Program.

Bridget A. Franklin and **Paul A. Rose** were published in the Insurance Coverage Law Bulletin's March issue entitled, "Is Coverage Hiding in Your Insured Contracts?"

Henry Mason Lambert, born Jan. 27, 2016

P. Wesley Lambert and his wife, Sarah, welcomed their new baby boy, Henry Mason.

Morgan Millicent Sporar, born Feb. 20, 2016

David Sporar and his wife, Colleen Hill Sporar, welcomed their new baby girl, Morgan Millicent.

Save the date!

Webinar: "When Ads Attack – An Overview of CGL Coverage for Advertising Injury"
May 31, 2016, 9:00 a.m. to 10:00 a.m.
Pending 1.0 CLE credit hour
Invitation coming soon via email or call 330.535.5711 x235 to register

Webinar: "A Litigator's Perspective: 10 Things That Can Make or Break Your Case in a Construction Dispute."
June 15, 2016, 2:30 p.m. to 3:00 p.m.
Invitation coming soon via email or call 330.535.5711 x235 to register

Fourth Annual Insurance Coverage Conference
October 13, 2016, 1:30 p.m. to 5:30 p.m.
Location: Embassy Suites Independence
5800 Rockside Woods Blvd.
Independence, OH 44131

Your Coverage Advisor

The Widening Arc of Coverage

By Paul A. Rose
prose@brouse.com

It is a common misconception that "intentional tort" liabilities are not insurable. To the contrary, such liabilities often are insurable; in fact, in certain cases, even punitive damages for such liabilities are insurable. Moreover, certain coverages are expressly written to insure such liabilities. For instance, advertising liability and personal injury liability coverages in Commercial General Liability Policies often expressly cover liabilities arising from such intentional torts as defamation, invasion of privacy, malicious prosecution, and false imprisonment. Employment Practices Liability Policies typically cover liabilities for a wide range of employment-related intentional torts, such as harassment or discrimination. Other types of policies, such as Directors and Officers Liability Policies, typically cover "wrongful acts," which usually are defined broadly to encompass a wide range of intentional tort liabilities.

> Liability policies cover a wide range of ostensibly "intentional" tort liabilities, so policyholders always should be thorough in evaluating their coverage prospects...

It is true, though, that certain liability coverages apply only to unintentional injuries or damage—in the words of the typical Commercial General Liability Policy, to injury or damage that is "neither expected nor intended from the standpoint of the insured." In regard to these more fortuity-based coverages, it is notable that the law of Ohio steadily and consistently has evolved to broaden the range of claims that would fall within their scope. This

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The Widening Arc of Coverage

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article will summarize three cases from the Ohio Supreme Court, including a very recent one, that have been notable developments in this evolution.

The Ohio Supreme Court first clearly delineated the types of claims that were sufficiently fortuitous to be considered covered "occurrences" under general liability policies in *Physicians Ins. Co. v. Swanson*, 58 Ohio St.3d 189 (1991). In that case, parents of teenagers asserted coverage under two policies for liabilities arising from the unfortunate consequences of the use of a BB gun. Two groups of teenagers had gathered near a lake, and a teen in one group fired a BB gun toward the teens in the other group. He testified that he had intended to hit a sign near the second group of teens, to frighten them. One of the shots, however, struck a teen from the second group in the eye, resulting in the loss of the eye. The insurers both denied the claim, contending that because the firing of the BB gun had been intentional, the claim was not covered.

The Ohio Supreme Court determined that the claim could be covered, and in so doing established a number of principles that have provided valuable protections for policyholders. First, the Court noted that the policy language which limited coverage to only unexpected or unintended injuries appeared in different sections of the two policies. In one policy, the limitation appeared in an exclusion, and in the other it appeared in the definition of a term used in the coverage grant. The Court determined that the location of the limitation in the policies was irrelevant for purposes of the coverage analysis, stating that because "the effect of both policies is the same, we will treat the respective policy provisions in like manner." *Id.* at 191. Because the language had the effect of limiting coverage, the Court treated it as an exclusion, as to which the insurers would have the burden of proof, regardless of where it appeared in the policy.

Second, the Court addressed the insurers' argument that there should be no coverage because the liabilities arose from an intentional act. The Court rejected that argument, noting that the policies purported to exclude coverage for *injuries* that were expected or intended, not for any injuries that merely arose from *acts* that were expected or intended. The Court summarized its holding as follows: "In order to avoid coverage on the basis of an exclusion for expected or intended injuries, the insurer must demonstrate that the injury itself was expected or intended." *Id.* at syllabus. The Court noted, "[M]any injuries result from intentional acts, although the injuries themselves are wholly unintentional." *Id*. at 193.

Finally, it is notable that the Court in *Swanson* held that the claim could be covered even though some negative consequence had been intended. After insults were exchanged between the two groups of teenagers, and tensions rose, a teen

from one group shot at the other group with the admitted intention of causing fear. Because the adverse result—the loss of an eye—was different from the one intended, however, the Court determined that the claim could be covered.

These doctrines served policyholders well for nearly 20 years, and then the Ohio Supreme Court considered a somewhat similar situation in *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186 (2010), a case in which it further expanded policyholder rights. In *Campbell*, the Court addressed another claim that arose from misconduct by teenagers. A group of teenage boys placed a Styrofoam target deer on a snowy roadway at night to surprise unsuspecting drivers. One such driver took evasive action, lost control of his vehicle, and sustained severe injuries.

The insurers argued that the actions of the boys were substantially certain to cause injury, such that the boys' expectation or intention to do so should have been presumed, thereby satisfying the insurers' burden under *Swanson* to establish their defense. The Court rejected this argument, holding that under various policy provisions that focused on the expectation or intention of causing injury, as opposed to the expectation or intention of performing acts that cause injury, the insurers could escape liability only if "the insured's intentional act and the harm caused are *intrinsically* tied so that the act *necessarily* resulted in the harm." *Id*. at 195 (emphasis added). The Court also made clear that the burden of insurers under this "inferred intent doctrine" was a high one. It noted that an insurer's burden could be satisfied in regard to underlying claims such as murder or sexual molestation, or in regard to any other of "a narrow range of cases" in which "the action necessitates the harm," but the Court emphasized that "courts should be careful to avoid applying the doctrine in cases where the insured's intentional act will not necessarily result in the harm caused by that act." *Id.*

Five years after *Campbell*, in which the Ohio Supreme Court established this heightened burden on

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insurers asserting an "expected or intended" injury defense, the Court further established and delineated the burden in *Grange v. Auto Owners Ins.*, 144 Ohio St.3d 57 (2015). In that case, a landlord policyholder faced a claim of housing discrimination that allegedly resulted in emotional distress. The landlord's insurer denied the corresponding coverage claim, contending that the policy at issue did not expressly cover discrimination claims and that the policyholder, in any event, intended to discriminate.

The Ohio Supreme Court found that the claim could be covered under the umbrella policy at issue. In regard to whether the claim fell within the coverage grant, the Court noted that the policy expressly covered "humiliation," which could encompass emotional distress damages. In regard to the insurer's "expected or intended" defense, the Court held that the "inferred intent" doctrine it articulated in *Campbell* did not extend to bar coverage for the claim. The Court quoted with approval the language of the underlying appellate court, noting that regardless of whether the landlord intended to discriminate, "the appropriate question to ask is whether [the landlord] expected or intended [the tenant] to be humiliated by his conduct." The Court held, "We do not find that humiliation is so intrinsically tied to … discrimination that [the landlord's] act necessarily resulted in the harm suffered …." *Id*. at 65. It added, "We cannot say that the personal injury was intended in this case, nor can we say that emotional distress is inherent in the very nature of housing discrimination." *Id.* at 66.

This line of cases permits a number of conclusions. One is that liability policies cover a wide range of ostensibly "intentional" tort liabilities, so policyholders always should be thorough in evaluating their coverage prospects, regardless of the nature of their alleged underlying liabilities. Another is that "intentional" or "expected or intended" coverage defenses are difficult for insurers to establish. As the law in this area continues to evolve, the degree of difficulty for insurers continues to increase, for the ongoing benefit of individuals and businesses in Ohio. ■

Don't Let Insolvency Scare You: Navigating the London Claims Process for OIC and L&O

By Bridget A. Franklin | bfranklin@brouse.com

If your company historically obtained insurance coverage from the London Market, it may have recently received a notice relating to claims it might have against two insolvent London Market companies – OIC Run-Off Limited ("OIC") and The London and Overseas Insurance Company Limited ("L&O"). While the notice looks simple enough, establishing a bar date of September 12, 2016, to file claims, it also directs parties to review the "Amending Scheme" to determine their rights to file claims. Unfortunately, the Amending Scheme, with exhibits, is over 200 pages and may be difficult to navigate.

OIC (previously known as Orion Insurance Company Limited) and L&O stopped underwriting policies in 1992 and subsequently became insolvent. The insurers' liquidation plan, known as the Original Scheme, was approved and effective in March of 1997. The Original Scheme allowed policyholders to assert claims against OIC or L&O in the ordinary course of their business. Recently, however, a court allowed OIC and L&O to amend the scheme to, among other things, require policyholders to file claims, including estimated claims, by September 12, 2016, or be forever barred from asserting such claims.

Policyholders with environmental, asbestos, toxic tort and other long term claims will need to engage in a detailed analysis of their London Market insurance policies to determine whether OIC or L&O subscribed to any of them. This is a significant undertaking, but it may well prove productive in this instance. The scheme administrators currently estimate that policyholder claimants could receive a distribution of up to 78% of their claims. Of course, filing a claim does not guarantee a distribution as the scheme administrators must agree with the validity and amount of the claim. Where disputed, policyholders will need to navigate a disputed claims process under the Amending Scheme. Further complicating issues, some OIC and L&O policies may have been signed and issued by the Institute of London Underwriters ("ILU Policies"). Policyholders with claims related to ILU

> Many policyholders have a tendency to ignore and forego claims against insolvent London insurers, finding the process too burdensome.

Policies may have further opportunities to recover additional distributions or payments on their claims.

Notwithstanding the foregoing complexities, policyholders with significant actual or

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potential losses should carefully consider filing a claim. Although policyholders may ultimately engage insurance recovery counsel to help with the process, policyholders can begin the process by contacting the OIC Help Desk (http://www.oicrun-offltd.com/Public/ContactUs.aspx) to obtain a claim form. Some policyholders may have already received an individual login ID and password to access claim forms electronically. If the scheme administrators are aware of the policyholder's potential claim, the policyholder should receive a prepopulated claim form, which should include certain policy and claim information.

Many policyholders have a tendency to ignore and forego claims against insolvent London insurers, finding the process too burdensome. Navigating the process may be a headache, but it could ultimately result in a substantial recovery, at far less cost than what is typically incurred in coverage litigation in U.S. courts. ■

Does Your Policy Do Double Duty When Your Employees Do: Shifting the Risk of Moonlighting Officers

By Amanda P. Parker | aparker@brouse.com

Hardworking employees are an asset to any employer, but when can that same employee be a liability? For municipalities, the risk is all too common. Municipalities may be held liable for the actions of an off-duty officer, and without adequate protection, these officers can substantially increase a municipality's risk of liability. Today, like many other employees, law enforcement officers find themselves in need of secondary employment, a practice known as moonlighting in the law enforcement community. Significantly, law enforcement is an occupation that has one of the highest rates of secondary employment, as officers are commonly hired by private employers to act as security guards, bouncers, process servers, bail bondsmen, debt collectors, or repossession agents.

While this off-duty employment increases police presence in the community, it can raise several concerns. Moonlighting is a high risk cause of law enforcement liability because when taking action during his secondary employment, the officer has more latitude, less oversight and no access to a partner, back-up officers, or other law enforcement assets. Moreover, off-duty

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security also causes citizen confusion because the extent of the officer's authority may be unclear. Consequently, moonlighting increases the likelihood that an officer may be accused of engaging in misconduct. Under U.S.C. §1983 when an officer, under color of state law, causes the deprivation of any rights, privileges, or immunities secured by the Constitution, the municipality may be held liable. Therefore, when an officer takes action while moonlighting, he increases the chance that he and the municipality will be liable to the citizen.

In order to manage the increased risk of liability from claims resulting from moonlighting, a municipality may choose to use any of the following strategies: (1) require each officer to acquire individual moonlighting coverage; (2) require an indemnity agreement with the secondary employer; (3) require the secondary employer to obtain coverage listing the municipality as an additional insured; and/or (4) acquire moonlighting coverage for the municipality. In addition, the best way to limit the municipality's exposure to liability from moonlighting is to have a clear policy regulating officer's off-duty employment.

What is Moonlighting Coverage?

While the nation's largest cities self-insure for most municipal liability risks, many municipalities find it necessary to obtain law enforcement liability coverage. Law enforcement liability policies provide indemnity and defense cost coverage for losses or damages arising from wrongful acts committed during the course of law enforcement activities. These policies, however, often include limiting language and generally do not cover moonlighting officers. However, insurance companies offer such moonlighting coverage through an endorsement or as a separate policy.

What to look for in Moonlighting Coverage?

When evaluating moonlighting coverage, first consider the policy definition of "insured." Specifically, the definition should be broad enough to include officers acting outside the scope of their employment for the municipality. Additionally, consider who is listed as the named insured. Does it include the individual officer and the municipality or government agency? Municipalities may also consider having the coverage extended to the private secondary employer.

Next consider whether the coverage extends only to "approved moonlighting activities." Many insurers strongly encourage or require the municipality to regulate the secondary employment of its officers. Regulating officer's off-duty employment usually involves establishing a policy that minimizes the factors contributing to municipal liability and establishing "approved moonlighting activities." As a result, it is not uncommon for such moonlighting policies to prohibit officers from working in establishments serving liquor. Some moonlighting policies also provide guidelines on whether the officer may or may not moonlight in his uniform or carry his department issued weapon.

Given the complexities, and fact-intensive analysis of municipal liability for off-duty conduct, it is critical to have both a clear moonlighting policy and to have comprehensive insurance coverage. As always, you should consider contacting a qualified insurance broker or coverage counsel to help determine which coverage strategy is best for you, your department or your municipality. ■