

# Memo

To: Attendees of April 8, 2008 Carrier Conference re: Deliberate Intent

From: WV Offices of the Insurance Commissioner

Date: May 27, 2008

---

The purpose of this memo is to bring clarity to certain issues that were discussed during the OIC's Carrier Conference on April 8, 2008, relating to coverage for deliberate intent claims (often referred to in West Virginia as "Mandolidis" claims). We understand that this can be a confusing area because of the specific nature of this statutory cause of action in our state, and we want to ensure that carriers and employers understand these important coverage issues.

This memo will address four primary topics that were discussed: what exactly is "deliberate intent" and how does it differ from NCCI's "Part Two" employer liability ("EL") coverage; whether experience related to deliberate intent claims becomes part of an employer's experience for rating purposes; is there a duty to defend deliberate intent claims if intentional acts are excluded from a workers' compensation policy; and how must carriers track premium for deliberate intent coverages for purposes of premium taxes and surcharges. In addition, the memo will provide guidance on what should be included in a deliberate intent endorsement.

1. What is a "deliberate intent" claim and is it covered under the EL portion of a policy?

Claims for deliberate intent are made outside of the workers' compensation system, and coverage for them is excluded under the NCCI filed EL coverages that are sold as part of the standard workers' compensation and employers' liability insurance policy.

The West Virginia Workers' Compensation Act gives covered employers a general immunity from employee suits for damages at common law or by statute resulting from work related injuries (W. Va. Code § 23-2-6). The immunity is lost, however, if an employer acts with deliberate intention to injure an employee [W. Va. Code § 23-4-2(c)(2)]. If the deliberate intent exception applies, the employee may file an action for damages in excess of the workers' compensation benefits that he or she would receive as a result of the compensable injury.

The deliberate intent claim is filed in Circuit Court, issues of fault are litigated, and there are no statutory limits on the type or amount of compensatory damages. It has none of the administrative, no-fault characteristics associated with a workers' compensation claim. The West Virginia Supreme Court has held that W. Va. Code § 23-4-2(c)(2) is not integrally related to the operation of West Virginia's workers' compensation system.

Previously, the "Employers' Excess Liability Fund" was established under Article 4C of Chapter 23 of the West Virginia Code, as a vehicle to provide coverage for employers subject to Chapter 23 who may be subjected to liability for excess damages because the

injury of an employee results from the deliberate intention of the employer. This fund and its obligations were transferred to BrickStreet on January 1, 2006. BrickStreet is required by law to offer coverage for deliberate intent until at least June 30, 2008. After that time, BrickStreet may choose to not offer this coverage. Currently, BrickStreet provides this coverage by special endorsement.

New private carriers entering the market after July 1, 2008 are not required, by statute, to offer this type of coverage as part of their workers' compensation policies. However, it is a matter of concern that the coverage be generally available for the employers of this state.

Much of the concern expressed during the April 8 Carrier Conference seemed to stem from the confusion between deliberate intent coverage and the separate "Part Two" EL coverage under NCCI's workers' compensation and employers' liability policy. The two coverages are not the same. The NCCI policy provides coverages under Parts One and Two. "Part One" coverage is coverage for the statutory workers' compensation benefits and defense costs involving any claim against the employer that is payable under the policy, as well as expenses, premiums for bonds and interest on judgments. Part Two coverage is EL, and provides coverage for liability for damages an employer may have that is outside the benefit provisions of the law for workers' compensation claims. The NCCI policy specifically excludes from coverage under Part Two claims for bodily injury intentionally caused or aggravated by the insured. In addition, NCCI has also filed an intentional act exclusion endorsement in our state that replaces the Part Two generic exclusion with one that specifically excludes deliberate intent as defined by W. Va. Code § 23-4-2(d)(2)(i) and (ii).

The following examples will illustrate coverage under NCCI's "Part Two" (EL):

- Loss of services, companionship, or consortium claims, for example if a spouse sues because the injury has damaged his or her relationship with the injured employee;
- Suits brought by injured employees of employers who are by statute not subject to the Workers' Compensation Act and are not required to carry workers' compensation coverage;
- "Third party over" suits in which an employee is injured while operating a machine that malfunctions because it hasn't been maintained properly. Even though the injured worker collects statutory workers' compensation benefits, he or she may also sue the manufacturer of the machine. The manufacturer then, in turn, may sue the employer for contributory negligence for its failure to properly maintain the machine;
- "Dual capacity" suits in which an employee is injured by a product the employer manufactures. In this case, the employee may sue the employer in its capacity as the manufacturer of a defective product; or
- Consequential bodily injury cases such as those in which an individual suffers a heart attack or stroke when informed of a serious injury or death of a family member in a workplace accident.

Clearly, NCCI's "Part Two" coverage does not include the very specific cause of action in West Virginia for deliberate intent.

Coverage for deliberate intent is currently provided in our state by BrickStreet by an endorsement that excludes intentional acts under "Part Two" which arise out of W. Va. Code § 23-4-2(d)(2)(i), but does provide coverage for the specific "five part test" deliberate intent cause of action arising out of W. Va. Code § 23-4-2(d)(2)(ii). Additional premium is paid for this coverage. It should be noted that deliberate intent causes of action may be brought under either paragraphs (i) or (ii) of W. Va. Code § 23-4-2(d)(2). BrickStreet's endorsement provides coverage for only the "five-part test" cause of action. If a carrier is not offering any deliberate intent coverage in our state, it should not model its state specific endorsement excluding intentional acts on the endorsement being used by BrickStreet. Rather, it would use the NCCI state specific exclusion endorsement.

2. Is deliberate intent data reported to NCCI for rate making and employer's experience purposes?

Deliberate intent coverage is separate coverage from employers' liability and is not used for ratemaking or experience rating purposes. We understand that some carriers are providing deliberate intent coverage via a filed and approved company specific endorsement that may be attached to a WC and EL policy. NCCI has made a filing to introduce a new code (9614) that carriers will use for those types of policies effective July 1, 2008, to report the premium and losses for deliberate intent coverage. In this manner, NCCI will ensure that this data will not be used in its ratemaking and experience rating systems. Information captured under this new code will further enable the OIC to gather data relating to this specific liability coverage product. This information will be somewhat limited because it would not provide data related to deliberate intent coverage that is sold as an endorsement to a general liability policy.

3. Does a carrier have a duty to defend deliberate intent claims if intentional acts are excluded from a workers' compensation policy?

This issue came up during the deliberate intent discussion at the April 8 Carrier Conference, and various opinions were expressed. However, this is a legal issue and a decision that must be made by the carrier and its counsel, and goes beyond the type of guidance that should be offered by the OIC.

4. How must carriers track premium for expanded limits of EL and deliberate intent for purposes of premium taxes and surcharges?

For purposes of determining which premiums are subject to the premium taxes and surcharges set out in Chapters 33 and 23, respectively, of the West Virginia Code, the OIC directs that deliberate intent coverage is subject to the premium taxes and surcharge of Chapter 33, not the workers' compensation surcharges of Chapter 23. Deliberate intent premium and increased limits premium under NCCI's filed "Part Two" EL premium are common law coverages outside of the no-fault workers' compensation system and remain subject to the premium taxes and surcharge of Chapter 33.

The NCCI filed and approved algorithm for West Virginia provides guidance for not only how to build premium for determining "estimated premium," but also details common workers' compensation premium elements and identifies which taxes or surcharges are applicable. The algorithm approved by the OIC is "all inclusive" and carriers are not required to match it identically if it doesn't match their business lines. However, the assessment rules need to be followed. The calculations used by carriers can be different from the algorithm as long as the

end result assessment amounts are correct and the rules are followed. While it may be unusual for the state to provide this level of detail in the algorithm, it is intended to be an aid to carriers as an example of how the rules should/could be applied. Different approaches can be taken (e.g., a carrier needn't have exactly 40 lines and each line correspond to the algorithm), but carriers do have to assess premium taxes and surcharges as required by the laws of our state. If a carrier chooses to use a different algorithm it should be filed with the OIC so that we can ensure that it assesses correctly.

In addition, OIC offers three rules to follow:

- 1) Premium for Federal Acts coverage is not subject to the workers' compensation surcharges in Chapter 23 (Advisory Loss Codes with an "F" or "M" suffix);
- 2) Premium for increased limits of EL is not subject to the workers' compensation surcharges in Chapter 23 (\* see *special note below regarding the treatment of standard limits for EL*); and
- 3) Prior to determining the premium base for assessing the workers' compensation surcharges, the carrier needs to add back the dollar amount reduced for any deductible credit plan.

There is a Surcharge Assessment Summary narrative on the OIC's website that goes into these rules in detail at [www.wvinsurance.gov](http://www.wvinsurance.gov).

*\*Special Note – Employers' Liability Premium treatment – The construct of the advisory loss costs used for workers' compensation premium requires further explanation on the treatment of premium taxes and surcharges for employers' liability premium. Employers' liability insurance is casualty liability coverage and is regulated by Chapter 33 and subject to the premium taxes and the surcharge of that chapter. However, each advisory loss cost classification filed by the State's designated workers' compensation rating organization (NCCI) contains a charge for providing the standard limits of employers' liability coverage which can not be easily isolated from each classification. So it has been determined that the corresponding premium collected for each approved loss cost classification shall default to the premium tax and surcharge applicable to the underlying loss cost.*

#### 5. OIC's suggestions for deliberate intent endorsements.

Carriers may choose to offer deliberate intent coverage through an endorsement such as the one used by BrickStreet, which excludes intentional acts under Part Two but does provide coverage for the "five-part test" deliberate intent claims. They may also, if they choose, offer coverage for causes of action under both paragraphs (i) and (ii) of W. Va. Code § 23-4-2(d)(2), although coverage under paragraph (i) has historically not been offered by BrickStreet or the state's Employers' Excess Liability Fund. Carriers may also offer deliberate intent coverage as an entirely separate coverage.