

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0682



PRAETORIAN INSURANCE COMPANY,

Petitioner,

FILE COPY

v.

**(On appeal from the Circuit Court of
Kanawha County, Civil Action No. 20-C-800)**

**AIR CARGO CARRIERS, LLC and
VIRGINIA CHAU, Administratrix of the
Estate of Anh Kim Ho,**

Respondents.

**AMICUS BRIEF SUBMITTED BY
THE WEST VIRGINIA CHAMBER OF COMMERCE
IN SUPPORT OF PETITIONER'S APPEAL
SEEKING REVERSAL**

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STATEMENT OF INTEREST¹

The West Virginia Chamber of Commerce (“the Chamber”) is the voice of West Virginia’s business community. For more than 83 years, the Chamber has been a leader throughout our State by developing solutions to problems, creating effective business approaches, and gathering the state’s most progressive thinkers to address key issues including education, economic development, and workforce preparedness. The Chamber is the largest, most influential general business organization in West Virginia. It represents all business sectors in every region of the state, with members ranging from small business enterprises to mid-size manufacturers to tourism destinations to energy companies to Fortune 500 corporations. Despite its wide membership range, 95% of the Chamber’s members are small business companies and firms. The Chamber has members in all 55 counties, and its members employ over half of West Virginia’s workforce.

The Chamber’s staff, leaders, and volunteers work every day to make West Virginia a better place to do business by giving private-sector employees a voice in state politics and protecting business interests before regulatory bodies, the Legislature, and the Courts. The Chamber believes business must be a positive force for enhancing the quality of life in West Virginia. Accordingly, the Chamber is a proactive leader in the search for solutions to problems and provides a voice for free market competition and streamlined government. It is also a catalyst for progressive thinking and problem solving and a partner with government for progress in West Virginia.

The Chamber and its members are interested in the issues before this Court because West Virginia cannot attract businesses to generate needed well-paying jobs if our State Courts ignore

¹ Pursuant to W.Va. R. App. P. 30(e), undersigned counsel states that no counsel for any party authored this brief in whole or in part, that no such counsel or party made any monetary contribution to fund the preparation or submission of this brief, and that no person other than the *amicus curiae*, its members, or its counsel made such monetary contribution.

the relevant and undisputedly applicable law of other jurisdictions. Further, the interpretation of insurance policies such as the one at issue in this appeal has a considerable effect on companies that do business or seek to do business in West Virginia. These companies must be able to obtain appropriate insurance coverage for their businesses. If coverage under insurance policies is improperly expanded beyond the scope of the parties' contractual agreement, insurance carriers will not be willing to write policies to insure companies operating in West Virginia or will be forced to charge premiums that are not affordable for business owners.

For these reasons, the Chamber files this brief in support of Petitioner Praetorian Insurance Company ("Praetorian").

ARGUMENT

This appeal primarily concerns, in relevant part, the interpretation of two Wisconsin statutes, Wis. Stat. § 632.23 and § 632.25, and their application to Policy No. AWC0500631 issued by Praetorian Insurance Company ("Praetorian") to Air Cargo Carriers, LLC ("Air Cargo") ("the Praetorian Policy").

The Praetorian Policy is a Workers Compensation and Employers Liability Insurance Policy that excludes coverage for deliberate intent claims by virtue of endorsement WC 47 03 01 A (Ed. 7-08), which reads as follows:

WEST VIRGINIA EMPLOYERS LIABILITY INSURANCE INTENTIONAL ACT EXCLUSION ENDORSEMENT

Part Two—Employers Liability Insurance, C. - Exclusions, 5, is replaced by the following:

This insurance does not cover:

5. Bodily injury intentionally caused or aggravated by you or which is the result of your engaging in conduct equivalent to an

intentional tort, however defined, including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2).

AR0150. The Circuit Court mistakenly applied Wis. Stat. § 632.23, which applies to aircraft insurance, to erroneously hold that the endorsement is prohibited under Wisconsin law. Likewise, the Circuit Court erred in holding that the endorsement is not enforceable under Wis. Stat. § 632.25, which prohibits certain conditions in employers liability policies.

Finally, the exclusion at issue here is enforceable under this Court's holding in *Summit Point Raceway Associates*, 228 W. Va. 360, 373, 719 S.E.2d 830, 843 (W.Va. 2011), in which the Court held that a nearly identical exclusion was clear, unambiguous, and enforceable. Accordingly, the Kanawha County Circuit Court's opinion, which was contrary to the *Summit Point* holding, should be reversed.

I. The Praetorian Policy Does Not Violate Wisconsin Law.

A. Wis. Stat. § 632.23 Does Not Prohibit the Exclusion for Deliberate Intent.

There is no dispute in this case that Wisconsin law governs questions of coverage under the Praetorian Policy, which was issued in Wisconsin to a Wisconsin insured. Statutory construction under Wisconsin law begins with the language of the statute itself. *Nekoosa-Edwards Paper Co. v. Public Service Comm'n.*, 99 N.W.2d 821 (Wis. 1959). If the statute at issue is ambiguous, courts look to the legislative intent behind the statute. *State ex rel. Arnold v. County Court*, 187 N.W.2d 354 (Wis. 1972). Statutes are ambiguous "if, looking at the language of the statute, a well informed person could have become confused." *Bortz v. Merrimac Mut. Ins. Co.*, 286 N.W.2d 16 (Wis. Ct. App. 1979).

Wis. Stat. § 632.23 prohibits certain exclusions in "aircraft insurance policies" as follows:

632.23. Prohibited exclusions in aircraft insurance policies.

No policy covering any liability arising out of the ownership, maintenance, or use of an aircraft, may exclude or deny coverage because the aircraft is operated in violation of air regulation, whether derived from federal or state law or local ordinance.

This provision clearly and unambiguously applies only to “aircraft insurance policies.” As acknowledged by the Circuit Court, the Praetorian Policy is a Workers Compensation and Employers Liability Policy. Thus, it was clear error for the Circuit Court to hold that Wis. Stat. § 632.23 applied to void the exclusion for deliberate intent claims.

The Circuit Court mistakenly focused on the nature of the insured’s business, rather than the type of coverage the Praetorian Policy provided. The Circuit Court noted that “[t]he Praetorian policy is a policy that potentially covers ‘liability arising out of the ownership, maintenance, or use of an aircraft’ since it is an Employer’s Liability policy insuring a company that ships cargo by aircraft piloted and/or occupied by its own employees.” The Circuit Court also based its decision on the policy’s “references to things such as ‘aviation,’ or ‘aircraft[,]’” and premium classifications that described the insured’s business. In effect, after acknowledging that the Praetorian Policy was a workers compensation and employers liability policy, the Circuit Court’s Order improperly attempted to transform the Praetorian Policy into an aircraft liability policy. This is not the nature or intent of the statute.

Under Wisconsin law, a policy does not become an “aircraft insurance policy” simply because the insured is an air carrier or because the policy refers to aircraft. The Wisconsin statutes, including Wis. Stat. § 632.23, clearly apply to specific types of insurance policies. For example, Wis. Stat. § 632.32 applies to “motor vehicle insurance policies.” Likewise, Wis. Stat. § 632.25, discussed further below, applies to conditions in “employer’s liability policies.” Wis. Stat. § 632.23, by its plain language, applies only to “aircraft insurance policies.”

These statutory titles are consistent with Chapter Ins 6 of the Wisconsin Administrative Code, which clearly – and separately – defines both “worker’s compensation insurance” and “aircraft insurance” under Wisconsin law:

Ins 6.75 Classifications of insurance. This rule defines and delimits lines and classes of insurance for any purposes within the commissioner’s regulatory power unless the language or context of a statute or rule otherwise provides.

...

(2) PROPERTY AND CASUALTY INSURANCE. Property and casualty includes all lines or classes of insurance which may lawfully be the subject of insurance . . . including but not limited to the following:

...

(k) Worker’s compensation insurance – insurance against obligations under ch. 102, Stats., or any similar law, and including employers’ liability insurance when written in the same policy;

...

(o) Aircraft insurance – insurance against loss, medical or other expense, and liability for damages arising out of the ownership, maintenance or use of any aircraft.

Wis. Admin. Ins. Code § 6.75.

The Wisconsin Legislature recognized a distinction between “aircraft insurance” and “employers’ liability insurance” in the Wisconsin Statutes. The Wisconsin Commissioner of Insurance recognized the same distinction in the Wisconsin Administrative Code. By comparison, the Kanawha County Circuit Court clearly erred in applying Wis. Stat. § 632.23 to an employers liability policy. The deliberate intent exclusion was properly included in the Praetorian Policy, and it should be enforced as written. The Chamber therefore respectfully requests that this Court reverse the Circuit Court’s Order.

B. The Circuit Court Erred in Applying Wis. Stat. § 632.25 to the Deliberate Intent Exclusion.

Wis. Stat. § 632.25, limits the effect of conditions in employers liability policies:

Any condition in an employer's liability policy requiring compliance by the insured with rules concerning the safety of persons shall be limited in its effect in such a way that in the event of a breach by the insured the insurer shall nevertheless be responsible to the injured person under s. 632.24 as if the condition had not been breached, but shall be subrogated to the injured person's claim against the insured and be entitled to reimbursement by the latter.

The Circuit Court ignored black-letter Wisconsin law interpreting this provision and incorrectly applied this statute to conflate policy exclusions with policy conditions. In *Bortz v. Merrimac Mut. Ins. Co.*, 286 N.W.2d 16 (Wis. Ct. App. 1979), the Wisconsin Court of Appeals clearly and unequivocally held that Wis. Stat. § 632.25 does not apply to exclusions, such as the exclusion at issue in this case. Rather, it applies only to policy conditions, which are entirely different from exclusions.

Bortz arose from injuries sustained by a minor in a farm tractor accident. *Id.* at 18. Merrimac Mutual Insurance Company ("Merrimack") and one of its reinsurers, Threshermen's Mutual Insurance Company ("Threshermen's"), denied coverage based on a policy exclusion that excluded coverage for injuries to employees who were employed in violation of age if the injuries arose out of "any power driven machine other than an automobile[.]" *Id.* at 18-19.

United Benefit Life Insurance Company ("United") was joined as a defendant to the case because United issued a health policy to the parents of the injured minor and therefore had a subrogation claim against Merrimack and Threshermen's. *Id.* at 19. United took the position that Merrimack and Threshermen's were required to provide coverage based on Wis. Stat. § 632.25

and argued that the policy's exclusion was also a condition within the meaning of the statute. The Wisconsin Court of Appeals soundly rejected this argument.

The Court unequivocally held that “conditions do not encompass exclusions” and provided a thorough discussion of the difference between conditions and exclusions. *Id.* Exclusions eliminate “coverage where, were it not for the exclusion, coverage would have existed.” *Id.* Conditions, on the other hand, “provide avoidance of the policy or coverage for a specific loss if a certain stipulated event occurs or the insured does or fails to do certain required things.” *Id.*

Conditions also “provide for avoidance of liability if they are breached.” *Id.* at 20. The Court noted that Wis. Stat. § 632.25 “refers to the ‘breach’ of the ‘condition.’ This is in keeping with the principle that conditions but not exceptions or exclusions may be breached.” Thus, the Court held in black letter law that “[T]he term ‘condition’ used in sec. 632.25, Stats., is unambiguous and does not refer to an exclusion.” *Id.*

The Circuit Court's Order acknowledged the language of the statutory provision as applying to conditions, but inexplicably held that Wis. Stat. § 632.25 “limits any exclusion in the Praetorian policy if the insured is required to comply with rules concerning the safety of persons.” AR0769 (emphasis added). This is directly contrary to the Wisconsin Court of Appeals holding in *Bortz* and was clearly erroneous.

II. This Court Has Enforced Virtually Identical Exclusions.

The endorsement at issue in the Praetorian policy, designated as WC 47 03 01 A (Ed. 7-08), reads as follows:

WEST VIRGINIA EMPLOYERS LIABILITY INSURANCE INTENTIONAL ACT EXCLUSION ENDORSEMENT

Part Two—Employers Liability Insurance, C. - Exclusions, 5, is replaced by the following:

This insurance does not cover:

5. Bodily injury intentionally caused or aggravated by you or which is the result of your engaging in conduct equivalent to an intentional tort, however defined, including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2).

Wisconsin does not have any legal precedent interpreting this endorsement. This Court, however, has held that a virtually identical endorsement is conspicuous, plain, clear, and obvious in excluding coverage for deliberate intent actions, regardless of whether a plaintiff alleges purely intentional misconduct under W.Va. Code § 23-4-2(d)(2)(i) or invokes the five-part test in W.Va. Code § 23-4-2(d)(2)(ii). *Summit Point Raceway Associates*, 228 W. Va. at 373, 719 S.E.2d at 843.

The exclusion at issue in *Summit Point* read as follows:

C. Exclusions

This insurance does not cover

...

5. Bodily injury caused by your intentional, malicious or deliberate act, whether or not the act was intended to cause injury to the employee injured, or whether or not you had actual knowledge that an injury was certain to occur, or any bodily injury for which you are liable arising out of West Virginia Annotated Code § 23-4-2.

This Court held that “by stating that the insurance did not cover ‘any bodily injury for which you are liable arising out of West Virginia Annotated Code § 23-4-2,’ it is clear that there was no coverage for deliberate intent liability arising from either W.Va. Code § 23-4-2(d)(2)(i) or W.Va. Code § 23-4-2(d)(2)(ii).” *Summit Point Raceway Associates*, 228 W. Va. at 373, 719 S.E.2d at 843.

Additionally, the West Virginia Office of the Insurance Commissioner evaluated the exact coverage form and exclusion at issue in this case, both of which were promulgated by the National

Council on Compensation Insurance (“NCCI”) and explained that the NCCI Part Two coverage for employers liability is separate and apart from deliberate intent coverage. *See* Exhibit A, May 27, 2008 Coverage Memo. The Commissioner noted that “[t]he NCCI policy specifically excludes from coverage under Party 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).” *Id.*

This Court has held that “[w]here any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of Chapter 33 of the West Virginia Code. *Erie Ins. Property & Casualty Co. v. King*, 236 W.Va. 323, 779 S.E.2d 591 (2015). This is the specific exclusion that has been approved by the West Virginia Insurance Commissioner, and it is therefore presumed to comply with West Virginia law.

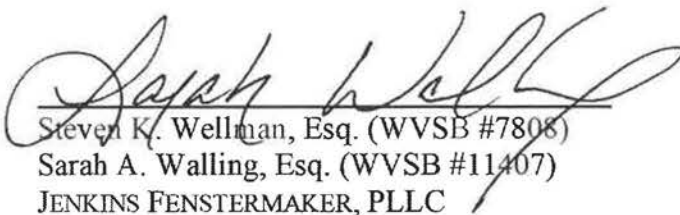
Just like the exclusion in *Summit Point*, the Praetorian Policy excludes coverage for “conduct equivalent to an intentional tort, however defined, including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2).” This exclusion encompasses both types of a deliberate intent action, including the five-part test. The Circuit Court’s ruling was contrary to this Court’s holding in *Summit Point* and should be reversed.

CONCLUSION

For the reasons set forth herein, the West Virginia Chamber of Commerce respectfully requests that this Honorable Court reverse the Circuit Court of Kanawha County and hold that the Praetorian Policy does not provide coverage for deliberate intent claims, whether brought under W.Va. Code § 23-4-2(d)(2)(i) or W.Va. Code § 23-4-2(d)(2)(ii).

**THE WEST VIRGINIA CHAMBER OF
COMMERCE,**

By Counsel

A handwritten signature in cursive script, appearing to read "Sarah Walling", is written over a horizontal line.

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EXHIBIT A

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.vvinsurance.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.