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**Traveling Employees and the  
Workers' Compensation Coverage Dilemma**

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**I. INTRODUCTION**

John Doe is a parts salesman for ABC Farming, a farming manufacturer based in the South. Mr. Doe's job requires him to travel to various distributors throughout Idaho during a one week sales trip. While driving from one sales call to the next, Mr. Doe's car is struck by a tractor negligently driven by a potato farmer. Since Mr. Doe was injured in the course of his employment, he seeks workers' compensation benefits and discovers that the laws of Idaho provide greater benefits for his injuries than those of the state in which ABC Farming is located. Mr. Doe thus pursues benefits under the Idaho workers' compensation laws, even though ABC Farming's insurance carrier is not licensed to transact insurance in Idaho. Because the insurer is not licensed to transact insurance in Idaho, ABC Farming fears its insurer will not cover Doe's claim.

Most states permit injured traveling employees to choose between the workers' compensation laws of their employer's home state and of the state in which they were injured. The richness of benefits under each state's law drives the option. Because an employee may elect the benefits under the law of a state other than the employer's home state, workers compensation insurers developed "Other States" coverage.

Originally, "Other States" coverage was quite broad, extending to all but the monopolistic fund states. More recently, however, "Other States" coverage from insurers not licensed in every state has been limited. The limits take two principal forms: either the carrier excludes coverage for states in which it is not licensed, or the state in which the injury occurred prohibits the carrier from paying the claim.

In either case, the employer faces an uninsured compensation liability, a possible regulatory sanction, and even tort exposure through loss of protection of the exclusive remedy. The employee experiences delay in receipt of benefits and may even have to sue to recover from the employer. The insurer may even be subject to sanction for conducting an unlicensed insurance business if it pays the claim.<sup>(1)</sup>

These limitations, among others, recently prompted the National Association of Insurance Commissioners Workers' Compensation Task Force to propose a legislative solution to the uncertainty associated with "Other States" workers'

Compensation Task Force to propose a legislative solution to the uncertainty associated with "Other States" workers' compensation coverage. This article summarizes the terms and scope of "Other States" coverage, the NAIC response to the problems noted, some shortcomings of the NAIC proposal, and several alternative solutions.

## II. OTHER STATES COVERAGE

An employer with employees who travel in states other than where the employer is located typically buys a workers' compensation policy which includes "Other States" coverage. The "Other States" coverage in the National Council on Compensation Insurance form extends coverage to states expressly listed in Item 3.C. of the declarations. "If an employer then has exposure for an incidental, unexpected, out-of-state work-related injury, there is potential coverage under the 'other states' portion of the policy."<sup>(2)</sup>

Unfortunately, the coverage does not always respond to an otherwise covered loss. No coverage is afforded in monopolistic states or where the insurer chooses not to write the coverage.<sup>(3)</sup> Moreover, insurers who are not licensed in a state in which an employee is injured "have been threatened with fines for operating without a license in the states of injury."<sup>(4)</sup> Faced with the specter of such regulatory action, some carriers elect not to write the coverage in such states. Other carriers have merely concluded that they may not pay claims that arise in states where they are not licensed, even though they have not limited the other states coverage in the policy.

If the "Other States" coverage does not apply, or if an insurer is prevented from paying a loss, the employer could be deemed to have no compensation insurance in force. Without proper insurance in place, an employer risks losing the protection of the exclusive remedy under the workers compensation laws. Loss of the exclusive remedy subjects the employer to a possible tort action by the employee.

As a consequence, an employer then faces "an unknown, uncovered, and in many cases an uncoverable exposure to loss under [foreign] workers' compensation laws."<sup>(5)</sup> "Employers are unnecessarily placed at risk of having unfunded liability" and employees, therefore, risk "experiencing delays in receiving benefits or having to sue the employer for damages."<sup>(6)</sup>

## III. THE NAIC SOLUTION

To address these problems, the NAIC Workers' Compensation Task Force has recommended a legislative response to ease employers' potentially uncovered exposure under foreign workers' compensation laws. The solution espoused by the Task Force incorporates the following elements:

1. The legislation should specify that injured employees will received the benefits of the state of regular employment regardless of where the injury occurs. In effect, this will remove employee choices over which state's benefits apply.
2. The legislation should provide that employees from other states, temporarily or incidentally working in that sate, are not subject to the laws of the state in which they are temporarily or incidentally working. In effect, this will establish the benefits for which the employer is responsible regardless of the location of the injury.
3. The legislation should specifically provide that if an employer has valid workers' compensation coverage in the state of domicile, which provides domiciliary state benefits to an employee injured in the course and scope of his employment while temporarily or incidentally located in another state, and has complied with the coverage requirements of the law of the state of domicile, the employer will maintain the exclusive remedy provisions afforded by the workers' compensation law.
4. The legislation should specify that this limitation is available only to employers domiciled in states which have passed similar legislation.<sup>(7)</sup>

Principally and plainly on its face, the Task Force believes the problem with other states coverage lies with an employee's choice of which benefits will apply. Thus, the Task Force maintains that limiting an employee to the benefits and the protection of the workers' compensation laws in the state in which an employee principally lives, is hired, and is paid by his employer solves the problem. Such a solution, in the view of the Task Force, addresses not only the concerns of employers, but that of employees as well:

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Employers are entitled to know what benefits are payable to injured employees, and to tort immunity when the employer is in compliance with applicable statutes. Employees are entitled to know that they will receive appropriate and adequate benefits in a timely fashion in a non-adversarial setting.<sup>(8)</sup>

Accordingly, the Task Force contends that its legislative remedy is a simple solution to the "other states" coverage dilemma which balances the best interests of employers and employees.

#### IV. SHORTCOMINGS OF THE NAIC PROPOSAL

The NAIC proposal has at least two chief flaws: First, it assumes that a carrier must (or should) be licensed in the state under whose laws the compensation claim arises. Second, it may violate the right to interstate travel guaranteed by the United States Constitution. Either of these infirmities should prompt the NAIC to reconsider its proposal.

##### A. Assumed Licensure Requirement

Most, if not all, states prohibit the sale of workers compensation insurance on an unadmitted basis. But is the payment of a traveling employee's claim subject to this prohibition? Put another way, should a license be required of an insurer before it may pay a compensation claim of a traveling employee that arises under the laws of a state other than the home state of the employer?

The authority to transact insurance in a given state is tied to maintaining an appropriate certificate of authority. Most states provide a specific exception to the definition of transacting insurance, however, when dealing with a policy of insurance that was lawfully issued outside of the relevant state. The typical exception to the need for a certificate of authority applies to

[t]ransactions in this state involving a policy lawfully solicited, written, and delivered outside of this state covering only subjects of insurance not resident, located, or expressly to be performed in this state at the time of issuance, and which transactions are subsequent to the issuance of such policy.<sup>(9)</sup>

Adjudicating an "other states" claim under the laws of a state in which the insurer is not licensed should not constitute the unauthorized transaction of insurance. Assuming the insurer was properly licensed in the employer's state of domicile, then the following conditions are met:

the workers' compensation policy was lawfully written outside the "other state;"

the policy did not cover subjects that were resident, located or *expressly to be performed* in the other state *at the time the policy was issued* (to reiterate, "Other States" coverage applies only to incidental, unexpected, out-of-state work-related injuries); and any adjudication of a claim in the instance of a traveling employee would clearly be subsequent to the issuance of the policy.

Accordingly, an insurer that is not licensed in states with a similar exception to the certificate of authority requirement, should not have to fear sanctions for operating without a license, nor should an employer fear that an unlicensed insurer in such state would lead to the employer facing uncertain coverage via the "other states" portion of the policy, unless, of course, such insurer expressly excluded the particular state on the declarations page of the employer's workers' compensation policy.

As to claims occurring outside the state in which the policy is issued, workers compensation insurance should not be treated differently from other forms of liability insurance. For example, there are many automobile liability insurers and products liability carriers who are not licensed in every state. Automobiles and manufactured products cross state lines with ease and regularity. Sometimes after migrating from the state in which the carrier is licensed and the policy is issued, they cause harm. Just as with the claim of the traveling employee who elects a foreign state's benefits, the negligence and product liability claims arise under a foreign state's laws. No one argues that the auto or product liability carrier should be prevented from paying claims that arise in those circumstances, simply because the carrier is not licensed where the accident occurred. Similarly, the unlicensed carrier should be permitted to adjust claims under the "Other States" coverage, even if it is unlicensed in the state where the claim arose.

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## B. Constitutional Challenge

Precluding traveling employees from choosing the best available benefits may encroachment on the equal protection clause of the Fourteenth Amendment.<sup>(10)</sup> Although not a glamorous topic of debate for legal scholars, the right to inter-state travel has long been recognized as a fundamental constitutional right and is protected pursuant to the equal protection clause.<sup>(11)</sup> To encapsulate the current standard followed by the Supreme Court in this area, any state law that penalizes the exercise of the right to inter-state travel will be found unconstitutional, unless it can be shown that the law is necessary to promote a compelling state interest.<sup>(12)</sup>

By explicitly preventing traveling employees choosing benefits available under the laws of a state in which they are injured, the NAIC proposal plainly penalizes a traveling employee's exercise of the right to interstate travel. The NAIC approach denies traveling employees the same benefits that are available to residents who suffer injuries in the course of their employment in a particular state. As such, it abrogates the fundamental right. But there are arguments to the contrary.

The NAIC could argue that the model law promotes a compelling state interest: that of regulating the business of insurance. The Supreme Court has long held that the business of insurance is a matter for local regulation.<sup>(13)</sup> Yet, the *necessity* to promote the regulation of the business of insurance does not appear to be as certain in the context of providing "Other States" coverage. As shown above, an insurer should not need to possess a license to provide benefits pursuant to "Other States" coverage. As will be seen below, states such as Delaware and Idaho have struck a balance between the competing interests of a traveling employee's right to unencumbered interstate travel and equal protection of the laws and an employer's need to be certain concerning workers' compensation coverage on the one hand, and the state's interest in regulating the business of insurance on the other hand. Thus, the necessity of the Task Force Model to regulate the business of insurance may not be as secure against a constitutional attack, and the NAIC White Paper on this subject appears to have glossed over the issue of a traveling employee's fundamental right to interstate travel.

## V. ALTERNATIVE SOLUTIONS

Two different approaches to the "other states" coverage difficulty reflect a similar approach to the above-referenced analysis. To allay fears of employers that seek coverage through the residual market, the National Council on Compensation Insurance ("NCCI") recently filed to expand "to 44 from 26 the number of states in which traveling employees workers' comp claims are automatically covered by their employers' residual market policies."<sup>(14)</sup> As noted by the NCCI, "This filing will benefit all stakeholders who are involved with the residual market and provide some protection for exposures for which employers currently have not protection."<sup>(15)</sup> Previously, if coverage was not available, the employer was ultimately responsible for payment of any compensation awarded to an injured employee. But rather than limiting an employee's options to the benefits available under the state in which the worker's company is based, the NCCI arguably sought to both protect both the employer and the employee by expanding the automatic coverage. As opposed to the Task Force Model, the NCCI solution providing automatic coverage preserves an employee's right to choose the best available benefits and protects employers from unknown coverage situations when dealing with traveling employees.

A second approach can be seen in the legislative solutions adopted by both Delaware and Idaho. In the context of an "other states" claim, Idaho and Delaware have enacted laws that deem an insurer authorized to write insurance in their states, although such insurer is not lawfully licensed to write such coverage in either state. In dealing with injuries to traveling employees, these states recognize an employee's right to choose the best available benefits, but they do not penalize the employer for purposes of the exclusive remedy under workers' compensation laws. Rather, an employer's insurer is allowed to provide benefits to the injured employee under their laws without the necessity of possessing a lawfully issued certificate of authority. The specific provision reads as follows:

If such employer's liability under the workmen's compensation law of such other state is insured, such employer's [carrier], as to such employee or his dependents only, *shall be deemed to be an insurer authorized to write insurance under and be subject to this law*, provided, however, that unless the contract with said employer requires it to pay an amount equivalent to the compensation benefits provided by this law, its liability for income benefits or for medical and related benefits shall not exceed the amounts of such benefits for which such insurer would have been liable under the workmen's compensation law of such other state;<sup>(16)</sup>

of such other state;<sup>(16)</sup>

Under this legislated course, an employer will not face the fear of being exposed to tort suits because of failure to have coverage under the Idaho or Delaware workers' compensation laws. Further, although the insurer's liability is capped at the liability under the law of the employer's domicile (unless the policy provides that it will pay the higher benefits), and the employer may face the prospect of providing collateral to secure the payment of benefits due the employee in excess of the insurer's liability,<sup>(17)</sup> such a solution recognizes both an employee's right to choose the best available benefits and protects an employer against uncertain coverage by affording the employer's insurer the opportunity to provide coverage without fear of sanctions for the unauthorized transaction of insurance.

## VI. CONCLUSION

In view of the perils that employers have experienced with "Other States" coverage, the NAIC has taken a logical step to address such problems. By focusing on the elimination of a traveling employee's option to choose the best available workers' compensation benefits, however, the NAIC Task Force has missed the opportunity to strike a true balance between an employee's right to choose freely, which arguably is a qualified fundamental right subject to equal protection under the laws, and an employer's need to be secure with its coverage and eliminate tort liability on the one hand, and the state's interest in regulating the business of insurance on the other. As referred to herein, the NCCI has appropriately acted in the context of the residual market to account for an employee's choice and clarify an employer's coverage by providing automatic coverage in all 44 states which do not have an exclusive fund. Similarly, the laws adopted by Idaho and Delaware concerning the claims of employees traveling through their states again strike a considerable balance, although favoring an employee's right to choose, by affording an employer's insurer the ability to provide benefits without fear of sanctions for transacting the business of insurance without an appropriate license.

Although the Task Force contends that it has addressed "the very real concerns of . . . employees," the unfettered abolition of a traveling employee's right to choose the best available benefits when he is injured in the course of employment appears to contradict such a statement. A more prudent approach could be modeled upon the laws of Idaho and Delaware by recognizing that an employer's insurer need not be licensed in a particular state to provide "other states" coverage. To be sure, the Idaho and Delaware laws leave room for additional liability to be potentially born by an employer, however, the laws also allow for the possibility that an employer can cover such liability by obtaining "Other States" coverage which requires the insurer to pay an amount equivalent to the compensation benefits payable under their workers' compensation laws. Imposing the obligation on negotiated policy language and allowing insurers to operate without fear of sanction for transacting insurance without a license, rather than merely removing an employee's choice, arguably provides a more balanced approach to the real concerns of employees and employers in the context of "Other States" coverage.

1. Meg Fletcher, *Business Insurance*, July 31, 1995.
2. Fletcher at 3.
3. NCCI, Basic Manual at R6.
4. Fletcher at 3.
5. NAIC White Paper, "'Other States' Coverage on Workers Compensation" (Draft 8/20/96) at 1.
6. *Id.* at 2.
7. *Id.* at 3-4.
8. *Id.* at 3.
9. See, e.g., Ariz. Rev. Stat. Ann. 20-206(C); Del. Stat. Ann. tit. 18, 506; Fla. Stat. 624.402(2); Idaho Code 41-306; N.Y. Ins. Law 1101(b)(2); N.C. Gen. Stat. 58-28-5; and Tex. Ins. Code Art. 1.14-1(2)(b).

Law 1101(b)(2); N.C. Gen. Stat. 58-28-5; and Tex. Ins. Code Art. 1.14-1(2)(b).

10. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, 1.

11. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

12. Id.; see *Attorney Gen. of New York v. Soto Lopez*, 476 U.S. 898 (affirming Shapiro approach).

13. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

14. See Meg Fletcher, *Business Insurance*, Comp Rule Change Proposed, September 2, 1996. The NCCI filing did not apply to employers based in Nevada, North Dakota, Ohio, Washington, West Virginia, and Wyoming -- the six remaining states with exclusive funds.

15. Id.

16. Idaho Code 72-219(3) (emphasis added); See also Del. Code Ann. tit. 19, 2303(c).

17. If the total amount for which an employer's insurer is liable is less than the total benefits a traveling employee is entitled under either Idaho or Delaware's workers' compensation laws, then the employer may be required to post collateral to secure the payment of benefits due to a traveling employee or his dependents. See Id.