RC&O
ROBISON CURPHEY & O'CONNELL

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Does Your Insurance Cover Everything You Think It Does?

"Take calculated risks. That is quite different from being rash."

~George S. Patton

Business owners and entrepreneurs are no strangers to the concept of risk. They encounter it right out of the gate merely by opening their doors, expending effort, time and money with no promise of a return on their investment. Moreover, throughout the process of providing goods and services, businesses risk liability to customers for transactions or products that go awry. Actions of competitors, changing customer preferences, and the vibrancy of the local economy all substantially contribute to the unpredictability of entrepreneurship.

Indeed, risk is an inescapable part of doing business. But while it may not be able to be eliminated entirely, certain risks can be effectively managed. As one expert has observed, what often distinguishes the best businesspeople from the rest of the pack is the degree to which they seek to reduce risk. [1]

One of the biggest potential sources of liability to businesses is job-related injuries and accidents. Although this particular species of risk is largely managed for most Ohio employers through Ohio's workers' compensation scheme – which provides businesses with immunity from liability for most injury-related damages resulting from actions brought by an employee – workers' compensation does not protect an employer from responsibility for all injuries or damages.

For example, "intentional" torts – which occur when an on-the-job employee is intentionally injured – are not covered. Of course, it's extremely rare that an employer ever intentionally harms its employee. But while this exclusion may not

[1] *Steve Strauss, "Ask An Expert: Reducing Risk Inherent in Business Key to Better Entrepreneurs", http://www.usatoday.com/money/smallbusiness/columnist/strauss/2007-03-25-reducing-risk_N.htm*

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The Insurance Industry Group at Robison, Curphey & O'Connell (RCO) provides a wide range of legal services to insurance carriers, self-insured entities and insureds in Northwest Ohio and Southeastern Michigan. For over 35 years our lawyers have advocated the interests of insurers and their insureds in the state and federal trial and appellate courts.

RCO also advises insurance companies and represents their interests in insurance coverage, declaratory judgment and bad faith disputes. We serve as state and national coordinating counsel for insurers with respect to issues of coverage and the defense of catastrophic injuries.

I Live in Ohio. Why Should I Care about the Michigan No-Fault Insurance Law?

It is no secret that Michigan and Ohio have had some differences with each other over the years. The oft-contentious relationship traces back at least to the "Ohio-Michigan War", an 1835 boundary dispute over a strip of land that included Toledo and control of the mouth of the Maumee river. Similarly contentious is the history between the Buckeyes and Wolverines, whose longstanding rivalry on the gridiron is deemed by many to be the best in all of American sports. [1]

The vast differences extend even to state laws, which, while more mundane, can have important implications for residents of both states – particularly those who live and/or work near the border. A prime example of this is found in Michigan's No-Fault Automobile Insurance Law, which was designed to provide "assured, adequate, and prompt reparation for certain economic losses."[2] This law requires Michigan car owners and licensed drivers to purchase[3], and Michigan-licensed insurance companies to provide, "no-fault" auto insurance, which provides unlimited medical and rehabilitation benefits, wage loss benefits, and replacement services for people injured in auto accidents, regardless of who is at fault in the accident. Under the no-fault system, motorists cannot sue, except in case of serious injury or death.

Failing to maintain proper coverage can result in total disqualification from the Michigan No-Fault System.

In contrast, most other states – including Ohio – have implemented the so-called tort (or "fault") liability system, where insurance companies pay damages to accident victims based on the relative degree of fault of their insured. Not surprisingly, problems can arise when these systems interact – i.e., when an Ohio driver has an accident with a Michigan driver in Michigan.

A combination of laws and insurance industry practices have arisen in an attempt to address systemic differences and potential conflicts arising under the two insurance systems. For example, when most insured Ohioans drive in Michigan, their Ohio insurance policy (typically) "transforms" itself to no-fault coverage. To do this, however, the insurer must have filed a certificate of compliance with the State of Michigan enabling it to sell insurance there, in accordance with MCL 500.3163.

Under Michigan law, however, all out-of-state owners or registrants of motor vehicles must maintain proper no-fault insurance (i.e. coverage beyond the transformational coverage provided by their regular policy) if the vehicle is operated in Michigan for more than 30 days in any year. [4] Persons failing to do so are guilty of a misdemeanor, and can be fined $100 - $ 500 and imprisoned for up to a year. [5]

More significantly, however, failing to maintain proper coverage can result in a total disqualification from the Michigan No-Fault system. MCL 500.3113(c) states that "[a] person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed: * * * (b) the person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by Section 3101 [the Michigan No-Fault Act's general coverage provision] or 3103 was not in effect".

Potentially worse still, in an accident in Michigan with an in-state driver carrying no-fault coverage, an out-of-state driver without the required insurance would be precluded from recovering damages for death,

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[1] "The 10 greatest rivalries," available at *http://espn.go.com/endofcentury/s/other/bestrivalries.html*, visited August 2007
[2] *Shavers v. Attorney General,* 402 Mich. 554, 579 (Mich. 1978)
[3] MCL 500.3101(1)
[4] MCL 500.3102(1); MSA 24.13102(1)
[5] Id.; *Gersten v. Blackwell,* 111 Mich. App. 418, 423 (Mich. Ct. App. 1981)

This document is intended to provide general information for clients or interested individuals. The information contained herein is not intended to be and should not be construed as legal advice. Please consult your attorney for specific advice regarding your situation since every circumstance should be considered and evaluated separately.

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appear significant at first glance, the problem is more apparent when one considers that, under Ohio law, an employer can be found to have "intentionally" injured its employee where, even though it did not directly intend to cause the injury, the employer knew that its employee was doing something dangerous, was "substantially certain" that injury would occur, and required the employee to continue the dangerous activity – also known as a "workplace" or "substantial certainty" intentional tort. Ohio law regards injuries to employees that occur in these circumstances as intentional from the standpoint of the employer. Under this standard, for example, an employer can held liable when a forklift driver loading a truck falls off a loading dock [2], or where an employee is allowed to operate a dangerous machine without safety guards in place. [3]

Savvy business owners typically attempt to hedge against this and other risks by purchasing commercial general liability insurance policies – commonly known as "CGL" coverage – and "stopgap" insurance policies, for the purpose of filling in the liability "gaps" that remain under the workers' compensation scheme and the business owner's other insurance policies. While CGL and stopgap coverages can be effective tools in managing risk, they may not provide the full protection desired. Often a CGL policy will contain exclusions for workplace or substantial certainty intential torts, a fact of which insured businesses may not be aware.

For example, CGL insurance policies often state that they do not provide coverage for:

1. acts committed by or at the direction of an insured in which the act is substantially certain to cause bodily injury ; or

2. bodily injury to an employee arising out of or in the course of employment.

Both provisions are examples of what may appear in CGL insurance policies. If coverage for workplace/substantial certainty intential torts is desired, the business owner should consult carefully with its insurance agent to assure that the desired coverage is obtained.

A good example of how a policy provision like this may surprise a business owner occurred in *Penn Traffic Co. v. AIU Ins. Co.* (2003), 99 Ohio St. 3d 227, a case where a worker was injured when she fell off of a company loading dock. In a previous trial, a jury found her employer, Penn Traffic Co., liable for her injuries on the basis that the accident was substantially certain to occur, in part because the company had failed to put a guardrail in place when it had knowledge of similar prior incidents. Because the injury was the result of a workplace/ substantial certainty intentional tort, workers' compensation did not protect the

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[2] *Davis v. Sam's Club,* 1996 Ohio App. LEXIS 3924
[3] *Brookover v. Flexmag Industries.,* 2002 Ohio 2404

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impairment of bodily functions, or disfigurement – even where the Michigan driver was at fault.[6] Thus, Michigan's scheme simultaneously denies personal injury protection benefits and tort remedies to injured plaintiffs who lack the requisite insurance coverage.[7]

In sum, residents of the Buckeye state – and any other state – who travel in Michigan may have more to worry about than just historic rivalries. For the occasional traveler in Michigan, it may be worthwhile to check that his/her auto insurance policy takes the state's no-fault scheme into account. Those with a more significant presence in the state (more than 30 days per year) need to check with their insurance company to verify that they have proper no-fault policies or endorsements in force. Without it, occasional and frequent travelers alike may find that, despite carrying appropriate insurance in their own state, they are limited, or in some cases, entirely precluded from recovering damages for an accident when traveling in Michigan.

[6] MCL 500.3135(2)(c); *McGhee v. Helsel,* 262 Mich. App. 221 (Mich. Ct. App. 2004)

[7] *Gersten v. Blackwell,* 111 Mich. App. 418, 422 (Mich. Ct. App. 1981)

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company from liability.

When the insurance company declined coverage based upon the terms of its CGL policy, Penn Traffic filed a lawsuit seeking coverage under an "enhancement endorsement" to its CGL policy, which it believed protected it from liability in such circumstances. However, the Ohio Supreme Court denied relief on the basis that a "CGL insurance policy that contains an exclusion from coverage for bodily injury to an employee arising out of or in the course of employment does not provide coverage for an employer's liability for substantial-certainty intentional torts."

Effect on Employers

The result in *Penn*, and other similar cases, has a potentially significant effect on business owners. Employers may find themselves completely without protection if they are found liable for a workplace/substantial certainty intentional tort, but have a CGL policy that excludes coverage for these types of claims. Not only will a business be denied immunity under workers' compensation, but its CGL policy language may preclude coverage as well.

Insurance companies may not even have the duty to defend an insured business under these circumstances. Several courts have upheld an insurance company's right to refuse to pay for the defense costs where the policy excludes coverage for substantial certainty intentional torts. See, e.g. *Altvater v. Ohio Cas. Ins. Co.* (2003), 2003 Ohio 4758, *Cincinnati Insurance Co. v. Schwerha* (2006), 2006 Ohio 3521.

Effective risk management, then, entails more than just paying workers' compensation premiums and purchasing CGL and stopgap insurance coverage. Businesses need to consult with their insurance agents to obtain the desired coverage and need to know what their insurance policies actually say, or they may find themselves bearing the costs of expensive litigation and damages for employee accidents and injuries.

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