

# Insurance Issues



Midwest

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## Call Us

This article reviews the current legal and exposure trends affecting insurers writing in the Midwest states. Much of the information is a compilation of articles previously released in other Gen Re Research publications.

If you would like to start or continue a dialogue, please contact your Gen Re representative. Do any of these trends matter to your business? We welcome a discussion of any issues affecting your book, and can offer insights and options from our ongoing research.

## Important Insurance Issues for the Midwest

by Liz Kramer, Diane Brown and Mindy Pollack, Gen Re

The Midwest has generated many significant developments in recent years, ranging from Liquor Liability and Construction Defect insurance coverage to Pollution Exclusions and Auto UM/UIM. In recent months, we noted more activity in Indiana, Missouri and Ohio, with Illinois, Wisconsin and Iowa not far behind. Some developments are very specific to state laws (such as Wisconsin UM/UIM and tort reform), but a few rulings could cross borders to influence challenges and outcomes in neighboring states.

Several themes emerge from our observations, and they are relevant in all lines and territories:

- > A single court decision can create a new exposure overnight, as the Ohio bus ruling demonstrates.
- > Policy wording is a critical part of the outcome, as almost every development reminds insurers about keeping forms current or responding to new issues with form changes.
- > Tracking developments in the courts and legislatures will help insurers prepare for what lies ahead, be they expansive court rulings or legislative fixes.

In this special edition of *Insurance Issues*, we highlight new trends emerging in Midwest states. More details on all of these topics can be found in other Gen Re publications. If you are not already following these topics, it might be time to add them to your list.



## SPOTLIGHT: Business Auto and Commercial Umbrella May Cover Contracted Transportation Services

Insurers issuing Standard Business Auto (BAP) and Commercial Umbrella (CU)/Excess policies to organizations and businesses may now be exposed to drivers employed by chartered transportation companies, under a significant decision from the Ohio Supreme Court. This ruling could have potential implications for all businesses and organizations that hire third parties for transportation services. *Federal Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 2010 Ohio LEXIS 3295.

Bluffton University contracted with a charter bus company, Executive Coach, to transport 33 members of its baseball team to Florida. A serious accident occurred in Georgia, and five team members, the driver and his wife died; seven other passengers received serious injuries. The BAP issued to Bluffton defined an “insured” to include “[a]nyone else while using with permission a covered ‘auto’ you own, hire or borrow.” This definition of insured contained several exceptions, including one for the owner of the hired auto. Bluffton also purchased a \$5 million Commercial Umbrella and a \$15 million Excess policy that provided coverage subject to the terms and conditions of the “controlling underlying insurance.”

The suit tests whether the driver, an employee of the charter bus company, is an insured under the University’s BAP/CU/ Excess policies. The Ohio Supreme Court held that the BAP language provided coverage, because the insured “hired the bus,” and the driver had permission to use it. While the charter company who “owned” the hired auto was not covered, the driver did not fit within that policy exception. As to the fundamental issue of whether the insured hired a contractor or a bus/driver, there is little satisfactory discussion in the opinion. Without a policy definition of “hired” auto to guide it, the court simply held that the insured hired a bus.

### Implications and Responses

- > **All Classes Affected:** Any organization or business that contracts with companies for transportation services could find itself a target of litigation, and that means their insurers as well. What about a church that hires a bus company to transport children to a nearby camp, or a business hiring a limo company to transport clients to a reception? If you write the BAP or CU for any businesses in Ohio, the decision is likely to have some effect on your exposures.
- > **Policy Language:** The BAP “insured” language here is the same as the current ISO form. In the discussion, the court points to another case involving a definition of insured that excluded the auto owner *and* agents and employees of that owner. Had the Bluffton policy contained this additional language in its exceptions to “insureds,” there would be no coverage for the driver. Will ISO and other Bureaus issue an Ohio amendatory endorsement? What do your policies say?

- > **Limits and Catastrophic Exposures:** The bus company’s \$5 million of insurance and the state of Georgia’s \$3 million (tort cap) had already been paid. As a result of the ruling, an additional \$21 million in coverage is now available. Bus accidents are one example of how a single catastrophic event can expose deep pockets and full policy limits. Are you adequately protected?

**Policy Form Support:** We expect that the Bureaus and individual companies are studying the case and considering whether any adjustments are necessary to their policy forms. As always, Gen Re stands ready to assist our clients in helping craft solutions that comport with your underwriting intent.

**Gen Re Research:** For more research on this topic, see Gen Re’s *E-News Auto* e-mail, January 14, 2011.

## Habitational—Landlord Liable After Sale of Property

An Ohio appellate court broke new ground by holding that a landlord can be liable in tort to a tenant for an accident that occurs after transfer of the property to a new owner. In this case, the first landlord neglected to fix an oven despite repeated requests. The landlord then sold the property to a new owner, and five days later the tenant was burned by the oven. The new owners were voluntarily dismissed, and the trial court then dismissed the first landlord on the basis of a lack of privity. The appellate court reversed, holding that a sale of property does not terminate duties to a tenant and that a landlord can be liable for its prior failure to make repairs even after it sold the property. There were no Ohio cases on the topic, so the court looked to other legal sources and considered the goal of the state’s landlord-tenant law. A tenant would not be protected if a landlord could ignore safety issues, knowing that a sale was imminent. *Robinson v. C&L Associates*, 2010 Ohio App. LEXIS 2613.

**Coverage Note:** You might have thought that the CGL exclusion for property damage to a sold premises applied (see exclusion j(2)), but the Ohio case involved a bodily injury claim.

## CATASTROPHIC EXPOSURES—Indiana Habitational Verdict

Across the border in Indiana, a landlord was ordered to pay \$23.5 million to *one* family harmed by improper application of pesticides in their apartment. What would the loss be if more families in the building had been affected?

**Long Tail:** In addition to the size of the Indiana award, it is notable for the “long tail” aspect—the suit was filed 14 years before the verdict was rendered. An appeal of the jury verdict is expected. See “Floyd jury awards \$23 million in lawsuit against apartment complex,” *Courier-Journal* (Sept. 17, 2010) at [www.courier-journal.com](http://www.courier-journal.com).



## Indiana

### SPOTLIGHT: Contractors and Construction Defects—Court Finds Occurrence

The Indiana Supreme Court has decided the case discussed in our May 2010 *Casualty Matters* “Case Watch,” and it goes against insurers of general contractors. The claimants alleged loss from leaky windows and water damage resulting from negligent work done by subcontractors. Previous Indiana cases had not found an occurrence where there is no property damage other than to the building itself. The Indiana Supreme Court took the opportunity to review the law from across the country, and concluded that faulty workmanship does constitute an accident as long as the resulting damage occurs without expectation or foresight. The determination of fortuity will depend on the facts of each case. In support of this interpretation, the high court notes that there would be no reason for a “Your Work” exclusion had not the coverage grant encompassed negligent construction work. In concluding, the Indiana Supreme Court offers one solution for GCs and their insurers—the ISO endorsement, 22 94, removing the subcontractor exception from the “Your Work” exclusion. *Sheehan Construction Co. v. Continental Cas. Co.*, 2010 Ind. LEXIS 557.

**ISO 22 94—Removing Subcontractor Exception:** There have been a few recent decisions where courts appropriately applied ISO GL 22 94, the endorsement removing the subcontractor exception to the “Your Work” exclusion. Courts rarely mention ISO forms or alternative coverage options, so the Indiana court suggestions for using an ISO endorsement are very interesting and should be noted by insurers when considering their own policies and coverage intent.

**Occurrence Trend in CD Claims:** The state court trend toward finding an occurrence continues, particularly for the Midwest. In the few states with pro-insurer decisions, agents and insureds are pressuring carriers to offer broadening endorsements. If you would like to see samples, ask your Gen Re representative.

#### MORE TO WATCH—UM/UIM—Wisconsin

With the change in political control in Wisconsin, a legislative fix to UM/UIM laws may become a reality. SB7/AB4 would undo most of the changes pushed through in 2009. The bills would:

- > Reduce the mandatory UM limits to 25/50, and the UIM limits to 50/100
- > Eliminate stacking requirements for primary and umbrella
- > Return to a “limits to limits” trigger for UIM
- > Remove Umbrella and commercial coverages from scope of UM/UIM law

**Tort Reform Enacted:** The swift enactment of a tort reform bill bodes well for passage of UM/UIM reforms. The most significant reforms concern product liability and medical malpractice, although broader litigation reforms should affect more civil actions. Call us for more details on the changes.



## Missouri

### SPOTLIGHT: Missouri “Fellow Employee” Liability Ruling

Due to a recent appellate court ruling, insurers of Missouri businesses may find themselves with more workplace-related exposure than they anticipated. The issue involves an employee, injured by a negligent co-worker, who goes on to sue that colleague in tort—after receiving Workers’ Compensation (WC) benefits from the employer. Most insurers do not have this exposure under basic policies, but some ISO or proprietary endorsements used to protect “fellow employees” could now pick up tort liability as well as defense costs, at least in Missouri.

In *Robinson v. Hooker*, 2010 Mo. App. LEXIS 1006, the appellate court held that the statute on Workers’ Compensation exclusivity did not protect employees from suits by fellow workers. The particular case involved two city employees on street cleaning duty; one employee lost her grip on a hose, which swung and hit the other employee. The injured worker was awarded WC benefits but went on to sue his colleague. The appellate court reviewed the evolution of Missouri Workers’ Compensation statutes, up to the most recent change that required strict construction of the law. Since the exclusivity statute mentioned employers but not employees, the court found no basis for extending that protection beyond employers. As a result, the injured employee could sue his co-worker for injuries resulting from negligence on the job. The state supreme court subsequently declined to review the decision, so it now stands as law until the statutes change or another decision/court addresses the issue.

**Legislative Watch:** Missouri Senate Bill 8, pre-filed with the legislature, would relieve co-employees of liability absent “purposeful, affirmatively, dangerous conduct.” We will monitor its progress.

#### MORE TO WATCH—Billed vs. Paid Medical Costs—Higher Damages

This Missouri case mirrors many found across the states. The underlying issue in all the litigation is whether tort damages should include the value of the healthcare or the actual healthcare billings as reduced per insurance arrangements. The Missouri high court determined that a jury could consider evidence of the amount billed by healthcare providers, regardless of the smaller amount actually paid. *Deck v. Teasley*, No. 90628. The impact will be significantly higher damage awards and settlements.

**Follow-up:** Already a bill has been introduced to overcome the decision, giving us yet another piece of legislation to track in Missouri.

**Gen Re Research:** For more on contractors and construction defects, see our *Casualty Matters*, May and November 2010 publications. For more on “Fellow Employee,” see our *E-News Multiline* e-mail, December 8, 2010.

# Around the Midwest—Liquor Liability

## Illinois—Restaurants, Bars and Clubs—Alcohol Negligence Suits Allowed

The Illinois Supreme Court has allowed a negligence action to continue against a “bring your own” (BYO) establishment that did not sell or serve alcohol, opening the door to more claims against restaurants, bars and clubs. Under the *Simmons v. Homatas* decision, a club can be sued under common law for affirmative acts of negligence that ultimately result in injury to third parties. In this case, those affirmative acts were ejecting a drunk patron and placing that patron in his vehicle, which was followed by a fatal accident. The court noted that the Illinois Dramshop Act did not apply without service of alcohol and hence did not preempt the negligence action. *Simmons v. Homatas*, 2010 Ill. LEXIS 286.

**Illinois Dramshop Act:** The Illinois liquor liability statute contains damage caps for death and injury claims; the amounts are indexed to inflation and still remain under \$100,000. The low amount provides an incentive to pursue negligence actions. If the dramshop law does not apply, as for the club and fact pattern above, the caps do not apply either. If a claim includes both dramshop and negligence allegations, the caps will apply only to the dramshop allegations.

**Implications:** Insurers of BYO and alcohol-serving establishments can anticipate more claims and defense obligations for allegations of “special circumstances” to support negligence actions and avoid the damage caps of the Illinois Dramshop Act. We would also expect many appeals as to whether the affirmative acts are legally sufficient to support a duty and liability.

**Gen Re Research:** For more research on this topic, see Gen Re’s *E-News GL/Umbrella* e-mail, March 30, 2010 and *Casualty Matters*, November 2010 publication.

## More Liquor Liability—Minnesota and Iowa—Financial Responsibility

- > **Minnesota:** A new law increases the financial responsibility requirements for establishments serving alcohol. Minnesota H. 3186/S. 2808 expanded the insurance law to mandate coverage for pecuniary loss in the amount of \$50,000 per person/\$100,000 all persons. This is in addition to the existing FR levels for injury, financial loss and property damage. Minnesota courts define pecuniary damages as loss of aid, advice, comfort and protection.
- > **Iowa:** The state Alcohol Beverage Division (ABD) has advised that aggregate limits in liquor liability policies are not permitted under current law, which has triggered regulatory and industry discussions. To date, the Insurance Department has approved policies with aggregate limits. Some insurers have questioned the statutory authority for the ABD position. The Insurance Department has issued Bulletin 10-03 to warn insurers that a policy with aggregate limits may not satisfy state FR laws. Although nothing in the Bulletin addresses enforceability in the event of a claim, we wonder how the policy limit would be viewed with this history. ■

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## Gen Re Research—UM/UIM



UM/UIM developments are included in Gen Re’s state law survey, *Uninsured and Underinsured Motorist Liability*, which is updated monthly and available on Gen Re’s client extranet (Gen Re Online) and shared with Auto and Umbrella clients via e-mail on a quarterly basis.

