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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

1995-96
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Insurance, Securities and Corporate Policy...

COMMITTEE NOTICES ...

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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
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- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (October 2012)

TESTIMONY ON ANTI-STACKING BILL
to
COMMITTEE(S) OF WISCONSIN LEGISLATURE
on
1993 SENATE BILL 135
February 24, 1993

[Note: Because I was asked to appear and testify at the above hearing on very short notice, I did not prepare a written statement but cobbled my testimony together at the last minute from material prepared for a previous occasion, and spoke from notes. At the request of the Chairman and some members of the Assembly Committee, I have tried to reproduce it essentially as it was given, but adding to it answers to the questions put to me in the hearing and afterward by committee members. There will not be exact correspondence. Spencer L. Kimball.]

I am Spencer L. Kimball, Seymour Logan Professor of Law **Emeritus** at the University of Chicago Law School. I am also "Of Counsel" to the law firm of Manatt, Phelps & Phillips of Los Angeles and Washington, D.C. In addition, I engage independently in a variety of consulting activities in the field of Insurance Law and Regulation.

From 1968 to 1972 I was Dean and Professor at the University of Wisconsin School of Law. From 1966 until the late 1970's I was Executive Director of the Wisconsin Insurance Laws Revision Committee, created in 1965 by the Wisconsin Legislature. Under direction of that committee and the Legislative Council, I was the principal drafter of the entire Wisconsin Insurance Code. My ultimate responsibility was to the legislature, through the legislature-created committee. I had no responsibility to anyone else.

Among the basic objectives of the revision were internal consistency and a degree of clarity not usually found in insurance statutes. Those objectives were met in large part. I am embarrassed to confess that the sections of the statute with which the anti-stacking bill is concerned did not meet those standards. I accept primary blame for that failure, though

many other closely involved persons also failed to see the problem.

To understand the problem it is necessary to know that many insurance policies, and automobile insurance policies in particular, often provide overlapping coverages, so that two or more policies cover the same risk. To prevent double coverage it is customary for policies in most lines of property and casualty insurance to contain an "other insurance" clause, which seeks to prevent double coverage by determining how the policies will allocate the loss among them. Sometimes the wording of such "other insurance" clauses would prevent either policy from providing coverage. It was to prevent such a gap in coverage that sections 631.43(1) was developed. In automobile insurance, one of the times when the problem becomes critical is when one of the policies insures "automobile handlers" such as garages and sales agencies and the other insures individual car owners. Section 632.32(3) dealt with such situations. There was controversy about the latter situation. Last minute changes were made; in the process the word "total" was inserted in section 631.43(1).

On May 17, 1989, at the request of the Wisconsin Insurance Alliance, I wrote a detailed history of the development of those sections and explanation of their purposes. That document can be made available to the committee on its request. I submit that no reasonable person, having read that document, can conclude that the two sections were intended to mandate stacking. There was no intention at all about stacking, which was not yet an issue to be discussed. The sections were intended to prevent "other insurance" clauses from creating gaps in coverage and to provide how overlapping coverages should be dealt with to prevent such gaps without creating double coverage.

The committee asked questions about the original intention of the legislature. In

truth, the legislature had no intention about stacking. The issue did not arise. The legislature did not consider it; the Wisconsin Insurance Laws Revision Committee did not consider it. Not even the drafters considered it. There was not even a hint that overlapping coverages should be added, or "stacked." Stacking had not yet developed, so no one was aware that there was a stacking problem to discuss. Stacking was invented later by clever lawyers, who persuaded the Supreme Court on the basis of an unclear section of the statute. If the legislature is presumed to have had any intention at all about something that was not discussed by anyone, the only possible suggestion is what the drafters intended. Of that I am the best witness.

But legislative intent is no longer relevant, anyway, for the Supreme Court has settled the matter. Whether the Supreme Court was correct or not is no longer an issue. The statute provides for stacking because the Supreme Court has said it does and that is the end of the matter. The Court has the last word until the statute is changed. I turn, therefore, to the merits of the present bill, which would change the statute and overturn the Court's decisions as the Legislature has the power to do.

Of all the recent developments in insurance law, "stacking" is, in my view, one of the worst. It is illogical and inconsistent with the structure of the insurance business and with insurance law. It always produces unjust results; at the extreme it produces absurd ones.

The justification for a statute permitting an anti-stacking clause is the following. The risks an automobile insurance company assumes, and therefore the premiums it charges, are based on the number of cars insured, not on the number of people involved. There is a full charge for each car. If a policyholder owns one car and has uninsured motorist coverage

(UM) and underinsured motorist coverage (UIM), he or she is protected against uninsured or underinsured drivers to the extent of the limits specified for that coverage. If the policyholder owns two or three cars, the insurance company's risk is the same for each car; the total risk it assumes is doubled or trebled. The premium on each car provides protection for the policyholder or other persons using that car, usually members of the policyholder's family, for use of that car plus some extended coverage, up to the specified limits. When the court stacks coverage, however, then the UM and UIM for each car is doubled when the policyholder has two cars and trebled when the policyholder has three cars. Yet the premium for each risk exposure imposed on the insurance company remains the same. For example, if a family has five adult drivers and five cars, the premium is five times as large because the insurance company is exposed to five times as much risk. Yet with stacking, each driver of each car is provided with UM and UIM of five times as much as the single car owner, for a total of twenty-five times as much coverage for only five times as much premium.

Opponents of this bill argue that UM and UIM is different because it is "personal and portable." So it is. It goes with the insured to almost any car. But so also is liability insurance personal and portable. It, too, goes with the car owner and any member of his household to other cars, as well. But portability of insurance has nothing to do with the limits of the insurance. It only means that the coverage goes from one car to another. Liability insurance is personal and portable, too, but does not and should not result in multiplication of coverage.

Opponents of this bill say that UM and UIM are based on a contract and that the

insured should get what was bargained for. Of course the insured should get what was bargained for, but that begs the question, which the opponents apparently are unable or unwilling to see. The question is what the contract is. The opponents of this bill are urging that the insured get a multiple of what was bargained for. Stacking is not a product of a bargain; stacking is a product of a Supreme Court decision that presented a gift to UM and UIM policyholders for which they did not pay.

The absurdity of the result is best shown by an extreme case. A 1984 case in Minnesota involved a person injured by an uninsured driver, while driving a vehicle that was one car of a 67 car commercial fleet. Each additional car represented an additional risk exposure to the insurance company, for most or all of those cars might be on the road at once, with up to 67 different drivers. Each driver should have had only single UM and UIM protection. Appropriately, the policyholder paid one premium for each car, or in the aggregate 67 times the one car premium. That provided single coverage for each of the 67 cars. But the Minnesota court allowed recovery of 67 times the policy limit, or $1,675,000, even though no additional premium was paid beyond the single premium for each car. Thus for a normal single car premium for each car, the drivers of each of those 67 cars had 67 times as much UM and UIM coverage as their employer paid for. The policyholder bought $25,000 protection for each car; through stacking it got $1,675,000 protection for each car. It is not surprising that the following year Minnesota enacted a bill permitting anti-stacking provisions. Though the absurdity of stacking is clearest with a 67 car commercial fleet, the principle is exactly the same if the coverage is only doubled for a single premium, which is far more common. The policyholder pays for a pint and gets a quart.

The question is asked "What if the injured driver had been injured $1,675,000 worth, why shouldn't he or she receive the higher amount?" That was the essence of the horror stories presented by certain of the witnesses. Such horror stories make an appealing impression but they are not analysis or argument. They can only mislead by appealing to the emotions. The buyer should not be able to pay for one coverage and get two, which is the result of stacking. The stories and the persons who present them are suggesting that insurance companies should make buyers of insurance whole even when they did not buy enough insurance to make them whole.

There are several partial solutions to such problems. Insurance limits often need to be far larger than they are. The buyer gets what is paid for. The promise in this kind of insurance is not to make people whole, but to pay what the company promises to pay. Persons buying insurance on their own cars can buy UM and UIM for more than the $25,000 minimum required coverage, if they wish, for an extra premium. It is true that they must also buy liability protection for third parties for the larger amounts. Under prevailing practice they may only protect themselves to the extent they are also willing to protect others. That is not unreasonable. But with that qualification and within the limits set by the available market, persons can provide UM and UIM protection for themselves for larger amounts by paying larger premiums. Premiums for higher limits for UM and UIM, as for liability insurance, do not increase in proportion to the increase in limits. Additional coverage, without additional liability insurance, can also be provided by buying disability insurance, or for medical costs by increasing the amount of medical payments coverage.

A pedestrian who owns no car and is not a member of a family with a car, but who

is injured by an uninsured motorist, is in a still worse situation than the automobile policyholder with inadequate coverage. That pedestrian will get nothing at all. That is sad, but is no reason to make some insurance company pay. These sad cases are not insurance problems. They are welfare-type problems.

UM and UIM are both first party coverage. The policyholder's own insurance company pays, not the other party's insurance company. That is all these coverages have in common with life insurance. Opponents of this bill have mistakenly said that UM and UIM are personal indemnity policies like life insurance. Calling life insurance indemnity insurance shows they have no understanding of the nature of life insurance. Life insurance is not indemnity insurance and no knowledgable person has ever said so. Life insurance is "sum" insurance. It is a promise to pay a specified sum on death, without any qualifications or limits. One may buy as many life insurance policies as is wanted and they will be additive; no one has ever said otherwise. On the other hand, uninsured and underinsured motorist insurance is indemnity insurance; it is a promise to pay up to the lower of two limits, the damages incurred and the specified limits of the policy. The only similarity to life insurance is that both are first party insurance; the policyholder's own company pays in the event of loss.

Opponents of this bill suggest that the insurance company can take care of the additional costs stacking imposes on it by raising its premiums. That is one of the few things on which they are correct. Whatever the short-run effect, the insurance companies will not be hurt over the long run. In the long run the insurance companies will be able to charge in full for their loss costs and their expenses, plus a loading for a reasonable profit. Rather,

it is the ordinary people who own only one car who are hurt by stacking, for they have to pay premiums that subsidize the owners of multiple cars who can claim the benefits of stacking. The insurance company is not a money tree; every cent that is paid out to claimants must come from policyholders, plus a substantial percentage for the frictional costs of the system.

The possibility of multiple coverage makes many cases more attractive to plaintiffs' lawyers because the potential fees for the winning attorney are also multiplied. Their pleas that they have no self-interest in this matter is self-evidently without merit. While the contingent fee arrangement has merit as the key to the courthouse door for the poor person with a large justified claim but no money for attorneys' fees, more fees for plaintiffs' lawyers is no argument for making litigation more attractive through stacking.

Turning to the specific provisions of the bill, proposed §632.32(5)(f) would permit policies to include anti-stacking clauses. The other provisions of the bill have the same rationalization. Paragraph (g) merely restricts a person not using a motor vehicle at the time of the accident -- a pedestrian -- to one limit, but the highest limit, of any policy that provides UM or UIM.

Paragraph (h) provides the same limitations for medical payments coverage. It precludes stacking of that coverage. Paragraph (i) requires more explanation. The purpose of UIM is not to provide separate coverage up to the limits of the policy, but to ensure that there will be total coverage from all sources up to the limits of the UIM. UIM, like UM, is a gap filler, not a device for multiplying coverage.

Paragraph (j) permits a clause that precludes free coverage from an uninsured

automobile in the same household. Without such a clause, insuring one car in the household would provide some free insurance for the uninsured cars in the household. That would obviously be inequitable.

Opponents suggest some unsupportable arguments about costs. They say that the bill would vastly increase premiums for liability insurance. That is unmitigated nonsense. It would do so only to the extent that the policyholder elects to increase liability insurance coverage to protect other people against harm and himself or herself against liability. It is unsound public policy to use UM and UIM as cheap accident insurance, with the automobile owner refusing to provide equivalent protection to third persons. If accident insurance is all that is wanted, it should be bought separately, as it can be, not as part of an automobile policy. The bill will not have a major impact on premiums but it will result in somewhat lesser premiums for UM and UIM over the long run, except to the extent that it has the salutary effect of inducing people to buy higher limits of automobile insurance.

Opponents have objected that the bill does not provide for a reduction in premiums to compensate for the reduction in costs. That is nonsense under Wisconsin's pattern of dealing with rates. Adjustments in premiums, whether up or down, will show up in the marketplace as fast as the loss costs justify it.

An insurance company is a conduit for funds, not a money tree. That statement touches tender nerves among the opponents of the bill, because it is both true and powerful. Every dollar paid out to claimants must come from premium payments, plus a lot more -- perhaps 50% more -- for the frictional costs of the system, a large part of which goes for lawyers' fees. Money sticks to the pipe as it goes through the conduit, for expenses and a

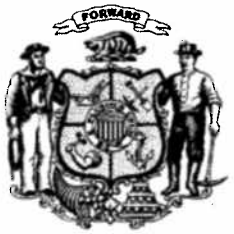
modest profit. Automobile insurance is a very expensive system, costing perhaps 50% more than the amount paid out to claimants. When some claimants get double or treble coverage through stacking, other policyholders have to pay for that excess recovery, plus frictional costs, through larger premiums. There is no other place for it to come from. It can't be picked effortlessly and free from an inexhaustible insurance company money tree.

None of the provisions in this bill in unfair. Each in its separate sphere prevents the subsidizing of multiple car owners by single car policyholders. The main effect of the bill is to achieve fair allocation of costs among policyholders. Regulators (or a free market, whichever applies) will in the long run ensure that the insurance industry gets approximately a fair return (and sometimes less) for the business it writes, whether or not the stacking required by the Supreme Court compels single car families to subsidize those wealthier than themselves who own two or more cars. The bill, in other words, is not anti-consumer. Instead it will reduce inequities among policyholders, and ultimately insurance premiums. This bill will restore this portion of the insurance laws to its correct meaning and will produce a proper allocation of costs among policyholders. It is not anti-consumer but pro-consumer.

Thank you very much.

Spencer L. Kimball


WISCONSIN STATE LEGISLATURE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The Wisconsin State Assembly
Committee on Insurance, Securities, and Corporate Policy
Representative Al Baldus, Chair
Hearing on

1993 Senate Bill 135

AN ACT relating to stacking of motor vehicle insurance coverage and other drive-other-car exclusions under motor vehicle policies

Testimony
of
D. James Weis
on behalf of the
Wisconsin Academy of Trial Lawyers
February 24, 1994

CHAIRMAN BALDUS AND MEMBERS OF THE COMMITTEE, my name is D. James Weis. I am a practicing attorney in Rhinelander and the immediate past president of the Wisconsin Academy of Trial Lawyers. I appear today on behalf of the members of the Academy in opposition to Senate Bill 135, which calls for the elimination of "stacking" of uninsured motorist protection, often called simply UM coverage, and underinsured motorists' protection, often called UIM coverage.

There is a good deal of confusion regarding this coverage. I hope in this testimony to answer the most asked questions about it and to examine the effect the passage of SB 135 would have on Wisconsin insurance consumers.

I must say in opening that I think a good deal of the confusion and anti-stacking sentiment stems from the use of the term "stacking" itself. One interesting irony is that the word "stacking" does not appear anywhere in the bill. Reading the language of the bill is nearly as confusing as reading the language of an insurance policy. Most

insurance policies start out with a pretty straightforward grant of coverage, but then follow it with pages of definitions and exclusions that leave most people with no real idea of what is covered and what is not. It is understandable that they are confused and unable to define exactly what coverages have been purchased. Furthermore, in reality, what coverage is available depends on the circumstances of an accident; no one can predict exactly ahead of time what coverage will be available in every possible situation.

Those who will benefit from this bill have succeeded in framing "stacking" as a pejorative term. In the minds of much of the public – and unfortunately many legislators – there is something sinister or evil about the "stacking" of UM & UIM insurance coverages. Proof that a pejorative meaning has attached to the term – and an indication that there is a profound lack of understanding of this coverage – was demonstrated recently by a legislator who questioned the motives of persons who buy more than one UM policy. That, of course, is nonsense.

Policyholders in Wisconsin don't make that decision. Current law mandates that all auto insurance policies contain UM protection. If a family has 2 insured cars, it automatically has 2 UM coverages. If 3 cars, there are 3 UM coverages. Although UIM coverage is not mandated by law, – it has only been sold in the last 10-15 years – insurance companies generally sell it as a package with UM protection.

Some legislators have expressed the view that there would be nothing wrong with eliminating stacking, as long as consumers are properly informed that it is no longer available, because most consumers do not understand or know that UM and UIM coverage may be stacked. This is a "consumer be damned" attitude that says, "Since they don't know they have it, they won't miss it when it's gone."

Proponents of this legislation have convinced a lot of people that stacking of UM & UIM coverages is merely a "get rich quick" scheme that allows injured parties to take insurers to the cleaners. It appears there are many legislators who believe that to be true. They obviously don't understand how stacking works.

Allowing the stacking of UM & UIM coverages can, at most, place the purchaser of the policies in the position he or she would have enjoyed had the uninsured or underinsured motorist who caused injury had sufficient insurance. There is no possibility of over-compensation or "windfall" for the injured party. "Stacked" coverages cannot exceed the extent of the injuries suffered by a policyholder or the extent of the applicable insurance coverage, whichever is less.

Wisconsin Academy of Trial Lawyers

As I'm sure you are aware, there are two types of insurance contracts. One is a liability contract — that's what we buy to protect ourselves and our assets in the event that we cause injury to someone. The other is an indemnity contract purchased to provide protection whenever a certain set of conditions has been met. UM & UIM fall into the latter category. Insurance consumers purchase it to provide protection for themselves, their families, their children, and their spouses.

It's no different than buying two or more life insurance policies. When a beneficiary collects on more than one life policy, no one complains that the policies were "stacked." It's understood that the insurance company was merely paying obligations it assumed when it took premiums for multiple indemnity policies.

Furthermore, continuing the life insurance policy analogy, if a legislator introduced legislation limiting coverage to a single life insurance policy no matter how many were bought and paid for, consumers would be outraged. That legislator would face certain defeat at the next election, especially if the insurer was permitted to continue to take premiums for the coverage that was no longer allowed. However, that is exactly what SB 135 would do with the elimination of stacking of UM and UIM. A separate premium is paid for that coverage, whether it is stated on the policy or not.

Coverage would be limited to one policy, but, as the industry testified before the Senate Judiciary and Insurance Committee, insurers will not reduce premiums below the levels they are charging with stacking allowed.

I have also heard the argument that stacking should be eliminated because Wisconsin insurers have been losing money on UM & UIM coverages ever since the Supreme Court and the Court of Appeals ruled stacking is permissible. That is abolute nonsense. The cost of those two coverages has been factored into premiums charged by Wisconsin insurance companies from the start — and those companies have been making a good deal of money in the bargain.

Attached to my testimony are two charts with comparative data on the total profit and rate of return on net worth for private passenger auto insurance for all 50 states. This data was published by the National Association of Insurance Commissioners, (NAIC) from reports submitted by insurance companies. The data shows Wisconsin ranks 15th in the nation in both profitability measures, with both categories about 25% higher than the national average. That means Wisconsin insurers already make about a 25% higher profit and return on net worth for private passenger auto insurance than the average state

— and that's with stacking being allowed.

Also attached is a chart with NAIC data on average auto insurance premium expenditures by state. Again, Wisconsin rates very well nationally, with our average premiums the 35th highest in the country. Premiums here are 20% below the nationwide average.

While UM & UIM coverage is inexpensive for the individual consumer, it's restricted use, as proposed in SB 135, would be worth millions more to insurers. That would be good news for Wisconsin insurers, who are already more profitable in our state than they are in other parts of the country. But it would be very bad news for Wisconsin insurance consumers.

And then there is the often heard appeal to eliminate stacking to protect Wisconsin-based insurers who also operate in other state markets. Aren't they damaged when stacking is allowed in their base state? It has no effect on the business of Wisconsin insurers in other states? However, it would be ironic if SB 135 became law and the many Wisconsin based insurance companies were allowed to deny stacking to its instate policyholders, while granting it to those they insure in other states — states, which are, on average, less profitable for those insurers.

For example, in 1991, Milwaukee Mutual's loss ratio (that percentage of each premium dollar which is paid out for losses) was 30% better in Wisconsin on property and casualty losses than it was nationally. American Family did 13% better. General Casualty did 11% better. Sentry did 19% better. West Bend Mutual did 16% better. Those and other Wisconsin based companies are well served in this state by our present laws. There is absolutely no reason to reduce benefits to their Wisconsin insureds.

It's important to understand we are playing by the same rules in this state as those being played by in the vast majority of other state with respect to these coverages. That means the passage of SB 135 would result in Wisconsin insurance consumers receiving less coverage for their premium dollars than most other states receive. That would be true despite the fact that our local companies consistently receive a much better return on premiums in this state than they do in other states.

Of course, the insurers could reduce premium charges commensurate with the loss of coverage from the disallowance of stacking. In fact an amendment to SB 135 was offered in the Senate to correct that peculiar inequity. It would have required insurers to return the anti-stacking "windfall" to consumers. The amendment failed on a 17-16 vote.

Wisconsin Academy of Trial Lawyers

The insurance industry has put up a smokescreen to conceal those and other facts and to confuse legislators by claiming SB 135 is "merely a technical correction" — a kind of housekeeping item that should require little attention or thought. That is stretching the truth to the limit. Section 631.43 of the statutes was passed in 1975. Wisconsin's Supreme Court cited that statute when it approved stacking of UM coverage in a 1980 case. Stacking of UIM benefits was formally recognized by the Supreme Court five years ago. Insurers admit they have been charging customers for stacking of UM and UIM benefits. No previous legislation of which I am aware permits insurers to keep charging for coverage that has been removed by law, as would be the case if stacking is struck down. That can hardly be considered a "techincal correction."

I am aware that proponents of SB 135 rely heavily on the anti-stacking arguments offered by Spencer L. Kimball of the University of Chicago Law School. I have read his testimony from a 1991 hearing and reject his arguments on several grounds.

Number one, he was the principal drafter of the Wisconsin Insurance Code. That is, he was paid by the state as the Executive Director of the Wisconsin Insurance Laws Revision Committee, from 1965 well into late 1970's. In his 1991 testimony, while explaining that his objective in rewriting the Code was "consistency and clarity," he stated: "It is with some emabarassment . . . that I confess that the sections of the statute with which the anti-stacking bill is concerned are lacking in both of those attributes." It appears to me that is not a credential for Kimball that commands respect in the 1990s.

Number two, he now says the Wisconsin Supreme Court erred in "an understandable misreading of the law." I am inclined to accept the Court's reading over that of Professor Kimball.

Number three, he argues, "The rich family with five cars has five times as much protection on each car for the single car price as does the poor family with one car." That simply in not true. The owner of five cars buys five UM and UIM policies indemnifying himself or herself against loss and pays five times the premium the owner of one car pays.

Number four, he argues it is not a matter of the insured getting what he or she bargained for because "Stacking is not the product of a bargain" since "the Supreme Court has required it by misinterpreting the statute." Kimball said, "The buyer gets what he or she pays for. The buyer should not be able to pay for a pint and get a quart, which is the result of stacking." An insurance company tried that argument recently and was

shot down by the Court of Appeals. It said even though a premium amount was not stated on each policy, there was in fact a premium paid for each.

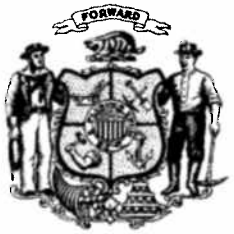
For these reasons, I reject the new-found, pro-business, anti-consumer ramblings of Professor Kimball on stacking.

The passage of SB 135 would be a classic "windfall" for the insurance industry. There is no other way to characterize that result other than to say the insurance consumers in this state would, quite literally, be robbed of premium dollars and robbed of coverage they have purchased.

In summary I think the strength of the case made by the proponents of this legislation lies in their ability to muddy the waters, to take advantage of the lack of understanding of this coverage, and to hide behind the public unfavorable perception of the term "stacking" itself. There is so little substance to their case that a defense of stacking would not be necessary if the public and our legislators were fully advised regarding how it works.

SB 135 should be rejected. Thank you.


WISCONSIN STATE LEGISLATURE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State of Wisconsin
1995 – 1996 LEGISLATURE

LRB–2356/1
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AN ACT *to amend* 631.43 (3); and *to create* 632.32 (5) (f) to (j) of the statutes; **relating to:** stacking of motor vehicle insurance coverage and drive–other–car exclusions under motor vehicle policies.

Analysis by the Legislative Reference Bureau

This bill overturns a series of Wisconsin appellate court decisions which have held that a motor vehicle insurance policy may not prohibit stacking of uninsured or underinsured motorist coverage. Stacking means that the limits of 2 or more coverages indemnifying an insured against the same loss, whether under the same or different policies, are added together to determine the limits of recovery for the insured. The bill permits motor vehicle insurance policies to prohibit stacking of uninsured or underinsured motorist coverage or any other coverage provided by the policy.

The bill also specifies the applicable policy limits if a pedestrian is injured by a motor vehicle. The policy may provide that the maximum amount of uninsured or underinsured motorist coverage, or medical payments coverage, available to the pedestrian is the highest limit of that coverage for any vehicle with respect to which the person is insured.

The bill also permits motor vehicle insurance policies to reduce the limits payable under the policy for uninsured or underinsured motorist coverage by payments received from other sources. Payments for bodily injury or death may be reduced by amounts paid by a person who is legally responsible, by amounts paid or payable under a worker's compensation law and by amounts paid or payable under a disability benefits law.

The bill also validates certain drive–other–car exclusions, which courts have invalidated when used to prevent stacking. Under the bill, a policy may exclude coverage for losses resulting from the use of a vehicle that is not described in the policy

and that is owned by the named insured or a family member residing with the named insured.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 631.43 (3) of the statutes is amended to read:

631.43 **(3)** EXCEPTION. Subsection (1) does not affect the rights of insurers to exclude ~~coverages~~, limit or reduce coverage under s. 632.32 (5) (b) ~~and~~, (c) or (f) to (j).

SECTION 2. 632.32 (5) (f) to (j) of the statutes are created to read:

632.32 **(5)** (f) A policy may provide that regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid the limits for any coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles to determine the limit of insurance coverage available for bodily injury or death suffered by a person in any one accident.

(g) A policy may provide that the maximum amount of uninsured or underinsured motorist coverage available for bodily injury or death suffered by a person who was not using a motor vehicle at the time of an accident is the highest single limit of uninsured or underinsured motorist coverage, whichever is applicable, for any motor vehicle with respect to which the person is insured.

(h) A policy may provide that the maximum amount of medical payments coverage available for bodily injury or death suffered by a person who was not using a motor vehicle at the time of an accident is the highest single limit of medical payments coverage for any motor vehicle with respect to which the person is insured.

SECTION 2.

(f) A policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily injury or death resulting from any one accident shall be reduced by any of the following that apply:

1. Amounts paid by or on behalf of any person or organization that may be legally responsible.

2. Amounts paid or payable under any worker's compensation law.

3. Amounts paid or payable under any disability benefits laws.

(j) A policy may provide that any coverage under the policy does not apply to a loss resulting from the use of a motor vehicle that meets all of the following conditions:

1. Is owned by the named insured, or is owned by the named insured's spouse or a relative of the named insured if the spouse or relative resides in the same household as the named insured.

2. Is not described in the policy under which the claim is made.

3. Is not covered under the terms of the policy as a newly acquired or replacement motor vehicle.

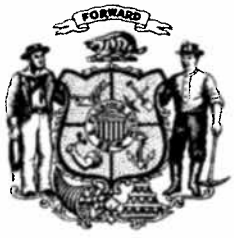
SECTION 3. Initial applicability.

(1) Except as provided in subsection (2), this act first applies to motor vehicle insurance policies that are issued or renewed on the effective date of this subsection.

(2) If a motor vehicle insurance policy in existence on the effective date of this subsection contains a provision authorized under section 632.32 (5) (f) to (j) of the statutes, as created by this act, the provision is first enforceable with respect to claims arising out of motor vehicle accidents occurring on the effective date of this subsection.

(END)


WISCONSIN STATE LEGISLATURE


FORWARD

95 AB25 SB2

Senate Bill 135 - Automobile Insurance Stacking

1993 Session

A Stacking Primer:

What you need to know about

- The History
- The Issue
- The Debate

Stacking: The History

Past Practice

In Wisconsin, automobile insurance is sold on each vehicle.

Insurance policies and insurance agents have been very explicit in indicating that the coverage you purchased on your first car, whether it be liability, uninsured motorist or underinsured motorist coverage, cannot be extended to your second car. In short, stacking isn't in the insurance contract. It's not what consumers expect. Stacking is not what insurance agents sell.

Origins

Stacking came out of the courts.

In 1975, the legislature passed Section 631.43(1) of the statutes. That language was drafted by Spencer Kimball, who currently is a professor at the University of Chicago Law School. At the time that language was drafted, Professor Kimball was Dean of the University of Wisconsin Law School and served on a part-time basis as the Executive Director of the Wisconsin Insurance Laws Revision Committee, a committee created in 1965 the legislature.

As explained by Dean Kimball, sec. 631.43(1) was based upon and intended to continue the provisions of sec. 203.11 of the Statutes. Section 631.43(1) addressed a problem that arose because most insurance policies contain "other insurance" clauses. This statute was intended to determine how two or more policies applicable to a particular event would relate to one another if each would provide coverage if it stood alone. For instance, two insurance companies sell a fire policy on the same barn and each policy says it will only pay if there is no other insurance. So, in the past, under certain circumstances, the language in the "other insurance" clauses in the two policies would result in denial of coverage under either of them. This statute corrected this problem. The objective of sec. 631.43(1) was to prevent total denial of coverage, not to mandate stacking of coverages under each of the policies.

Dean Kimball appeared before the Senate Insurance Committee to testify in support of SB 105, the anti-stacking bill from last session, and his written testimony is available. Essentially, he told the Committee that when this section was drafted, personal injury lawyers approached him and asked that the section require stacking of coverages. "That

Stacking: The History *(continued)*

request was denied," said Dean Kimball. Dean Kimball stated that the underlying intent of the legislature when it passed Section 631.43(1) was not to mandate stacking of coverages.

Development of the Case Law

Subsequent to the enactment of sec. 631.43 of the Wisconsin Statutes, there have been a series of appellate court decisions in Wisconsin which have led in the direction of stacking uninsured motorist and underinsured motorist coverages. In 1980, 1981, 1984, 1985, 1987, 1988, and 1989, there have been reported decisions from either our Wisconsin Court of Appeals or the Wisconsin Supreme Court on the issue of stacking. In each case, the court came a small step toward mandating stacking of uninsured motorist and/or underinsured motorist coverages. Many of those cases turned on technical language in a specific insurance policy. Most insurance companies, responding to those early cases, went back and revised their insurance policies to attempt to make it very clear that a stacked coverage was not being sold. Despite these efforts, the cases developed and finally in 1989, the Wisconsin Supreme Court took the position that sec. 631.43 of our Wisconsin Statutes prohibited insurance policy language which limited uninsured motorist or underinsured motorist coverage to the specific amount purchased on the automobile involved in the accident. The Wisconsin Supreme Court ruled this way because they read sec. 631.43 of the statutes to be a legislative mandate in favor of stacking coverages. Dean Kimball has since testified that this was not the case and that he made a technical error when he drafted this section of the statutes.

Key Words

Uninsured and Underinsured Motorist Coverage

Definition: Coverage designed to enable insured motorists, you and your constituents, to collect for personal injuries when they are involved in an accident and the other driver either has no insurance coverage (uninsured motorist) or does not have sufficient insurance coverage to pay for the costs of the injuries suffered by the insured driver (underinsured motorist).

Example: You, someone from your family or someone on your staff is driving his/her own automobile and gets hit by another car which is either uninsured or does not have enough insurance to pay for your personal injuries. Your uninsured motorist coverage and underinsured motorist coverage gives you some additional protection to pay for the damages caused by the "at fault" driver. All automobile insurance sold in the State of Wisconsin is required by law to include uninsured motorist coverage. While underinsured motorist coverage is not required by law, the majority of automobile insurance policies sold in the State of Wisconsin include underinsured motorist coverage.

Stacking

Definition: Stacking is the process of combining two or more insurance coverages whether under the same or different policies, to increase the amount of coverage available to an insured. Under the concept of stacking, for example, if a driver has three cars, the total uninsured motorist and/or underinsured motorist coverage provided by the policies on those three cars can be added together if any one car is involved in an accident with an uninsured or underinsured motorist.

Example: Let's say you and your spouse have two cars. On one car, you have $50,000 worth of liability coverage as well as $50,000 worth of uninsured motorist coverage and $50,000 worth of underinsured motorist coverage. Now let's say you are driving that car and you run into someone: your liability coverage means that your insurance company will pay for their injuries up to $50,000 (the amount of coverage you purchased). If, however, someone runs into you and that someone has no insurance, the uninsured motorist coverage will pay for your personal injuries up to an amount of $50,000 (the amount of coverage you purchased). If the someone who hit you had only $30,000 worth of coverage but your injuries exceed that, you can collect under your underinsured motorist coverage in order to recover a maximum of $50,000 (the amount of coverage you purchased).

Key Words *(continued)*

Now let's turn our attention to your second car. On that vehicle, you have $100,000 worth of liability coverage, and $100,000 of uninsured motorist coverage and $100,000 of underinsured motorist coverage. That car is home in the garage one day when you are in an accident in the first car. Stacking means that you can combine the coverages you have on both cars together and claim, for example, that you have $150,000 of underinsured motorists coverage, i.e. the $50,000 on the car you were driving and the $100,000 on your car in the garage.

Reducing Clause

Definition: When consumers purchase underinsured motorist coverage, they select an amount of coverage that they think will be sufficient to cover them in an accident if the other driver does not have enough insurance. What the consumer is buying and the insurance company is selling is a guarantee that the consumer will have that selected amount of money should they need it. The amount of underinsured motorist coverage purchased is "reduced" by the amount of coverage the "at fault" driver has on his/her car.

Example: Let's say a consumer purchases $100,000 worth of underinsured motorist coverage. Let's then say they have an accident with somebody who has $25,000 worth of coverage available. In this specific instance, the UIM policy will provide the consumer with the difference of up to $75,000. There are some court rulings that eliminate this deduction. A portion of SB 135 validates the use of this type of reducing clause.

Senate Bill 135

Definition: Senate Bill 135 overturns a series of Wisconsin Appellate Court decisions that have mandated stacking of underinsured and uninsured motorist coverage.

Example: The bill simply permits motor vehicle insurance policies to prohibit stacking of uninsured or underinsured motorist coverage or any other coverage provided by the policy. That language is in paragraph "f" of the bill. Paragraph "g" merely limits a person not using a motor vehicle at the time of the accident to one limit . . . the highest limit . . . of any policy provided him or her with uninsured or underinsured motorist coverage. Paragraph "h" allows a clause that precludes free coverage from an uninsured automobile in the same household. This is the language to stop the abuses of insuring one car in a household in order to provide some free insurance for the uninsured other car or cars in the household.

Legislative and Judicial Timelines

1929 First "other insurance" statute. This statute was originally adopted to protect farm owners who might have two fire insurance policies on one barn. At that time, some insurance companies had clauses in their contracts that provided that the insurance was only valid if there was "no other insurance." A farmer who had two fire insurance policies on his barn with these clauses in them could end up without any coverage. This language had nothing to do with stacking, auto insurance, uninsured motorist, or underinsured motorist coverages.

1971 Leatherman v. American Family, 52 Wis. 2d 664, 190 N.W. 2d 904 — Wisconsin Supreme Court refused to allow stacking.

1972 Scherr v. Drobac, 53 Wis. 2d 308, 193 N.W. 2d 14 — Wisconsin Supreme Court refused to allow stacking.

1974 Nelson v. Employers Casualty, 63 Wis 2d 558, 217 N.W. 2d 670 — Wisconsin Supreme Court refused to allow stacking.

1975 S631.43(1) — Passed by legislature which prohibited "other insurance" clauses in indemnity coverages.

1980 Landvatter v. Globe Security, 100 Wis. 2d 21, 300 N.W. 2d 875 — Court of Appeals allows stacking of uninsured motorist under separate policies issued by different companies.

1981 Vidmar v. American Family, 104 Wis. 2d 360, 312 N.W. 2d 129 — Holds that uninsured motorist is "portable," thus allowing the insured to use uninsured motorist coverage from an insured auto, even though driving an uninsured car.

1984 Burns v. Milwaukee Mutual, 121 Wis. 2d 574, 360 N.W. 2d 61 — Court of Appeals held that uninsured coverage should be stacked under one policy issued by the same insurer for two cars.

1985 Welch v. State Farm, 122 Wis. 2d 172, 361 N.W. 2d 680 and Tahtinen v. MSI, 122 Wis. 2d 158, 361 N.W. 2d 673 — Held that uninsured motorist coverage should be stacked under separate policies issued by the same insurer.

Legislative and Judicial Timelines *(continued)*

1987 Nicholson v. Home Insurance Company, 137 Wis. 2d 581, 405 N.W. 2d 327
— Held that liability and uninsured motorist should be stacked from the same policy.

1987 Schwochert v. American Family, 139 Wis. 2d 335, 407 N.W. 2d 525
— Court held that underinsured motorist coverage was not required to be stacked.

1988 Martin v. Milwaukee Insurance, 146 Wis. 2d 759, 433 N.W. 2d 1
— Supreme Court held that an "occupancy insured" could not stack the UM limits covering the named insured's other cars.

1989 Wood v. American Family, 148 Wis. 2d 639, 436 N.W. 2d 594
— The court held that underinsured motorist coverage must be stacked.

1989 Agnew v. American Family, 150 Wis. 2d 341, 441 N.W. 2d 222
— The court held that liability coverage could not be stacked.

1992 St. Paul Mercury Insurance Company v. Zastrow, 166 Wis. 2d 423, 480 N.W. 2d 8
— The court held that 29 antique and collector vehicles insured under a special limited use antique auto policy must be stacked.

1992 Carrington v. St. Paul Fire & Marine Insurance Company, 269 Wis. 2d 211, 485 N.W. 2d 267
— The court held that the underinsured motorist coverage for 16 vehicles insured under a commercial fleet policy must be stacked.

1992 West Bend Mutual Insurance Company v. Playman, 171 Wis. 2d 37, 489 N.W. 2d 915
— The court held that underinsured motorist coverage on three vehicles under a single policy must be stacked regardless of a contract clause limiting the imsurer's liability.

Sample Analogies

Stacking: Sample Comments

❒ What we are confronting here is a miscarriage of justice. In a few words what happened was that this body passed some highly technical revision language in 1975. There was a technical error in that language - an error the drafter now freely acknowledges - an error that mislead the Supreme Court into mistakenly believing that the Legislature meant to mandate stacking of coverages.

Now, if we were auto mechanics and we had made a mistake when we were tuning someone's engine...we'd have an obligation to correct the mistake.

If we were physicians and we had sent the hospital the wrong diagnosis...we'd have an obligation to correct the mistake.

If we were teachers and we passed on incorrect information to our students... we'd have an obligation to correct the mistake.

Well, we're not auto mechanics, or physicians, or teachers...we're legislators, but our predecessors did make a mistake when they passed Section 631.43 with that technical error in it...and we have an obligation to correct the mistake.

❒ Now, some people want us to believe that "stacking" of auto insurance coverages is a benefit to the consumer. The problem is they don't tell you ***which*** consumer is going to get the benefit. See, if you've got a dairy farmer with 100 gallons of milk...and that farmer has to make $30 off those 100 gallons just to break even...well then he needs to get about .33 cents a gallon from all of us consumers.

Now, if one of us consumers gets two gallons of milk for his or her .33 cents the the farmer's either going to wind up short, or he's going to charge the rest of us more to make up for that one fellow getting more than he paid for. So, the way I figure it, stacking helps the consumer who didn't pay for what he's getting, but it sure doesn't help the rest of us.

❒ I'd just like to make sure I've got this issue straight. As I understand it, we're being told that we shouldn't ammend S631.43 because if someone buys insurance for two cars, they should be entitled to collect on both coverages even if one of the cars was sitting safe and sound in their garage. Now I thought about that and I asked myself if there was any comparable example to that sort of "two for one" bargain in the real world.

Well (I said) let's see...if I bought a **life** insurance policy for myself and one for my wife, and I died, could she...should she... collect on both policies? No, that wouldn't fly.

Stacking: Sample Comments *(continued)*

Okay, what about if I went to Sears and bought one of those extended warranty plans on my barbecue and another on my lawnmower. If my lawnmower breaks down and it needs more work than is covered by the warranty I've got on it, can I tell Sears to charge the rest of it against my barbecue warranty? I don't think so.

Hey, then I thought what about my voting in this body. Maybe I could stack votes on a bill. I mean I could say the people sent me here to vote...you know kind of like they bought a "voting" insurance policy... and I could say, well look I don't care too much about that one bill because it's just sitting there safe and sound (kind of like being in a legislative garage), but this other bill, well I really want to pass that one...that one needs more votes, so I'll just use my vote from that other bill on this one and vote twice! Any of you folks want to let me do that? No, I didn't think you would.

To make a long story short, I thought and thought, but the only "two-fer" I could think of was this one we're talking about today, and I've got to tell you that I don't think stacking auto insurance coverages makes any more sense than stacking life insurance policies, or Sears warranties, or getting to vote twice on a bill in this house just because we're here.

Stacking: Some Examples

What does Stacking Lead to?

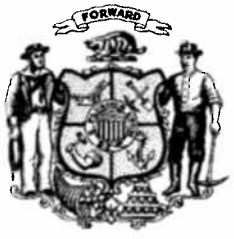
❒ Here's a real case that occurred in 1984 in Minnesota. In that case, the injured person was driving a vehicle that was one car in a sixty-seven-car commercial fleet. The policyholder bought $25,000 worth of protection on that car. The policyholder knew he was buying $25,000 worth of protection on that car. The insurance agent sold $25,000 worth of protection on that car. Guess what? The Minnesota court allowed recovery of 67 times the policy limit or $1,675,000. It's not surprising that the following year Minnesota enacted a bill permitting anti-stacking provisions along the line of SB 135.

❒ Another example involves a person who owns four cars. One of the cars is uninsured. That's right, the person decides not to have insurance on one car... the old station wagon. The person does have insurance on the other three cars. The person decides to drive the uninsured vehicle and becomes involved in an accident. You'd think he doesn't have any coverage. "NO!" says the Wisconsin Supreme Court, as they have mandated stacking. Their rulings allow this uninsured driver to stack coverages from the other three cars on which he had insurance coverage.

❒ A third example. A person has $500,000 worth of coverage on car A and $25,000 worth of coverage on car B and car C. Under our Wisconsin law, as set forth by the Wisconsin Supreme Court, that person, can access $550,000 worth of coverage ... whether or not they are driving car A, car B, or car C. Compounding this lunacy, our Supreme Court rulings indicate that if car A, car B and car C are all involved in accidents, that in each accident, the person can access $550,000 worth of stacked UM and/or UIM coverage where appropriate.

❒ A fourth example ... recently decided by our Wisconsin Supreme Court. A company had a fleet of 15 vehicles. They bought $100,000 worth of uninsured motorist coverage on each vehicle. The policy specifically provided that the maximum exposure on any one accident was $100,000. There was an accident. Guess how much coverage the Wisconsin Supreme Court said the company had? You guessed it ... 1.5 million dollars. They stacked all 15 vehicles.

WISCONSIN STATE LEGISLATURE



Memo

from SHERYL ALBERS

UNCoupling — Mike Vaughan not comfortable with it

Lousy Public Policy that I can protect myself more than the other guy I injure

(1) 3 disability benefits laws

prob. stay

(1)

(2) Limit to 5

accident
o violation

p I don't make
uation lose license AND

Proof of Resp.
Filing w/ DOT

liability 25,000 / ind.
50,000 / accident
have to 10,000 / prop. damage
by uninsured - not to exceed
don't protect yourself more
than what you protect
to
ability currently

↓
This Amendment

986-2105 / mess 986-2018 RR 2 Box 1375 Casanova 53924
Dennis Cooper -

Dept of Vocational & Rehabilitation

counselor
clueless

his name is
Kelly Ashbrook → his supervisor
267-4336

last Nov. 94 brake work pd →

← Reimbursed
On mileage

Richland Co. — on the job transport payment
he wouldn't make until we contacted — then he did.
→

Employment Analyst's
OUR
They tell you to
find a job yourself
then they'll help
you.

lost paperwork
reduced hours
fil

'92 - back injury while working

(-) 2 car
(-) dis benefit —
(-)(-)

+ UM coupling ✓ caveat
- limits | damages

5-10% translates into $5.00 = Low premium coverage Actuarily — 10% um — 20% uim

Couple quick points - Then Potential Change

631.43

* They agree that the fleet issue should be addressed

* In every instance where stacking is involved - there are very serious injuries -
- So those people are left in the cold while there is no real benefit

- (i) takes it out complete

* If I'm Riding (rider) all my son who lives w/ me - his can um or uim

- I'm hurt um or uim or passenger by

(i)(1)

Good Point

out of luck

Whereas if I was in Rider truck or walking down road

JES Senate floor tomorrow

BB & SA,

After close scrutiny of AB 25, combined with a meeting with the State bar folks, there are several changes proposed by them (some of which are ~~bad~~ actually good) believe it or not

1) pg 3 ln strike whole line - no body knows what "disability benefits laws means". ~~Both sides agree~~ doesn't come up very often - Should be stricken to prevent problem w/ dis. ins. benefits concern Sheryl had.

Ins. Co. want it in

2) lifting cap OK
unlimited the uninsured limit from the liability purchased - All sides agree this is probably OK

'LIL MORE CONTROVERSIAL BUT maybe worthwhile
Should at least be considered

3) (i) Changing limits to damages - Ins. ind. pretty opposed - but I think the other side has a very good policy point - Lets discuss this further. Eliminating doubling Recovers happens when you have ~~Ins~~ Amounts payable Reducing clause (damages vs. limit of liability

Reducing Clause (limit)

This problem has appeal to me too but needs to be careful because about other side

(4.) (j) – Dad Rides in 18 yr old Sons uninsured car & [redacted] is hit by an UNIS. motorist Dad (completely not covered even tho he would be in a Rental van or walking down the streets or anywhere else by his own UM coverage on his own car.

Lono lives w/ him

– 5.) no way – Limiting to stacking 2 cars only

Attys know

Disability Benefits Law -

- Ct will this co. pay constitute ins. to make ins. co. pay

WF Ct's won't read it in favor of ins co.'s

Municipal EE

Involved in accident

future wages pd. by municipalities

- Similar in nature to wkrs comp - salary continuation plans

- SSI arguably circumvented

Co. Case

Bernal

Reducing Clause - most common

1. Limit of Liability Clause

Underinsured motorist coverage for ~~250,000~~ 100,000

150,000 total damages - claim is worth

tortfeasor carry liability 25,000

Inj party UIM 100,000

Limit of liability Reduced by tortfeasor's

$150,000 - 25 tortfeasor damages = 125,000 but only 50,000 UIM

100,000 Recovery

100,000 tortfeasor
- 25,000
75,000 — Limit of Liability Clause

50,000 outstanding not pd.

Underinsured Scenarios — Damages Reducing

150,000 damages
- 25,00 — Received from tort
125,000

Full UIM 100,000 | 100,000
25,000 — Not pd.

10.29

UM | WRKRS COMP

Recovery #O
WC comp. if you recover from liability policy of tortfeasor but not if recover from 1st party
UM on UIM

same prob.

150,000 damages

100,000
50,000
50,000

UIM
50,000
UIM

Compromise

Jim can make sure he gets to basket

SMC WAIT

3 items proposed changes

1. uncoupling UM | b-i
2. making sure people can obtain | mandate offer UIM
3. UIM excess to worker comp only

NOT liability