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Details:

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on ... Insurance (AC-In)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**
- Record of Comm. Proceedings ... **RCP**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt**
- Clearinghouse Rules ... **CRule**
- Hearing Records ... bills and resolutions
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

Vote Record

Committee on Insurance

Date: 5/24/07

Bill Number: CA 06-117

Moved by: Berceau Seconded by: Cullen

Motion: Waive our jurisdiction

<u>Committee Member</u>	<u>Aye</u>	<u>No</u>	<u>Absent</u>	<u>Not Voting</u>
Representative Frank Lasee, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative John Nygren	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Phil Montgomery	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Karl Van Roy	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Joan Ballweg	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Representative Terry Moulton	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Bill Kramer	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative David Cullen	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Terese Berceau	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Robert Ziegelbauer	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Joseph Parisi	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Steve Hilgenberg	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Totals:	<u>11</u>	<u>0</u>	<u>1</u>	<u> </u>

Motion Carried

Motion Failed





State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Jim Doyle, Governor
Sean Dillweg, Commissioner

Wisconsin.gov

May 10, 2007

Legal Unit
125 South Webster Street • P.O. Box 7873
Madison, Wisconsin 53707-7873
Phone: (608) 267-9586 • Fax: (608) 264-6228
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Report From Agency

REPORT ON Section Ins 6.77, Wis. Adm. Code, relating to underinsured ("UM") and uninsured motorist coverage ("UIM") in personal umbrella, personal excess, commercial automobile liability and commercial liability policies and affecting small business

Clearinghouse Rule No. 06-117
Submitted Under s. 227.19 (3), Stats.

(The proposed rule-making order is attached.)

(a) A detailed statement of basis for the proposed rule and how the rule advances relevant statutory goals or purposes:

OCI has administered the uninsured motorist ("UM") provisions of s. 632.32, Stats., since their enactment in 1985 as applying to personal auto policies and not umbrella and excess or commercial liability policies. In 1987 OCI amended s. Ins 6.77, Wisc. Admin. Code, to clearly exempt umbrella policies from the UM requirements. In 1995, s. 632.32, Stats., was amended again to add sub. (4m) requiring insurers to give notice of the availability of underinsured motorist ("UIM") coverage. OCI continued to administer s. 632.32, Stats., including the additional UIM provision, as applicable only to personal auto liability policies.

The recent Wisconsin Supreme Court cases, *Rebernick v American Family Mutual Ins Company*, 2006 WI 27 (2006), and *Rocker v USAA Casualty Ins Company*, 2006 WI 26 (2006), held that the UIM provision applies to personal umbrella liability policies, imply that the UIM provision applies to commercial liability and commercial automobile liability policies, and imply that the UM provision is applicable to umbrella, commercial liability and commercial automobile policies.

These Wisconsin Supreme Court decisions necessitate that OCI, as the agency administering ss. 631.01 (5) and 632.32, determine whether the "interests of the ... insureds or ... the public do not require such regulation." They also necessitate that OCI, as the administering agency, provide clarity, to the extent it can, to the insurance industry and consumers regarding issues raised by these decisions but not resolved. The court noted this OCI responsibility in the *Rebernick* decision. OCI's rule accomplishes both goals as follows:

- 1) The proposed rule resolves the question of whether the UM provision applies to commercial liability policy by exempting those policies that solely provide coverage of hired or non-owned motor vehicles from the UM provision.

(Commercial liability policies, as defined by the rule, provide automobile liability coverage only as an ancillary coverage. They include "package" policies that also provide property coverage.)

The proposed rule does not exempt commercial automobile liability policies from the UM provision. (Commercial automobile liability policies are issued for the primary purpose of covering automobile liability.) These provisions of the rule provide clarity to insurers offering commercial liability and commercial automobile liability policies. They ensure that insureds and the public will not bear the unforeseen cost of litigation regarding this issue. These provisions also mitigate disruption of business access to a competitive market for commercial liability policies. This is a concern particularly because of the effect of the s. 632.32, Stats., UM provision on availability of commercial liability policies issued by small insurers, town mutual insurers and insurers serving specialized markets. These insurers will find it difficult to obtain reinsurance for UM coverage and would incur significant additional administrative costs to do so. This cost would be passed along to their insureds. They may withdraw from or limit their market. Many of these insurers do not write automobile coverage, so would have to incur the cost of adding UM to their business. Others include motor vehicle liability coverage only as incidental coverage to commercial liability coverage and only for hired or non-owned motor vehicle. It is questionable whether town mutual insurers writing this type of coverage are authorized by law to offer UM (or UIM) coverage.

The rule does apply the UM provision to commercial automobile liability policies and to commercial liability policies that cover owned motor vehicles. Insurers writing these products are not likely to experience the same reinsurance and additional administration costs when required to write this coverage. Also, UM coverage is more significant to an insured with this product which is intended to provide automobile liability coverage, than a commercial liability policyholder who is seeking only ancillary non-owned automobile liability coverage.

- 2) The proposed rule resolves the question of how the UIM provision applies to umbrella, excess liability, commercial liability, and commercial automobile liability policies by exempting those policies from the UIM notice provision. These provisions of the rule provide clarity to insurers offering these policies. This resolves any interpretative issue regarding the obligation imposed on an insurer under the UIM provision. The interests of insureds and the public are best served by clear direction to insurers and by direction to provide the more effective disclosure described below. The required disclosure places the applicant in a position to seek coverage from alternative sources if the insurer does not offer UIM coverage or to apply for the UIM coverage if it is offered by the insurer. Insurers that are not in a position to offer UIM coverage in their markets (including for reasons similar to those discussed with respect to UM) are nevertheless required to make the disclosure.

The proposed rule establishes a more effective, and clearer, UIM disclosure requirement applicable to commercial liability, commercial automobile, umbrella and excess liability policies. The proposed rule requires an insurer issuing these policies to disclose in writing whether the insurer does offer

(similar to the statutory notice requirement) or does not offer (unlike the statutory notice requirement) UIM coverage. Unlike the statutory notice, this disclosure must be included on the application form if an application form is used. Section 632.32 (4m), Stats., requires notice only on delivery of the policy, and only if the insurer offers the UIM coverage. The proposed rule requires disclosure on the application, a more timely point. The rule requires disclosure on delivery of the policy if an insurer does not use an application form. The rule requires disclosure if the insurer does not provide UIM coverage. The rule also requires that all insurers provide the disclosure to existing policyholders on renewal of their policies. These provisions serve to give more effective notice to applicants of the availability, or lack of availability from the particular insurer, of UIM coverage.

(b) Summary of the public comments and the agency's responses to those comments:

Comment: For personal policies, the insured should be given notice of the availability of UIM

Response: The proposed rule was revised to include the disclosure requirement described in paragraph (a).

Comment: Commercial auto and commercial liability policies should be required to provide UM and give notice of the availability of UIM.

Response: OCI modified the rule so that it does not exempt commercial automobile policies from the UM requirements of s. 632.32(4), Stats. The rule was also modified so as to not exempt a general commercial liability policy from the UM requirement if it includes coverage for owned motor vehicles. The rule was revised to require insurers issuing commercial liability, commercial auto, umbrella or excess liability policies to make a timely disclosure with respect to availability of UIM coverage.

(c) An explanation of any modifications made in proposed rule as a result of public comments or testimony received at a public hearing:

See paragraph (a) and (b). OCI modified the proposed rule to require the insurers to disclose in writing whether or not UIM can be purchased from that insurer at the time of application, or on delivery of the policy if an application is not used. Also, existing insureds will receive a similar disclosure at their next renewal. The proposed rule was also revised to limit the commercial liability policy exemption from the UM provision to policies that do not include coverage for owned motor vehicles.

(d) Persons who appeared or registered regarding the proposed rule:

Appearances for:

Eric England
Wayne Cwik

Wisconsin Insurance Alliance
Jewelers Mutual Insurance Co

Appearances against:

Eric Farnsworth Wisconsin Academy of Trial Lawyers

Appearances for information:

None

Registrations for:

Anthony Mormino	Swiss Re
Noreen Parrett	Wisconsin Insurance Alliance
Louis Shubert	American Family Insurance
Misha Lee	Sentry Insurance
Glenn Pomeroy	Swiss Re

Registrations against:

Ruth Simpson Wisconsin Academy of Trial Lawyers

Registrations neither for nor against:

None

Letters received:

Noreen Parrett	Wisconsin Insurance Alliance
Christine Kienbaum	Sentry Insurance
Wayne Cwik	Jewelers Mutual
Robert Juskulski	Wisconsin Academy of Trial Lawyers

- (e) An explanation of any changes made to the plain language analysis of the rule under s. 227.14 (2), Stats., or to any fiscal estimate prepared under s. 227.14 (4), Stats.**

The analysis was modified to include a specific discussion of the *Rebernick* case which necessitated the rule. Since the rule was significantly modified, the analysis was changed to reflect the current proposal. The fiscal estimate was not changed.

- (f) The response to the Legislative Council staff recommendations indicating acceptance of the recommendations and a specific reason for rejecting any recommendation:**

All comments were complied with.

- (g) The response to the report prepared by the small business regulatory review board:**

OCI did not receive a report from the small business regulatory review board.

- (h) Final Regulatory Flexibility Analysis**

A Final Regulatory Flexibility Analysis is Not Required because the rule will not have a significant economic impact on a substantial number of small businesses.

(1) Fiscal Effect

See fiscal estimate attached to proposed rule.

Attachment: Legislative Council Staff Recommendations
May 10, 2007

**PROPOSED ORDER OF THE OFFICE OF THE COMMISSIONER OF INSURANCE
RENUMBERING, AMENDING AND CREATING A RULE**

To renumber Ins 6.77 (4) (b); **To amend** Ins 6.77 Title, (1) and (2) and 6.77 (4) (a); and **To create** Ins 6.77 (3) (ac), (ag), (am) and (bm), 6.77 (4) (b) and (c) and 6.77 (6), Wis. Adm. Code, **Relating to** underinsured ("UM") and uninsured motorist coverage ("UIM") in personal umbrella, personal excess, commercial automobile liability and commercial liability policies and affecting small business.

ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE (OCI)

1. Statutes interpreted:

ss. 600.01, 631.36, 632.32, Stats.

2. Statutory authority:

ss. 600.01(2), 601.41(3), 628.34(12), 631.01(5), 631.36(1)(c), Stats.

3. Explanation of the OCI's authority to promulgate the proposed rule under these statutes:

Under s. 631.01(5), the commissioner is given authority to exempt certain classes of insurance from the requirements of ss. 631.36 or 632.32, Stats. The commissioner has previously exercised this authority at various times in adopting and amending Ins 6.77, Wisc. Admin. Code.

4. Related Statutes or rules:

Ins 6.77, Wisc. Admin. Code

5. The plain language analysis and summary of the proposed rule:

This rule attempts to clarify exactly which policies are subject to s. 632.32 (4) – Uninsured Motorist coverage ("UM") and (4m) – underinsured motorist coverage ("UIM"), Stats., and what notices need to be provided

For UM, the rule would not require that umbrella liability and excess liability policies include UM. [This continues the current requirement for umbrella liability policies to not have to include UM.] Commercial auto policies and commercial liability policies that cover owned automobiles would be required to include UM under s. 632.32 (4), Stats., for both owned and non-owned automobiles. Commercial liability policies that only cover non owned motor vehicles would not be required to include UM

For UIM, the rule would exempt commercial liability policies, commercial auto policies, personal umbrella liability policies and personal excess liability policies from the statutory provisions of s. 632.32(4m), Stats. As a substitute, these policies would be required to give notice of whether or not UIM is available from the insurer but does not require the insurer to write such coverage. Lastly, the

rule ensures that existing policyholders will receive notice of the availability of UIM at their next renewal.

The commissioner finds that the interests of Wisconsin insureds or creditors or of the public do not require such regulation and that these changes will adequately protect the public and clarify the responsibility of insurers writing the coverage.

These changes will modify the rule in light of the recent Supreme Court decisions, including *Rebernick v American Family Mutual Ins Company*, 2006 WI 27 and *Rocker v USAA Casualty Ins Company*, 2006 WI 26. The interpretations made by the court are inconsistent with current insurer practices and OCI's expectation of what would be covered in these types of policies.

The *Rebernick* court held, in pertinent part, that UIM in s. 632.32 (4m), Stats., applies to personal umbrella policies that include automobile liability coverage. Section 632.32 (4m), Stats., specifies that an insurer writing a policy for liability arising out of the ownership, maintenance, or use of a motor vehicle must give the insured notice of the availability of UIM.

Although the issue in the *Rocker* court specifically related to the provisions in s. 632.32 (6) (a), Stats., which deals with coverage for a motor vehicle handler, the *Rocker* court broadly endorsed the applicability of s. 632.32, Stats., to commercial liability policies, including commercial umbrella policies, that provide for loss or damage resulting from an accident caused by a motor vehicle, except as otherwise provided.

When s. 632.32, Stats., was modified in 1985, OCI believed that the new provisions related to UM were meant to apply to personal auto policies and not commercial policies. In 1987, OCI amended Ins 6.77, Wisc. Admin. Code, to clearly exempt umbrella policies from the UM requirements. If OCI considered commercial policies to be covered by s. 632.32, Stats., it would have included those in the exemption. For about 20 years, this was the view of the agency. In 1995, s. 632.32, Stats., was again modified to add paragraph (4m) dealing with UIM. Consistent with OCI's prior view and the discussions at the time, this new UIM section was not applied to commercial or umbrella policies. With the recent supreme court cases, including *Rebernick v American Family Mutual Ins Company*, 2006 WI 27 and *Rocker v USAA Casualty Ins Company*, 2006 WI 26, this viewpoint has been examined again.

After reviewing the recent Supreme Court decisions, OCI found that the interpretations made by the court are inconsistent with current insurer practices and OCI's expectation of what should be covered in these types of policies. Compliance with these broad interpretations would create significant, if not impossible, compliance problems for many insurers. Some insurers who write umbrella coverage or commercial liability policies do not write, and are not even licensed to write, automobile coverage. Obtaining reinsurance for UM and UIM is problematic or unavailable for some insurers.

6. Summary of and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

None.

7. Comparison of similar rules in adjacent states as found by OCI:

Illinois: 215 ILCS 5/143a In *Hartbarger v. Country Mut. Ins. Co.*, 107 Ill. App. 3d 391, it was found that this section was enacted to insure a minimum amount of uninsured motorist protection, but did not give the authority to rewrite unambiguous provisions of an umbrella policy in order to expand the maximum coverage afforded plaintiff.

Iowa: Iowa Code § 321A.21 Primary insurance is purchased to be the first tier of insurance coverage while an umbrella policy is intended to cover only catastrophic losses that exceed the insured's required primary insurance limit. "Umbrella" policies are not included under Iowa Code § 321A.21, the financial responsibility statute. *Jalas v. State Farm Fire & Cas. Co.*, 505 N.W.2d 811, 1993 Iowa Sup. LEXIS 211 (Iowa 1993).

Michigan: Sec. 257.520 (a) Michigan is a no-fault state and thus is not comparable to Wisconsin. Michigan defines a "motor vehicle liability policy" as an owner's or an operator's policy of liability insurance which would appear to not include an umbrella policy.

Minnesota: 65B.49 Minnesota is a no-fault state and thus is not comparable to Wisconsin. Uninsured and underinsured coverage is required in auto policies.

8. A summary of the factual data and analytical methodologies that OCI used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule:

OCI review of insurer's existing business practices, complaints and other information

9. Any analysis and supporting documentation that OCI used in support of OCI's determination of the rule's effect on small businesses under s. 227.114:

The change will clarify when insurers issuing personal umbrella, excess liability, commercial auto or commercial liability policies must give notice of the availability of UIM or include UM in the policy. As such, it will have little impact.

10. See the attached Private Sector Fiscal Analysis.

11. A description of the Effect on Small Business:

This rule will have little or no effect on small businesses.

12. Agency contact person:

A copy of the full text of the proposed rule changes, analysis and fiscal estimate may be obtained from the OCI WEB sites at: <http://oci.wi.gov/ocirules.htm> or by contacting Inger Williams, OCI Services Section, at:

Phone: (608) 264-8110
Email: Inger.Williams@OCI.State.WI.US
Address: 125 South Webster St - 2nd Floor Madison WI 53702
Mail: PO Box 7873, Madison WI 53707-7873

13. Place where comments are to be submitted:

Mailing address:

Robert Luck, Legal Unit - OCI Rule Comment for Rule Ins 6
Office of the Commissioner of Insurance
PO Box 7873

Madison WI 53707-7873

Street address:

Robert Luck, Legal Unit - OCI Rule Comment for Rule Ins 6
Office of the Commissioner of Insurance
125 South Webster St - 2nd Floor
Madison WI 53703-3474

Email address:

Robert Luck, Robert.Luck@oci.state.wi.us

WEB Site: <http://oci.wi.gov/ocirules.htm>

The proposed rule changes are:

SECTION 1. Section Ins 6.77 (Title), (1) and (2) are amended to read:

Ins 6.77 Exemption from mid-term cancellation requirements and from required uninsured motorist, underinsured motorist and medical payment coverages.

(1) PURPOSE. This section is intended to exempt certain classes of insurance contracts from ss. 631.36 (2) (a), (b) and (c) and 632.32 (4) and (4m), Stats. This section implements the provisions of ss. 631.01 (5) and 631.36 (1) (c), Stats.

(2) SCOPE. This section applies to all insurers authorized to write umbrella or excess liability insurance policies in Wisconsin, to all insurers authorized to write commercial liability and commercial automobile liability policies in Wisconsin and to all insurers authorized to write aircraft insurance policies in Wisconsin.

SECTION 2. Section Ins 6.77(3)(ac), (ag), (am) and (bm) are created to read:

Ins 6.77 (3) (ac) *Application form* means a policy form that is designated an application by the insurer and that is filed with the office of the commissioner of insurance under s. 631.20, Stats.

(ag) *Commercial automobile liability policy* means a liability insurance policy intended principally to provide primary coverage for the insured's liability arising out of the ownership, maintenance or use of an automobile or other motor vehicle in the insured's business or for other commercial activities.

(am) *Commercial liability policy* means any form of liability insurance policy, including a commercial or business package policy or a policy written on farm and agriculture operations, that is intended principally to provide primary coverage for the insured's general liability arising out of its business or other commercial activities, and which includes coverage for the insured's liability arising out of the ownership, maintenance or use of motor vehicles as only one component of the policy or as coverage that is only incidental to the principal purpose of the policy. For purposes of this section, commercial liability policy excludes worker's compensation policies.

(bm) *Owned motor vehicle* means a motor vehicle that is owned by the insured or that is leased for a term of six months or longer.

SECTION 3. Section Ins 6.77 (4) (b) is renumbered to Ins 6.77 (4) (d).

SECTION 4. Section Ins 6.77 (4) (a) is amended to read:

6.77 (4) EXEMPTION. (a) Any umbrella liability or excess liability insurance policy ~~as defined in sub. (3)~~ is exempt from the requirements of ss. 631.36 (2) (a) and 632.32 (4), Stats.

SECTION 5. Section Ins 6.77 (4) (b) and (c) are created to read:

6.77 (4) (b) Any commercial liability policy issued or renewed on or after the effective date of this paragraph is exempt from the requirements of s. 632.32 (4), Stats., if its coverage of the insured's liability arising out of the maintenance or use of a motor vehicle is limited to coverage for non-owned motor vehicles. [revisor inserts date]

(c) Any commercial liability, commercial automobile liability, umbrella liability or excess liability insurance policy issued or renewed on or after the effective date of this paragraph is exempt from the requirements of s. 632.32 (4m), Stats. [revisor inserts date]

SECTION 6. Section Ins 6.77 (6) is created to read:

6.77 (6) DISCLOSURE. (a) An insurer shall disclose on each commercial liability, commercial automobile liability, umbrella liability or excess liability insurance policy application form whether or not underinsured motorist coverage may be purchased from the insurer under the policy. If the insurer writes a commercial liability, commercial automobile liability, umbrella liability or excess liability policy without using an application form, the insurer shall send with delivery of the policy a written disclosure of whether or not underinsured motorist coverage may be purchased from the insurer under the policy. The insured's signature on the application form or on the disclosure sent with the policy is not required, and the disclosure on the application form or with the delivery of the initial policy creates an irrebuttable presumption that the disclosure was made in accordance with this paragraph. An insurer is only required to provide the disclosure under this paragraph on any application form or with the delivery of the initial policy, if no application form is used, and need not provide the disclosure in connection with any subsequent renewal of or change to the policy. This paragraph first applies to policies issued after 150 days after the effective date of this paragraph. [revisor inserts date]

(b) Each insurer that has a commercial liability, commercial automobile liability, umbrella liability or excess liability insurance policy in effect on the effective date of this paragraph shall disclose in writing to one insured under each policy whether or not underinsured motorist coverage may be purchased from the insurer under the policy. An insurer is required to provide the disclosure only one time and in conjunction with either the notice of, or the delivery of, the first renewal of each policy occurring after 120 days after the effective date of this paragraph. [revisor inserts date]

(c) Nothing in this subsection shall be interpreted to require insurers to provide underinsured motorist coverage in policies.

SECTION 7. Effective date. This rule will take effect on the first day of the month after publication, as provided in s. 227.22 (2) (intro.), Stats.

Dated at Madison, Wisconsin, this 10th day of May, 2007.

Sean Dilweg
Commissioner of Insurance

**Office of the Commissioner of Insurance
Private Sector Fiscal Analysis**

for Rule Ins 6 relating to underinsured and uninsured motorist coverage
in umbrella and commercial policies

This rule change will have no significant effect on the private sector regulated by OCI.

FISCAL ESTIMATE WORKSHEET

Detailed Estimate of Annual Fiscal Effect

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB Number	Amendment No. if Applicable
Bill Number	Administrative Rule Number INS 6.77

Subject
underinsured motorist coverage in umbrella and commercial policies

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
None

Annualized Costs:	Annualized Fiscal impact on State funds from:	
	Increased Costs	Decreased Costs
A. State Costs by Category		
State Operations - Salaries and Fringes	\$ 0	\$ -0
(FTE Position Changes)	(0 FTE)	(-0 FTE)
State Operations - Other Costs	0	-0
Local Assistance	0	-0
Aids to Individuals or Organizations	0	-0
TOTAL State Costs by Category	\$ 0	\$ -0
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$ 0	\$ -0
FED	0	-0
PRO/PRS	0	-0
SEG/SEG-S	0	-0
C. State Revenues	Increased Rev.	Decreased Rev.
<small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>		
GPR Taxes	\$ 0	\$ -0
GPR Earned	0	-0
FED	0	-0
PRO/PRS	0	-0
SEG/SEG-S	0	-0
TOTAL State Revenues	\$ 0 None	\$ -0 None

NET ANNUALIZED FISCAL IMPACT

	<u>STATE</u>	<u>LOCAL</u>
NET CHANGE IN COSTS	\$ <u>None 0</u>	\$ <u>None 0</u>
NET CHANGE IN REVENUES	\$ <u>None 0</u>	\$ <u>None 0</u>

Prepared by: Robert Luck	Telephone No. (608) 266-0082	Agency Insurance
Authorized Signature:	Telephone No. (608) 267-3782	Date (mm/dd/yyyy) 5/10/2007

FISCAL ESTIMATE

ORIGINAL UPDATED

 CORRECTED SUPPLEMENTAL

LRB Number	Amendment No. if Applicable
Bill Number	Administrative Rule Number INS 6.77

Subject
underinsured motorist coverage in umbrella and commercial policies

Fiscal Effect
State: No State Fiscal Effect
Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

<input type="checkbox"/> Increase Existing Appropriation	<input type="checkbox"/> Increase Existing Revenues	<input type="checkbox"/> Increase Costs - May be possible to Absorb Within Agency's Budget <input type="checkbox"/> Yes <input type="checkbox"/> No
<input type="checkbox"/> Decrease Existing Appropriation	<input type="checkbox"/> Decrease Existing Revenues	
<input type="checkbox"/> Create New Appropriation	<input type="checkbox"/> Decrease Costs	

Local: No local government costs

1. <input type="checkbox"/> Increase Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	3. <input type="checkbox"/> Increase Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	5. Types of Local Governmental Units Affected: <input type="checkbox"/> Towns <input type="checkbox"/> Villages <input type="checkbox"/> Cities
2. <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	4. <input type="checkbox"/> Decrease Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	<input type="checkbox"/> Counties <input type="checkbox"/> Others _____
		<input type="checkbox"/> School Districts <input type="checkbox"/> WTCS Districts

Fund Sources Affected <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S	Affected Chapter 20 Appropriations
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Assumptions Used in Arriving at Fiscal Estimate

Long-Range Fiscal Implications

None

Prepared by: Robert Luck	Telephone No. (608) 266-0082	Agency Insurance
Authorized Signature:	Telephone No. (608) 267-3782	Date (mm/dd/yyyy) 5/10/2007





WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director
Laura D. Rose, Deputy Director*

TO: SENATOR ROGER BRESKE AND REPRESENTATIVE FRANK LASEE

FROM: Joyce L. Kiel and Rachel Letzing, Senior Staff Attorneys

RE: Clearinghouse Rule 06-117, Relating to Underinsured and Uninsured Motorist Coverage in Personal Umbrella, Personal Excess, Commercial Automobile Liability, and Commercial Liability Policies

DATE: May 17, 2007

This memorandum describes: current law relating to underinsured motorist (UIM) and uninsured motorist (UM) and medical payments coverage; recent Wisconsin Supreme Court decisions regarding UIM and UM coverage, an emergency rule promulgated by the Office of Commissioner of Insurance (OCI) in response to two of these court decisions; and Clearinghouse Rule 06-117 (CR 06-117), relating to UIM and UM coverage in personal umbrella, personal excess, commercial automobile liability, and commercial liability policies. A chart is attached summarizing the memorandum.

CR 06-117 was referred to the Senate Committee on Transportation, Tourism and Insurance on May 11, 2007 and was referred to the Assembly Committee on Insurance on May 14, 2007.

CURRENT LAW

Underinsured Motorist Coverage -- s. 632.32 (4m)

Section 632.32 (4m) (a) 1., Stats., specifies that an insurer writing a policy that insures with respect to a motor vehicle registered or principally garaged in Wisconsin against loss for liability arising out of ownership, maintenance, or use of a motor vehicle and that does not include UIM coverage must provide written notice to the insured about the availability of UIM coverage, including a brief description of the coverage. This notice is required to be provided only one time and in conjunction with the delivery of the policy.

If a person rejects UIM coverage after being notified, the insurer is not required to provide the coverage to the person under a policy that is renewed by that insurer unless an insured under the policy subsequently requests the coverage in writing. [s. 632.32 (4m) (c), Stats.] If an insured who is notified

accepts UIM coverage, the insurer must provide coverage under the policy to the insured in limits of at least \$50,000 per person and \$100,000 per accident. [s. 632.32 (4m) (d), Stats.]

The acceptance or rejection of UIM coverage by a person after he or she receives this notice does not need to be in writing. [s. 632.32 (4m) (b), Stats.] Further, the absence of a premium payment for UIM coverage is “conclusive proof” that the person has rejected such coverage. The rejection of the coverage by the person who is notified applies to all persons who may be insured under the policy, including any renewal of the policy.

Uninsured Motorist and Medical Payments Coverage – s. 632.32 (4)

Section 632.32 (4), Stats., specifies that every insurance policy that insures any motor vehicle registered or principally garaged in Wisconsin for liability arising out of the ownership, maintenance, or use of a motor vehicle must contain UM coverage. The UM coverage, which protects injured persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, or death, must be provided in limits of at least \$25,000 per person and \$50,000 per accident. [s. 623.32 (4) (a) 1., Stats.]

Current law also requires every insurance policy that insures any motor vehicle registered or principally garaged in Wisconsin for liability arising out of the ownership, maintenance, or use of a motor vehicle to contain medical payments coverage for medical payments or chiropractic payments or both, in the amount of at least \$1,000 per person. [s. 632.32 (4) (b), Stats.] The insured may reject this coverage. If medical payments coverage is rejected, it does not need to be provided in a subsequent renewal policy issued by the same insurer, unless the insured requests the coverage in writing.

Current Administrative Rule – s. Ins 6.77

Section 631.01 (5), Stats., gives OCI broad authority to exempt by rule any class of insurance contract or insurer from any or all of the provisions of chs. 631 and 632, Stats., if the interests of Wisconsin insureds or creditors or of the Wisconsin public do not require such regulation.

OCI has used its authority under s. 631.01 (5), Stats., to exempt all umbrella liability and excess liability insurance policies, as defined in the rule, from the requirement to contain UM and medical payments coverage. [s. Ins 6.77 (4) (a), Wis. Adm. Code.] “Umbrella liability policy” is defined as an insurance contract providing at least \$1,000,000 of liability coverage per person or per occurrence in excess of certain required underlying liability insurance coverage or a specified amount of self-insured retention. “Excess liability policy” is defined as an insurance contract providing at least \$1,000,000 of liability coverage per person or per occurrence in excess of certain required underlying liability insurance coverage.

Emergency Rule

In response to the recent Wisconsin Supreme Court decisions *Rebernick v. Wausau General Insurance*, 2006 WI 27, 289 Wis. 2d 324, 711 N.W.2d 621 (2006), and *Rocker v. USAA Casualty Insurance*, 2006 WI 26, 289 Wis. 2d 294, 711 N.W.2d 634 (2006), discussed below, OCI adopted an emergency rule which modifies s. Ins 6.77. The emergency rule does the following: (1) provides that insurers are not required to give notice of the availability of UIM coverage for commercial liability

policies or for personal or commercial umbrella or excess liability policies; and (2) expands the exemption from the requirement to offer UM and medical payments coverage to also include an exemption for commercial liability policies.

The emergency rule took effect on September 29, 2006. The Joint Committee for Review of Administrative Rules has granted extensions for the emergency rule until June 25, 2007.

COURT DECISIONS

Several court decisions handed down in 2006 relate to UIM coverage under s. 632.32 (4m) and UM and medical payments coverage under s. 632.32 (4). This section of the memorandum addresses issues raised by those court decisions as they relate to issues addressed in CR 06-117. (The next section of the memorandum describes CR 06-117 and comments on how current law, as reflected in the court decisions, may be affected by CR 06-117.)

Underinsured Motorist Coverage – s. 632.32 (4m)

There are two basic questions about UIM coverage: First: Is it a required notice only statute or is it also a mandatory offer statute (that is, must UIM coverage actually be available for purchase in the policy)? Second: To which policies does it apply? An important corollary question is: Is the answer to the first question the same for all types of policies identified in the second question, or are there differences? As discussed below, the courts have not answered all of these questions.

The following questions relate to issues affected by CR 06-117 with regard to UIM coverage under s. 632.32 (4m) which have been touched on by recent court decisions:

1. *Does s. 632.32 (4m) require an insurer that offers a **personal umbrella liability or personal excess liability policy** that includes motor vehicle liability coverage to notify the insured about the availability of UIM coverage in the personal umbrella liability or personal excess liability policy?*

Yes. In *Rebernick*, the Wisconsin Supreme Court held that s. 632.32 (4m) applies to personal umbrella policies that include motor vehicle liability coverage and requires notice of the availability of UIM coverage under the personal umbrella policy.

2. *What is the remedy if an insurer violates s. 632.32 (4m) by failing to notify an insured about the availability of UIM coverage?*

OCI has broad authority to take enforcement action against an insurer for violating an insurance statute, including ordering a forfeiture. [See, e.g., subch. V, ch. 601, Stats.]

What is unclear is whether the insured has a personal remedy against the insurer. That issue is currently pending before the Wisconsin Supreme Court.

The majority opinion in *Rebernick* did not decide the matter since the court determined that the insurer had given effective notice to the insured that UIM coverage was available. [*Rebernick*, Para 39.] The dissent in *Rebernick* disagreed that the insurer had given the required notice about

the availability of UIM coverage in the personal umbrella policy and discussed what, if any, would be the appropriate remedy, without reaching a conclusion about the matter.

The Wisconsin Court of Appeals recently held that when an insurer fails to notify an insured about the availability of UIM coverage in a personal umbrella policy that includes motor vehicle liability coverage, then the policy is reformed to provide for the UIM coverage (upon payment of premiums by the insured) if the insured would have purchased the UIM coverage had the insured been notified about its availability. [*Stone v. Acuity Mutual Insurance Co.*, 2006 WI App 205, 723 N.W.2d 766 (2006).] Because there was no evidence that the Stones would not have purchased UIM coverage in their personal umbrella policy had the Stones been notified of its availability, the *Stone* court held that the policy should be reformed to include the UIM coverage (in that case, in the amount of \$500,000).

On January 11, 2007, the Wisconsin Supreme Court accepted a petition to review the *Stone* decision to address what remedy applies if an insurer violates s. 632.32 (4m). It likely will be many months before the Supreme Court issues its decision.

3. *Does s. 632.32 (4m) require that UIM coverage be offered, that is, must UIM coverage actually be available for purchase (sometimes referred to as a mandatory offer requirement), in a personal umbrella liability or personal excess liability policy that includes motor vehicle liability coverage? In other words, is it a violation of s. 632.32 (4m) if an insurer does not have UIM coverage available in a personal umbrella liability policy or personal excess liability policy that includes motor vehicle coverage and simply notifies the insured of that fact?*

In *Vieau v. American Family Mutual Insurance Co.*, 2006 WI 31, 289 Wis. 2d 552, 712 N.W.2d 661 (2006), the Wisconsin Supreme Court stated that s. 632.32 (4m) requires an insurer to offer UIM coverage to persons purchasing a motor vehicle insurance policy but the decision is left to the policyholder as to whether to purchase UIM coverage. [*Vieau*, Para 27.] The *Vieau* case dealt with a personal primary automobile insurance policy.

Reading *Vieau* (s. 632.32 (4m) is a UIM mandatory offer statute (at least with respect to primary personal motor vehicle policies)) and *Rebernick* (s. 632.32 (4m) applies to personal umbrella liability policies) together would imply that a court is likely to answer yes. However, the answer is uncertain as that exact question has not been decided by an appellate court.

Vieau could be differentiated from the question at hand because that case dealt with a personal primary automobile policy, not a personal umbrella liability or personal excess liability policy. *Rebernick* could be differentiated since UIM coverage was actually available under the personal umbrella policy in that case and, thus, the issue of a mandatory offer was not an issue. Whether those differences would be important to a subsequent court is not clear. The *Rebernick* court specifically declined to address the issue since the plaintiff had not advanced the question.¹

¹ *Rebernick*, n. 5. The *Rebernick* court observed that the plaintiff's attorney stated in oral argument that s. 632.32 (4m) just requires notice, which would mean that the plaintiff thought s. 632.32 (4m) is not also a mandatory offer statute. However, the plaintiff's statement is contrary to the court's decision in *Vieau*, which may be understandable since *Vieau* was decided after the oral argument in *Rebernick*.

If a court determined that the statute was ambiguous on this point, the court may resolve the ambiguity by attempting to discern legislative intent as reflected in legislative history. Section 632.32 (4m) was created by 1995 Wisconsin Act 21. The proposed creation of s. 632.32 (4m) was not part of the original bill but was included in Assembly Substitute Amendment 1 to 1995 Senate Bill 6, which was adopted and then passed as amended. The Legislative Council Staff memorandum to legislators describing the substitute amendment referred to s. 632.32 (4m) as a mandatory offer requirement for UIM coverage. [Memorandum to Representative Sheryl Albers, Chairperson, and Members of the Assembly Committee on Insurance, Securities, and Corporate Policy, from Gordon A. Anderson, Senior Staff Attorney, Legislative Council Staff (March 2, 1995).] The memorandum did not refer explicitly to personal umbrella liability or personal excess liability policies or to primary policies. According to the *Rebernick* court, the legislative history is sparse, but nothing in the legislative drafting file suggests that the Legislature intended that umbrella policies be exempt from the requirements of s. 632.32 (4m). [*Rebernick*, Para 24.] Thus, it is possible that a court would conclude that the legislative intent was that s. 632.32 (4m) is a mandatory offer requirement for UIM coverage with respect to personal umbrella liability or personal excess liability policies. Until the matter is litigated, the answer is uncertain.

4. *Does s. 632.32 (4m) apply to commercial general liability policies and commercial umbrella liability and excess liability policies that include motor vehicle liability coverage?*

As discussed below, it appears likely that a court would answer yes. However, the answer is uncertain as that exact question has not been decided by an appellate court.

In *Rocker*, the Wisconsin Supreme Court held that another subsection of s. 632.32 (namely s. 632.32 (6) (a)) applies to commercial general liability policies and commercial umbrella policies that include motor vehicle liability coverage. Section 632.32 (6) (a) prohibits a “policy” issued to a motor vehicle handler (as defined in s. 632.32 (2) (b)) from excluding coverage under certain circumstances.

Section 632.32 (6) (a) did not define “policy.” However, the *Rocker* court relied on the scope statement of s. 632.32 (1) which specifies that, *except as otherwise provided*, s. 632.32 applies to every insurance policy issued or delivered in the state that insures against liability for loss or damage resulting from accident caused by any motor vehicle. The *Rocker* court held that this included commercial general liability policies and commercial umbrella policies that include motor vehicle liability coverage for the purpose of applicability of s. 632.32 (6) (a).

One of the defendant insurers argued in *Rocker* that applying s. 632.32 (6) (a) to commercial general liability policies and commercial umbrella policies would require that these policies comply with certain other subsections in s. 632.32, including s. 632.32 (4m) regarding UIM coverage. [*Rocker*, Para 47.] The court specifically declined to address the issue of the applicability of other subsections of s. 632.32 to such commercial policies because that issue was not before the court. [*Id.*]

However, the *Rocker* court stated that the test for analyzing the applicability of a particular subsection of s. 632.32 to commercial general liability policies and commercial umbrella policies would be whether the law does provide otherwise for a particular subsection of s. 632.32. This

statement implies that, unless the statutes specifically exempt commercial general liability policies and commercial umbrella policies from s. 632.32 (4m), the court likely would hold that s. 632.32 (4m) applies to such policies if they include motor vehicle liability coverage for a motor vehicle registered or principally garaged in Wisconsin.

Applying this test, it appears likely that a court would hold that s. 632.32 (4m) applies to such commercial general liability policies and commercial umbrella liability or excess liability policies because the statute does not explicitly exempt such commercial policies. However, it is theoretically possible that if a court were presented with this specific question, it might use a different test and conclude otherwise.

If a court determined that the statute was ambiguous on this point, the court may resolve the ambiguity by attempting to discern legislative intent. The Legislative Council Staff memorandum referred to above did not refer explicitly to commercial general liability or commercial umbrella liability or excess liability policies--either to specify that they are or are not included. It is noted that neither the scope provision in s. 632.32 (1) (specifying to which policies s. 632.32 applies (unless specified otherwise)) nor the statement in s. 632.32 (4m) (specifying the policies to which it applies) distinguishes between commercial and personal lines of coverage. It is possible that a court would conclude, similar to the approach used in *Rebernick*, that s. 632.32 (4m) applies to such commercial policies if the court finds that nothing suggests that the Legislature intended them to be exempt. Again, no definitive answer can be provided.

Also, the question of whether s. 632.32 (4m) is a notice statute only or also a mandatory offer statute for commercial general liability or commercial umbrella liability or excess liability policies has not been explicitly addressed by an appellate court. The same line of reasoning outlined above may apply. However, no definitive answer can be provided.

5. *Does s. 632.32 (4m) apply to commercial automobile liability policies?*

Reading *Vieau* (s. 632.32 (4m) is a UIM mandatory offer statute (at least with respect to personal primary motor vehicle policies) and *Rocker* (test likely is that s. 632.32 (4m) applies to commercial policies unless specifically exempted (and they are not)) together, it appears that a court is likely to answer yes. However, the answer is uncertain as that exact question has not been decided by an appellate court. In addition, the question of whether s. 632.32 (4m) is a notice statute only or also a mandatory offer statute has not been addressed with respect to commercial automobile liability policies.

Vieau could be differentiated from the question at hand because that case dealt with a personal primary automobile policy, rather than a commercial automobile liability policy. *Rocker* could be differentiated because it concerned commercial general liability policies and commercial umbrella policies with respect to a different subsection of s. 632.32, not commercial automobile liability policies with respect to s. 632.32 (4m). Whether those differences would be important to a subsequent court is not clear.

If a court determined that the statute was ambiguous on this point, the court may resolve the ambiguity by attempting to discern legislative intent. The Legislative Council Staff

memorandum referred to above did not distinguish between commercial and personal motor vehicle policies. Neither does the scope provision in s. 632.32 (1) nor the provisions in s. 632.32 (4m) stating to which policies the provision applies. It is possible that a court would conclude, similar to the approach used in *Rebernick*, that s. 632.32 (4m) applies to commercial automobile insurance policies if the court finds that nothing suggests that the Legislature intended them to be exempt. Until the matter is litigated, the answer is uncertain.

Uninsured Motorist and Medical Payments Coverage – s. 632.32 (4)

As noted above, current s. Ins 6.77 (4) (a), Wis. Adm. Code, exempts all umbrella liability and excess liability policies from the requirements of s. 632.32 (4), relating to UM and medical payments coverage. This would include personal and commercial umbrella liability and excess liability policies. However, the question remains:

1. Does s. 632.32 (4) apply to commercial general liability policies that include motor vehicle liability coverage?

Based on language in *Rocker* (test likely is that s. 632.32 (4) applies to commercial policies unless specifically exempted (and they are not)), it appears that a court is likely to answer yes if coverage is included under the policy with respect to any motor vehicle registered or principally garaged in Wisconsin insuring against loss from liability arising out of the ownership, maintenance, or use of a motor vehicle. However, the answer is uncertain as that exact question has not been decided by an appellate court.

As with the argument about UIM coverage discussed above, one of the defendant insurers argued in *Rocker* that applying s. 632.32 (6) (a) to commercial general liability policies and commercial umbrella policies would require that these policies comply with certain other subsections in s. 632.32, including s. 632.32 (4), regarding UM and medical payments coverage. [*Rocker*, Para 47.]² Like its approach with respect to UIM coverage, the *Rocker* court specifically declined to address the issue of the applicability of other subsections of s. 632.32, including s. 632.32 (4), relating to UM and medical payments coverage, to such commercial policies because that issue was not before the court. [*Id.*]

However, under the same line of reasoning discussed above, it appears likely that a court would hold that s. 632.32 (4) applies to commercial general liability policies that include motor vehicle liability coverage because there appears to be no statutory exception providing otherwise. However, it is theoretically possible that if a court were presented with this specific question, it might use a different test than that set forth in *Rocker* and conclude otherwise. No definitive answer can be provided.

² It is not clear why the plaintiff did not note that current administrative rules already exempt commercial umbrella and commercial excess liability policies from the requirements of s. 632.32 (4).

CR 06-117

This section describes CR 06-117 and then comments on how the law, as reflected in the court decisions discussed above, may be affected by the proposed rule.

Underinsured Motorist Coverage – s. 632.32 (4m)

CR 06-117 includes the following provisions with respect to UIM coverage under s. 632.32 (4m):

1. Exempts **commercial liability policies** issued or renewed on or after the effective date of the proposed rule from the requirements of s. 632.32 (4m). [Proposed s. Ins 6.77 (4) (c).]

CR 06-117 provides a definition of “commercial liability policy” as meaning any form of liability insurance policy, including a commercial or business package policy or a policy written on farm and agricultural operations, that is intended principally to provide primary coverage for the insured’s **general liability** arising out of its business or other commercial activities, and which includes coverage for the insured’s liability arising out of the ownership, maintenance, or use of motor vehicles as only one component of the policy or as coverage that is only incidental to the principal purpose of the policy. The proposed definition specifies that it excludes worker’s compensation policies.

Comment: As noted in Question 4. (UIM), above, based on the reasoning in *Rocker*, a court may hold that s. 632.32 (4m) applies to commercial general liability policies that include motor vehicle liability coverage. **However, CR 06-117 specifies that s. 632.32 (4m) does not apply to such policies.**

2. Exempts **commercial automobile liability policies** issued or renewed on or after the effective date of the proposed rule from the requirements of s. 632.32 (4m). [Proposed s. Ins 6.77 (4) (c).]

CR 06-117 provides a definition of “commercial automobile liability policy” as meaning a liability insurance policy intended principally to provide primary coverage for the insured’s liability arising out of the ownership, maintenance, or use of an automobile or other motor vehicle in the insured’s business or for other commercial activities.

Comment: As noted in Question 5. (UIM), above, based on the reasoning in *Rocker* and *Vieau*, a court may hold that s. 632.32 (4m) applies to commercial automobile liability policies. **However, CR 06-117 specifies that s. 632.32 (4m) does not apply to such policies.**

3. Exempts **all umbrella liability and excess liability policies** (this includes both **personal and commercial policies**) issued or renewed on or after the effective date of the proposed rule from the requirements of s. 632.32 (4m). [Proposed s. Ins 6.77 (4) (c).]

Comment: As noted in Questions 1., 3., and 4. (UIM), above, based on the reasoning in *Rebernick*, *Rocker*, and *Vieau*, a court may hold that s. 632.32 (4m) applies to personal and commercial umbrella and excess liability policies that include motor vehicle liability coverage. **However, CR 06-117 specifies that s. 632.32 (4m) does not apply to such policies.**

4. Requires disclosure with respect to **commercial liability, commercial automobile liability, and all umbrella liability and excess liability policies (this includes both commercial and personal policies)** about whether or not UIM coverage is available for purchase under the policy. [Proposed s. Ins 6.77 (6) (a) and (b).] CR 06-117 specifies that this disclosure requirement is not to be interpreted as a mandatory offer requirement for such policies. [Proposed s. Ins 6.77 (6) (c).]

Because CR 06-117 exempts all of these policies from s. 632.32 (4m) (see items 1., 2., and 3., above), the disclosure requirement is not implementing s. 632.32 (4m) but is a requirement promulgated by rule under OCI's general rule-making authority.

CR 06-117 includes separate provisions regarding the disclosure which depend on whether the policy was or was not in effect on the effective date of the proposed rule, as follows:

Policy in effect on the effective date of CR 06-117.

If a commercial liability, commercial automobile liability, umbrella liability, or excess liability policy is in effect on the effective date of CR 06-117, the proposed rule requires the insurer to disclose in writing to one insured under the policy whether or not UIM coverage may be purchased under the policy. This disclosure must be sent with the notice of, or the delivery of, the first renewal of each such policy occurring after 120 days after the effective date of CR 06-117. (For example, if CR 06-117 became effective July 1, 2007, the disclosure would have to be provided with the notice of renewal or delivery of the renewed policy for the first renewal that occurred after October 29, 2007.) An insurer would be required to provide the disclosure only one time, that is, with that first renewal.

Policy not in effect on the effective date of CR 06-117.

If a commercial liability, commercial automobile liability, umbrella liability, or excess liability policy is not in effect on the effective date of CR 06-117, the proposed rule requires disclosure about whether or not UIM coverage can be purchased under the policy, but requires the disclosure in a different manner.

If the insurer uses an application form, the insurer must disclose this information on the application form. However, if the insurer does not use an application form, the insurer must send a written disclosure about this with delivery of the policy.

CR 06-117 specifies that the insured's signature on the application form or on the disclosure sent with the policy is not required. It also specifies that the disclosure on the application form or with the delivery of the initial policy creates an irrebuttable presumption that the disclosure was made in accordance with the rule.

CR 06-117 specifies that this disclosure is only required in connection with the initial policy and is not required for renewals of that policy.

Under the proposed rule, these provisions about disclosure with respect to policies not in effect on the effective date of CR 06-117 apply only to policies issued after 150 days after the effective

date of CR 06-117. (For example, if CR 06-117 became effective July 1, 2007, the disclosure would have to be provided only for such policies that were issued after November 28, 2007.)

Comment: As noted in Questions 3. and 4. (UIM), above, based on the reasoning in *Rebernick, Rocker, and Vieau*, a court may hold that s. 632.32 (4m) is a mandatory offer statute with respect to umbrella liability, excess liability, and commercial liability policies that include motor vehicle liability coverage. CR 06-117 would require disclosure as to whether UIM coverage is offered in such policies but would specify that this is *not* a mandatory offer requirement.

Uninsured Motorist and Medical Payments Coverage – s. 632.32 (4)

CR 06-117 includes the following provisions with respect to UM and medical payments coverage under s. 632.32 (4):

1. Retains the provisions in current s. Ins 6.77 that exempts *all umbrella liability and excess liability policies* (this includes both *personal and commercial* policies) from the requirements of s. 632.32 (4).
2. Exempts *commercial liability policies* issued or renewed on or after the effective date of the proposed rule from the requirements of s. 632.32 (4) if the coverage arises out of the maintenance or use of a motor vehicle and the coverage is limited to non-owned motor vehicles. [Proposed s. Ins 6.77 (4) (b).] CR 06-117 defines “owned motor vehicle” as a motor vehicle that is owned by the insured or that is leased for a term of six months or longer. [Proposed s. Ins 6.77 (3) (bm).] (It should be noted that, in contrast to the exemption of commercial liability policies from the UM and medical payments coverage requirements, neither the current rule nor CR 06-117 exempts commercial automobile policies from the requirements in s. 632.32 (4) to include UM and medical payments coverage.)

Comment: As noted in Question 1. (UM), above, based on the reasoning in *Rocker*, a court may hold that s. 632.32 (4) applies to commercial general liability policies that include coverage for a motor vehicle registered or principally garaged in Wisconsin. *However, CR 06-117 would specify that s. 632.32 (4) does not apply to such policies if the coverage of liability arises out of the maintenance or use of only non-owned motor vehicles.* If the commercial liability policy includes liability coverage for owned motor vehicles, s. 632.32 (4) applies and requires inclusion of UM and medical payments coverage.

The attached chart summarizes the answers to the questions presented in the memorandum regarding which types of policies s. 632.32 (4) and (4m) apply to under current law and, for each type of policy discussed, whether it is required notice only or also a mandatory offer requirement. The chart then indicates what the answer to each question would be under CR 06-117.

If you have any questions about this or the rules promulgation process, please feel free to contact us directly at the Legislative Council staff offices.

JLK:REL:jal

Attachment





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Assembly Insurance Committee
Testimony of Sean Dilweg, Commissioner of Insurance
Clearinghouse Rule 06-117
May 24, 2007

Thank you Chairman Lasee, Vice-Chairman Nygren, Representative Cullen and members of the committee. I'm here today to provide the committee with information on Clearinghouse Rule 06-117. The rule before you is the permanent rule that replaces the emergency rule currently in place and due to expire on June 25, 2007.

Under the authority granted to the Commissioner by section 631.01 (5), Stats, the office previously (1987) exempted umbrella policies from the Uninsured Motorist ("UM") requirements through the rulemaking process. In 1995, s. 632.32, Stats., was again modified to add paragraph (4m) dealing with Underinsured Motorist coverage ("UIM"). Consistent with OCI's prior view, this new UIM section was not applied to commercial or umbrella policies. Recent Supreme Court decisions have caused a reexamination of the applicability of UIM statutory provisions to commercial and umbrella policies.

These Wisconsin Supreme Court decisions necessitate that OCI, as the agency administering ss. 631.01(5) and 632.32, determine whether the "interests of the ... insureds or... the public do not require such regulation." They also necessitate that OCI, as the administering agency, provide clarity, to the extent it can, to the insurance industry and consumers regarding issues raised by these decisions but not resolved. The court noted this OCI responsibility in the *Rebernick v American Family Mutual Ins Company* decision.

This rule clarifies exactly which policies are subject to s. 632.32 (4) – Uninsured Motorist coverage and (4m) – Underinsured Motorist coverage, Stats., and what notices need to be provided. Legislative Council's May 17th memo on CR 06-117 contained a helpful table that specifies how the rule compares with current regulation under different lines of insurance. I have included a copy of this table with my written testimony for your review.

For UM, the rule would not require that umbrella liability and excess liability policies include UM, continuing the current requirement for umbrella liability policies. Commercial auto policies and commercial liability policies that cover owned automobiles would be required to include UM under s. 632.32 (4), Stats. Commercial liability policies that only cover non owned motor vehicles would not be required to include UM.

For UIM, the rule would exempt commercial liability policies, commercial auto policies, personal umbrella liability policies and personal excess liability policies from the statutory provisions of s. 632.32(4m), Stats. As a substitute, these policies would be required to give

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notice of whether or not UIM is available from the insurer but does not require the insurer to write such coverage.

Lastly, the rule ensures that existing policyholders will receive notice of the availability of UIM at their next renewal.

After much discussion with stakeholders, I believe we have agreement that the rule before you is consistent with current insurer practices and OCI's expectation of what should be covered in these types of policies.

Thank you for the opportunity to have a hearing on Clearinghouse Rule 06-117 and I would be happy to answer any questions that committee members may have.

ATTACHMENT

Comparison of Current Law and Clearinghouse Rule 06-117 (CR 06-117) with Regard to Underinsured Motorist (UIM) Coverage and Uninsured Motorist (UM) and Medical Payments Coverage

	Current Law	Personal Primary Automobile Policy	Personal Umbrella or Excess Liability Policy	Commercial Automobile Policy	Commercial Liability Policy	Commercial Umbrella or Excess Liability Policy
REQUIRED NOTICE OF AVAILABILITY OF UIM COVERAGE?		YES. (Appears to be unlitigated, but s. 632.32 (4m) (a), Stats., seems clear on this point)	YES. (Rebernick decision)	YES. (Appears to be unlitigated, but s. 632.32 (4m) (a), Stats., seems clear on this point)	POSSIBLY YES. (Based on rationale of <i>Rocker</i> decision)	POSSIBLY YES. (Based on rationale of <i>Rocker</i> and <i>Rebernick</i> decisions)
	CR 06-117	YES. (Current law unchanged by CR 06-117)	YES. (CR 06-117 requires disclosure about whether or not UIM coverage is available (but provides that it is not a disclosure required by s. 632.32 (4m), Stats.))	YES. (CR 06-117 requires disclosure about whether or not UIM coverage is available (but provides that it is not a disclosure required by s. 632.32 (4m), Stats.))	YES. (CR 06-117 requires disclosure about whether or not UIM coverage is available (but provides that it is not a disclosure required by s. 632.32 (4m), Stats.))	YES. (CR 06-117 requires disclosure about whether or not UIM coverage is available (but provides that it is not a disclosure required by s. 632.32 (4m), Stats.))

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		<i>Personal Primary Automobile Policy</i>	<i>Personal Umbrella or Excess Liability Policy</i>	<i>Commercial Automobile Policy</i>	<i>Commercial Liability Policy</i>	<i>Commercial Umbrella or Excess Liability Policy</i>
MANDATORY OFFER REQUIREMENT FOR UIM COVERAGE?	<i>Current Law</i>	YES. (<i>Vieau</i> decision)	POSSIBLY YES. (Based on rationale of <i>Rebernick</i> and <i>Vieau</i> decisions)	POSSIBLY YES. (Based on rationale of <i>Rocker</i> and <i>Vieau</i> decisions)	POSSIBLY YES. (Based on rationale of <i>Vieau</i> , <i>Rocker</i> , and <i>Rebernick</i> decisions)	POSSIBLY YES. (Based on rationale of <i>Vieau</i> , <i>Rocker</i> , and <i>Rebernick</i> decisions)
	<i>CR 06-117</i>	YES. (Current law unchanged by CR 06-117)	NO. (CR 06-117 states that the disclosure requirement noted above is not to be interpreted as a mandatory offer requirement)	NO. (CR 06-117 states that the disclosure requirement noted above is not to be interpreted as a mandatory offer requirement)	NO. (CR 06-117 states that the disclosure requirement noted above is not to be interpreted as a mandatory offer requirement)	NO. (CR 06-117 states that the disclosure requirement noted above is not to be interpreted as a mandatory offer requirement)
REQUIRED UIM AND MEDICAL PAYMENTS COVERAGE?	<i>Current Law</i>	YES.	NO. (s. Ins 6.77 (4) (a), Wis. Adm. Code.)	YES.	POSSIBLY YES. (Based on rationale of <i>Rocker</i> decision)	NO. (s. Ins. 6.77 (4) (a), Wis. Adm. Code)
	<i>CR 06-117</i>	YES. (Current law unchanged by CR 06-117)	NO. (Current law unchanged by CR 06-117)	YES. (Current law unchanged by CR 06-117)	YES, if policy covers owned motor vehicles (regardless of whether non-owned vehicles are also covered). NO, if policy covers only non-owned motor vehicles.	NO. (Current law unchanged by CR 06-117)

Prepared by: Joyce L. Kiel and Rachel Letzing, Senior Staff Attorneys

Legislative Council Staff

May 17, 2007

JLK:REL:ksm:jal



Eric ^{Testified} Englund - Insurance all.
Joe Strohl - trial lawyer
Commissioner all together
test

CR 06-117 ?
Date ?