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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
YLK *RL*

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

DATE: March 12, 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 a preliminary draft of Clearinghouse Rule 06-117 (CR 06-117), relating to UIM and UM coverage in umbrella and commercial policies.

OCI submitted CR 06-117 to the Legislative Council Rules Clearinghouse on November 3, 2006, but has not yet submitted the proposed final rule to the Legislature under s. 227.19 (2), Stats., to continue the rules promulgation process. OCI has provided us with a preliminary draft (dated March 7, 2007) of the version of CR 06-117 that OCI is contemplating submitting to the Legislature ("preliminary draft"). A copy of the preliminary draft is attached. This preliminary draft is not the officially submitted version of CR 06-117 and, therefore, is subject to change by OCI before submission to the Legislature.

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.

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.

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.]

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 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 include commercial liability policies.

The emergency rule took effect on September 29, 2006. On February 13, 2007, the Joint Committee for Review of Administrative Rules (JCRAR) granted a 60-day extension for the emergency rule until April 26, 2007. Upon OCI's request, JCRAR could extend the emergency rule for an additional 60 days, that is, until June 25, 2007. However, no further extensions are allowed. [s. 227.24 (2) (a), Stats.]

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 the preliminary draft. (The next section of the memorandum describes the preliminary draft and comments on how current law, as reflected in the court decisions, may be affected by the preliminary draft.)

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 the preliminary draft 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 that UIM coverage be offered, that is, must UIM coverage actually be available for purchase (sometimes referred to as a mandatory offer requirement)?*

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. It appears that the appellate courts have not specifically addressed this question for other types of policies covered by s. 632.32 (4m).

2. *Does s. 632.32 (4m) require an insurer that offers a personal umbrella 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 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.

3. *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.

4. *Does s. 632.32 (4m) require that UIM coverage be offered, that is, must UIM coverage actually be available for purchase, in a personal umbrella or personal excess liability policy that includes motor vehicle liability coverage, that is, is s. 632.32 (4m) a mandatory offer requirement for such personal umbrella or personal excess liability policies? 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 policy or personal excess liability policy that includes motor vehicle coverage and simply notifies the insured of that fact?*

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 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 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

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 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 or personal excess liability policies. Until the matter is litigated, the answer is uncertain.

5. *Does s. 632.32 (4m) apply to commercial general liability policies and commercial umbrella 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).

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*.

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 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 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 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.

6. 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 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 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. 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.

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).

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.

PRELIMINARY DRAFT OF PROPOSED RULE

This section describes the preliminary draft and then comments on how the law, as reflected in the court decisions discussed above, may be affected by the preliminary draft.

Underinsured Motorist Coverage – s. 632.32 (4m)

The preliminary draft includes the following provisions with respect to UIM coverage under s. 632.32 (4m):

1. Exempts ***commercial liability policies*** from the requirements of s. 632.32 (4m). [Proposed s. Ins 6.77 (4) (c).]

The preliminary draft proposes a definition of “commercial liability policy” as meaning any form of liability insurance policy or package insurance policy that includes more than one kind of coverage and 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 may include coverage for the insured’s liability arising out of the ownership, maintenance, or use of an automobile or other motor vehicle 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 includes policies written on farms and agricultural operations but excludes worker’s compensation policies.

Comment: As noted in Question 5. (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, the preliminary draft would specify that s. 632.32 (4m) does not apply to such policies.***

2. Exempts ***commercial automobile liability policies*** from the requirements of s. 632.32 (4m). [Proposed s. Ins 6.77 (4) (c).]

The preliminary draft proposes a definition of “commercial automobile liability policy” as 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 6. (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, the preliminary draft would specify 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***) from the requirements of s. 632.32 (4m). [Proposed s. Ins 6.77 (4) (c).]

Comment: As noted in Questions 2., 4., and 5. (UIM), above, based on the reasoning in *Rebernick, Rucker, 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, the preliminary draft would specify that s. 632.32 (4m) does not apply to such policies.***

4. Requires disclosure with respect to ***personal umbrella liability and personal excess liability policies*** about whether or not UIM coverage is available under the policy. [Proposed s. Ins 6.77 (6).] The preliminary draft specifies that this disclosure requirement is not to be interpreted as a mandatory offer requirement for such policies but, rather, is a disclosure as to whether or not UIM coverage is available under the policy. (The preliminary draft does ***not*** require such disclosure with respect to commercial umbrella policies or commercial excess liability policies, commercial automobile liability policies, or commercial general liability policies.)

The preliminary draft 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 personal umbrella liability or personal excess liability policy is in effect on the effective date of CR 06-117, the preliminary draft requires the insurer to disclose in writing to one insured under the policy whether or not UIM coverage can 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 June 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 September 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 the personal umbrella liability or personal excess liability policy is not in effect on the effective date of CR 06-117, the preliminary draft 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.

The preliminary draft 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 proposed rule.

The preliminary draft specifies that this disclosure is only required in connection with the initial policy and is not required for renewals of that policy.

Under the preliminary draft, 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 June 1, 2007, the disclosure would have to be provided only for such policies that were issued after October 29, 2007.)

Comment: As noted in Question 4. (UIM), above, based on the reasoning in *Rebernick* and *Vieau*, a court may hold that s. 632.32 (4m) is a mandatory offer statute with respect to personal umbrella and personal excess liability policies that include motor vehicle liability coverage. The preliminary draft would require disclosure as to whether UIM coverage is offered in a personal umbrella or personal excess liability policy but would specify that this is *not* a mandatory offer requirement.

Comment: As noted in item 3., above, the preliminary draft exempts all personal umbrella and personal excess liability policies from the requirements of s. 632.32 (4m). Thus, the preliminary draft appears to be stating that this disclosure requirement falls outside the scope of s. 632.32 (4m). This suggests that this disclosure of availability requirement noted above is promulgated under OCI's more general rule-making authority.

The attached chart summarizes the answers to the questions presented in the prior section of the memorandum regarding which types of policies s. 632.32 (4m) applies to 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 the preliminary draft.

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

The preliminary draft 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 and excess liability policies* (this includes both *personal and commercial* policies) from the requirements of s. 632.32 (4). [Under the preliminary draft, this provision is included in proposed s. Ins 6.77 (4) (b), rather than s. Ins 6.77 (4) (a).]
2. Exempts *commercial liability policies* from the requirements of s. 632.32 (4). [Proposed s. Ins 6.77 (4) (b).] (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 preliminary draft exempts commercial automobile policies from the requirements in s. 632.32 (4) to include UM and medical payments coverage. In comparison, the preliminary draft exempts commercial automobile policies from the requirements in s. 632.32 (4m) with regard to UIM coverage.)

Comment: As noted in Question 1. (UM), above, based on the reasoning in *Rocker*, a court is likely to hold that s. 632.32 (4) applies to commercial general liability policies that include motor vehicle coverage. *However, the preliminary draft would specify that s. 632.32 (4) does not apply to such policies.*

Again, the draft described above is preliminary and is subject to revision by OCI before submission to the Legislature.

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

Attachments

ATTACHMENT

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

	<i>Personal Primary Automobile Policy</i>	<i>Personal Umbrella or Excess Liability Policy</i>	<i>Commercial Primary Automobile Policy</i>	<i>Commercial General Liability Policy</i>	<i>Commercial Umbrella or Excess Liability Policy</i>
REQUIRED NOTICE OF AVAILABILITY?	<i>Current Law</i> YES. (Appears to be unlitigated, but s. 632.32 (4m) (a), Stats., seems clear on this point)	YES. (<i>Rebernick</i> 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)
	<i>Preliminary Draft of CR 06-117</i> YES. (Current law unchanged by CR 06-117)	YES. (CR 06-117 requires disclosure about whether or not UIM coverage is available (but indicates that it is not a disclosure required by s. 632.32 (4m), Stats.))	NO.	NO.	NO.
MANDATORY OFFER REQUIREMENT?	<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>Preliminary Draft of 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.	NO.	NO.

Prepared by: Joyce L. Kiel and Rachel Letzing, Senior Staff Attorneys
 Legislative Council Staff
 March 12, 2007

March 7, 2007 Draft

**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) (ag), (am) and (ar), 6.77 (4) (b) and (c) and 6.77 (6), Wis.
Adm. Code, **Relating to** underinsured and uninsured motorist coverage in
umbrella and commercial policies.

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)(ag), (am) and (ar) are created to read:

Ins 6.77 (3) (ag) *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.

(am) *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.

(ar) *Commercial liability policy* means any form of liability insurance policy or package insurance policy that includes more than one kind of coverage and 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 may include coverage for the insured's liability arising out of the ownership, maintenance or use of an automobile or other motor vehicle 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 includes policies written on farms and agricultural operations but excludes worker's compensation policies.

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)~~, s. 631.36 (2) (a), Stats.

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

6.77 (4) (b) Any commercial liability, umbrella liability or excess liability policy is exempt from the requirements of s. 632.32 (4), Stats.

(c) Any commercial liability, commercial automobile liability, umbrella liability or excess liability policy is exempt from the requirements of s. 632.32 (4m), Stats.

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

6.77 (6) DISCLOSURE. (a) An insurer shall disclose on each personal umbrella liability and personal excess liability application form whether or not underinsured motorist coverage can be purchased from the insurer under the personal umbrella liability or personal excess liability policy. If the insurer writes a personal umbrella liability or personal 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 can 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 [effective date of rule].

(b) Each insurer that has personal umbrella liability or personal excess liability policies in effect on [effective date of rule] shall disclose in writing to one insured under each policy whether or not underinsured motorist coverage can be purchased from the insurer under the personal umbrella liability or personal excess liability 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 [effective date of rule].

(c) Nothing in this subsection shall be interpreted to require insurers to provide underinsured motorist coverage in personal umbrella liability or personal excess liability policies.

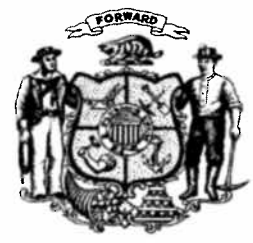
SECTION 7. Effective date. This rule will take effect on the first day of the month after publication, as provided in s. 227.22 (2) (intro.), Stats.

Dated at Madison, Wisconsin, this ___th day of March, 2007.

Sean Dilweg
Commissioner of Insurance



WISCONSIN STATE LEGISLATURE





State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

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Senate Transportation, Tourism and Insurance Committee
Testimony of Sean Dilweg, Commissioner of Insurance
Clearinghouse Rule 06-117
May 23, 2007

Thank you Senator Breske 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

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

REQUIRED NOTICE OF AVAILABILITY OF UIM 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
	<p>YES. (Appears to be unlitigated, but s. 632.32 (4m) (a), Stats., seems clear on this point)</p>	<p>YES. (Rebernick decision)</p>	<p>YES. (Appears to be unlitigated, but s. 632.32 (4m) (a), Stats., seems clear on this point)</p>	<p>POSSIBLY YES. (Based on rationale of <i>Rocker</i> decision)</p>	<p>POSSIBLY YES. (Based on rationale of <i>Rocker</i> and <i>Rebernick</i> decisions)</p>	
	<p>YES. (Current law unchanged by CR 06-117)</p>	<p>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.))</p>	<p>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.))</p>	<p>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.))</p>	<p>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.))</p>	<p>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.))</p>

		<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 UM 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