



State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

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Wisconsin.gov

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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.

(i) Fiscal Effect

See fiscal estimate attached to proposed rule.

Attachment: Legislative Council Staff Recommendations
May 10, 2007