
**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
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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:	
A. State Costs by Category	Increased Costs	Decreased Costs
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.
GPR Taxes <small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>	\$ 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>

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Authorized Signature:	Telephone No. (608) 267-3782	Date (mm/dd/ccyy) 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.
 Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation
 Increase Costs - May be possible to Absorb Within Agency's Budget Yes No
 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 <input type="checkbox"/> Counties <input type="checkbox"/> Others _____
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"/> 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

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