

June 20007

A FIX FOR *REBERNICK V. WAUSAU GENERAL INS. CO.*

**WISCONSIN UNINSURED AND UNDERINSURED MOTORISTS RULES
Amendment of Wis. Adm. Code Ins 6.77**

The Wisconsin Office of the Commissioner of Insurance (“OCI”) has promulgated a permanent rule amending Wis. Adm. Code § 6.77 (the “Amendment”). The Amendment creates exemptions to the application of Wisconsin’s uninsured motorist (“UM”) and underinsured motorist (“UIM”) requirements in Wis. Stat. § 632.32(4) and (4m) for policies issued in Wisconsin that contain coverage for an insured’s liability arising out of the ownership, maintenance or use of motor vehicles. The Amendment also creates a UIM disclosure requirement for policies containing motor vehicle coverage. **The Amendment will become effective on July 1, 2007.** A copy of the Amendment is attached for your convenience.

Background

On March 30, 2006, the Wisconsin Supreme Court filed its opinion in *Rebernick v. Wausau General Insurance Company*, 2006 WI 27, 289 Wis. 2d 324, 711 N.W.2d 621. The Court held that personal umbrella and excess policies that contain coverage for the insured’s liability arising out of the ownership, maintenance or use of a motor vehicle registered or principally garaged in Wisconsin are subject to Wis. Stat. § 632.32(4m). Section 632.32(4m) requires insurers to give “written notice of the availability of underinsured motorist coverage.” Prior to *Rebernick*, § 632.32(4m) was thought to apply only to personal auto policies.

On the same day, the Wisconsin Supreme Court filed its opinion in *Rocker v. USAA Casualty Insurance Company*, 2006 WI 26, 289 Wis. 2d 294, 711 N.W.2d 634. Although *Rocker* did not interpret § 632.32(4m)¹, it broadly interpreted § 632.32(1) describing § 632.32’s scope to apply to any policy that includes motor vehicle coverage, unless a particular subsection of § 632.32 defines the scope of that subsection in a different way.

The *Rebernick* and *Rocker* decisions do not address every issue under § 632.32. However, the decisions, when read together, at least imply that unless a particular subsection of § 632.32 narrows the scope, any policy that includes any coverage for an insured’s “liability for loss or damage resulting from accident caused by any motor vehicle” will be subject to that subsection.

¹ *Rocker* interpreted Wis. Stat. § 632.32(1) to include a commercial general liability policy that provided nonowned motor vehicle coverage, and held that the policy was subject to § 632.32(6)(a), the subsection on motor vehicle handlers that was at issue in the case, since § 632.32(6)(a) did not contain language narrowing its scope.

The *Rebernick* and *Rocker* decisions resulted in the OCI promulgating an emergency rule in an attempt to clarify the requirements of § 632.32.

The Emergency Rule

Section Ins 6.77 of the Wisconsin Administrative Code already contained an exemption for all umbrella and excess policies (both commercial and personal) with limits of \$1,000,000 or more from the UM requirements in § 632.32(4). The emergency rule added the following exemptions:

- Commercial liability policies² were exempted from the UM requirements in § 632.32(4) and the UIM requirements in § 632.32(4m).
- Umbrella and excess policies (both commercial and personal) with limits of \$1,000,000 or more were exempted from the UIM requirements in § 632.32(4m).

The emergency rule did not address either personal or commercial auto policies. The emergency rule was effective on September 29, 2006. Under Wisconsin's emergency rule procedures, an emergency rule can remain in place for 150 days with two possible extensions of 60 days each. **The emergency rule therefore will remain effective through June 25, 2007.**

The Permanent Rule Amendment

The Amendment is not the same as the emergency rule. It is the result of a compromise between the insurance industry and the plaintiffs' bar. It has different exemptions and also requires a UIM disclosure.

The Exemptions

The Amendment exemptions are:

- Commercial liability policies³ that provide **only** coverage for nonowned motor vehicles are exempt from the UM requirements of § 632.32(4). All commercial liability policies that provide owned⁴ or owned **and** nonowned motor vehicle coverage are **not** exempted

² "Commercial liability policy" was defined in the emergency rule as "any form of commercial insurance contract providing coverage for the insured's liability arising out of the ownership, maintenance or use of an automobile or other motor vehicle. For purposes of this section, commercial liability policy includes policies written on farms and agricultural operations but excludes worker's compensation policies."

³ The definition of "commercial liability policy" in the Amendment is also different from that in the emergency rule. The Amendment's definition expressly includes business package policies within the definition of "commercial liability policy."

⁴ An "owned motor vehicle" includes a vehicle that is leased for six months or longer. Under this definition, vehicles under a long-term lease (six months or more) must be treated under the owned category and not under the nonowned category.

by the Amendment from the UM provisions.

- Commercial liability, commercial automobile liability, and umbrella and excess liability (both commercial and personal) policies are exempted from the UIM requirements in § 632.32(4m).

In addition, commercial and personal umbrella and excess policies with limits of \$1,000,000 or more are exempted from the UM requirements of § 632.32(4). This is not new – it has been in § Ins 6.77 since 1987.

The UIM Disclosure Requirement

In addition to the new exemptions, the Amendment creates a new requirement (§ Ins 6.77(6)) for all commercial liability, commercial automobile liability, and umbrella and excess liability (both commercial and personal) policies to “disclose” whether or not UIM is available under the policies. The disclosure must be made on the company’s policy application forms. If application forms are not used in any particular instance, the insurer must send the disclosure with delivery of the policy. The insured’s signature is not required on the application form or on the disclosure sent with the policy. For policies written on and after the effective date of the rule, insurers are only required to provide the disclosure with the initial policy. The disclosure requirement for new policies applies to policies issued after 150 days after the effective date of the rule.

There is also a one-time disclosure requirement for policies in effect on the effective date of the rule. Insurers must send the disclosure with either the notice of or the delivery of the first renewal of each such policy occurring after 120 days after the effective date of the rule.

Finally, the rule expressly states that it does not require insurers to provide underinsured motorist coverage. All that is required is the disclosure.

Please note that neither personal auto nor commercial auto are exempt from the UM requirements of § 632.32(4). Note as well that commercial liability policies that contain coverage for owned autos are not exempt from § 632.32(4). Finally, the Amendment does not exempt personal auto from the UIM requirements of § 632.32(4m). The OCI takes the position that § 632.32(4m) requires insurers writing personal auto policies to provide UIM coverage in at least the limits specified in § 632.32(4m) if the insured wishes to purchase it.

Timing Issues

The emergency rule became effective on September 29, 2006 and is effective through June 25, 2007. The Amendment will not be effective until July 1, 2007, leaving a gap of five days between the emergency rule and the permanent rule amendment. During that five-day period, Wis. Stat. § 632.32 and current § Ins 6.77 will apply. The only express exemption applicable will be umbrella and excess (both commercial and personal) policies from the UM requirements of § 632.32(4). There still are, of course, arguments on the application of § 632.32 that the Wisconsin courts have not answered. However, the *Rebernick* decision held that § 632.32(4m)

applies to personal umbrella and excess policies. And, under the *Rebernick* and *Rocker* decisions, it is possible that both § 632.32(4) (UM) and § 632.32(4m) (UIM) will also apply to any other type of policy that covers the insured for liability arising out of the ownership, maintenance and use of motor vehicles, although there have been no court decisions to date on these issues.

Important Dates

The relevant dates are:

- **The Emergency Rule is effective through June 25, 2007.**
- **The Amendment will be effective on July 1** (the first day of the month following publication).
- **The Amendment's UIM disclosure requirement is effective for new policies written on and after November 28, 2007** (150 days after the July 1 effective date of the Amendment). This is a one-time disclosure.
- **The Amendment's UIM disclosure requirement is effective for renewals on October 29, 2007** (with the first renewal of policies occurring after 120 days after the July 1 effective date). This is a one-time disclosure.

Company Action Items

- Determine how to handle policies issued during the five-day period between the expiration of the emergency rule on June 25, 2007 and the effective date of the exemptions in the Amendment of July 1, 2007.
- Amend application forms for the relevant policies to include UIM disclosure required by Wis. Adm. Code § Ins 6.77(6). All applications must be filed and approved by the OCI before use.
- Prepare disclosure to be sent with renewal policies.
- Prepare disclosure to be sent with delivery of policies when no application is taken.

Since the UIM notice that is currently required under Wis. Stat. § 632.32(4m) is not a filed form, it is unlikely that the OCI will require the filing of any disclosure required under Wis. Adm. Code § Ins 6.77 with the exception of the application forms.

If you have questions on the Amendment, please contact Noreen Parrett at (608) 251-1967 or e-mail at nparrett@parrettoconnell.com.