WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 06-117

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

2. Form, Style and Placement in Administrative Code

a. SECTION 3 creates a definition of "commercial liability policy" in s. Ins 6.77 (3) (c). This means it would follow the definition of "excess liability policy" in s. Ins 6.77 (3) (b). However, definitions must be in alphabetical order. [See s. 1.01 (7) (a), Manual.]

Rather than the renumbering proposed in SECTION 2 and the creation of s. Ins 6.77 (3) (c), the proposed rule could simply create s. Ins 6.77 (3) (am) to define "commercial liability policy." [See s. 1.03 (7), Manual.]

b. The amendment to s. Ins 6.77 (1) should be simplified to read: "ss. 631.36 (2) (b) and (c) and 632.32 (4) and (4m), Stats.," since reference to s. 632.32 (4m) is the only addition. (However, see the comment in item 3., below, about which statutes should be referred to in s. Ins 6.77 (1).)

c. In s. Ins 6.77 (4), ", Stats.," should be added following "631.36 (2) (a)."

d. In s. Ins 6.77 (4), "ss. 632.32 (4) and 632.32 (4m)," should be changed to "s. 632.32 (4) and (4m),".

3. Conflict With or Duplication of Existing Rules

Current s. Ins 6.77 (1) indicates that s. Ins 6.77 is intended to exempt certain classes of insurance contracts from s. 631.36 (2) ***(b) and (c)***, Stats. However, current and proposed s. Ins 6.77 (4) (a) indicates that umbrella or excess liability insurance policies are exempt from the

requirements of s. 631.36 (2) ***(a)***, Stats. It appears that reference to s. 631.36 (2) (a), Stats., should be added to s. Ins 6.77 (1).

On a related note, the reference in s. Ins 6.77 (1) to exempting certain classes of insurance contracts from s. 631.36 (2) (c), Stats., is confusing. Section 631.36 (2) (c), Stats., provides that s. 631.36 (2) (a) and (b), (6), and (7), Stats., do not apply to certain policies under certain circumstances. Thus, exempting certain policies from the exception provided in s. 631.36 (2) (c), Stats., means that the exception would ***not*** apply to them. Is that the intent of s. Ins 6.77 (1)? Or should s. Ins 6.77 (1) refer to exempting certain classes of insurance contracts from s. 631.36 (2) (a) and (b) (plus s. 632.32 (4) and (4m))?

A similar comment also may apply to existing s. Ins 6.77 (4) (b) which provides that war risks coverage of an aircraft insurance policy is exempt from the requirements of s. 631.36 (2) (c), Stats. However, that provision limits itself to the "requirements" of s. 631.36 (2) (c). There are no requirements in s. 631.36 (2) (c), although there is a provision that a cancellation does not become effective under s. 631.36 (2) (c) until at least 10 days after mailing or delivery of a notice of cancellation to the policyholder. It would be useful to clarify this.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Section 631.01 (5), Stats., permits the Commissioner of Insurance to exempt, by rule, any class of insurance contract or insurer from any or all provisions of ch. 631 or 632, Stats., if the interests of Wisconsin insureds or creditors or of the public do not require such regulation. The proposed rule states that it is based on this authority. However, nothing in the analysis explains that the commissioner has made this finding. An affirmative statement to this effect should be included; it also would be helpful to include the basis for such a statement. [Item 8. in the rule preface also could explain how the listed items support the rule proposal.]

b. The analysis does not refer to the two Wisconsin Supreme Court cases decided in 2006 that the proposed order apparently would undo, at least in future situations, namely, *Rebernick v. Wausau General Insurance* (2006 WI 27) and *Rocker v. USAA Casualty Insurance* (2006 WI 26).

The *Rebernick* court held, in pertinent part, that 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 ownership, maintenance, or use of a motor vehicle that does not include underinsured motorist coverage must provide notice to the insured about the availability of such coverage, and it also establishes minimum standards for such coverage. In contrast, the proposed rule would exempt personal umbrella policies and personal excess liability policies (and commercial liability policies, as discussed below) from s. 632.32 (4m), Stats.

Although the issue before the *Rocker* court specifically related to the provisions in s. 632.32 (6) (a), Stats., that concern 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. One of the defendant insurers argued that this would require its commercial liability policy to, in pertinent part, comply with s. 632.32 (4) and (4m), Stats. (Section 632.32 (4), Stats., requires uninsured motorist coverage and medical payments coverage; s. 632.32 (4m), Stats., requires notice of the availability of underinsured motorist coverage and establishes minimum standards for it.) The court responded that each subsection of s. 632.32 would have to be examined to determine if an exception applied to commercial liability policies. The statutes do not appear to provide any exception to s. 632.32 (4) or (4m), Stats., for commercial liability policies. However, the proposed rule would exempt commercial liability policies, including commercial umbrella liability policies and commercial excess liability policies, from the requirements of s. 632.32 (4) and (4m), Stats.

It would be useful if background about the two court decisions were provided in the analysis so that the Legislature understands the background of the proposed rule.

c. Item 5. of the analysis refers to umbrella policies and to commercial policies. However, the proposed rule also affects excess liability policies, which are defined differently than umbrella liability policies in s. Ins 6.77 (3). Thus, the analysis also should refer to the proposed rule's effect on excess liability policies. This comment also applies to the relating clause.

d. The proposed order includes the standard effective date provision. However, this does not make clear if the changes are intended to apply, for example, to existing policies or to policies issued or renewed after the effective date, or both, or to claims incurred but unreported prior to the effective date or claims incurred on or after the effective date, or both. Depending on what is intended, an initial applicability date may be appropriate.