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Details: Complaints.

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules ...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)

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September 8, 2009

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Representative Josh Zepnick, Co-Chair
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Joint Committee for Review of Administrative Rules
Senator Jim Holperin, Co-Chair
Room 409 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

**RE: Michelle B. Wadzinski v. Auto-Owners Insurance Company
Brown County Case No.: 07-CV-1827**

Dear Representative Zepnick and Senator Holperin:

Enclosed please find copies of pleadings filed in Brown County Court, including the parties' cross-motions for summary judgment, responses and replies.

By way of background, this is an insurance coverage dispute regarding UM coverage in a Commercial and Executive Umbrella policy. It has become apparent during summary judgment briefing that the constitutionality of Wis. Admin. Code § 6.77 (which exempts all umbrella policies from the requirements of Wis. Stat. § 632) is at issue.

We are therefore forwarding these pleadings pursuant to Wisconsin Statutes Section 806.04(11). We have also forwarded copies to the Attorney General's office.

September 8, 2009

Page 2

Very truly yours,

LIEBMANN, CONWAY, OLEJNICZAK & JERRY, S.C.

By: Dawn M. Korver
Dawn M. Korver

DMK:c11 (450605.178-#584198)

Enclosures

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH VIII

BROWN COUNTY

MICHELLE B. WADZINSKI, individ-
ually and as personal represen-
tative of the ESTATE OF
STEVEN W. WADZINSKI,

RECEIVED OCT 30 2007

ANSWER

Plaintiff,

Case No. 07 CV 1827

vs.

Code No. 30303

AUTO-OWNERS INSURANCE COMPANY,

Defendant.

NOW COMES the defendant, Auto-Owners Insurance Company, by its attorneys, Everson, Whitney, Everson & Brehm, S.C., and by way of Answer to the plaintiff's Complaint, admits, denies and affirmatively alleges as follows:

1. In answering paragraphs 1 and 2 of the plaintiff's Complaint, admits the allegations contained therein, upon information and belief.

2. In answering paragraph 3 of the plaintiff's Complaint, admits that, at all material times hereto, Auto-Owners Insurance Company had issued a policy of commercial auto insurance to or on behalf of Pecard Chemical Company, Inc., but affirmatively alleges that said policy was and is subject to all the terms, conditions, limitations and exclusions set forth therein, as well as the laws of the State of Wisconsin. In further answering said paragraph, presently denies having sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained therein and, accordingly, denies the same and puts the plaintiff to her proof thereon.

3. In answering paragraph 4 of the plaintiff's Complaint, admits that, at all material times hereto, Auto-Owners Insurance Company had issued a commercial umbrella policy to or on behalf of Pecard Chemical Company, Inc. and an executive policy to or on behalf of Steven W. Wadzinski, but affirmatively alleges that said policies were and are subject to all the terms, conditions, limitations and exclusions set forth therein, as well as the laws of the State of Wisconsin, and in further answering said paragraph, presently denies having sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained therein and, accordingly, denies the same and puts the plaintiff to her proof thereon.

4. In answering paragraphs 5, 6, 7, 8 and 9 of the plaintiff's Complaint, presently denies having sufficient knowledge or information to form a belief as to the truth of the allegations contained therein and, accordingly, denies the same and puts the plaintiff to her proof thereon.

5. In answering paragraph 10 of the plaintiff's Complaint, admits the allegations contained therein, upon information and belief, and affirmatively alleges that said payment was subject to all the terms, conditions, limitations and exclusions set forth in a release governing the settlement of said claim.

6. In answering paragraph 11 of the plaintiff's Complaint, denies all of the allegations contained therein and denies that Auto-Owners Insurance Company had any obligation to

make any payment under the umbrella policy referenced in said paragraph.

AFFIRMATIVE DEFENSES

As and for its separate and affirmative defenses to the plaintiff's Complaint, this defendant alleges and shows to the Court as follows:

7. That, upon information and belief, plaintiff's Complaint, in one or more respects, fails to state a claim upon which relief can be granted as against this answering defendant.

8. That, upon information and belief, the plaintiff has failed to join necessary and proper parties to this action pursuant to Wisconsin Statutes Section 803.03.

9. That, upon information and belief, based upon the facts and circumstances of this claim, as a matter of public policy, Auto-Owners Insurance Company may not be held liable to the plaintiff.

10. That, upon information and belief, at the time of the accident referenced in the plaintiff's Complaint, the type of uninsured motorist coverage through which plaintiff now seeks to recover against Auto-Owners Insurance Company was not even offered by Auto-Owners Insurance Company to its insureds and therefore, this claim must fail.

11. That, upon information and belief, given the facts and circumstances of this case, and the policy/policies issued to Pecard/Wadzinski, there is no coverage under the statutory or case law scheme of the State of Wisconsin.

12. That, upon information and belief, even if there was in existence, under any theory of law, the type of coverage under which the plaintiff seeks to recover in this case, any such coverage was excluded under the policy or policies at issue.

13. That, upon information and belief, even if there was in existence, under any theory of law, the type of coverage under which the plaintiff seeks to recover in this case, the insured failed to comply with one or more conditions precedent or policy requirements which otherwise, arguably, would have entitled the plaintiff to make a claim for uninsured motorist coverage under the umbrella policy, or otherwise, including but not limited to a failure to meet the contractual requirements for underlying policy limits.

14. That, upon information and belief, the insured was notified of the availability of uninsured motorist coverage by an independent agency but elected to purchase UM limits of 150,000/300,000 only, which amount has previously been paid to the plaintiff.

15. That, upon information and belief, to the extent that the plaintiff claims relief as a result of Auto-Owners' alleged failure to provide notice of the availability of uninsured motorist coverage, the plaintiff has suffered no damages as a result thereof, since the plaintiff chose to only purchase uninsured motorist coverage limits of \$150,000.00, when limits of \$1,000,000.00 were offered for purchase.

16. That, upon information and belief, even if it is determined that Auto-Owners Insurance Company would be required to provide UM coverage of the sort alleged in the plaintiff's Complaint, such coverage would be limited to the minimum amount required under Wisconsin law.

17. That, upon information and belief, even if Auto-Owners was required to offer uninsured motorist coverage under its umbrella policy for failure to provide notice of the availability of uninsured motorist coverage, the limits would be those required by Wisconsin law, \$25,000.00 per person and \$50,000.00 per accident, under Wisconsin Statutes Section 632.32(4)(a).

18. That, upon information and belief, coverage under the Auto-Owners umbrella policy and following forms was subject to the maintenance of underlying policy conditions which require coverage under the underlying auto policy to be \$500,000.00, yet the insured purchased only \$150,000.00 limits for uninsured motorist coverage in the scheduled underlying policy. Therefore, if it is somehow determined that Auto-Owners Insurance Company had or should have had uninsured motorist coverage, it still would have been subject to the required underlying schedule of \$500,000.00, but the insured purchased only \$150,000.00 in coverage, with a "gap" remaining of \$350,000.00.

19. That this defendant reserves the right to supplement these affirmative defenses to include any and all affirmative defenses set forth in Wisconsin Statutes Sections 802.02 and

802.06, to include affirmative defenses of contributory negligence, if the facts, as developed, warrant the same.

WHEREFORE, this answering defendant respectfully demands judgment as follows:

A. Dismissal of the plaintiff's Complaint, on the merits, with prejudice;

B. For the right to plead additional affirmative defenses as they are discovered in the course of this action;

C. For a declaration that Auto-Owners Insurance Company has no obligation to pay under the facts and circumstances of this case, has no coverage as asserted in the plaintiff's Complaint and had no applicable policy in effect at the time of the incident in question;

D. For the costs and disbursements of this action;

E. For such other and further relief as the Court may deem just and equitable.

Dated at Green Bay, Wisconsin this 29th day of October, 2007.

EVERSON, WHITNEY,
EVERSON & BREHM, S.C.

Attorneys for Defendant
Auto-Owners Insurance Company

By: 
John M. Thompson

P. O. ADDRESS:
P. O. Box 22248
Green Bay, WI 54305-2248
(920) 435-3734
Attorney Bar No. 01017188
JMT:ams1022-7

I certify that on October 29, 2007, I served the within document by mail postage prepaid, pursuant to Rule 801.14(2), Wis. Rules of Civil Procedure.

EVERSON, WHITNEY, EVERSON &
BREHM, S.C.

BY: Angela M. Zills
TO: Attorney George Burnett

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 8

BROWN COUNTY

MICHELLE B. WADZINSKI, individually
and as personal representative of the
ESTATE OF STEVEN M. WADZINSKI,

Plaintiff,

vs.

AUTO-OWNERS INSURANCE COMPANY

Defendant.

RECEIVED JUL 17 2009

Case No. 07 CV 1827

Case Code: 30303

NOTICE OF MOTION FOR SUMMARY JUDGMENT

TO: Mr. R. George Burnett
Attorney for Plaintiff
Post Office Box 23200
Green Bay, WI 54305-3200

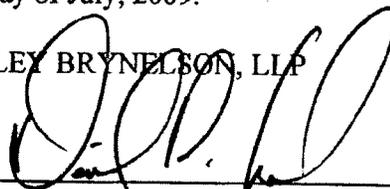
Mr. John M. Thompson
Attorney for Auto-Owners Insurance Co.
Post Office Box 22248
Green Bay, WI 54305-2248

PLEASE TAKE NOTICE that Defendant Auto-Owners Insurance Company, by its attorneys Axley Brynson, LLP, by Arthur Kurtz and Daniel P. McAlvanah, hereby requests that this Court enter an appropriate order declaring, as a matter of law, that plaintiff is not entitled to uninsured motorist coverage under the umbrella policy issued to Pecard Chemical Company, Inc and attached as Exhibit "B" to the accompanying Affidavit of Rod Vandyk. This motion will be heard at a time and date to be set by the Court.

This motion is based on Wis. Stat. § 802.08(2), the file and record of these proceedings, the accompanying Affidavit of Rod Vandyk, and Motion for Summary Judgment.

Respectfully submitted this 16th day of July, 2009.

AXLEY BRYNELSON, LLP

By 

Arthur E. Kurtz, SBN: 1003525

Daniel P. McAlvanah, SBN: 1060064

Attorneys for Defendant, Auto-Owners Insurance Company

2 East Mifflin Street/P.O. Box 1767

Madison, WI 53703/53701-1767

608/257-5661

MICHELLE B. WADZINSKI, individually
and as personal representative of the
ESTATE OF STEVEN M. WADZINSKI,

RECEIVED JUL 17 2009

Plaintiff,

Case No. 07 CV 1827

vs.

Case Code: 30303

AUTO-OWNERS INSURANCE COMPANY

Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Auto-Owners Insurance Company ("Auto-Owners"), by its attorneys Axley Brynson, LLP, by Arthur Kurtz and Daniel P. McAlvanah, respectfully requests that this Court enter an appropriate order declaring, as a matter of law, that plaintiff is not entitled to uninsured motorist coverage under the umbrella policy that Auto-Owners issued to Pecard Chemical Company, Inc. This motion is based on Wis. Stat. § 802.08(2), the accompanying Affidavit of Rod Vandyk, the file and record of these proceedings, and the following grounds:

INTRODUCTION AND FACTUAL BACKGROUND

The Plaintiff, Steven Wadzinski was operating a motorcycle that was involved in an accident that occurred on August 3, 2006 in Door County, Wisconsin. (Complaint at ¶¶ 5, 6). The vehicle that struck Mr. Wadzinski was operated by an uninsured driver. (Complaint at ¶ 6). Mr. Wadzinski died as a result of the accident. (Complaint at ¶ 7).

At the time of the accident, Mr. Wadzinski, through his company, had a commercial automobile policy (the "underlying policy") and a commercial and executive umbrella policy

(the “umbrella policy”) with Auto-Owners. (Affidavit of Rod Vandyk, ¶¶ 2-3). The declarations page of the underlying policy shows uninsured motorist (UM) coverage in the amount of \$150,000 per person and \$300,000 per occurrence. (Id., Exhibit “A”). At the time of the accident, Mr. Wadzinski was an insured under the terms of the underlying policy. (Id.).

Auto-Owners paid Mr. Wadzinski’s estate \$150,000 under the UM provisions of the commercial automobile policy. (Complaint at ¶ 10). Mr. Wadzinski’s estate now seeks UM coverage under the umbrella policy, which does not explicitly provide for uninsured motorist coverage and includes the following exclusions:

**EXCLUSION OF PERSONAL INJURY TO INSUREDS
FOLLOWING FORM**

We do not cover personal injury to you or a relative. We will cover such injury to the extent that insurance is provided by an underlying policy listed in Schedule A.

(Following Form 26265 (3-86)).

**AUTOMOBILE LIABILITY—FOLLOWING FORM
Commercial Umbrella Policy**

It is agreed:

The following exclusion is added to the **EXCLUSIONS** section of the policy:

Bodily injury . . . arising out of the ownership, maintenance, operation, use, entrustment, loading or unloading of any automobile. Except when otherwise excluded by this policy, this exclusion does not apply if any **scheduled underlying insurance** shown in the Declarations under the Schedule of Underlying Insurance provides such coverage and is maintained:

1. At the agreed liability limits shown in the Schedule of Underlying Insurance; and
2. In accordance with the **Maintenance of Underlying Insurance** condition.

(Following Form 27824 (7-05)).

EXCLUSIONS

This policy does not apply to:

...

E. Liability for injury or damages to you or any other insured.

...

P. **Bodily injury** . . . arising out of uninsured motorist, underinsured motorist, underinsured motorist, **automobile** no-fault, personal injury protection or other similar law.

(Umbrella Policy, pp. 8, 12).

Auto-Owners now moves for summary judgment and specifically requests that this Court order that the Plaintiff is not entitled to UM coverage under the umbrella policy as a matter of law. This is for three reasons. First, the umbrella policy clearly and unambiguously excludes an additional claim for UM coverage. In addition, the exclusionary language is enforceable under established precedent which confirms that UM coverage is not required under an umbrella policy pursuant to Wis. Stat. § 632.32(4)(a). Finally, there is nothing in the language of the umbrella policy, or its exclusions, that confers UM coverage to the plaintiff. For these reasons, plaintiff's complaint should be dismissed, on the merits and with prejudice.

APPLICABLE STANDARD OF REVIEW

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. § 802.08(2). "The construction of words and phrases in insurance policies is generally a matter of law and is controlled by the same rules of construction as are applied to contracts generally." Kremers-Urban Co. v. American Employers Ins. Co., 119 Wis.2d 722, 735,

351 N.W.2d 156 (1984). Where, as here, the only issue is the construction and legal effect of an unambiguous document, only a question of law is presented, which is determined by summary judgment. Negus v. Madison Gas & Elec. Co., 112 Wis.2d 52, 58, 331 N.W.2d 658 (Ct. App. 1983).

ARGUMENT

Auto-Owners is entitled to summary judgment on plaintiff's claim for UM coverage under the umbrella policy because the unambiguous language of the insurance certificate makes it clear that UM coverage is not contemplated by the parties' agreement. Moreover, Auto-Owners was not required to provide UM coverage under the umbrella policy pursuant to Wis. Stat. § 632.32(4)(a). For these reasons, plaintiff is not entitled to UM coverage under the umbrella policy as a matter of law.

I. The Umbrella Policy Specifically Excludes UM Coverage.

The umbrella policy specifically excludes coverage for injury to the insured and injury "arising out of uninsured motorist" or "any other similar law." The only reasonable and sensible interpretation of these related provisions is that the umbrella policy specifically excludes the UM coverage that plaintiff seeks in its complaint.

Wisconsin Courts have enforced similar exclusionary language for underinsured (UIM) coverage in umbrella or excess policies. In Muehlenbein v. West Bend Mutual Ins. Co., 175 Wis.2d 259 (Ct. App. 1993), the plaintiff was seriously injured while driving a vehicle, owned by his employer, that was insured under a commercial automobile insurance policy and an umbrella policy issued by West Bend. The plaintiff recovered the policy limits for UIM coverage under the automobile policy and then turned to West Bend's umbrella policy for additional UIM coverage. However, West Bend's umbrella policy included an endorsement which specifically

stated that “[w]e do not cover any claim or obligation imposed by an Uninsured or Underinsured Motorists law, or which is covered by the Uninsured or Underinsured Motorist Coverage part of any insurance policy covering you as an insured person.” Muehlenbein at 175 Wis.2d at 262-263. The Circuit Court granted summary judgment to West Bend after concluding that the umbrella policy did not provide additional UIM coverage.

The Wisconsin Court of Appeals affirmed. In support of its conclusion, the court noted that the umbrella policy was intended to be a liability policy that did not reimburse the insured for his or her own loss. Instead, the policy “protects the insured against damages which he may be liable to pay to other persons by virtue of his own actions.” Meuhlenbein at 175 Wis.2d at 266. In this respect, the court concluded that “[d]amage caused by an uninsured or underinsured motorist is not damage for which Muehlenbein’s employer, Servicemaster, is liable by virtue of Muehlenbein’s actions.” Meuhlenbein at 175 Wis. 2d at 267. Turning to the language of the endorsement, the court concluded that its language “clearly and unambiguously excludes coverage for any claim that is covered under the uninsured or underinsured motorist provision of any policy covering the insured.” Id. at 269.

The Court of Appeals reached a similar conclusion in Jaderborg v. American Family Mutual Insurance Co., 2000 WI App. 246, 239 Wis.2d 533. In Jaderborg, the plaintiff was injured in an accident in which the tort-feasor’s carrier paid the policy limits of \$50,000. The plaintiff also had an automobile insurance policy with American Family that included an underinsured motorist endorsement. After enforcing the reducing clause, American Family paid \$50,000 in UIM benefits to the plaintiff. American Family also issued an umbrella policy to the plaintiff which included the following exclusion:

“Uninsured/Underinsured Motorists. We will not cover any claims which may be made under Uninsured Motorists Coverage, Underinsured Motorists Coverage or similar coverage, unless this policy is endorsed to provide such coverage.”

Even though it was undisputed that the umbrella policy did not include an endorsement for underinsured motorist coverage, plaintiff sought to secure underinsured motorist coverage under the policy. In reversing the trial court’s grant of coverage, the Court of Appeals plainly stated as follows: “According to the clear and unambiguous terms of the underinsured motorist exclusion, no underinsured coverage is afforded without the necessary endorsement. It is undisputed that the exclusion is not endorsed to provide underinsured coverage.” Jaderborg at 2000 WI App. 246 at ¶ 7.

The same result should follow here. As Muehlenbein and Jaderborg instruct, UIM exclusions found within an umbrella policy are enforceable. Here, the umbrella policy specifically and unambiguously excludes coverage for injury or damages to the insured, as well as bodily injury “arising out of uninsured motorist, underinsured motorist, automobile no-fault, injury protection or any other similar law.” This language provides a specific exclusion that completely negates plaintiff’s request for UM coverage under the umbrella policy. For these reasons, this Court should enter an appropriate order declaring that plaintiff is not entitled to uninsured motorist coverage under the umbrella policy referenced in its complaint.

II. Auto-Owners Was Not Required to Provide UM Coverage Under the Umbrella Policy.

In attempting to secure UM coverage, plaintiff may argue that Wis. Stat. § 632.32(4)(a) required Auto-Owners to provide UM coverage under the umbrella policy. Section 632.32(4)(a) requires that motor vehicle liability policies include UM coverage:

Every policy of insurance subject to this section that insures with respect to any motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by any person

arising out of the ownership, maintenance or use of a motor vehicle shall contain . . . the following provisions:

(a) *Uninsured motorist*. 1. For the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom.

Wis. Stat. § 632.32(4)(a)

Section 632.32(4), however, is limited by Wis. Stat. § 631.01(5), which permits the insurance commissioner to “by rule exempt any class of insurance contract or insurer from any or all of the provisions of this chapter and ch. 632 if the interests of Wisconsin insureds or creditors or of the public of this state do not require such regulation.” In 1987, the Wisconsin Commissioner of Insurance exercised the authority under this statute to exempt umbrella policies from the requirements of Wis. Stat. § 632.32(4). See Rebernick v. Wausau Gen. Ins. Co., 2006 WI 27, ¶ 27, 289 Wis.2d 324, 711 N.W.2d 621. This exemption was codified in Wis. Admin. Code § Ins. 6.77(4)(a), which provides that “any umbrella or excess liability insurance policy is exempt from the requirements of . . . § 632.32(4).”

Based on the foregoing, the Wisconsin Court of Appeals recently held that an insurance company was not required to provide UM coverage in an umbrella policy under Wis. Stat. § 632.32(4)(a). Etter v. State Farm Mut. Auto. Ins. Co., 2008 WI App 168, 314 Wis. 2d 678, 761 N.W.2d 26; *petition for review denied* 2009 WI 23, 764 N.W.2d 523. In Etter, representatives for a deceased policeman sought UM coverage under an umbrella policy. In support of this demand, the Etters argues that Wis. Stat. § 632.32(4)(a) requires personal liability umbrella policies to include UM coverage. Etter at 2008 WI App at ¶ 16. The Court of Appeals rejected this argument, stating as follows: “Wisconsin Stat. § 631.01(5) is clear. It permits the Commissioner to exempt insurers from including UM coverage in umbrella

policies. The Commissioner did just that with Wis. Admin. Code. § Ins. 6.77(4)(a). The Etters' policy was not required to provide UM coverage." Etter at 2008 WI App at ¶ 16.

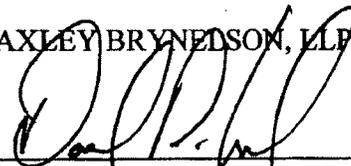
For identical reasons, Auto-Owners is not required to provide UM coverage to plaintiff in the instant case. Accordingly, this Court should enter summary judgment declaring that plaintiff is not entitled to UM coverage under the umbrella policy as a matter of law.

CONCLUSION

For the reasons set forth above, defendant respectfully requests that the Court dismiss plaintiff's complaint with prejudice, and enter an order declaring, as a matter of law, that plaintiff is not entitled to uninsured motorist coverage under the umbrella policy referenced in plaintiff's complaint.

Respectfully submitted this 16th day of July, 2009.

AXLEY BRYNEDSON, LLP



Arthur E. Kurtz, SBN: 1003525

Daniel P. McAlvanah, SBN: 1060064

Attorneys for Defendant, Auto-Owners Insurance Company

2 East Mifflin Street/P.O. Box 1767

Madison, WI 53703/53701-1767

608/257-5661

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH VIII

BROWN COUNTY

MICHELLE B. WADZINSKI, individually
and as personal representative of the
ESTATE OF STEVEN W. WADZINSKI
1036 South Webster Street
Green Bay, Wisconsin 54301,

Classification Code: 30303

Plaintiff,

Case No.: 07-CV-1827

-VS-

AUTO-OWNERS INSURANCE COMPANY
c/o David L. Zumwalt, Registered Agent
4330 Golf Terrace Boulevard, Suite 205
Eau Claire, Wisconsin 54701,

AUTHENTICATED COPY
FILED

07 20

Defendant.

LISA M. WILSON
CLERK OF COURTS
BROWN COUNTY, WI

**PLAINTIFF'S NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

NOTICE OF MOTION

PLEASE TAKE NOTICE that on a date and time to be determined by the Court,
Plaintiff, Michelle B. Wadzinski, individually and as personal representative of the Estate of
Steven W. Wadzinski, by and through her attorneys, Liebmann, Conway, Olejniczak & Jerry,
S.C., will bring the following motion before the Honorable William M. Atkinson, in his
courtroom in the Brown County Courthouse, 100 S. Jefferson Street, Green Bay, Wisconsin,
54301.

MOTION

Plaintiffs moves the Court to enter summary judgment that as a matter of law, Plaintiff is
entitled to Uninsured Motorist coverage under the Umbrella insurance policy attached as Exhibit
1 to the accompanying Affidavit of Michelle B. Wadzinski. This motion is made pursuant to

Wis. Stat. § 802.08(2), the file and record of these proceedings, the Affidavit of Michelle B. Wadzinski, and the Motion and Brief in Support of Summary Judgment.

Dated this 20th day of July, 2009.

LIEBMANN, CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Plaintiff, Michelle B. Wadzinski, individually
and as personal representative of the Estate of Steven W.
Wadzinski

By: 
George Burnett
Dawn M. Korver

POST OFFICE ADDRESS
231 South Adams Street
Green Bay, WI 54301
P.O. Box 23200
Green Bay, WI 54305-3200
(920) 437-0476
State Bar Nos. 1005964/1058813

The undersigned certifies that a true copy of the within was served by U.S. Mail upon all attorneys of record pursuant to Wis. Stat. Sec. 801.14, this 20th day of July, 2009.


Rosemary Brunner

(450605.178-#558804)

STATE OF WISCONSIN
COUNTY

CIRCUIT COURT
BRANCH VIII

BROWN

MICHELLE B. WADZINSKI, individually
and as personal representative of the
ESTATE OF STEVEN W. WADZINSKI

Plaintiff,

Case No.: 07-CV-1827

-vs-

AUTHENTICATED COPY
FILED

AUTO-OWNERS INSURANCE COMPANY

Defendant.

LISA M. WILSON
CLERK OF COURTS
BROWN COUNTY, WI

BRIEF IN SUPPORT OF SUMMARY JUDGMENT

NOW COMES the Plaintiff, Michelle B. Wadzinski, individually and as personal representative of the Estate of Steven W. Wadzinski, by and through her attorneys, Liebmann, Conway, Olejniczak & Jerry, S.C., and submits this brief in support of her Motion for Summary Judgment.

INTRODUCTION AND FACTUAL BACKGROUND

This insurance coverage dispute arises out of a tragic accident which occurred on August 3, 2006. Laura J. Beck-Nielson, an uninsured motorist driving her husband's car, negligently struck Steven W. Wadzinski ("Wadzinsk") while he was operating a 2004 Ducati 749R motorcycle (the "Motorcycle") near Maple Grove Road and Gibraltar Road in Fish Creek, Door County, Wisconsin. Wadzinski suffered severe injuries and died shortly thereafter.

Wadzinski was the owner and CEO of Pecard Chemical Company, Inc. ("Pecard"). At the time of the collision, Auto-Owners Insurance Company ("Auto-Owners") had issued

to Pecard and Wadzinski a total of eight (8) different insurance policies. Three are relevant to this dispute.

First, Auto-Owners issued a Commercial Auto Insurance policy, Policy Number 41-321-013-00 (the "Auto Policy"), for Pecard Chemical Company, Inc. ("Pecard"), covering motor vehicles owned by Pecard, including the Motorcycle driven by Wadzinski at the time of his death. Mr. Wadzinski was an insured under the Auto Policy. The coverage on the Motorcycle included bodily injury, property damage, uninsured motorist, underinsured motorist, medical payment, comprehensive, and collision.

Auto-Owners also issued Pecard and Wadzinski a policy entitled "Commercial and Executive Umbrella Policy Number 96-886-558-00. (Affidavit of Michelle B. Wadzinski, Exhibit 1). Although one policy, the Commercial Umbrella Policy and The Executive Umbrella Policy each contain very different terms and conditions. The two umbrellas have: Different table of contents in different formats with different wording; separate Declaration pages for each policy, different "Definitions" sections, and different exclusions and "Following Forms". The pages are numbered differently and are not in sequence as related to each other. In addition, the Commercial Umbrella and Executive Umbrella have different coverage provisions. Relevant here is that the Commercial Umbrella has an exclusion for UM claims while the Executive Umbrella does not.

Both Umbrellas required that automobile liability insurance be maintained as an "underlying policy" in Schedule A as a condition of coverage. The Auto Policy that underlies both Umbrellas contained UM coverage, as required under Wis. Stat. § 632.32(4).

The Executive Umbrella contains an Endorsement adding an exclusion for injuries sustained while "occupying" a motorcycle. However, the Endorsement contains an

exception to the exclusion for insurance contained in an underlying policy listed in Schedule

A.

BODILY INJURY FOLLOWING FORM ENDORSEMENT

We agree the following exclusion is added:

We do not cover bodily injury to passengers while occupying or getting on or off a motorcycle, moped or recreational vehicle which an insured owns, hires or borrows.

We will cover such injury:

1. *to the extent that insurance is provided by an underlying policy as listed in Schedule A; and*
2. subject to the Maintenance of Underlying Insurance Condition.

((Form 26083 (1-85)).

SUMMARY JUDGEMENT STANDARD

The interpretation of an insurance policy's language is a question of law commonly decided on summary judgment. Commercial Union Midwest Ins. Co. v. Vorbeck, 269 Wis.2d 204, 211-12, 674 N.W.2d 665 (2003). A policy is interpreted under the same rules of construction as other contracts, with an eye towards fulfilling the insured's reasonable expectation of coverage. Kremers-Urban Co. v. American Employers Ins. Co., 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). Ambiguities are to be construed in favor of coverage. Folkman v. Quamme, 2003 WI 116, ¶¶ 13, 15, 264 Wis.2d at 631, 665 N.W.2d at 864-65.

ARGUMENT

I. THE POLICY CONFERS UM COVERAGE.

A. A reasonable Insured Would Expect UM Coverage.

Umbrella policies are meant to provide another layer of protection to primary policies. An insured buys an 'umbrella' to cover those risks and contingencies that the

insured has protected himself against in an underlying insurance policy. If the insured does not maintain the specified underlying policy, the umbrella does not provide extra protection for any losses. If, however, the insured *does* maintain the required underlying insurance, the policy will cover those 'net losses' that exceed the primary policy limits of the underlying policy. Here, the Executive Umbrella policy provides”:

COVERAGES

PERSONAL LIABILITY

We will pay on behalf of the insured the ultimate net loss in excess of the retained limit which the insured becomes legally obligated to pay as damages because of personal injury or property damage which occurs anywhere in the world.

(Executive Umbrella Policy, p. 3 or 6).

The 'retained limit' refers to the limits stated for each policy listed or insurance described in Schedule A. (*Id.*, p. 2 of 6). Schedule A, 'Underlying Insurance Requirements' require Automobile Liability as underlying insurance. (Executive Umbrella, Declarations p. 2). A reasonable insured would therefore conclude that the risks and contingencies covered by any underlying policy are also covered by the umbrella. In addition, anyone in Wisconsin who buys auto insurance knows that UM insurance must be included in all auto policies. Wis. Stat. §632.324(a). Since UM coverage is included in the underlying Auto Policy, and the Auto Policy is required by the Executive Umbrella, an insured would reasonably conclude that the umbrella covers the UM risk.

Of course, an insurance company could choose to explicitly exclude UM coverage from the policy, thereby making the insured aware that such coverage is not included. Auto Owners did just that, but *only* in the Commercial Umbrella Policy. The Commercial Umbrella states:

Exclusions

- P. Bodily Injury or property damage arising out of uninsured motorist, underinsured motorist, automobile no-fault, personal injury protection or any other similar law

(Commercial Umbrella Policy, p. 12 of 20).

This exclusion of UM coverage is glaringly absent from the exclusions in the Executive Umbrella, thereby reinforcing the expectation that UM coverage is afforded under the Executive.

B. The Policy, When Read as a Whole, is Ambiguous and Creates a Reasonable Expectation of UM Coverage.

The interpretation of an insurance contract must be determined from the four corners of the insurance policy itself and the policy as a whole must be considered to give reasonable meaning to every provision. Kraemer Bros. v. United States Fire Ins. Co., 89 Wis.2d 555, 562, 278 N.W.2d 857, 860 (1979). “[T]he meaning of a particular provision in the contract is to be ascertained with reference to the contract as a whole.” Folkman v. Quamme, 2003 WI 116, ¶ 24, 264 Wis.2d at 634-35, 665 N.W.2d at 866. Viewing the policy under these constructs, UM coverage is afforded because the policy is ambiguous and leads a reasonable insured to expect UM coverage.

Policy language is ambiguous “if it is susceptible to more than one reasonable interpretation.” Id., 2003 WI 116, ¶ 13, 264 Wis.2d at 631, 665 N.W.2d at 864. Ambiguous clauses are interpreted in favor of the insured as the insurers have an advantage over the insured as they draft the contract. Id., 2003 WI 116, ¶¶ 13, 15, 264 Wis.2d at 631, 665 N.W.2d at 864-65.

The policy here is ambiguous and must be construed in favor of the insured. First, the policy requires that the insured maintain an underlying Auto Policy, and states that coverage will be afforded for all amounts in excess of the retained limits of each underlying policy. Because the underlying Auto Policy insures for UM damages, it is logical that an insured would expect that the umbrella covers the same risks and losses.

Second, the umbrella contains certain exclusions that also contain exceptions, thereby creating an ambiguity as to what is really covered. For example:

EXCLUSION OF PERSONAL INJURY TO INSUREDS

FOLLOWING FORM

We do not cover personal injury to you or a relative. We will cover such injury to the extent that insurance is provided by an underlying policy listed in Schedule A.

(Form 26265 (3-86) (emphasis added).

If Auto Owners meant to exclude personal injury to the insured, even for injuries covered by underlying insurance in Schedule A, why include the second sentence at all? Policies must be interpreted to give meaning to all terms. This exclusion has an exception that explicitly states Auto Owners will cover personal injuries if provided in underlying insurance. Therefore the language is ambiguous and should be read in favor of coverage.

Similarly, the exclusion for injuries sustained while occupying a motorcycle has the same contradictory, ambiguous language:

BODILY INJURY FOLLOWING FORM ENDORSEMENT

We agree the following exclusion is added:

We do not cover bodily injury to passengers while occupying or getting on or off a motorcycle, moped or recreational vehicle which an insured owns, hires or borrows.

We will cover such injury:

3. *to the extent that insurance is provided by an underlying policy as listed in Schedule A; and*
4. subject to the Maintenance of Underlying Insurance Condition.

((Form 26083 (1-85)).

Auto Owners could have simply excluded bodily injury, but instead created an exception for injuries covered in insurance provided in an underlying policy. Here, the underlying Auto Policy covered the Ducati motorcycle Mr. Wadzinski was riding at the time of his death, and also provided UM coverage. It is therefore reasonable to expect such coverage would be included in the Umbrella. To interpret this any other way would mean that the language in numbers 3 and 4, above, is meaningless surplus.

Finally, here (as distinguished from Etters, infra), we have what appears to be two separate, distinct policies, each with its own declarations, exclusions and endorsements. The Commercial Umbrella, for example, has 30 exclusions, while the Executive Umbrella has 7. Strikingly, the Commercial Umbrella specifically excludes UM damages, not in an amendatory endorsement, but within its "Coverages and Exclusions" section. (Exclusion 'P', Commercial Umbrella Policy, p. 12 of 20). The Executive Umbrella contains no such UM exclusion. The two Umbrellas have very different terms, yet both Umbrellas were presented to the Wadzinskis as one policy under a single policy number, 96-886-558-00. The question is, was there one policy or two? How did they relate to one another? Both policies required the same underlying auto insurance and appeared to provide excess coverage for those risks,

but only the Commercial Umbrella negated a part of that auto coverage through its' UM exclusion.

Considering the Commercial and Executive Umbrella policy as a whole, including apparent UM coverage by virtue of the underlying Auto Policy, an exclusion with an exception, and "two policies in one" with different treatment of UM coverage, the policy as a whole is undeniably ambiguous and must be interpreted in favor of the insured.

Even if the two policies were separate, the fact that Auto Owners chose to exclude UM coverage under only one type of umbrella would still lead the insurer to expect that coverage remained intact in the other.) As the Folkman court stated, "... ambiguity-producing language cannot be deleted to cure ambiguity. After all, an insured attempting to make a reasonable interpretation of his or her policy may not ignore language that is seemingly relevant to a provision whose meaning is to be ascertained." 2003 WI 116, ¶ 34, 264 Wis.2d at 642, 665 N.W.2d at 869-70. As such, courts have "the authority to construe an insurance contract in favor of the insured when a policy is so ambiguous or obscure, or deceptive that it befuddles the understanding and expectations of a reasonable insured." Commercial Union Midwest Ins. Co. v. Vorbeck, 2004 WI App 11, ¶ 10, 269 Wis.2d 204, 214, 674 N.W.2d 665, 670 (internal cites omitted). Auto Owners two-in-one Commercial and Executive Umbrella Policy is a prime example of 'deceptive and befuddling' because it seemingly grants UM coverage as part of the underlying insurance, takes away coverage and gives it back, and is inconsistent, and therefore should be interpreted to afford the coverage Mr. Wadzinski believed he had purchased.

II. UM CONVERAGE IS MANDATED BY LAW

WISCONSIN STAT. § 632.32(4)(a) requires that motor vehicle liability policies include UM coverage:

Every policy of insurance subject to this section that insures with respect to any motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall contain ... the following provisions:

- (a) *Uninsured motorist*. 1. For the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom....

Wis. Stats. § 632.32(4)(a).

The statute is clear that UM coverage is required in *every* policy of insurance relating to any motor vehicle, for the bodily injury of *any person* arising out of ...the use of a motor vehicle.... The Executive Umbrella covers excess damages arising from an automobile policy covering UM damages. The umbrella is therefore an insurance policy relating to bodily injury of any person arising out of the use of a motor vehicle.

Auto Owners will likely argue that Wis. Admin. Code § 6.77 (4)(a) trumps the mandate of 632.32(4)(a). Section 6.77 provides that “any umbrella liability or excess liability insurance policy is exempt from the requirements of ... [§] 632.32(4). However, Section 6.77, a directive issued by the insurance commissioner, directly conflicts with (and in fact negates) a legislative directive. As a matter of law, such regulations cannot stand. Seider v. O’Connell, 236 Wis. 2d 211, 612 N.W.2d 659 (2000). In Seider, the Court held that the insurance commissioner exceeded its authority in issuing a regulation that conflicted with a statute and legislative intent. “A rule out of harmony with the statute is a mere nullity.” Id. The decision to write an exception into a statute is best reserved for the

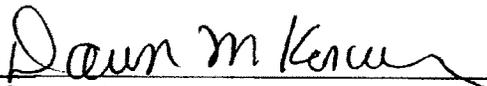
legislature. Motola v. LIRC, 219 Wis.2d 588, 614, 580 N.W.2d 297 (1998) (Abrahamson, C.J., dissenting). If the legislature intended to exempt umbrella policies from § 632.324(a), it could have done so, and if the Office of the Commissioner of Insurance had an issue with the statute, "it should have sought corrective legislation." Seider at ¶ 40, 336 Wis. 2d at 232.

The Court of Appeals in Etters v. State Farm Insurance Company, recently faced this question in a similar (but distinguishable) factual setting.¹ In Etters the question was whether a personal umbrella policy afforded UM coverage. The circuit court found the policy ambiguous and the Court of Appeals reversed.

The insurance company also argued that umbrella policies are exempt from the requirements of including UM coverage pursuant to §632.324(a) because Insurance Regulation § 6.77 exempts umbrella policies from §632.32's requirements. Curiously, although the Court held that the insurance commissioner had the authority to issue §6.77, the Court explicitly refrained from deciding the question presented here, namely whether §6.77 is invalid because it conflicts with a statute. Therefore this question is still undecided, and under Seider, §6.77 is invalid as a matter of law.

Dated this 20th day of July, 2009.

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Attorneys for Plaintiff, Michelle B. Wadzinski, individually
and as personal representative of the Estate of Steven W.
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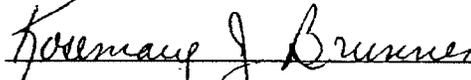
By: 
George Burnett
Dawn M. Korver

¹ The policies here materially differ from that at issue in Etters. Here, the ambiguity arises not only from the grant of coverage and ambiguous endorsements, but also because reading the policy as a whole, a reasonable insured would expect the Executive Umbrella to afford UM coverage because another section of the same policy excluded UM coverage for the Commercial Umbrella portion.

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The undersigned certifies that a true copy of the within
was served by U.S. Mail upon all attorneys of record
pursuant to Wis. Stat. Sec. 801.14, this 20th day of
July, 2009.



Rosemary J. Brunner

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