

COMMENT

**YOU GET WHAT YOU PAY FOR: WHY WISCONSIN SHOULD ADOPT UNINSURED AND UNDERINSURED MOTORIST STACKING WAIVERS**

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The ability to stack, adding multiple uninsured motorist (UM) or underinsured motorist (UIM) policies together to fully compensate a party for the amount of his or her injuries sustained in an automobile accident, has been a prevalent subject of insurance litigation in Wisconsin. Wisconsin currently allows insurance companies to include anti-stacking provisions in UM and UIM policies, which restrict injured parties from stacking multiple policies. Yet, Wisconsin has not always permitted anti-stacking provisions—Wisconsin’s position on stacking has changed four times in the last two decades.

Wisconsin’s current stacking scheme, permitting anti-stacking clauses in UM and UIM policies, does not fully compensate consumers in catastrophic accidents and does not provide consumers with the benefits for which they paid a premium. This Comment suggests that Wisconsin implement legislation permitting stacking waivers for UM and UIM policies, similar to Pennsylvania’s statute. Pennsylvania’s stacking waiver statute allows consumers to waive their right to stacking UM and UIM policies in exchange for a lower premium. This Comment analyzes the practical implications and anticipated criticisms of adopting a stacking waiver statute in Wisconsin. Rather than adopt the Pennsylvania stacking waiver statute verbatim, this Comment suggests four changes the Wisconsin legislature should make to ensure the statute is more clear and practical for Wisconsin. Finally, this Comment concludes with a sample statute the Wisconsin legislature should adopt—an equitable compromise that resolves Wisconsin’s oscillating stance on stacking.

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\* J.D. Candidate, University of Wisconsin Law School, 2016. Many thanks to Attorney Gregory B. Conway for introducing me to this topic and for being an influential mentor. In addition, thank you to the *Wisconsin Law Review* staff for their dedication and effort. Finally, special thanks to my family, the crew, and Spencer for their untiring love, support, and patience.

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### INTRODUCTION

Nationwide, the estimated number of uninsured motorists has decreased since 2003.<sup>1</sup> Yet, in 2013, uninsured motorists caused 14% of vehicle accidents.<sup>2</sup> As a result, many states require drivers to carry uninsured or underinsured motorist coverage.<sup>3</sup> Uninsured motorist (UM) and underinsured motorist (UIM) policies provide coverage to compensate an injured party for damages the tortfeasor cannot afford.<sup>4</sup> Stacking refers to the ability to add multiple UM or UIM policies together to fully compensate a party for the amount of his or her injuries.<sup>5</sup> Wisconsin currently allows insurance companies to include

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1. David Corum, *New Study Reveals a Declining Trend in the Percentage of Uninsured Motorists*, INS. RES. COUNCIL (Aug. 5, 2014), [http://www.insurance-research.org/sites/default/files/downloads/IRC\\_UM\\_NewsRelease.pdf](http://www.insurance-research.org/sites/default/files/downloads/IRC_UM_NewsRelease.pdf). In 2012, the Insurance Research Council (IRC) ranked Wisconsin as the state with the twenty-fifth highest percentage of uninsured motorists at 11.7%. *Uninsured Motorists*, INS. INFO. INST., <http://www.iii.org/fact-statistic/uninsured-motorists> (last visited Mar. 1, 2016). IRC measures the number of uninsured motorists in a state by using a ratio of insurance claims made by insureds injured by uninsured motorists relative to claims made by insureds injured by insured drivers. *Id.*

2. *Uninsured Motorist Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/uninsured-motorist-statistics/> (last updated Apr. 28, 2013).

3. In 2009, Wisconsin required motorists to purchase UM and UIM coverage for the first time. 2009 Wis. Act 28, § 3156; WIS. STAT. § 632.32(4), (4m) (2009–10). Even though 2011 Wisconsin Act 14 enacted legislation overturning the requirement to purchase UIM coverage, the statute still mandated that motorists purchase UM coverage. 2011 Wis. Act 14, §§ 17m, 21m; WIS. STAT. § 632.32(4m) (2011–12).

4. ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW § 4.1 (6th ed. 2010); see also Kevin P. Clark & Chris Vanderbeek, *When Bodily Injury Limits Are Stacked, Jurisprudential Consistency Topples*, 36 S. ILL. U. L.J. 89, 91 (2011) (“UM/UIM coverages provide compensation for the negligence of an unknown driver who does not have insurance or has too little of it.”).

5. *Estate of Dorschner ex rel. Dorschner v. State Farm Mut. Auto. Ins. Co.*, 628 N.W.2d 414 (Wis. Ct. App. 2001); see also Thomas C. Cady & Christy Hardin Smith, *West Virginia’s Automobile Insurance Policy Laws: A Practitioner’s Guide*, 97 W. VA. L. REV. 583, 609 (1995) (“‘Stacking’ of automobile liability coverages refers

anti-stacking provisions in their UM and UIM policies, which restrict injured parties from stacking multiple policies.<sup>6</sup>

An example best illustrates the concept of stacking. In 2010, an automobile failed to yield to traffic and hit a motorcycle in Sheboygan County, Wisconsin.<sup>7</sup> The motorcyclist, sixty-nine-year-old Carroll Plumb, suffered severe injuries including a fractured skull, six broken ribs, a compound fracture to his thigh, and multiple breaks in his foot.<sup>8</sup> Mr. Plumb's hospital bills exceeded \$1,000,000.<sup>9</sup> The at-fault driver had a \$250,000 policy, and Mr. Plumb had two \$300,000 UIM policies for his two vehicles.<sup>10</sup> If the law permitted the insurance policies to contain anti-stacking clauses, Mr. Plumb would only be able to recover \$300,000, the amount of the largest policy, even though his injuries exceeded \$850,000, the aggregate of all three policies.<sup>11</sup>

Wisconsin has not always permitted anti-stacking provisions in UM and UIM policies.<sup>12</sup> In fact, in the last two decades, Wisconsin's stance on anti-stacking clauses has oscillated four times.<sup>13</sup> Regardless of the numerous policy changes in the last twenty years, Wisconsin courts interpret UM and UIM policies and assess the validity of anti-stacking

to the piling up of multiple coverages from multiple policies, or the piling up of coverages of multiple vehicles in a single policy, when there is only one loss.”); Lucia Hawks, *Stacking Up to Full Recovery*, 35 LOY. L. REV. 409, 415 (1989) (“Stacking increases the amount of recovery by applying coverage from more than one policy or by increasing the policy limits by the number of insured vehicles.”). Wisconsin has never permitted insureds to stack multiple bodily injury coverages, only UM or UIM policies. *See* WIS. STAT. § 632.32(5)(f) (2013–14); WIS. STAT. § 632.32(6)(d) (2009–10).

6. *See* WIS. STAT. § 632.32(5)(f) (2013–14) (“[P]olicy may provide that, regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, the limits for any coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles . . .”).

7. Daniel Plumb, Carroll Plumb's son, shared his father's story at the January 19, 2011, Joint Public Hearing of the Wisconsin Assembly and Senate Committee on Insurance and Housing. *Joint Hearing of Assembly Insurance Committee & Senate Insurance & Housing Committee*, WIS. EYE (Jan. 19, 2011) [hereinafter *Joint Hearing*], <http://www.wiseye.org/Video-Archive/Event-Detail/evhdid/3633>.

8. *Id.*

9. *Id.*

10. *Id.*

11. In this case, Mr. Plumb's accident occurred during the “Truth in Auto Insurance” era, during which Wisconsin insureds could stack up to three insurance policies, so he was able to receive the entire \$850,000. WIS. STAT. § 632.32(6)(d) (2009–10). *See infra* Part I.B.

12. *See* § 632.32(6)(d) (“No policy may provide that . . . the limits for any uninsured motorist coverage or underinsured motorist coverage under the policy may not be added to the limits for similar coverage . . .”).

13. *See infra* Part I.

provisions.<sup>14</sup> As expected, in virtually every case, the insurer asserts that the anti-stacking clause applies and limits the insurer's liability,<sup>15</sup> while the insured asserts that the anti-stacking provision does not apply or is ambiguous, thereby increasing the insured's recovery for damages.<sup>16</sup>

Throughout the United States, state legislatures and courts take various stances on stacking UM and UIM policies. Some states completely permit stacking,<sup>17</sup> while others prohibit it entirely.<sup>18</sup> Moreover, some states, like Pennsylvania, have created a variation on allowing stacking.<sup>19</sup> Under Pennsylvania law, stacking UM and UIM policies is permitted, but an individual may waive his or her right to stacking in exchange for a lower premium.<sup>20</sup>

"Stacking waivers" are the most equitable compromise to resolving the stacking issue. Stacking waivers have practical implications for consumers, insurers, legislatures, and the judiciary.<sup>21</sup> A stacking waiver is a market solution that provides consumers with the option to stack UM and UIM policies.<sup>22</sup> The waiver gives insureds the

14. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Hunt*, 856 N.W.2d 633, 634 (Wis. Ct. App. 2014); *Bodish v. W. Bend Mut. Ins. Co.*, 851 N.W.2d 811, 812 (Wis. Ct. App. 2014); *Belding v. Demoulin*, 843 N.W.2d 373, 379 (Wis. Ct. App. 2014); *Westra v. State Farm Mut. Auto. Ins. Co.*, 835 N.W.2d 280, 281 (Wis. Ct. App. 2013); *Janssen v. State Farm Mut. Auto. Ins. Co.*, 668 N.W.2d 820, 822 (Wis. Ct. App. 2003); *Schroeder v. State Farm Mut. Auto. Ins. Co.*, 640 N.W.2d 215, 217 (Wis. Ct. App. 2001); *Estate of Dorschner ex rel. Dorschner v. State Farm Mut. Auto. Ins. Co.*, 628 N.W.2d 414, 416 (Wis. Ct. App. 2001).

15. See, e.g., *Janssen*, 668 N.W.2d at 822; *Schroeder*, 640 N.W.2d at 217; *Dorschner*, 628 N.W.2d at 415.

16. See, e.g., *Janssen*, 668 N.W.2d at 822; *Schroeder*, 640 N.W.2d at 217; *Dorschner*, 628 N.W.2d at 416. It is well established in contract law that ambiguous clauses are found invalid. See Neil Chamberlin & J. Stephen Holt, *Why Arkansas Should Overturn Its Anti-stacking Precedent: A Look at Aggregating Uninsured and Underinsured Motorist Coverage*, 21 U. ARK. LITTLE ROCK L. REV. 413, 432 (1999); Clark & Vanderbeek, *supra* note 4, at 93; Joseph Sclafani, Note, *Stacking the Deck Against the Insurance Industry: United States Fidelity and Guaranty Company v. Ferguson*, 698 So. 2d 77 (Miss. 1997), 19 Miss. C. L. REV. 251, 257 (1998).

17. See CAL. INS. CODE § 11580.2 (West 2011-12); MISS. CODE ANN. § 83-11-102 (West 2014); R.I. GEN. LAWS § 27-7-2.1 (LexisNexis 2011-12).

18. See 215 ILL. COMP. STAT. 5/143a (West 2011-12); IOWA CODE ANN. § 516A.2 (West 2011-12); MINN. STAT. ANN. § 65B.49 (West 2011-12).

19. 75 PA. CONS. STAT. § 1738 (2011-12); see also ALA. CODE § 32-7-23 (LexisNexis 2011-12).

20. 75 PA. CONS. STAT. § 1738. A premium is "the consideration paid to an insurer for undertaking to indemnify the insured against a specified peril." 5 COUCH ON INSURANCE § 69:1 (3d ed. 2012).

21. See *infra* Part II.B.

22. Barry Zalma, *The Right to Stack UM Coverage Can Be Waived*, LEXISNEXIS LEGAL NEWSROOM INS. L. (Aug. 27, 2012, 3:49 PM), <http://www.lexisnexis.com/legalnewsroom/insurance/b/motorvehicle/archive/2012/08/2>

ability to decide how much protection to receive in the event of a catastrophic accident.<sup>23</sup> Insureds paying a premium for UM or UIM coverage should receive the benefit of their payment and should be able to stack multiple policies.<sup>24</sup>

On the other hand, numerous criticisms exist in allowing stacking waivers for UM and UIM coverage.<sup>25</sup> Stacking waivers increase insurance policy premiums and add more variables in assessing risk.<sup>26</sup> Stacking waivers can also be detrimental to insureds. If an insured waives his or her right to stack and is injured by an uninsured or underinsured motorist, the insured will not be able to stack multiple policies to aid in his or her recovery. On balance, however, these arguments against stacking waivers are unpersuasive for reasons discussed in detail below. Stacking waivers are the most equitable solution to the stacking conundrum and are ultimately beneficial to both insureds and insurers.

The Wisconsin legislature has never adopted a stacking waiver statute.<sup>27</sup> Perhaps now is the time for change. The constant seesawing of Wisconsin's stacking stance is inefficient.<sup>28</sup> The Wisconsin legislature should implement a statute similar to Pennsylvania's allowing Wisconsin insureds to waive their right to stack UM or UIM policies in exchange for lower premiums. Stacking waivers are the most equitable solution to provide consistency in Wisconsin's law.

This Comment proposes that the Wisconsin legislature adopt legislation permitting stacking waivers for UM and UIM insurance policies. First, this Comment provides a brief history of Wisconsin's statutory changes regarding anti-stacking provisions in UM and UIM policies. Part II explores the practical implications and anticipated criticisms of a Wisconsin statutory change to include stacking waivers in UM and UIM policies. Part III considers the changes the Wisconsin legislature should make to the Pennsylvania statute and offers a model stacking waiver statute the Wisconsin legislature should adopt. This

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7/insurance-law-uim-underinsured-motorist-toyota-car-accident-car-insurance-waiver-stack-um-uninsured-motorist-coverage-waived.aspx; *see also* 75 PA. CONS. STAT. § 1738(d).

23. *See infra* Part II.B.

24. *See infra* note 72 and accompanying text.

25. *See infra* Part II.C.

26. *See infra* Part II.C.1–2.

27. *See* WIS. STAT. ch. 632 (2013–14).

28. *See* 2011 Wis. Act 14 (renumbering Wisconsin Statutes section 632.32(6)(d) to section 632.32(5)(f) and amending it to permit anti-stacking provisions in UM and UIM policies); 2009 Wis. Act 28 (renumbering Wisconsin Statutes section 632.32(5)(f) to section 632.32(6)(d) and amending it to prohibit anti-stacking provisions in UM and UIM policies); 1995 Wis. Act 21 (enacting Wisconsin Statutes section 632.32(5)(f), permitting anti-stacking provisions in UM and UIM policies).

Comment concludes that the Wisconsin legislature should adopt stacking waivers for UM and UIM insurance policies. To understand the arguments for implementing or opposing stacking waivers, it is important to understand Wisconsin's UM and UIM insurance history.

### I. WISCONSIN'S SEESAWING ANTI-STACKING LEGISLATION

"The ability to stack UM [and UIM] coverage has been the frequent subject of legislation and litigation in Wisconsin since the mid-1960s."<sup>29</sup> UM coverage "protects drivers against the possibility that a driver who has no liability insurance will cause damages that he cannot pay for."<sup>30</sup> UIM coverage applies when the "liability limits of an individual" are lower than the injured party's total damages.<sup>31</sup> Stacking, as the term appears in insurance policies, means the availability of more than one policy to reimburse an injured party's losses.<sup>32</sup> Wisconsin courts continually grapple with "whether insureds may invoke multiple UM [or UIM] coverages for a single accident."<sup>33</sup> To prevent insureds from aggregating coverage limits, "insurers developed 'anti-stacking' provisions," forbidding an insured from adding coverage limits together.<sup>34</sup>

Wisconsin legislation regarding the ability to stack policies has been altered numerous times in the last twenty years. Specifically, major legislation concerning stacking was enacted in 1995, 2009, and 2011.<sup>35</sup> Whether Wisconsin legislation permitted or prohibited

29. *Belding v. Demoulin*, 828 N.W.2d 890, 892 (Wis. Ct. App. 2014). The Wisconsin Supreme Court described UIM coverage as a "legal iceberg, a seemingly straightforward area of law, which in fact can prove to be nettlesome to analyze." *Badger Mut. Ins. Co. v. Schmitz*, 647 N.W.2d 223, 227 (Wis. 2000) (quoting *Dowhower v. W. Bend Mut. Ins. Co.*, 613 N.W.2d 557, 562 (Wis. 2000)) (internal quotation marks omitted).

30. *Belding*, 828 N.W.2d at 892. For a complete history of UM coverage in Wisconsin, see ANDERSON, *supra* note 4, § 3.10.

31. ANDERSON, *supra* note 4, § 4.1. For a complete history of UIM coverage in Wisconsin, see *id.* § 4.11.

32. *Estate of Dorschner ex rel. Dorschner v. State Farm Mut. Auto. Ins. Co.*, 628 N.W.2d 414, 417 (Wis. Ct. App. 2001). This includes stacking based on the payment of multiple premiums and unrelated policies. *Id.*

33. *Belding*, 828 N.W.2d at 892; see also *State Farm Mut. Auto. Ins. Co. v. Hunt*, 856 N.W.2d 633, 834 (Wis. Ct. App. 2014); *Bodish v. W. Bend Mut. Ins. Co.*, 851 N.W.2d 811, 812 (Wis. Ct. App. 2014); *Westra v. State Farm Mut. Auto. Ins. Co.*, 835 N.W.2d 280, 281 (Wis. Ct. App. 2013); *Janssen v. State Farm Mut. Auto. Ins. Co.*, 668 N.W.2d 820, 822 (Wis. Ct. App. 2003); *Schroeder v. State Farm Mut. Auto. Ins. Co.*, 640 N.W.2d 215, 217 (Wis. Ct. App. 2001); *Dorschner*, 628 N.W.2d at 415.

34. *Belding*, 828 N.W.2d at 892–93.

35. See 2011 Wis. Act 14; 2009 Wis. Act 28; 1995 Wis. Act 21.

anti-stacking provisions in UM and UIM policies depended on how the legislature and the courts defined the purpose of UM and UIM insurance at the time the statute was in effect.

*A. Anti-stacking Clauses Prior to 2009*

Historically, courts upheld anti-stacking clauses in UM and UIM policies<sup>36</sup>—Wisconsin courts rejected public policy challenges against anti-stacking provisions and upheld the provisions until the early 1970s.<sup>37</sup> In 1975 and 1979, the legislature enacted legislation prohibiting anti-stacking clauses.<sup>38</sup> As a result, courts “prohibited almost all clauses that sought to prevent the stacking of UM and [UIM] coverage.”<sup>39</sup>

In 1995, the legislature again changed the law, this time permitting anti-stacking provisions.<sup>40</sup> Specifically, 1995 Wisconsin Act 21 overturned “a series of Wisconsin appellate court decisions which have held that a motor vehicle insurance policy may not prohibit stacking of uninsured or underinsured motorist coverage” or any other coverage provided by the policy.<sup>41</sup> The legislature enacted Wisconsin Statutes section 632.32(5)(f), which stated,

*A policy may provide that regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid the limits for any coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles to determine the limit of insurance coverage available for bodily injury or death suffered by a person in any one accident.*<sup>42</sup>

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36. ANDERSON, *supra* note 4, § 3.1.

37. *Belding*, 828 N.W.2d at 893 (citing *Nelson v. Employers Mut. Cas. Co.*, 217 N.W.2d 670, 672–73 (Wis. 1974)).

38. 1975 Wis. Sess. Laws, ch. 375, subch. III; *see also* 1979 Wis. Sess. Laws 618 (making “major editorial changes” to the statute without intending to change its meaning).

39. *Belding*, 828 N.W.2d at 893; *see Welch v. State Farm Mut. Auto. Ins. Co.*, 361 N.W.2d 680, 682 (Wis. 1985) (holding that the prohibition against anti-stacking clauses barred a “drive other car exclusion” to the extent that it would “exclude coverage for accidents involving motor vehicles owned by the insured but not included in the policy”).

40. 1995 Wis. Act 21.

41. WIS. LEGISLATIVE REFERENCE BUREAU, ANALYSIS BY THE LEGISLATIVE REFERENCE BUREAU, 1993 S.B. 135, 1993–94 Leg. (Wis. 1993).

42. WIS. STAT. § 632.32(5)(f) (1995–96) (emphasis added).

Thus, under the 1995 legislation, an insured could not stack multiple insurance policies. The legislative purpose of UM coverage “was to place the insured in the same position as if the uninsured motorist had insurance but subject to the terms, limitations, and conditions” of section 632.32(5).<sup>43</sup> Wisconsin courts held that anti-stacking provisions were valid when the policy was not ambiguous;<sup>44</sup> however, an insured could stack policies if the court found that a provision in the policy regarding stacking or recovery was ambiguous.<sup>45</sup>

### *B. The Truth in Auto Insurance Era*

In 2009, the legislature made major alterations to Wisconsin’s insurance law, ushering in the “Truth in Auto Insurance” era.<sup>46</sup> The legislature repealed most of the 1995 anti-stacking legislation and replaced it with a new statute allowing “stacking policy language.”<sup>47</sup> The legislature renumbered Wisconsin Statutes section 632.32(5)(f) to section 632.32(6)(d) and amended the statute to read,

*No policy may provide that, regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premium paid, the limits for any uninsured motorist coverage or underinsured motorist coverage under the policy may not be added to the limits for similar coverage applying to other*

43. ANDERSON, *supra* note 4, § 3.14.

44. *Estate of Dorschner ex rel. Dorschner v. State Farm Mut. Auto. Ins. Co.*, 628 N.W.2d 414, 418 (Wis. Ct. App. 2001) (finding that the anti-stacking clause, when read together with the rest of the policy, was not susceptible to more than one construction and resulted in Dorschner receiving the highest coverage available under any single policy); *see also Remiszewski v. Am. Family Ins. Co.*, 687 N.W.2d 809, 818 (Wis. Ct. App. 2014); *Dempich v. Pekin Ins. Co.*, 710 N.W.2d 691, 701 (Wis. Ct. App. 2006); *Kendziora v. Church Mut. Ins. Co.*, 661 N.W.2d 456, 465 (Wis. Ct. App. 2003); *Schroeder v. State Farm Mut. Auto. Ins. Co.*, 640 N.W.2d 215, 219 (Wis. Ct. App. 2001).

45. *Janssen v. State Farm Mut. Auto. Ins. Co.*, 668 N.W.2d 820, 823 (Wis. Ct. App. 2003) (Although the insurer’s anti-stacking provision was unambiguous, when read together with the excess clause, the policy’s coverage was ambiguous and illusory.).

46. 2009 Wis. Act 28; ANDERSON, *supra* note 4, § 3.6; *see also* Steven Snedeker, *Appellate Court Overturns Drive Other Car Exclusion During ‘Truth in Auto Insurance’: ‘Belding v. State Farm,’* WIS. DEF. COUNS. (Jan. 18, 2013), <http://www.wdc-online.org/resources/legal-news/appellate-court-overturns-drive-other-car-exclusion-during-truth-in-auto-insurance-belding-v-state-farm/>.

47. ANDERSON, *supra* note 4, § 3.6. The Truth in Auto Insurance Law “applied prospectively—only affecting insurance policies issued or renewed on or after the November 1, 2009 effective date.” *Wolf v. Am. Family Mut. Ins. Co.*, 865 N.W.2d 186, 187 (Wis. Ct. App. 2015); *see also* 2009 Wis. Act 28, § 9426.

motor vehicles to determine the limit of insurance coverage available for bodily injury or death suffered by a person in any one accident, *except that a policy may limit the number of motor vehicles for which the limits for coverage may be added to 3 vehicles.*<sup>48</sup>

Therefore, an insured could stack UM and UIM policies, but the ability to stack was not unlimited.

The 2009 legislation changed the purpose of UM and UIM coverage. Governor Jim Doyle proposed changes to vehicle insurance requirements to “ensure that policy holders obtained the full benefit of the coverage they . . . purchased.”<sup>49</sup> Yet, Governor Doyle vetoed provisions allowing *unlimited* stacking because he believed it was “more essential than ever to ensure that insurance premiums remain[ed] affordable for all drivers.”<sup>50</sup> An individual could stack policies for up to three vehicles.<sup>51</sup> Thus, in 2009, the legislature intended for insureds to obtain close to the full benefit of their purchased coverage, which they could do through stacking UM or UIM policies.

### C. 2011 Legislation: A Switch Back to 1995 Legislation

In 2011, the Wisconsin legislature again enacted laws allowing “insurance policies to include anti-stacking clauses.”<sup>52</sup> Specifically, 2011 Wisconsin Act 14 largely reversed the 2009 legislation regarding UM and UIM policies—most of the UM and UIM laws in effect *before* 2009 became applicable again.<sup>53</sup> The legislature renumbered Wisconsin Statutes section 632.32(6)(d) to section 632.32(5)(f) and amended the statute to read,

*A policy may provide that, regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, the limits for any coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles to determine the limit of insurance*

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48. WIS. STAT. § 632.32(6)(d) (2009–10) (emphasis added).

49. JIM DOYLE, 2009 WISCONSIN ACT 28: VETO MESSAGE DETAILS 39 (2009), [https://docs.legis.wisconsin.gov/2009/related/veto\\_messages/2009\\_wisconsin\\_act\\_28\\_details.pdf](https://docs.legis.wisconsin.gov/2009/related/veto_messages/2009_wisconsin_act_28_details.pdf).

50. *Id.*

51. § 632.32(6)(d).

52. ANDERSON, *supra* note 4, § 3.1e; *see* 2011 Wis. Act 14.

53. ANDERSON, *supra* note 4, § 3.1b; *see Joint Hearing, supra* note 7.

coverage available for bodily injury or death suffered by a person in any one accident.<sup>54</sup>

The new law allowed insurance policies to “limit, restrict, reduce, or exclude coverage in an anti-stacking clause, and for a vehicle for which the person is not insured.”<sup>55</sup> The purpose of UM and UIM policies reflected the ideals of the 1995 legislation—Governor Scott Walker, who signed the bill into law, indicated that “the new law will make it more affordable to have car insurance and sends a message to consumers and employers that Wisconsin is a good place for business.”<sup>56</sup>

Along with permitting anti-stacking clauses, 2011 Wisconsin Act 14 reduced the amount of minimum coverage required for Wisconsin insureds.<sup>57</sup> Under the Act, automobile insurance companies were obligated to provide minimum liability coverage of (1) \$25,000 for injury or death of one person, (2) \$50,000 for injury or death of two or more people, and (3) \$10,000 for property damage.<sup>58</sup> The 2011 minimum coverage limits were significantly lower than the 2009 minimum coverage limits, which required (1) \$50,000 for injury or death of one person, (2) \$100,000 for injury or death of two or more people, and (3) \$15,000 for property damage.<sup>59</sup> Act 14 also reduced the amount of mandatory UM and UIM coverage to \$25,000 and \$50,000, a drastic reduction from the \$100,000 and \$300,000 minimum limits mandated in 2009 Wisconsin Act 28.<sup>60</sup> That is not to say that consumers

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54. WIS. STAT. § 632.32(5)(f) (2011–12) (emphasis added).

55. ANDERSON, *supra* note 4, § 3.1e.

56. Joe Forward, *Auto Insurance Changes: New Law Rolls Back Coverage Limits and Prevents Stacking*, ST. B. WIS. (Apr. 20, 2011), <http://www.wisbar.org/NewsPublications/RotundaReport/Pages/Article.aspx?ArticleID=7893>. During the January 19, 2011 Joint Public Hearing of the Wisconsin Assembly and Senate Committee on Insurance and Housing, bill drafter Representative John Nygren asserted, “[I]t’s not about the insurance industry, it’s about the citizens of the state of Wisconsin making the choice for what’s right for them and what they can afford.” *Joint Hearing*, *supra* note 7.

57. 2011 Wis. Act 14, § 18m.

58. *Frequently Asked Questions*, WIS. OFF. COMMISSIONER INS., <http://oci.wi.gov/consumer/autohome-faqauto.htm#finresp> (last updated Apr. 15, 2015) [hereinafter *Frequently Asked Questions*].

59. *Wisconsin’s Financial Responsibility Law*, WIS. OFF. COMMISSIONER INS., <http://oci.wi.gov/employers/afaqfinresp.htm> (last updated Dec. 22, 2011).

60. *Compare* 2011 Wis. Act 14, § 18m, *with* 2009 Wis. Act 28, § 3159. Medical payments coverage was reduced from \$10,000 to \$1,000 per person under 2011 Wisconsin Act 14. 2011 Wis. Act 14, § 20c.

could not purchase higher levels of coverage; the statute only stated the mandatory minimum levels.<sup>61</sup>

The 2011 legislation is still in effect today. No Wisconsin appellate court has interpreted a UM or UIM policy under the new statute; yet, because Wisconsin Statutes section 632.32(5)(f) is nearly identical to the 1995 statute, courts will likely use past cases to assist in their analysis of an anti-stacking provision. The statute regulating stacking UM and UIM policies has changed three times in the last decade, and commentators speculate that the legislature will once again revise the statute.<sup>62</sup> Constantly amending Wisconsin's policy regarding stacking is inefficient and wastes resources for the legislature, courts, insurance companies, and the insured. The most equitable solution to ensure that the Wisconsin legislature stops amending stacking legislation is to implement stacking waivers for UM and UIM policies. This Comment recommends a permanent fix to Wisconsin's vacillating law: stacking waivers for UM and UIM policies.

## II. THE PROPOSED SOLUTION: STACKING WAIVERS

This Comment proposes that the Wisconsin legislature adopt a statute that permits stacking UM and UIM coverage but allows an insured to waive the right to stack in exchange for a lower premium. This Part begins by discussing the current Pennsylvania stacking waiver statute. Next, it delves into the statute's practical implications and addresses the anticipated criticisms of a Wisconsin stacking waiver statute.

### A. Pennsylvania's UM and UIM Stacking Waivers

Pennsylvania's statute requires all stacking rejection forms to contain specific language allowing an insured to knowingly and voluntarily reject stacked limits of UM and UIM coverage for himself and members of his family.<sup>63</sup> The insured waives the right to stack in

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61. WIS. STAT. § 632.32(5)(f) (2011–12); *see also Joint Hearing*, *supra* note 7.

62. *See* Joseph Strohl, *Legislative Report*, VERDICT, Summer 2014, at 5 (“Next session might be the right time to ask state legislators to take another look at the reducing clauses found in many auto insurance policies . . . . [I]f a package of various changes in auto insurance statutes are made, the auto insurance industry might go along with some modest changes.”).

63. 75 PA. CONS. STAT. § 1738 (2011–12). The Pennsylvania General Assembly enacted the Motor Vehicle Financial Responsibility Law, which contains the stacking waiver statute, in 1990. Act of Feb. 7, 1990, 1990 Pa. Laws 11, No. 6. In the late 1980s, Pennsylvanians faced an insurance rate “crisis” as insurance rates escalated at three times the rate of the Consumer Price Index. EDWARD L. LASCHER, JR., THE

exchange for reduced premiums.<sup>64</sup> Under Pennsylvania's statute, an insured can only waive the right to stack by signing a written form.<sup>65</sup>

Pennsylvania acknowledges two public policy considerations that led to adopting the stacking waiver statute. First, the Motor Vehicle Financial Responsibility Law (MVFRL) provides sufficient coverage to those injured by a tortfeasor who lacks adequate coverage to pay for the injured party's expenses.<sup>66</sup> Second, the General Assembly intended to make the cost of UM and UIM insurance more affordable for consumers.<sup>67</sup> The Pennsylvania Supreme Court recognized that while cost containment is not the statute's only objective, "it has become an increasingly significant one, and it is apparent that the General Assembly has been employing the vehicle of free consumer choice with greater latitude and frequency in furtherance of this objective."<sup>68</sup> These concerns are analogous to the Wisconsin legislature's considerations in enacting the 2011 legislation permitting anti-stacking clauses in UM and UIM policies.<sup>69</sup>

### *B. The Practical Implications of Stacking Waivers*

Stacking waivers have many practical implications, such as allowing consumers to decide how much coverage they desire. Ultimately, adopting stacking waivers is a question of fairness.<sup>70</sup> Insurance companies should not be able to refuse to provide coverage to an insured who has paid a premium for that coverage.<sup>71</sup> Individuals who pay a premium for the ability to stack UM or UIM coverage should receive the benefits of their payment.<sup>72</sup> Insureds should be covered

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POLITICS OF AUTOMOBILE INSURANCE REFORM: IDEAS, INSTITUTIONS, AND PUBLIC POLICY IN NORTH AMERICA 53-54 (1999).

64. § 1738(d).

65. *Id.*

66. *Generette v. Donegal Mut. Ins. Co.*, 957 A.2d 1180, 1192 (Pa. 2008).

67. *Id.* The MVFRL imposed mandatory rate reductions and created a medical cost containment system. LASCHER, *supra* note 63, at 59. The plan was to "stop the skyrocketing cost of auto insurance . . . once and for all." *Id.* at 55.

68. *Generette*, 957 A.2d at 1192.

69. See *Joint Hearing*, *supra* note 7; see also DOYLE, *supra* note 49, at 39.

70. See *infra* note 77 and accompanying text.

71. Wisconsin courts have adopted a strong public policy against excluding insurance coverage to insureds. *Zarder v. Humana Ins. Co.*, 762 N.W.2d 682, 692 (Wis. 2010) ("[W]hen there is ambiguity in an insurance policy, it is construed in favor of coverage."); see also *Frost ex rel. Anderson v. Whitbeck*, 654 N.W.2d 225, 230 (Wis. 2002) ("[A]mbiguous terms are to be construed in favor of coverage, and exclusions are to be narrowly construed against an insurer."); *Davison v. Wilson*, 239 N.W.2d 38, 41 (Wis. 1976) (same).

72. DOYLE, *supra* note 49, at 39. It is "unconscionable to permit the insurers to collect a premium . . . and then avoid payment of a loss because of language of

when they sustain injuries at no fault of their own.<sup>73</sup> To consumers, buying insurance is a Catch-22. On one hand, consumers “choose coverage that does not fully protect them in order to keep their premiums low,” yet when an accident does occur, they are unsatisfied that not all of their damages are covered.<sup>74</sup> On the other hand, when a loss does *not* occur, consumers are unsatisfied because they paid an increased premium and may “perceive that the insurance was an unwise investment.”<sup>75</sup> Stacking forces individuals to pay an increased premium, an extra expense that may never be used.<sup>76</sup> Nonetheless, if insurers collect the premiums, they should pay the benefits.<sup>77</sup> Therefore, if an insured chooses to pay an extra premium for the ability to stack, the insurance company should provide that coverage.

Moreover, stacking allows insureds to more fully recover for injuries sustained in catastrophic accidents caused by uninsured or underinsured drivers.<sup>78</sup> A crucial problem in automobile compensation is “the fact that nearly all victims who suffer catastrophic losses are compensated to a degree representative of only a small percentage of those losses.”<sup>79</sup> The purpose of Wisconsin’s UM and UIM legislation is

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limitation devised by themselves.” Note, *Stacked Recovery Under the Uninsured Motorist Endorsement of the Automobile Liability Policy*, 9 VAL. U. L. REV. 135, 144 (1974) (quoting *Simpson v. State Farm Mut. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970)).

73. *Permanent White Journals 2009–2010 Session*, J. ASSEMBLY, June 29, 2009, at 323 (Stacking reforms “are necessary to protect consumers and to ensure that people injured in accidents are shielded from excessive financial loss due to insufficient coverage.”).

74. HOWARD C. KUNREUTHER ET AL., *INSURANCE & BEHAVIORAL ECONOMICS: IMPROVING DECISIONS IN THE MOST MISUNDERSTOOD INDUSTRY* 5 (2013).

75. *Id.*

76. *Id.*; see Sclafani, *supra* note 16, at 267 (“In order to compensate for the increased liability associated with the inability to contractually prevent insureds from stacking UM coverages, insurers will increase premiums.”).

77. See Clark & Vanderbeek, *supra* note 4, at 106 (“Another rationale for permitting stacking of UM/UIM coverage . . . is that stacking prevents insurers from reaping a windfall by collecting premiums for additional coverage and then not paying the limits according to the premiums paid.”); see also Chamberlin & Holt, *supra* note 16, at 419 (No law prevents an insurer “from issuing as many policies to an insured as it may be able to sell, and such insured is entitled to collect under the policies the full amount of injuries within the limits of the policies suffered by him proximately caused by the negligence of an uninsured motorist.”); Hawks, *supra* note 5, at 422 (“[T]he nonowner occupant has paid a premium for his own coverage, it is only fair to allow him to recover under his own policy when the primary coverage on the occupied vehicle is inadequate.”).

78. *Permanent White Journals 2009–2010 Session*, *supra* note 73, at 323 (“[R]eforms are necessary to protect consumers and to ensure that people injured in accidents are shielded from excessive financial loss due to insufficient coverage.”).

79. M.G. WOODROLL III & ALPHONSE M. SQUILLANTE, *AUTOMOBILE LIABILITY AND THE CHANGING LAW* 16 (1972).

to make sources of indemnification available for individuals in car accidents.<sup>80</sup> Wisconsin statutes require UM coverage for every insured.<sup>81</sup> Consumers rely on UM and UIM coverage as a safety net—an insured only invokes UM or UIM coverage when the tortfeasor either has no insurance or does not have sufficient insurance to pay for others' injuries.<sup>82</sup> This safety net is all the more important now that Wisconsin's minimum liability requirements are so low.<sup>83</sup> Insureds are exposed to the risk of an individual who buys the lowest coverage,<sup>84</sup> and, in a catastrophic accident, \$25,000 does not go very far to pay for an individual's recovery.<sup>85</sup> Consumers pay a premium for substantial UM and UIM coverage to aid in their recovery if they are in a horrible accident.<sup>86</sup> When an insured pays a premium for each of his or her policies, and the policy has been issued to the insured, it "seems both equitable and desirable to permit recovery under more than one

80. See Forward, *supra* note 56.

81. WIS. STAT. § 632.32(4) (2011–12).

82. ANDERSON, *supra* note 4, § 4.1; see also Clark & Vanderbeek, *supra* note 4, at 91 (discussing the purpose of UM and UIM coverage).

83. § 632.32(4) (Every policy of insurance must provide "uninsured motorist coverage in limits of at least \$25,000 per person and \$50,000 per accident . . . [and medical payments coverage, in the amount of at least \$1,000 per person."]).

84. Interview with Gary Gibson, Vice President and Treasurer, Shopko Stores Operating Co., LLC, in Green Bay, Wis. (Jan. 22, 2015) [hereinafter Gibson Interview]; see also Corum, *supra* note 1 ("Responsible drivers who pay for insurance end up also paying for injuries caused by uninsured drivers." (quoting Elizabeth Sprinkle, Senior Vice President, Insurance Research Council)).

85. In 2013, the average personal injury claim was \$15,443. *Cost of Auto Crashes & Statistics*, ROCKY MOUNTAIN INS. INFO. ASS'N, [http://www.rmiiia.org/auto/traffic\\_safety/Cost\\_of\\_crashes.asp](http://www.rmiiia.org/auto/traffic_safety/Cost_of_crashes.asp) (last visited Jan. 26, 2016). However, IRC reported that medical expenses resulting from automobile accidents increase at rates faster than inflation. See Press Release, Ins. Research Council, Medical Costs for Auto Injury Claims Outpace Inflation, Even as Reported Injuries Become Less Severe (Mar. 10, 2014), [http://www.insurance-research.org/sites/default/files/downloads/2012\\_Auto\\_Injury\\_Study\\_News\\_Release.pdf](http://www.insurance-research.org/sites/default/files/downloads/2012_Auto_Injury_Study_News_Release.pdf). Looking at previous Wisconsin verdicts and settlements, individuals have received injuries costing substantially more than \$25,000. *Automobile Personal Injury*, 21 WIS. VERDICTS & SETTLEMENTS 1, 14–23 (2012) (Recovery amounts range from \$25,000 to \$610,000.). For instance, a motorcyclist in Waukesha County was hit by an SUV that failed to yield to the motorcycle at a roundabout. *Id.* at 22. After a Flight for Life ride to a hospital, the plaintiff's multiple facial fractures and lacerations, a paralyzed iris, two fractured front teeth, and other injuries were treated. *Id.* The jury awarded the motorcyclist a total of \$492,841 in damages: \$68,641 in past medical expenses, \$60,000 in future medical expenses, \$14,200 in past nursing expenses, \$250,000 in past pain, suffering, and disability, and another \$100,000 for future damages. *Id.* at 23. The injured's medical expenses alone were \$142,841. Unfortunately, Wisconsin drivers are capable of being in high-cost, tragic accidents.

86. See *supra* note 4 and accompanying text.

[allowable] coverage until the claimant is fully indemnified.”<sup>87</sup> Insureds should receive the benefits of the premium they pay for UM and UIM insurance. In the interest of fairness, the Wisconsin legislature should permit stacking these coverages.

Additionally, the consumer, not the legislature, should make decisions about stacking. From Wisconsin’s beginning, “the legislature . . . dominated the process of insurance-law making.”<sup>88</sup> With the growth of special interest groups, however, the Wisconsin legislature has been pressured to reform its insurance laws and policies.<sup>89</sup> Given that all legislators’ ultimate goals are either to be reelected or to advance their political career, they presumably may cater to special interest groups’ desires at the expense of their constituents’ needs as a whole.<sup>90</sup> In the area of insurance regulation, policies “tend to reflect the demands of insurance companies.”<sup>91</sup> Historically, the Wisconsin legislature rarely refused the insurance industry’s “requests for adjustments of law, unless [they] seriously conflicted with attitudes strongly felt by the legislators.”<sup>92</sup> Presently, legislators receive pressure from a wide range of sources.<sup>93</sup> Policy decisions about automobile insurance are a product of the competition of certain special interest groups: insurance companies, trial lawyers, consumer groups, and others.<sup>94</sup> Pressures from special interest groups have prevented the Wisconsin legislature from maintaining a consistent, longstanding stacking statute.<sup>95</sup>

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87. Chamberlin & Holt, *supra* note 16, at 437 (quoting ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE 13.6 at 583 (2d ed. 1992)).

88. SPENCER KIMBALL, INSURANCE AND PUBLIC POLICY: A STUDY IN THE LEGAL IMPLEMENTATION OF SOCIAL AND ECONOMIC PUBLIC POLICY, BASED ON WISCONSIN RECORDS 1835-1959, at 311 (1960).

89. *Id.* at 308–12.

90. LASCHER, *supra* note 63, at 13 (“[E]conomic producers with intense self-interests in policy outcomes will be advantaged in the political process and be able to obtain regulation that provides them with economic benefits.”).

91. *Id.*

92. KIMBALL, *supra* note 88, at 304.

93. LASCHER, *supra* note 63, at 14.

94. *Id.* at 7. On January 19, 2011, the Assembly held a public hearing for Assembly Bill 4, which would become 2011 Wisconsin Act 14. WIS. ASSEMBLY INS. COMM., RECORD OF COMMITTEE PROCEEDINGS, ASSEMBLY BILL 4 (2011). Special interest groups in favor of Assembly Bill 4 included Property Casualty Insurance Association of America (PCI), Independent Insurance Agents of Wisconsin (IIAW), Wisconsin Insurance Alliance, and numerous insurance companies. *Id.* Special interest groups in attendance opposed to Assembly Bill 4 included Citizen Action Wisconsin, ABATE (a motorcyclist interest group), Wisconsin Association for Justice, and numerous law firms. *Id.*

95. *See supra* Part I.

Further, legislators make decisions based not only on specific interest group pressures but also on their understanding of policy consequences.<sup>96</sup> Policymakers are motivated by making good public policy that will benefit their constituents.<sup>97</sup> Yet, institutions and other special interest groups shape how legislators value certain public policy decisions.<sup>98</sup> These different pressures and other policy values cause legislators to have differing opinions about what the most effective policy is.<sup>99</sup> Wisconsin's stacking legislation has oscillated four times in the past twenty years. An identifiable link exists "between the political balance of power in Wisconsin state government and significant changes in Wisconsin insurance law."<sup>100</sup> As such, a change in the political balance of power may yield dramatic changes to Wisconsin's insurance law.<sup>101</sup>

With such diverse opinions about stacking and the changing law that results, why not allow consumers to decide whether they want a lower premium or increased stacking coverage? Individual consumers should be able to decide, in a free-market economy, if they want the ability to stack. The market is "often superior to politics at dealing with conflicts between the interests of the majority and the minority" of consumers and their advocates.<sup>102</sup> During the January 19, 2011 Joint Public Hearing of the Wisconsin Assembly and Senate Committee on Insurance and Housing, bill drafter Representative John Nygren indicated consumer choice was the main reason to roll back the changes made during the Truth in Auto Insurance Era.<sup>103</sup> Representative Nygren asserted that the bill, which eventually became 2011 Wisconsin Act 14, addressed "the ability for consumers to choose and to put affordability back into the equation for auto insurance."<sup>104</sup>

Permitting individual choice between insurance products would satisfy both consumers who prefer increased coverage by way of stacking in exchange for a higher premium and consumers who prefer a lower premium at the cost of the inability to stack policies. The "most practical and politically acceptable" way to eradicate the problems that

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96. LASCHER, *supra* note 63, at 17.

97. *Id.* at 18.

98. *Id.* at 14, 17–18.

99. *Id.* at 18.

100. Robert L. Jaskulski, *Politics & Wisconsin Automobile Insurance Law*, WIS. LAW. (Nov. 1, 2010), <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=83&Issue=11&ArticleID=1981>.

101. *Id.*

102. Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 694 (2013).

103. *Joint Hearing, supra* note 7.

104. *Id.*

stacking poses, while simultaneously respecting stacking advocates' views, is to permit stacking and allow consumers to waive the ability to stack by submitting stacking waivers.<sup>105</sup> Wisconsin consumers, not the legislature, should decide whether they desire the ability to stack.

### C. Anticipated Criticisms of Stacking Waivers

While there are many practical benefits of allowing consumers to determine whether they want the ability to stack UM or UIM coverage,<sup>106</sup> there are also criticisms. These criticisms include increased insurance premiums, difficulties rating insureds, unequally spreading the risk among insureds, and potential consumer confusion. This Section addresses ways to diminish these concerns if the Wisconsin legislature chooses to adopt a stacking waiver statute.

#### 1. INCREASED PREMIUMS

Permitting insureds to stack multiple policies results in higher premiums overall.<sup>107</sup> Insurance premiums will likely rise if the Wisconsin legislature enacts statutes implementing stacking waivers. Indeed, in 2011, the Wisconsin legislature enacted statutes permitting anti-stacking provisions as one avenue to reduce insurance premiums.<sup>108</sup> The amount of an insurance premium is determined by balancing two important policies—"the preservation of the integrity of the insurance fund against improper raids by persons not entitled to participate and the satisfaction of the reasonable expectations of the insured."<sup>109</sup>

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105. See Jeffrey O'Connell et al., *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 76 (1986).

106. See *supra* Part II.B.

107. See DOYLE, *supra* note 49, at 39; Forward, *supra* note 56; see also Sclafani, *supra* note 16, at 267. Premiums will increase simply because insureds are getting more coverage. *Joint Hearing*, *supra* note 7.

108. Forward, *supra* note 56. However, eliminating stacking was not the Wisconsin legislature's only concern—another component of Wisconsin Statutes section 632.32(4)(d) that increased premiums from 2009 to 2011 was the increased mandatory minimum coverage levels. *Joint Hearing*, *supra* note 7. The proponents of 2011 Wisconsin Act 14 speculated that individuals who would benefit from notable premium reductions would be individuals at the current minimum limits (\$50,000 and \$100,000) dropping to the new minimum limits (\$25,000 and \$50,000). *Id.*

109. KIMBALL, *supra* note 88, at 7. Premiums are calculated based on expectations of future claims and expense costs, including "amounts paid to third parties as compensation, any insured punitive damage awards, legal defense costs, and other operational expenses." Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 TEX. L. REV. 1681, 1685 (1994).

Realistically, insurance premiums minimally increase when an insured stacks multiple UM and UIM policies.<sup>110</sup>

Although insurance premiums will likely rise if Wisconsin implements stacking waivers, the increase will not be detrimental to the average Wisconsin consumer.<sup>111</sup> Purchasing insurance with higher premiums, even “purchasing excessive coverage, is unlikely to pose a severe strain on the typical middle-class family.”<sup>112</sup> Paying higher premiums for increased coverage “normally has less financial and public policy significance than the failure to purchase” insurance for unlikely catastrophic circumstances, in which case losses to individuals are extensive.<sup>113</sup> Additionally, on balance, stacking waivers help control insurance costs for consumers.<sup>114</sup> When assessing Pennsylvania’s insurance reform, overall, commentators found that the MVFRL assisted in controlling auto insurance rates and lowering insurance costs.<sup>115</sup> Further, increased coverage, by way of stacking numerous policies, provides benefits to Wisconsin families when significant loss occurs.<sup>116</sup>

## 2. RATING DIFFICULTIES

Stacking creates a rating problem for insurers.<sup>117</sup> Insurance companies gather aggregate data on claims and losses to determine what rates to charge<sup>118</sup> and also use information about the individual driver to rate an insured.<sup>119</sup> Insurance companies consider numerous driving- and

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110. *See Joint Hearing, supra* note 7.

111. KUNREUTHER ET AL., *supra* note 74, at 185. The Wisconsin Office of the Commissioner of Insurance also has tips to assist consumers in shopping around for competitively priced insurance. *Tips for Saving on Auto Insurance*, WIS. OFF. COMMISSIONER INS., [http://oci.wi.gov/pub\\_list/pi-218.htm](http://oci.wi.gov/pub_list/pi-218.htm) (last visited Jan. 30, 2015).

112. KUNREUTHER ET AL., *supra* note 74, at 185.

113. *Id.*

114. LASCHER, *supra* note 63, at 71.

115. *Id.* at 66–71 (discussing studies by the Legislative Budget and Finance Committee and Insurance Federation of Pennsylvania).

116. *Id.*

117. Gibson Interview, *supra* note 84; *see Pottier & Witt, supra* note 109, at 1690 (“When actions that give rise to legal liability and the amount of actual and punitive damages are changing and unpredictable, insurers cannot predict or forecast with any accuracy the average amount to be paid out under a liability policy.”).

118. KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* 113 (4th ed. 2005). Insurance companies use “information about characteristics correlated with losses” and “reliable data regarding the characteristics of the insured” to determine risk. *Id.* at 124–25.

119. Jessica Bosari, *What Really Goes into Determining Your Insurance Rates?*, FORBES (Jan. 8, 2013), <http://www.forbes.com/sites/moneywisewomen/2013/01/08/what-really-goes-into-determining-your-insurance-rates/>.

non-driving-related risk factors to determine auto insurance rates.<sup>120</sup> Premium amounts are determined based on “the probability distributions of the risks involved.”<sup>121</sup> Stacking, however, is unpredictable because an injured person is able to stack across multiple policies.<sup>122</sup>

Determining premium rates for individuals who can stack across multiple policies is problematic because no relationship exists between the unrelated vehicles. Consider an individual who owns a pick-up truck, a sports car, and a motorcycle—three very different vehicles. His insurance company insures him as a truck driver; yet, he is exposing himself to risk on the motorcycle. Not surprisingly, motorcycles are more dangerous than trucks.<sup>123</sup> If the individual is in a motorcycle accident with an uninsured driver and is permitted to stack, he will be able to apply the UM coverage for his truck and his car. The insurance company insuring his truck rates him for a risk that is not necessarily accurate because it does not factor in the risks involved in driving his other vehicles. Thus, stacking makes rating an insured’s risk less predictable and more variable.

Nonetheless, allowing stacking is reasonable public policy.<sup>124</sup> The Wisconsin legislature was not concerned with rating risks when it

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120. *Id.* Driving-related factors may include the insured’s driving record, how much the insured uses the car, and where the car is parked. *What Determines the Price of My Auto Insurance Policy?*, INS. INFO. INST., <http://www.iii.org/article/what-determines-price-my-auto-insurance-policy> (last visited Feb. 21, 2015). Non-driving-related factors may include gender, age, where the insured lives, vehicle type, and the insured’s credit. *Id.* Some states have enacted regulations barring insurance companies from using some of these factors. *See, e.g.*, WIS. ADMIN. CODE Ins. § 6.54 (2011–12).

121. Zinoviy Landsman & Michael Sherris, *Risk Measures and Insurance Premium Principles*, 27 INS.: MATHEMATICS & ECON., Mar. 2001, at 103. The uncertainty of increased actual and potential liability can change an insurance company’s expectations about the level of premiums needed to produce a competitive return. Pottier & Witt, *supra* note 109, at 1686. After all, an insurance company is a business expecting to earn a competitive profit. *Id.* at 1685.

122. Clark & Vanderbeek, *supra* note 4, at 89–90; Gibson Interview, *supra* note 84.

123. Mary Ann Porucznik, *Per Miles Traveled, Motorcycles Are Deadlier than Cars*, AM. ACAD. ORTHOPAEDIC SURGEONS (July 2012), <http://www.aaos.org/news/aaosnow/jul12/clinical1.asp>. Per mile travelled, a motorcyclist is thirty-seven times more likely than a car occupant to die and nine times more likely to be injured. *Id.*

124. Adam Korbitz, *New State Budget Permits Auto Policy Stacking, Mandates Coverage*, INSIDE TRACK (July 24, 2009), <http://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?Volume=1&Issue=13&ArticleID=5587> (“The State Bar’s Board of Governors has a long-standing public policy position supporting the ability of insureds to stack automobile policy limits . . .”).

allowed stacking in 2009, and it should not be a concern now.<sup>125</sup> Individuals should not be caught in a position in which they are exposed to risk they did not cause and are unable to obtain adequate financing for their injuries. If insurance companies continue to rate their customers in a way that makes the same margin, insurance companies will continue to profit.<sup>126</sup> Thus, difficulty in assessing risk should not deter the Wisconsin legislature from implementing stacking waivers.

### 3. UNEQUALLY SPREADING THE RISK

Additionally, stacking waivers create difficulty for an insurance company attempting to equally spread the risk of stacking amongst single-vehicle owners and multi-vehicle owners. Insurance companies spread risks across similarly situated individuals.<sup>127</sup> A risk disparity may exist between a single person and a married person who each purchase a premium to gain the ability to stack. Adding multiple vehicles to a policy increases an insurer's risk.<sup>128</sup> Typically, a single person who buys an insurance policy has one vehicle, whereas a married couple is likely to have multiple vehicles.<sup>129</sup> Even if a single individual has the ability to stack, given the circumstances of the accident, the individual might not have any other coverage with which to stack.

Consider a situation in which an uninsured motorist hits a single individual creating a two-car accident. The single individual only has his UM coverage. He does not have another UM policy to stack with his policy. Therefore, he would be in the same position as if he had signed a stacking waiver and paid a lower premium. Conversely, if an uninsured motorist hits a married individual creating a two-car accident, the married individual can stack his UM policy with his spouse's policy. This scenario creates unequal treatment of insureds. Essentially, the single individual who cannot stack is subsidizing a

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125. DOYLE, *supra* note 49, at 39 (“[R]eforms are necessary to protect consumers and to ensure that people injured in accidents are shielded from excessive financial loss due to insufficient coverage.”).

126. ABRAHAM, *supra* note 118, at 114.

127. Richard Zeckhauser, *Insurance*, LIBR. ECON. & LIBERTY, <http://www.econlib.org/library/Enc/Insurance.html> (last visited Feb. 18, 2016). Insurers can also spread risk over property and timespans by increasing reserves in “good years to deal with heavier claims in bad ones.” *Id.*

128. Note, *supra* note 72, at 158 (“[I]t is clear that a family operating a fleet of automobiles simultaneously has a much greater chance of a member being struck and injured by an uninsured motorist than if the family owned and operated only one vehicle.”).

129. *Cheap Auto Insurance*, AUTOINSURANCE.ORG, <http://www.autoinsurance.org/cheap-auto-insurance/> (last visited Feb. 20, 2015).

person who can.<sup>130</sup> Inevitably, this type of treatment would need to be built into an insurance company's rates; yet, insurance companies cannot easily assess and create rates for such a situation.

Nonetheless, insurance law creates "some protection against the unequal treatment of policyholders."<sup>131</sup> In Wisconsin, insurers may not use classifications such as age, marital status, sexual preference, or moral character to charge different rates to insureds.<sup>132</sup> Insurance commissioners are able to "prohibit rates that are 'unfairly discriminatory,' and state statutes sometimes single out particular variables for prohibition in connection with certain forms of insurance," even if the rates are statistically truthful.<sup>133</sup> In reality, most regulatory rate scrutiny is not focused on whether the rates are inadequate or unfairly discriminatory.<sup>134</sup> Instead, the "typical Insurance Commissioner in a rate hearing" determines whether rates are excessive.<sup>135</sup> Because insurance companies in Wisconsin cannot take marital status into account, a recovery difference for single and married individuals may exist creating an inequity. But, as long as the insurance premiums are not excessive, the Commissioner may not find the system "unfairly discriminatory."<sup>136</sup> Moreover, single-vehicle policyholders are able to obtain a benefit from the ability to stack in two situations:

- (1) where the insured is injured in his own vehicle insured with uninsured motorist coverage and is also covered as an insured under another policy providing uninsured motorist benefits, and (2) where the individual is injured in a vehicle other than his own insured vehicle and is an insured under the non-owned vehicle's policy, which also has uninsured motorist coverage (such as an employer's vehicle).<sup>137</sup>

Thus, stacking waivers provide some benefit for both single-vehicle policy holders and multi-vehicle policy holders.

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130. *Id.*

131. Abraham, *supra* note 102, at 691.

132. WIS. ADMIN. CODE Ins. § 6.54 (2011-12).

133. Abraham, *supra* note 102, at 691.

134. ABRAHAM, *supra* note 118, at 116.

135. *Id.*

136. *Id.*

137. *Craley v. State Farm Fire & Cas. Co.*, 895 A.2d 530, 537 (Pa. 2006) (discussing the Insurance Commissioner's declaratory opinion and order entered "in *Leed v. Donegal Mutual Insurance Co.*, Docket Number MS96-10-055, on February 23, 1998").

## 4. CONSUMER CONFUSION

Also, consumers may not understand stacking waivers. Pennsylvania courts have considered whether stacking waivers are knowing waivers.<sup>138</sup> The concern is that consumers may inadvertently sign their stacking rights away and not receive coverage. Conflicts regarding recovery arise because “expectations of policyholders which appeared reasonable were often in excess of the coverage the companies contemplated when the policies were written, and for which premiums were computed.”<sup>139</sup>

When reviewing insurance contracts, absent any ambiguity, the Wisconsin Supreme Court will not rewrite the contract to cover a risk the insurer “did not contemplate and for which it did not receive a premium.”<sup>140</sup> But the court also construes policy provisions as would a “reasonable person in the position of the *insured*.”<sup>141</sup> Wisconsin courts have held that insurers are in a “superior position to the insured in relation to the formation and interpretation of the insurance contract.”<sup>142</sup> Ultimately, the insurance scheme is most effective when insureds fully understand what risks their policies cover.<sup>143</sup> This understanding comes down to communication.

If insurance companies and insureds communicated more effectively, insureds would better understand what their policy covers.<sup>144</sup> Typical consumers have difficulty understanding the insurance policies they purchase because they do not read and cannot negotiate their insurance policies.<sup>145</sup> Many times, consumers do not understand “what they are getting, partly because insurance policies are

138. See *id.* at 541; see also *Haspel v. State Farm Mut. Auto. Ins. Co.*, 241 F. App’x 837, 839–40 (3d Cir. 2007).

139. KIMBALL, *supra* note 88, at 209.

140. *Hirschhorn v. Auto-Owners Ins. Co.*, 809 N.W.2d 529, 535 (Wis. 2012).

141. *Badger Mut. Ins. Co. v. Schmitz*, 647 N.W.2d 233, 234 (Wis. 2002) (emphasis added) (quoting *Taylor v. Greatway Ins. Co.*, 628 N.W.2d 916, 920 (Wis. 2001)). Courts “attempt to determine what a reasonable person in the position of the insured would have understood the words of the [insurance] policy to mean.” *Id.* (quoting *Taylor*, 628 N.W.2d at 920).

142. *Maxwell v. Hartford Union High Sch. Dist.*, 814 N.W.2d 484, 497 (Wis. 2012) (quoting *Towne Realty, Inc. v. Zurich Ins. Co.*, 548 N.W.2d 64, 67 (Wis. 1996)).

143. KUNREUTHER ET AL., *supra* note 74, at 73; see also George L. Priest, *The Antitrust Suits and the Public Understanding of Insurance*, 63 TUL. L. REV. 999, 1000 (1989).

144. KUNREUTHER ET AL., *supra* note 74, at 280.

145. John Dwight Ingram, *The Insured’s Expectations Should Be Honored Only If They Are Reasonable*, 23 WM. MITCHELL L. REV. 813, 814 (1997); see also Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet To Be Met*, 45 AM. BUS. L.J. 2, 3 (2008).

often not clearly written and are not transparent, and partly because risk is a complicated concept to explain in plain language.”<sup>146</sup>

In addition, insurance companies struggle to fully explain a consumer’s coverage and the risks involved, partially because insurers do not have the time or resources to provide these details.<sup>147</sup> Determining “how to provide, present, and pay for this information poses challenges” to both legislatures and insurance companies.<sup>148</sup> Stacking waivers present one way to reduce insured misconception. Even though stacking waivers are a type of standard form contract, the waiver can assist insurance companies in notifying consumers about exactly what UM and UIM coverage they are receiving. The stacking waiver is not an extensive document, and the consumer will have to sign the waiver, releasing his or her ability to stack.<sup>149</sup> The waiver requires a separate signature from that signifying agreement to the entire policy, so the waiver will draw the insured’s attention to his or her ability to stack.<sup>150</sup> Thus, stacking waivers will actually increase consumers’ understanding about what type of coverage they are receiving from their UM and UIM policies.

Moreover, even if a consumer releases his or her right to stack, he or she would be in the same predicament Wisconsin’s current legislation provides.<sup>151</sup> Presently, Wisconsin drivers do not have the ability to stack, even if they are willing to pay a higher premium for the right.<sup>152</sup> Consumers should be able to choose whether or not they desire stacking.<sup>153</sup> To be sure, allowing stacking waivers comes with some costs, but the benefits of a waiver system far outweigh any costs. For this reason, the Wisconsin legislature should implement stacking waivers in UM and UIM policies.

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146. KUNREUTHER ET AL., *supra* note 74, at 280; *see also* Ingram, *supra* note 145, at 814–15. The average insured does not read an insurance policy because the policy contains “legal language, jargon, and terms which non-sophisticated parties cannot read easily,” and the policy is usually extensive. Becher, *supra* note 145, at 9.

147. KUNREUTHER, ET AL., *supra* note 74, at 211. Standard form contracts minimize production and transaction costs allowing insurance companies and insureds to share in the benefit of form insurance policies. *See* Becher, *supra* note 145, at 7.

148. KUNREUTHER, ET AL., *supra* note 74, at 211.

149. *See* 75 PA. CONS. STAT. § 1738 (2011–12). Each waiver for UM and UIM coverage is one paragraph. *Id.*

150. *Id.*

151. The insured would not be able to stack coverage and would be paying a premium similar to what he or she is paying now. WIS. STAT. § 632.32(5)(f) (2011–12); *see also* Forward, *supra* note 56.

152. § 632.32(5)(f).

153. Abraham, *supra* note 102, at 694.

## III. DRAFTING THE WISCONSIN STACKING WAIVER STATUTE

The Pennsylvania General Assembly clearly did not have certain circumstances or scenarios in mind when enacting its stacking waiver statute, title 75, section 1738(d) of the Pennsylvania Consolidated Statutes. If the Wisconsin legislature adopts a stacking waiver statute, it can benefit from Pennsylvania's twenty-five years of case law and experience in working through the statute's ambiguities. While Wisconsin should not adopt Pennsylvania's statute verbatim, it provides a starting point for the legislature when crafting the appropriate Wisconsin stacking waiver statute. This Part addresses the changes the Wisconsin legislature should make to Pennsylvania's statute to ensure the statute is more clear and practical for Wisconsin. This Part concludes with a sample statute the Wisconsin legislature should adopt.

A. *Wisconsin Legislature Considerations*

The Wisconsin legislature will face four considerations when drafting the stacking waiver statute. First, stacking waivers should apply to both inter- and intra-policy stacking.<sup>154</sup> Second, the Wisconsin stacking waiver statute should be "opt out."<sup>155</sup> Third, the statute should make clear that the written rejection must contain the statute's exact language. Fourth, the Wisconsin legislature should not allow an individual who waived stacking to receive stacked coverage as a passenger.

First, the Wisconsin statute should make clear that the stacking waiver applies to both inter- and intra-policy stacking. Inter-policy stacking refers to the stacking of coverage under separate insurance policies covering different vehicles, regardless of whether the policies were issued by the same insurer.<sup>156</sup> Intra-policy stacking refers to the stacking of coverage under a single policy that covers multiple vehicles, with a separate premium attributable to each vehicle.<sup>157</sup> Pennsylvania's statute was ambiguous on this point until the Pennsylvania Supreme

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154. Inter-policy stacking allows individuals to stack coverage under multiple insurance policies insuring different vehicles. ANDERSON, *supra* note 4, § 3.59. Intra-policy stacking allows an individual to stack coverage under a single policy that insures multiple vehicles. *Id.* § 3.60.

155. Opt out means "to choose not to participate in (something)." BLACK'S LAW DICTIONARY 1269 (10th ed. 2014). In this case, an "opt out" stacking waiver would require an insured to sign a waiver relinquishing his or her right to the standard option. Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, J. RISK & UNCERTAINTY, Aug. 1993, at 47.

156. ANDERSON, *supra* note 4, § 3.59.

157. *Id.* § 3.60.

Court concluded that stacking waivers applied to both inter- and intra-policy stacking.<sup>158</sup>

Wisconsin's stacking waivers, like Pennsylvania's, should waive both inter- and intra-policy stacking because Wisconsin's current stacking scheme applies to both inter- and intra-policy stacking.<sup>159</sup> Even when the Wisconsin legislature permitted stacking from 2009 to 2011, an individual could only stack up to three policies regardless of inter- or intra-policy stacking.<sup>160</sup> *Westra v. State Farm Mutual Automobile Insurance Company*<sup>161</sup>—an example of stacking at its most extreme—best evidences Wisconsin's inter- and intra-policy stacking procedure.<sup>162</sup> In *Westra*, a vehicle hit a motorcyclist, Westra, who sustained severe injuries.<sup>163</sup> After the accident he recovered insurance proceeds from four separate policies.<sup>164</sup> He sought to recover \$100,000 of UIM coverage from two additional State Farm policies.<sup>165</sup> The parties stipulated that Westra had suffered bodily injury damages that would entitle him to recover at least \$200,000 in additional UIM coverage.<sup>166</sup> However, the court concluded that under Wisconsin Statutes section 632.32(6)(d), State Farm's anti-stacking provision was valid.<sup>167</sup> The court held that although Wisconsin Statutes section 632.32(6)(d) prohibited anti-stacking clauses, the statute unambiguously allowed insurers to restrict both inter- and intra-policy stacking of UIM coverage to the coverage limits for three vehicles.<sup>168</sup> The anti-stacking provisions in the State Farm policies barred Westra from recovering the

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158. *Craley v. State Farm Fire & Cas. Co.*, 895 A.2d 530, 542 (Pa. 2006). The court reasoned that prohibiting waiver in single-vehicle policies conflicts “with the cost-containment purpose of the MVFRL because it would prevent a class of insureds from taking advantage of a method to reduce their premiums.” *Id.* at 540.

159. WIS. STAT. § 632.32(5)(f) (2011–12). Under the current statute, UM and UIM policies can include anti-stacking provisions to preclude inter- and intra-policy stacking. *Id.*

160. WIS. STAT. § 632.32(6)(d) (2009–10).

161. 835 N.W.2d 280 (Wis. Ct. App. 2013).

162. *Id.* at 281.

163. *Id.*

164. *Id.* Westra recovered the \$150,000 limit of defendant Kerrigan's automobile liability policy. *Id.* He also recovered \$100,000 from a UIM policy issued to the owner of the motorcycle he was driving, \$100,000 in UIM coverage and \$10,000 in medical payments from a policy on a pickup truck he owned, and \$100,000 in UIM coverage and \$10,000 in medical payments from a policy issued to him on a 2003 Harley-Davidson motorcycle. *Id.* These payments totaled \$470,000. *Id.*

165. *Id.* at 282. The policies were issued to Westra for a 2000 Chevrolet pickup truck and a 1999 Harley-Davidson Motorcycle. *Id.*

166. *Id.*

167. *Id.* at 288.

168. *Id.*

additional \$200,000 in UIM coverage.<sup>169</sup> While he could not stack all of his policies, the Wisconsin statute permitted inter- and intra-policy stacking.<sup>170</sup> The court's holding evinces Wisconsin's policy to permit inter- and intra-policy stacking.<sup>171</sup> A Wisconsin stacking waiver statute should unambiguously permit inter- and intra-policy stacking to ensure the new legislation does not upset Wisconsin insureds' expectations.

Second, Wisconsin legislators should adopt a stacking waiver opt-out system. Opt-in systems allow an insured to choose to participate in an insurance scheme while opt-out systems allow an insured to choose not to participate in an insurance scheme.<sup>172</sup> This simple framing question has a significant economic impact on consumers.<sup>173</sup> In the late 1980s and early 1990s, some states began "changing their automobile liability insurance laws to give consumers more choice."<sup>174</sup> These regulations concerned "a choice between a 'full-priced' policy that include[d] the right to sue for any auto-related injury and a less-expensive policy" that restricted a consumer's right to sue.<sup>175</sup> Both Pennsylvania and New Jersey offered different versions of these laws with the ultimate goal of lowering automobile insurance rates.<sup>176</sup> New Jersey's regulations allowed consumers to opt-in to certain coverage, "to actively choose the full right to sue at a more expensive price."<sup>177</sup> Conversely, Pennsylvania consumers had to opt-out of the advantages

169. *Id.*; cf. *Bodish v. W. Bend Mut. Ins. Co.*, 851 N.W.2d 811, 812 (Wis. Ct. App. 2014) (The injured could not stack Milwaukee County's policy for each vehicle it owned because the policy did not include a separate premium attributable to each vehicle in the County's fleet.).

170. WIS. STAT. § 632.32(6)(d) (2009–10).

171. *Westra*, 835 N.W.2d at 288.

172. BLACK'S LAW DICTIONARY 1269 (10th ed. 2014).

173. Johnson et al., *supra* note 155, at 48.

174. *Id.* at 46. For example, Pennsylvania enacted the Motor Vehicle Financial Responsibility Law in 1990. Act of Feb. 7, 1990, 1990 Pa. Laws 11, No. 6. New Jersey enacted the Automobile Insurance Cost Reduction Act (AICRA) in 1998. *Get Legal with New Jersey's Basic Auto Insurance Policy*, ST. NEW JERSEY DEP'T BANKING & INS., [http://www.state.nj.us/dobi/division\\_consumers/insurance/basicpolicy.shtml](http://www.state.nj.us/dobi/division_consumers/insurance/basicpolicy.shtml) (last visited Feb. 21, 2015) [hereinafter *Get Legal*]. Both laws were implemented to effectively and efficiently regulate automobile insurance premiums. *Id.*; Act of Feb. 7, 1990, 1990 Pa. Laws 11, No. 6.

175. Johnson et al., *supra* note 155, at 46.

176. KUNREUTHER ET AL., *supra* note 74, at 124.

177. *Id.* The AICRA created a Basic Policy and a Standard Policy. *Get Legal*, *supra* note 174. The Act mandated that a Basic Policy be available to all New Jersey drivers. *Id.* The Basic Policy provides less coverage to the insured but at a lower cost than the Standard Policy. *Id.* For instance, the Basic Policy provides \$15,000 per person per accident coverage for personal injury protection and does not include UM or UIM coverage. *Id.* Conversely, the Standard Policy allows personal injury protection from \$15,000 to \$250,000 or more per person per accident as well as UM and UIM coverage up to amounts selected for liability coverage. *Id.*

of certain coverage, as illustrated by Pennsylvania's stacking waiver statute.<sup>178</sup>

Theoretically, the choice between these two options should be the same.<sup>179</sup> The percentage of consumers paying the premium for full coverage should be consistent in both New Jersey and Pennsylvania. In actuality, the number of individuals in New Jersey choosing to acquire the right to sue was drastically disproportionate compared to the numbers in Pennsylvania.<sup>180</sup> In New Jersey, "only about twenty percent of . . . drivers chose to acquire the full right to sue with eighty percent maintaining the status quo of no right to sue," whereas in Pennsylvania, "seventy-five percent of the insured population retained the full right to sue."<sup>181</sup> The simplest explanation for this result is the way the states framed the option to obtain the right to sue.<sup>182</sup> The way New Jersey and Pennsylvania framed the choice changed the consumer's reference point.<sup>183</sup> Consumers finding the right to sue valuable depended "on whether that right was presented as the standard option or one that had to be chosen actively."<sup>184</sup> By framing the limited right as a loss from the full right, Pennsylvania increased "the relative attractiveness of the full right."<sup>185</sup>

This framing question, whether to make Wisconsin stacking waivers opt-in or opt-out, has significant financial consequences.<sup>186</sup> If Pennsylvania had adopted a statute similar to New Jersey's, where a limited tort option was the default choice, "Pennsylvanians would have paid over \$200 million dollars less for auto insurance."<sup>187</sup> While the legislators in Pennsylvania may not have given the wording of these statutes much thought, the way the stacking waiver was framed evinces that "the financial repercussions may be in the tens or hundreds of millions of dollars."<sup>188</sup> The Wisconsin legislature's focus is clearly on

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178. KUNREUTHER ET AL., *supra* note 74, at 124. Pennsylvania legislatures may have believed making the full tort option the default option would more likely hold up against a challenge in court. LASCHER, *supra* note 63, at 73 n.20.

179. Johnson et al., *supra* note 155, at 46.

180. KUNREUTHER ET AL., *supra* note 74, at 124.

181. *Id.*; see also LASCHER, *supra* note 63, at 71 (Most Pennsylvania consumers retained full-tort coverage because it was the default option.).

182. Johnson et al., *supra* note 155, at 47.

183. *Id.*

184. *Id.*

185. *Id.* Consumers tend to display "a strong and robust tendency to stick with what they have, the status quo, even when it is randomly determined." *Id.* at 48.

186. *Id.*

187. *Id.*

188. *Id.* The added administrative costs insurance companies will face by adding stacking waivers to their policies will be offset by the added revenue resulting from opt-out waivers.

keeping Wisconsin premiums low.<sup>189</sup> At the same time, New Jersey residents apparently did not opt-in to stacking because of the way the option was framed—*not* due to the cogent choice to have a lower premium.<sup>190</sup> To ensure that more Wisconsin insureds receive full coverage for catastrophic events, an opt-out waiver would be more appropriate. Therefore, a Wisconsin stacking waiver statute should be drafted similar to Pennsylvania’s statute and allow residents to opt-out of stacking.

Third, Wisconsin’s statute should clarify that consumers’ written stacking waiver in their UM and UIM policy must contain the statute’s exact language. If an insurance company deviates from the statute’s exact language, the stacking waiver must be found *per se* invalid.<sup>191</sup> Demanding that the stacking waiver match the statute verbatim differs from Wisconsin’s past stacking requirements.<sup>192</sup> Nonetheless, the stacking waiver must mirror the statute so the insurance company does not include a clause in the waiver the Wisconsin legislature did not approve. Wisconsin’s statute must explicitly state that the insurance company’s UM and UIM stacking waiver follows the statute’s exact language, not only so that the waiver is upheld but also to ensure that consumers better understand the scope of the indemnification rights to be waived.

Fourth, the Wisconsin legislature should not allow an individual who waived stacking to receive stacked coverage as a passenger. This prohibition would deviate from Pennsylvania law. In *Generette v. Donegal Mutual Insurance Company*,<sup>193</sup> the Supreme Court of Pennsylvania concluded that the stacking waiver only applied to “insureds” as defined by title 75, section 1702 of the Pennsylvania Consolidated Statutes, “which does not include guest passengers.”<sup>194</sup> Accordingly, a passenger who signed a stacking waiver and was injured in an accident could still stack UIM policies.<sup>195</sup> Regardless, preventing

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189. DOYLE, *supra* note 49, at 39 (“[I]t is more essential than ever to ensure that insurance premiums remain affordable for all drivers required to purchase insurance.”); Forward, *supra* note 56 (“[T]he new law will make it more affordable to have car insurance.”); *Joint Hearing*, *supra* note 7.

190. Johnson et al., *supra* note 155, at 48.

191. See 75 PA. CONS. STAT. § 1738(e) (1990).

192. See *Hanson v. Prudential Prop. & Cas. Ins. Co.*, 591 N.W.2d 619, 626 (Wis. Ct. App. 1999) (holding that because Wisconsin Statutes section 632.32(5)(f) did not indicate that certain magic language is required in an insurance policy, the policy’s anti-stacking provision did not need to “parrot” the statute’s language).

193. 957 A.2d 1180 (Pa. 2008).

194. *Id.* at 1190. The court reasoned it was bound to Section 1702’s definition of “insured” because the legislature did not indicate that the definition should not be applied. *Id.*

195. *Id.*

guest passengers from stacking UM and UIM policies would allow insurance companies to more easily assess the risk associated with stacking because insurance companies would have one less variable to consider.<sup>196</sup> Wisconsin's stacking waiver should be a complete waiver. If a consumer releases his or her right to stack as a driver, he or she should release his or her right to stack entirely. Allowing passengers to stack UM or UIM policies even though they signed a stacking waiver allows insureds to receive a benefit for which they did not pay a premium.<sup>197</sup> Therefore, the Wisconsin legislature should not allow an individual who waived stacking to receive stacked coverage as a guest passenger.

Under this principle, imagine that an underinsured motorist causes an accident that severely injures a passenger in the other vehicle. If the passenger signed a stacking waiver, she would not be able to stack her UIM policy with the driver's policy. The recovery amounts would be determined by her policy's "Other Insurance Clause,"<sup>198</sup> as is Wisconsin's current practice.<sup>199</sup> To maintain consistency in rate considerations and Wisconsin law, a passenger who waived the right to stack should not be able to stack policies when he or she is injured.

#### *B. A Proposed Wisconsin Stacking Waiver Statute*

To create a choice-based stacking insurance system in Wisconsin, the legislature must engage in significant statutory reform. The following is proposed model legislation designed to implement the proposals outlined in this Comment.<sup>200</sup>

#### **Stacking of uninsured and underinsured benefits and option to waive.**

**a) Limit for each vehicle.** When more than one vehicle is insured under one or more policies providing uninsured or underinsured motorist coverage, the stated limit for uninsured or underinsured coverage shall apply separately to each

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196. See *supra* Part II.C.2.

197. The Wisconsin Supreme Court will not interpret an insurance policy to force an insurer to provide coverage the company did not bargain for or promise to cover. See *1325 N. Van Buren, LLC v. T-3 Group, Ltd.*, 716 N.W.2d 822, 837 (Wis. 2006) (quoting *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 73 (Wis. 2004)).

198. When multiple insurance companies are responsible for making payments for recovery, an Other Insurance Clause dictates the order in which the companies must compensate the injured. ANDERSON, *supra* note 4, § 11.3.

199. See *Burgraff v. Menard, Inc.*, 853 N.W.2d 574, 578 (Wis. 2014).

200. The proposed statute is based on 75 PA. CONS. STAT. § 1738 (2011-12).

vehicle so insured. The limits of coverage available under this subchapter for an insured shall be the sum of the limits for each motor vehicle as to which the injured person is an insured.

**b) Waiver.** Notwithstanding the provisions of subsection (a), a named insured may waive coverage providing stacking of uninsured or underinsured coverage, in which case the limits of coverage available under the policy for an insured shall be the stated limits for the motor vehicle as to which the injured person is an insured.

**c) More than one vehicle.** Each named insured purchasing uninsured or underinsured motorist coverage for more than one vehicle under a policy shall be provided the opportunity to waive the stacked limits of coverage and instead purchase coverage as described in subsection (b). The premiums for an insured exercising such waiver under this section shall be reduced to reflect the different cost of such coverage.

**d) Forms.**

1) Any rejection form that does not comply verbatim with subsection (d)(2) or (3) is void.

2) The named insured shall be informed that he may exercise the waiver of the stacked limits of uninsured motorist coverage by signing the following written rejection form:

#### UNINSURED COVERAGE LIMITS

By signing this waiver, I am rejecting stacked limits of inter- and intra-policy uninsured motorist coverage under the policy for myself and members of my household under which the limits of coverage available would be the sum of limits for each motor vehicle insured under the policy. Instead, the limits of coverage that I am purchasing shall be reduced to the limits stated in the policy. I knowingly and voluntarily reject the stacked limits of inter- and intra-policy coverage. I understand this waiver also applies if I am a guest passenger in an accident and sustain injuries which would otherwise receive the stacked limits of inter- and intra-policy coverage. I understand that my premiums will be reduced if I reject this coverage.

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Signature

Date

3) The named insured shall be informed that he may exercise the waiver of the stacked limits of underinsured

motorist coverage by signing the following written rejection form:

#### UNDERINSURED COVERAGE LIMITS

By signing this waiver, I am rejecting stacked limits of inter- and intra-policy underinsured motorist coverage under the policy for myself and members of my household under which the limits of coverage available would be the sum of limits for each motor vehicle insured under the policy. Instead, the limits of coverage that I am purchasing shall be reduced to the limits stated in the policy. I knowingly and voluntarily reject the stacked limits of inter- and intra-policy coverage. I understand this waiver also applies if I am a guest passenger in an accident and sustain injuries which would otherwise receive the stacked limits of inter- and intra-policy coverage. I understand that my premiums will be reduced if I reject this coverage.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**e) Signature and date.** The forms described in subsection (d) must be signed by the first named insured and dated to be valid.

#### CONCLUSION

Wisconsin's stance on anti-stacking clauses has oscillated too frequently in the last two decades. Wisconsin's current anti-stacking legislation is inefficient at providing full recovery to individuals in catastrophic accidents caused by uninsured or underinsured motorists. Even though shifts in Wisconsin's political power changed insurance legislation, the legislature's purpose for the stacking statute is consistent—allowing Wisconsin citizens to choose what type of insurance is right for them and what they can afford.<sup>201</sup> Rather than oscillate between two extremes every time the Wisconsin legislature changes hands, the legislature must realign and reset Wisconsin's stacking legislation. The most equitable compromise between balancing the interests of insurance companies, consumers, and the state is to

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201. DOYLE, *supra* note 49, at 39 (“[I]t is more essential than ever to ensure that insurance premiums remain affordable for all drivers required to purchase insurance.”); Forward, *supra* note 56 (“[T]he law will make it more affordable to have car insurance.”).

adopt stacking waivers for UM and UIM policies. This change is completely new to Wisconsin. However, by adopting stacking waiver legislation, insureds themselves can decide how much protection they desire and can afford, which ultimately achieves the legislature's objective.