

POLICY LIMITS: TAKING NOTHING FOR GRANTED

Recently, a newspaper advertisement for a local telephone company caught our eye. Taking up only a fraction of a full-page ad, in tiny print, were several sentences concerning phone company customers unintentionally switching from regional service to a long distance company. Two sentences were particularly striking: "If you don't look closely, something could get by you And pay attention to the little things."

In "The Importance of Reading the Policy" New York Law Journal, July 19, 1995, p. 3, col. 1, we wrote about heeding the actual language of an insurance policy and not assuming knowledge of the contents without a careful examination of the text. Indeed, examples, in the words of the phone company of "looking closely" and "paying attention to the little things" continue to appear in reported cases.

In this article, we will re-visit Mostow v. State Farm Ins. Co., to analyze its important place in the jurisprudence of this State since the Court of Appeals' recent affirmance, and we will examine, for the first time, a case dealing with policy limits provisions, Allstate Ins. Co. v. Silver, and taking nothing for granted.

Limits of Liability

Insofar as all of the pertinent statutes governing the minimum limits of coverage under a liability policy contain language specifically subjecting the "per accident" limit to the "per person" limit (see, e.g., VTL § 311(4)(a) ["\$25,000 because of bodily injuries to and \$50,000 because of death of one person in any one accident, and subject to said limit for one person, to a limit of \$50,000 because of bodily injury to and \$100,000 because of death of two or more persons in any one accident (emphasis added)"]; see also Ins. L. §3420(f)(1); Ins. L. §5210(a); cf. Ins. L. §3420(f)(2)), it was, for many years, assumed and/or taken for granted that, for example, two people making claim under a \$300,000 per accident limit could only recover a maximum of \$100,000 each, for a total of \$200,000.

Mostow

In Mostow, the Court was faced with the interpretation of a split limit of liability provision, in a pre-Regulation 35-D supplementary uninsured motorist policy, which provided bodily injury coverage of \$100,000 per person and \$300,000 per accident, i.e. for two or more persons. The policy at issue, however, did not mirror the statutes, but, instead, defined the \$300,000 "each accident" limit as "the total amount of coverage for all damages due to bodily injury to two or more persons in the same accident" -- without any indication or suggestion that this "each accident" limit was subject to or limited by the \$100,000 "each person" limit.

In affirming an Order of the Appellate Division, Second Department, the Court of Appeals agreed that the provisions of State Farm's policy allowed for the possibility that where two people were injured they could recover a total of \$300,000, and that each claimant, if not limited by the "each person" limit, could recover more than \$100,000. Thus, the Court agreed that those provisions were ambiguous and were to be construed against State Farm.

Importance of Mostow

How important is the Mostow decision, borne out of a careful lawyer's careful reading of a seemingly standard policy and refusal to take anything for granted? Obviously, it is very important to Mrs. Mostow, whose award of \$190,000, in addition to the award of \$100,000 to her husband, was confirmed by the Court. Mostow's importance, however, goes far beyond its effect upon the litigants in that case. In the words of the unsuccessful Amicus Memorandum of Law submitted to the Court of Appeals by and on behalf of the New York State Insurance Association, American International Group, Inc., and CNA Insurance Companies, "The case involves an issue of broad public importance regarding underinsured motorist benefits and impacts insurance presently in force and effect with regard to millions of motor vehicles throughout New York State."

In their papers, the Amici detailed how, in an effort to quantify the direct impact of the Mostow decision on the "motor vehicle insurance marketplace," they conducted a survey of member companies to determine the number of policies utilizing the precise language at issue in Mostow. As reported therein, that survey disclosed that approximately 61% of all automobile insurance policies issued in New York State (including voluntary and involuntary policies) contain identical language. That figure includes personal and commercial line policies providing supplemental underinsured motorist coverage for private passenger and commercial vehicles.

Thus, it was estimated that of the approximately 12 million vehicles registered and insured in New York, 7.3 million vehicles are directly impacted by Mostow as it pertains to supplementary uninsured motorist coverage. This is to say nothing of the numerous policies and policyholders that may similarly be impacted with reference to other liability coverages, which were not quantified by the Amici.

Another significant element of the importance of the Mostow decision is the fact that it effectively invalidates that portion of the "new" SUM endorsement promulgated pursuant to Regulation 35-D (11 NYCRR §60.2, et seq., applied to new and renewal policies issued to

become effective on or after October 1, 1993) which deals with "Maximum SUM Limits" in cases of bodily injury (as opposed to death).

The language of the endorsement, as did State Farm's Limit of Liability section, fails to subject or limit the "each accident" limit to the "each person" limit. As we have previously reported, the failure to include the "subject to" language in the "Maximum SUM Limits" section, combined with the inclusion of such restricting language in the "SUM Limits" section dealing with death cases evidences an apparently inadvertent omission. Whether or not such omission was inadvertent, the Court of Appeals is now firmly on record as stating that it creates a problem which can only be remedied by an amendment of the provision. Certainly, in an effort to maintain consistency, avoid confusion, and prevent unjust enrichment, the Insurance Department should amend the Regulation. Similarly, all insurers with pre-Regulation 35-D policy provisions akin to State Farm's in Mostow would be well-advised promptly to send out endorsements to their policies inserting the appropriate "subject to" language. Of course, insofar as such endorsements could be considered reductions in coverage, the insurers would first have to get approval for such a change and, perhaps, reduce premiums accordingly.

There is, of course, no way to tell just how long it will take the Insurance Department and the insurers to make the appropriate changes. In this regard, it is interesting to note that State Farm itself was aware that the very language at issue in Mostow was ambiguous and likely to result in a ruling against it by virtue of a ruling of the Washington Court of Appeals in 1988 in Haney v. State Farm Ins. Co., 760 P.2d 950 (Wash. Ct. App. 1988), yet did nothing to change its policy language.

In the interim, however, it is incumbent upon every claimant's attorney to check the policy provision and make the Mostow argument where appropriate. Indeed, we would even go so far as to say that an attorney who does not do so may properly be charged with malpractice. Cf. Campagnola v. Mulholland, Minion & Roe, 76 NY2d 38, 556 NYS2d 239 (1990).

Death Limits

The second recent example of the perils of taking things for granted also involves the issue of the limits of liability for supplementary uninsured motorist coverage -- in this case, the limits for death cases.

It is widely known that, initially, when uninsured motorist coverage was first created in this State, the maximum limits for such coverage -- under both the Motor Vehicle Accident

Indemnification Corporation Act (Ins. L. §5201, et seq.) and the New York Automobile Accident Indemnification Act (Ins. L. §3420(f)(1)) were \$10,000 per person, and subject to a limit of \$10,000 per person, \$20,000 for two or more persons injured in an accident. These limits coincided with the limits for liability insurance set forth in the financial responsibility and compulsory insurance statutes, as originally enacted (see VTL §311(4)(a)).

By statutory amendment in 1979, the mandatory liability insurance and uninsured motorist limits were increased in cases of death, to \$50,000 for the death of one person and, subject to a limit of \$50,000 per person, \$100,000 for the death of two or more persons in an accident (L. 1979, Ch. 665, §2; Ins. L. §§5210(a), 3420(f)(1)). As a result of the more recent statutory amendments (see L. 1995, Ch. 305), effective for all accidents occurring on or after January 1, 1996, the 10/20 compulsory limits were increased to 25/50. The 50/100 limits for death, however, remained unchanged.

The Assumption

In 1977 -- prior to this amendment increasing the required limits in death cases, the Legislature created and enacted supplementary uninsured motorist coverage in Ins. L. §3420(f)(2). As it pertained to the limits of such coverage, the statute simply provided that the insured would be afforded the option of purchasing supplementary uninsured motorist coverage in amounts up to the limit of his or her bodily injury coverage, subject to a maximum of \$100,000 for bodily injury to or death of one person, and, subject to that per person limit, \$300,000 for bodily injury or death of two or more persons.

Because the coverage provided for in Ins. L. §3420(f)(2) was also considered "underinsured" motorist coverage and expanded the territorial scope of the "supplementary uninsured" motorist coverage beyond New York State, it was possible to, and, indeed, many insureds did, purchase such coverage in the same minimal amount as the mandatory coverages. It is safe to say that those who did took for granted that in the event of a death, their supplementary uninsured motorist coverage limits would, just as their mandatory uninsured motorist coverage limits, automatically increase to 50/100 coverage.

Confirmation in "Wu"

Indeed, such a belief was given credence and confirmation in an opinion by then-Supreme Court (and now Appellate Division) Justice William Friedmann in Wu v. Twin City Fire Ins. Co., NYLJ, December 23, 1993, p. 35, col. 1 (Sup. Ct. Queens Co. 1993), wherein an underinsured motorist award of \$50,000 for death under a policy with the minimum underinsurance limits was confirmed on the basis that,

"No reading of [§3420(f)(2)] infers that an insured who purchases SUM coverage with a limit identical to the minimum limits of coverage afforded pursuant to Insurance Law §3420(f)(1)], would be obtaining less coverage than that which said person had before, giving due consideration to the fact that that person, once SUM coverage is purchased, no longer is afforded mandatory uninsured motorist protection at all. While SUM coverage affords an insured the option of increasing the coverage afforded under the mandatory coverage, nevertheless where a person purchases SUM coverage at the same limits as was afforded pursuant to the mandatory coverage, that person should at the very least be afforded the same monetary limits as is afforded in the mandatory coverage which includes \$50,000 per person, not to exceed \$100,000 per accident, when the injury results in death."

Allstate v. Silver

Apparently, three years later, Justice Friedmann's colleagues on the Appellate Division disagreed with his analysis of this question. In Allstate Ins. Co. v. Silver, __ AD2d __, 639 NYS2d 485 (2d Dept. 1996), the court affirmed the grant, by Justice Burke of the Supreme Court, Nassau County, of a petition to vacate a \$50,000 underinsured motorist arbitration award in a death case to the extent that it exceeded \$10,000.

In Silver, supra, the motor vehicle which struck and killed 18-year-old Meredith Silver on July 11, 1992 was insured by a policy with the then-statutory minimum limits of 10/20. Silver was covered under a policy with Allstate with bodily injury limits of 50/100 but supplementary uninsured motorist coverage of only 10/20. Following the tender of the tortfeasor's full policy limits of \$50,000, Silver demanded arbitration from Allstate in the sum of \$50,000. As particularly pertinent hereto, the record demonstrates that the supplementary uninsured motorist coverage limits were stated simply as \$10,000 per person and \$20,000 per accident, without any reference whatsoever to increased limits for death. After two failed attempts by Allstate at staying the arbitration, the arbitration proceeded and resulted in an award of

\$50,000. In its motion to vacate the award to the extent that it exceeded \$10,000, Allstate contended, inter alia, that the arbitrator exceeded his authority in awarding the sum of \$50,000 because the limits of the policy at issue were only \$10,000 (per person). Justice Burke agreed that "since the amount specified in the Silver policy for underinsurance was \$10,000/\$20,000 the maximum amount available for underinsurance coverage was \$10,000."

On appeal, Silver argued, in line with Wu, that the purchase of supplementary uninsured motorist coverage affords the insured at least the same minimum coverage that is afforded with the purchase of mandatory uninsured motorist coverage. In opposition, Allstate argued that unlike the minimum coverage mandated by §3420(f)(1), supplementary uninsured motorist coverage under §3420(f)(2) is optional and nothing in the governing statute prohibits the parties from agreeing to limit supplementary recovery to an amount less than the statutory minimum for other coverage, as they did in Silver. See Valente v. Prudential Prop. & Cas. Ins. Co., 77 NY2d 894, 568 NYS2d 901 (1991) (supplementary uninsured motorist coverage is optional; parties are free to agree to reduce supplemental recovery by amounts received pursuant to Workers' Compensation Law).

Further, since an insured's entitlement to §3420(f)(2) coverage is solely a matter of contract, in the absence of statutory restriction, the court is bound to enforce the contract as written. Valente, supra.

Allstate noted that "while the legislature made clear the maximum amount of coverage that may be provided by such supplementary uninsured motorists coverage, it did not provide for any minimum amount" [citing Home Indemnity Co. v. Allwood, 122 Misc.2d 747, 471 NYS2d 824 (Sup. Ct. Chemung Co. 1984)]. Indeed, Allstate noted that Allwood presented a factual scenario quite similar to the one presented in Silver.

There, too, the issue presented was whether the respondent was entitled to recover \$50,000 under a SUM endorsement in the case of death, despite the fact that the SUM coverage was contractually limited to \$10,000 per person. Allwood argued that the supplemental protection could not be in an amount less than that required by the predecessor to Insurance Law (§3420(f)(1), i.e. \$50,000 coverage on account of death of one person.

Finding that the statute did not provide for any minimum amount of coverage in the case of supplementary uninsured motorist coverage, however, the court ruled that the limits established by the contract governed, and limited Allwood's recovery to the \$10,000 policy limit. In reaching this conclusion, the court articulated its rationale, as follows:

"It is difficult to reconcile a mandatory minimum amount, as urged by respondents, with the fact that motorist may opt to have no supplemental insurance at all... Even if the first paragraph [of former §167(2-a) of the Insurance Law, now §3420(f)(1)] evidences a legislative determination that uninsured motorist protection, to be adequate, should provide at least \$50,000 protection on account of death, the legislature has not thereby required that an optional supplementary insurance policy be construed to provide that amount of coverage where the contract between the insurer and insured did not provide otherwise.

The Court finds no legislative requirement that the insurance contract be enforced in an amount different from that which the policy provides. The limit of liability is ten thousand dollars (10,000) for each person on account of bodily injury including death resulting therefrom." 471 NYS2d at 825-26.

In its opinion in Silver, the Second Department held that Ins. L. §3420(f)(1) did not prohibit the insurance of supplementary uninsured motorist coverage "subject to a monetary limit of \$10,000 in the case of injuries, per person (including death), and \$20,000 per occurrence." Further, the court noted, the Insurance Law, which specifically required uninsured motorist coverage of at least \$50,000 in death cases in §3420(f)(1) "did not fix a similar minimum amount" with respect to supplementary uninsured motorist coverage governed by §3420(f)(2). Thus, as in Allwood, the court held that where the policy did not specifically provide for increased death limits, the stated lower coverage limits applied.

Effect of Silver

It should be noted that although the Silver decision must have come as quite a shock to those (including us) who had assumed that Wu accurately stated the law, that decision is unlikely to have significant effect on future cases. Silver was a pre-Regulation 35-D case and was, therefore, not governed by the "new" SUM endorsement. As alluded to above, that endorsement clearly and explicitly provides, under a section entitled "SUM limits," that if the bodily injury results in death the SUM limits would be either the SUM limits stated in the Declarations, or 50/100 coverage, whichever was higher. Thus, insofar as this endorsement

is now mandatory, no provisions such as was contained in Silver's Allstate policy will be seen in the future.

Moreover, as we have previously discussed, Regulation 35-D's SUM endorsement contains a reduction-in-coverage/offset provision for amounts received from the tortfeasor. Thus, unless that provision is found to be invalid, at least in the context of a SUM policy with the minimum amounts, in such cases application of the offset will effectively eliminate the supplementary uninsured motorist coverage and there will be nothing to arbitrate. We are aware of only one lower court decision, to date, that has ruled directly on the question of whether the Regulation's reduction-in-coverage clause is valid when the SUM coverage is in the minimum amounts.

In *USF&G v. Ficner*, Supreme Court, Suffolk County, Index No. 13389-95, where the tortfeasor's coverage was \$10,000 and the claimant's Regulation 35-D SUM coverage was also \$10,000, Justice Melvyn Tanenbaum stated that "To interpret the regulations as an offset under these circumstances would negate the reasons and purpose an insured would ever apply for underinsurance coverage since no circumstances exist under which a valid claim could be tendered."

Accordingly, Justice Tanenbaum ruled that the claimant was entitled to pursue her claim for underinsurance benefits for the \$10,000 SUM limits of her policy. This decision was not appealed and we know of no appellate level case on this point. We note, however, that the Insurance Department has taken the position that *Ficner* is incorrect because, in fact, SUM coverage in even the minimum amounts still extends the 50/100 death limits to out-of-state cases in states that do not have such increased limits for death and thus, minimum SUM coverage does not involve the payment of "something for nothing," i.e., payment of a premium for illusory coverage.

It is likely that this issue will make its way to the appellate courts in the near future and we will, of course, "look closely" for such a case and "pay attention" so it does not "get by us."