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## **ESCAPE CLAUSES, DISCLAIMERS AND ADDITIONAL PIP**

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### **Cover The Gap**

Policies of liability insurance sometimes include a clause that provides that there shall be no liability at all thereunder in case the risk is covered by other valid or collectible insurance. This provision is called a “no liability” or “escape” clause. A standard escape clause provides that :“If any other assured included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, he shall not be entitled to protection under this policy.”

Such clauses have generally been upheld by the courts. For example, in *Davis v. DeFrank*, 33 AD2d 236, 306 NYS2d 872 (4<sup>th</sup> Dept. 1970), *aff'd.* 26 NY2d 924 (1970), the Court of Appeals held that a provision of an automobile policy excluding coverage for the driver, if not a named insured, where other insurance, either primary or excess, was in force, was clear in language and intent and since liability was excluded only when there was full legal coverage, no reason of public policy justified a refusal to enforce it. As stated by the Appellate Division in that case, “The no liability clause does not operate unless there is sufficient insurance to meet the minimum set by the financial responsibility laws, thus public policy, to the extent it is expressed in this law [Vehicle and Traffic Law §388] is not violated.” See also, *Carlino v. Lumbermen’s Mut. Cas. Co.*, 74 NY2d 350, 547 NYS2d 616 (1989); *Mills v. Liberty Mutual Ins. Co.*, 36 AD2d 445, 321 NYS2d 230 (4<sup>th</sup> Dept. 1971) *Miller v. Sullivan*, 174 Misc.2d 690, 666 NYS2d 892 (Sup. Ct., Monroe Co., 1997).

However, in *Royal Indemnity Co. v. Providence Washington Ins. Co.*, \_\_\_ NY2d \_\_\_, \_\_\_ NYS2d \_\_\_ [decided 12/22/98], the Court of Appeals voided an escape/no liability clause because of an unanticipated possibility that would have created a gap in

coverage in violation of New York's public policy, which requires that every owner of a vehicle provide coverage while the vehicle is being operated with the owner's permission, even when the vehicle has been leased and the lessee has provided its own insurance. Unlike the situation in *Davis v. DeFrank*, supra, which applied only if there was coverage under another policy, the exclusion in *Royal* was so worded that a potential gap existed. In that case, the owners leased a truck to the lessee under a contract requiring the lessee to secure insurance. The owner itself obtained a "non-trucking use" policy, which covered the truck while not being used in the lessee's business. The Court held that the non-trucking use exclusion created a gap in policy coverage for any loss incurred when the truck was being used in furtherance of the lessee's business. The fact that the lessee's policy, at the lessor's insistence, included trucking use coverage was unavailing. As explained by the Court: "Nor, here, was the insistence of the lessor's insurer that proof of the lessee's truckers' insurance be submitted before issuance of a bobtail policy sufficient to validate the exclusion. In either instance, while an initial gap in coverage might be foreclosed, truckers coverage might not continue to be in effect at some later date when an accident occurs, due, for example, to a cancellation or lapse of the lessee's policy."

With the exclusion voided, the policy will be read as if the exclusion did not exist. Absent a provision stating that "coverage is limited to the statutory minima, if a non-trucking use exclusion is found to be invalid, no such limitation will be read into the policy". Thus, it is assumed, that if the policy contained a provision making its policy applicable at least to the extent of the statutory minima if there is no other valid and collectible insurance, the escape clause will be found not to violate New York's public policy and will not be invalidated.

## **Notice Of Disclaimer**

In the seminal case of *Zappone v. Home. Ins. Co.*, 55 NY2d 131, 447 NYS2d 911 the Court of Appeals laid down certain guidelines for determining when it is necessary to comply with Insurance Law §3420(d), which requires a liability insurer to provide written notice of disclaimer or denial of coverage as soon as reasonably possible. In so doing, the Court distinguished between situations where there was simply no coverage under the policy -- in which case notice of disclaimer, timely or otherwise, was deemed unnecessary -- and situations where coverage existed but for an exclusion -- in which event, timely notice of disclaimer was required. As the Court explained "the insurer may deny liability because although the person and the vehicle are covered by the policy the circumstances of the accident bring a policy exclusion into play, for example, that the person injured is an employee of the insured whose injury arose out of and in the course of his employment or was injured while an automobile insured as a pleasure vehicle was being used as a public conveyance." In such instance, "the policy covers the driver and the vehicle and the accident would be covered except for the specific policy exclusion and the carrier must deny coverage on the basis of the exclusion if it is not to mislead the insured and the injured person to their detriment." 55 NY2d at 136.

Consistent therewith, in *Jefferson v. Travelers Indem.*, 92 NY2d 363 (1998), the Court of Appeals recently explained that "where some ambiguity is present regarding . . . any possible exclusions, the insurer must timely disclaim." Discussing an endorsement in the lessee's policy under which the lessor was to be included under a paragraph of the "Who Is Insured" provision, the Court therein stated that : "Based on the language of the endorsement, the question remaining is not whether A-Drive could be considered an

insured, or whether coverage existed under any circumstances, but instead the nature and extent of coverage of A-Drive. The endorsement indicated that A-Drive was to be included in Paragraph 3 of the “WHO IS INSURED” provision, and any limitation on A-Drive’s inclusion in the policy amounts to an attempt by Travelers only to exercise a policy exclusion. This Court has consistently held policy exclusions are to be narrowly construed, and an explanation of how they neutralize coverage, otherwise operative, must be asserted by the insurer in a timely fashion.”

However, even more recently, the Second Department in Worcester Ins. Co. v. Bettenhauser, \_\_ AD2d \_\_, \_\_ NYS2d \_\_ [decided 4/12/99] (NYLJ, April 16, 1999, p. 25, col. 3), held that the failure of the insurer to give timely notice of disclaimer to the son of the named insured, who had made claim under his parent’s policy for underinsured motorist benefits for injuries suffered while operating his own vehicle because of a provision appearing in the “Exclusion” section of the policy which eliminated coverage to anyone injured while occupying a vehicle which he owned and which was not listed as a covered vehicle under the policy in question, did not result in a waiver or estoppel of the right to deny or disclaim coverage. Therein, the Court stated: “As we have held under similar circumstances involving policy language virtually identical to that at bar, this policy language expresses a lack of coverage for which no prompt disclaimer is required. This conclusion is not altered by the fact that the language appears under the heading “EXCLUSIONS” in the endorsement.”

In a vigorous dissent, in which Justice Mangano concurred (in result only), Justice Luciano argued that the majority’s holding “renders the word ‘exclusion’ meaningless” because, in his view, it was “virtually impossible to imagine a clearer example of the

“exclusion” discussed by the Court of Appeals [in Zappone supra] than that embodied in the circumstances of the present case.” As Justice Luciano further explained, “Here, the parties contemplated the possibility of an event, to wit, injury from an accident involving the named insureds and/or their family members (i.e., relatives living in the insured’s home), the damages for which there would be insufficient insurance coverage . . . . The parties further agreed, however, that in the event that the accident occurred while the named insured or a family member was driving a car not specifically listed in the policy, coverage would be excluded. This agreed upon limitation of coverage was expressly enumerated in language under the nomenclature “Exclusions”. The majority would have us interpret this language to mean that despite the parties’ express agreement, the explicit choice to exclude coverage must be treated as if coverage had never been contemplated at all.” Justice Luciano also noted that the majority’s holding directly conflicted with three recently decided cases by the same court, wherein “in circumstances which were factually identical to this case, and where the relevant policy terms replicated the language of Worcester’s policy”, the court, applying Zappone, construed the policy terms as an “exclusion”, requiring timely notice of disclaimer. See Matter of General Accident Ins. Co. v. Lobritto, 240 AD2d 493, 658, NYS2d 438 (2d Dept. 1997); Matter of Aetna Life & Cas. v. Boucher, 238 AD2d 414, 656 NYS2d 316 (2d Dept. 1997); and Matter of Unigard Ins. Group v. Bothwell, 237 AD2d 450, 655 NYS2d 77 (2d Dept. 1997). The majority responded to this criticism by simply stating, without explanation, that those cases should no longer be followed, and, instead, cited and relied upon three substantially earlier cases, which appeared to hold to the contrary. See, Matter of Continental Ins. Co. v. Sarno, 128 AD2d 870, 573 NYS2d 791 (2d Dept. 1987); Matter of USF&G v. Housey, 162 AD2d 523, 556, NYS2d 721 (2d Dept.

1990); and Matter of Liberty Mutual Ins. Co. v. Panetta, 187 AD2d 719, 590 NYS2d 290 (2d Dept. 1992). Indeed, the majority went so far as to chastise the dissent for making “no effort to explain [the cited cases’] deviation from our established rule [in the earlier cases] or to distinguish the earlier cases factually.”

In this regard, it is interesting to note that two of the three earlier cases relied upon by the majority do, in fact, appear to be distinguishable. In Continental Ins. Co. v. Sarno, supra, for example, two separate and distinct grounds were raised by the insurer in its Petition to Stay Arbitration -- the exclusion of coverage for “any persons struck by or occupying any motor vehicle owned by you or a relative other than an insured auto” and the absence of physical contact, an essential element of the definition of a hit-and-run and a matter which the Court of Appeals has held constitutes a matter of coverage, and not exclusion (see Prudential v. Hobson, 67 NY2d 19, 499 NYS2d 637 (1986)). Moreover, the decision in Sarno deals with the timeliness of the Petition to Stay, made more than 20 days after receipt of the Demand for Arbitration, and not the separate and distinctly treated issue of whether a timely disclaimer was required and/or provided. (See, Feeney, L. and Fitzpatrick, E., “Courts Have Created Confusion in UM/UIM Arbitration Cases”, NYLJ, 8/17/98, p. 1, col. 1). Similarly, the decision in Liberty Mutual v. Panetta, supra, deals with the timeliness of the Petition to Stay Arbitration and mentions nothing whatsoever about the provision or the timeliness of a disclaimer based upon a similar exclusion. Only in USF&G v. Housey, supra, did the Court actually address the disclaimer issue when it found that “it is irrelevant that USF&G failed to timely disclaim liability” under a similar exclusion, presumably on the basis of its earlier statement that “no coverage was provided” under the policy containing such an exclusion.

After Bettenhauser, a degree of uncertainty and confusion is sure to be injected in this previously relatively clear area. Practitioners, at least in the Second Department, must now ask themselves the following questions: “When is an Exclusion not really an Exclusion?” and “To disclaim, or not to disclaim?” Seventeen years after the Zappone decision, it is perhaps time once again for the Court of Appeals to provide its guidance. [Counsel for Bettenhauser has advised that he is appealing this case, as of right by virtue of the two dissents, to the Court of Appeals.]

### **Additional PIP**

\_\_\_\_\_ The Mandatory Personal Injury Protection (“PIP”) Endorsement requires the insurer to pay first party benefits, up to \$50,000, to reimburse for basic economic loss. The optional Additional PIP (“APIP”) Endorsement requires the insurer to pay Extended Economic Loss Benefits, defined in the endorsement promulgated by the Superintendent of Insurance (11 NYCRR §65.13 (b)) as follows:

“Extended economic loss shall consist of the following:

- (a) basic economic loss sustained on account of an accident occurring within the United State of America, its possessions or territories, or Canada, which is not recovered or recoverable under a policy issued in satisfaction of the requirements of article VI or VIII of the New York Vehicle and Traffic Law and article 51 of the New York Insurance Law:
- (b) the difference between
  - (i) basic economic loss; and
  - (ii) basic economic loss recomputed in accordance with the time and dollar limits [set out in the declaration]; . . . .”

In *Canastraro v. State Farm Mutual Ins. Co.*, \_\_\_ AD2d \_\_\_, 684 NYS2d 103 (4<sup>th</sup> Dept. 1998), the plaintiff's policy included Additional PIP coverage of \$50,000 under a "Q1" endorsement, for which she paid \$1.80. State Farm offered other additional PIP endorsements denominated Q2 and Q3, for which it charged \$7.00 and \$9.40 respectively, which plaintiff did not purchase. (Other companies use different symbols to describe their gradations of coverage.)

When the plaintiff exceeded the \$50,000 mandatory coverage limit, she demanded that the insurer pay the excess under the Additional PIP coverage. State Farm responded that the only thing she purchased under the Q1 endorsement was basic coverage, which was enhanced and supplemented to provide PIP coverage for a broader class of persons injured in accidents outside New York, but that since the limit was only \$50,000, under the additional PIP coverage which she had already received, under basic coverage, she was entitled to no more under the formula set forth above. Plaintiff argued, however, that she paid for an additional \$50,000 coverage and that's what she insisted on recovering.

Holding that the definition of extended economic loss was vague because "it fails to indicate whether the descriptions contained in paragraphs (a) and (b) should be read conjunctively ["and"] or disjunctively ["or"], the provision must be given a construction favorable to the insured and thus should be read in the disjunctive, the Court ruled in favor of the Plaintiff, concluding that: "Paragraph (b) describes extended economic loss as 'the difference between (i) basic economic loss; and (ii) basic economic loss recomputed in accordance with the time and dollar limits set out in the schedule.' The schedule, however, also is vague because it does not refer to basic economic loss; it contains only what

appears on its face to be a computation of extended economic loss, not a recomputation of basic economic loss. Under the circumstances, the additional PIP coverage endorsement, read in the light most favorable to the insureds, provides extended economic loss benefits to the maximum of \$50,000.”