

## RECENT COLUMN UPDATE

### NO-FAULT REGULATIONS

Several of our recent columns have addressed the proposed amendments to the No-Fault regulations promulgated by the State of New York Insurance Department. See “Proposed Changes to No-Fault Regulations,” July 13, 1999, p. 3, col. 1; “More on No-Fault,” July 11, 2000, p. 3, col. 1. As we most recently reported, the amended Regulation 68 was declared “invalid” and “null and void” by Justice Phyllis Gangel-Jacob in her decision of June 9, 2000, and, on July 17, 2000, the Appellate Division, First Department refused to grant a stay of enforcement of that Order pursuant to CPLR 5519(a) pending the Insurance Department’s appeal. See also, Letter to the Editor, July 26, 2000, p. 2, col. 6. As a result, insurers and self-insurers have been directed to follow the pre-amendment regulations that were in effect prior to February 1, 2000, at least until the appeal is decided.

As we indicated in our earlier article, Justice Gangel-Jacob’s decision was based, in large part, upon the Insurance Department’s failure to comply with its duties and obligations under the public disclosure and review requirements of the State Administrative Procedures Act (“SAPA”). Indeed, she specifically stated that in “deliberately overlooking” those duties and obligations and implementing the amended regulations “notwithstanding significant public comment in opposition,” the Insurance Department had acted unlawfully, arbitrarily, capriciously and abused its discretion. Because the failure by the Insurance Department to fulfill its important public notice requirements constituted, in and of itself, a sufficient ground upon which to invalidate the amendment, Justice Gangel-Jacob did not – because she did not need to -- make a specific determination regarding the

Department's power to make the changes it did even if the promulgation procedures were properly followed, i.e., whether the Department's actions were ultra vires. Still, Justice Gangel-Jacob went out of her way to note the serious "destructive" impact that the Department's shortened time periods would have upon no-fault claims, and, thus, upon claimants and their health providers and assignees, and to declare, inter alia, that "it seems obvious that the New Regulations lack consistency with the essential purpose and legislative policy underlying the no-fault law."

Notwithstanding that the strong implication of Justice Gangel-Jacob's words is that if the ultra vires test had been reached and ruled upon, the amendments would have been voided on that basis as well, the Insurance Department has apparently taken a different view of the meaning and impact of Justice Gangel-Jacob's decision. The Department has recently published a new Notice of Proposed Rule Making pertaining to Regulation 68. Apparently of the belief that its only impropriety the first time around was its violation of few procedural requirements, the Department has now attempted to comply with those requirements by properly following the prescribed procedures. However, notwithstanding Justice Gangel-Jacob's specific comments regarding the unfairness of the proposed amendments, the Department has simply published the exact same Regulation 68 that was previously overturned.

Those interested in submitting public comments should be advised that the notice was published on August 2, 2000. The Department is allowing only forty-five (45) days for public comment. Thus, the deadline for the submission of comments is September 15, 2000. Comments should be addressed to Neil Levin, Superintendent of Insurance, New York State Insurance Department, Attn: Patricia Mann, 25 Beaver Street, New York, New

York 10004. The Department has set November 1, 2000 as the planned effective date for the proposed amendments. Stay tuned for further developments.

### **NOTICE OF UNDERINSURANCE CLAIM**

In a column entitled “Court of Appeals Addresses Underinsured Motorist Notice of Claim,” published on September 14, 1999, we reported on the important decision of the Court of Appeals in *Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*, 93 NY2d 487 (1999), which held that the term “as soon as practicable” in the context of notice of an underinsured motorist claim meant that “the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured.”

Several cases reported after that column appeared have cited *Mancuso*, *supra*, and further expanded upon the concept of what is “as soon as practicable” in the context of an underinsurance claim.

In *Nationwide Ins. Co. v. Brown-Young*, 265 AD2d 918 (4<sup>th</sup> Dept. 1999), the accident took place on October 27, 1995, but the claimant did not give notice of an SUM (underinsured) claim until July 17, 1997 because she was apparently not initially aware of the severity of her injury. Although the claimant was diagnosed with a cervical strain immediately after the accident, her pain continued and she eventually consulted an orthopedic surgeon in June 1997, who diagnosed a disc injury in the C5-6 region. Noting that “the seriousness and nature of the insured’s injuries” is a factor to consider in determining when the insured “knew or should reasonably have known that the tortfeasor

was underinsured,” the court held that “prior to June 1997, [the claimant] reasonably believed that she had not sustained a ‘serious injury’ (Insurance L. §5102(d)). After learning of the seriousness of her injury, [she] promptly commenced an action against the tortfeasor and placed petitioner on notice of a potential SUM claim on July 17, 1997. We conclude that, under those circumstances, notice was given as soon as practicable.”

Similarly, in *Nationwide Insurance Enterprise v. Leavy*, 268 AD2d 661 (3d Dept. 2000), the claimant sustained an ankle injury in a February 1997 accident. Although initially diagnosed with an ankle contusion, a right ankle fracture was detected during a visit to her orthopedist on July 11, 1997. The finding of a fracture was confirmed by a second doctor on June 25, 1997. On August 11, 1997, claimant underwent arthroscopic surgery, and she retained an attorney in early September 1997. Upon his retention, the attorney made several unsuccessful attempts to contact the driver and owner of the other vehicle, a task made more difficult because the police report failed to set forth the name of the owner. Thus, the claimant was unable to obtain the coverage limits of the applicable insurance policy. Nevertheless, the claimant’s attorney sent the SUM insurer notice of a potential SUM claim in November 1997. When, in December 1997, the pertinent coverage information was finally obtained and provided to the SUM carrier, the SUM carrier denied the claim as untimely. Under those circumstances, the court held that “Since the extent of [the claimant’s] injuries were not apparent until June 1997 and the owner of the other car could not be located until December 1997 despite due diligence, we conclude that respondent has presented a reasonable excuse for her failure to provide notice of her underinsured claim until nine months after the accident.”

On the other hand, in *Unwin v. New York Central Mutual Fire Ins. Co.*, 268 AD2d 669 (3d Dept. 2000), the claimant was injured in March 1994. He sought medical care on the day after the accident and continued for a significant period of time to receive treatment for the injuries he sustained, with such treatment including a prolonged regimen of physical therapy. On September 13, 1995, he was referred to a neurosurgeon who ultimately performed spinal surgery on insurer to divulge its policy limits. Upon learning the tortfeasor's policy limits, claimant's attorney made a written claim to the SUM carrier for SUM (underinsured) coverage. The SUM carrier thereafter disclaimed coverage on the ground that it was not provided notice "as soon as practicable" as called for by its policy of insurance.

In an action for declaratory judgment, the court noted that "one of the circumstances to be considered when determining reasonableness is the time within which an insured's injuries manifest themselves." The court then went on to hold that the claimant's notice, given twenty-three (23) months following the accident, was untimely. In so doing, the court rejected the claimant's contention that his initial treatments were rendered "with the understanding that there were no significant problems and that [he] should recover from [his] 'soft tissue' injuries." Furthermore, the court noted that the claimant "failed to submit any evidence from which it could be determined that he was not reasonably aware of the severity of his condition until February 1996, at which time he undertook to determine the limits of liability of [the tortfeasor's] policy."

In *Travelers Prop. Cas. Corp. v. Fusilli*, 266 AD2d 48 (1<sup>st</sup> Dept. 1999), the claimant commenced an action against the tortfeasor in August 1995, but did not discover the limits of the tortfeasor's policy until July 1, 1997. He then gave notice of his SUM (underinsured)

claim on July 16, 1997. The court first noted that the 1998 amendment to Insurance Law §3420(f)(2)(A), requiring an insurer to disclose within forty-five (45) days the extent of the coverage provided under its policy was not retroactively applicable to this case, and then held that the notice given by the claimant was reasonable and timely as a matter of law. As stated by the court, “Although Travelers speculates that respondent might have learned about the coverage afforded by the Allcity policy at an earlier time had his attorney been more aggressive in pursuing the matter, the record reflects that counsel was diligent in requesting the information, and there is nothing to indicate that further requests would have produced the information sought any sooner.”

On the other hand, in Eagle Ins. Co. v. Bernardine, 266 AD2d 543 (2d Dept. 1999), the accident took place in February 1997. Yet, the claimant did not give notice of an SUM (uninsured) claim until December 1997, two months after receiving a copy of a notice of disclaimer from the tortfeasor’s insurer. Noting that the claimant “came forward with no evidence of any efforts made to acquire information regarding insurance coverage,” the court held that the claimant “failed to sustain her burden of demonstrating due diligence or a reasonable excuse for the delay in ascertaining the tortfeasor’s insurance status,” and therefore, held that notice of the claim was not given as soon as practicable. Similarly, in State Farm Mutual Auto. Ins. Co. v. Tremaine, \_\_\_ AD2d \_\_\_, 705 NYS2d 477 (4<sup>th</sup> Dept. 2000), the court held that where the claimant offered no explanation for a delay of 2½ years in providing notice of an underinsured motorist claim, such delay was unreasonable as a matter of law.

Most recently, in Ciaramella v. State Farm Ins. Co., \_\_\_ AD2d \_\_\_, 709 NYS2d 296 (4<sup>th</sup> Dept. 2000), the claimant did not give notice of an SUM claim until 1½ years after the

accident, which occurred in March 1997. Therein, the court held that even if the claimant was excused from providing timely notice “until the true extent of his injury was known in December 1977, the claimant “failed to explain the next eight months of delay during which he was represented by counsel.”

Thus, as can be seen, the resolution of the issue of timeliness of notice is still taking place on a case by case basis. Prior exhortations to be alert, careful and prompt when it comes to providing notice to an SUM carrier still apply with equal force.

Two additional points bear mention on the subject of notice. First, it is critically important that the notice letter to the SUM carrier be specific and definite concerning the intention to make a claim.

In *American Cas. Ins. Co. v. Silverman*, \_\_\_ AD2d \_\_\_, 705 NYS2d 676 (2d Dept. 2000), the claimant’s attorney informed the insurer, in writing, two months after the accident, of his intent to pursue an underinsured motorist claim by stating that “(i)n the event that the vehicle owned by [the tortfeasor] is uninsured or underinsured, our clients will be making a claim under the applicable provisions of the uninsured or underinsured motorist endorsements of the above stated policy.” The Supreme Court, Suffolk County (Doyle, J.) held that “This letter is clearly insufficient to notify [the insurer] of [the claimant’s] intention to make an underinsured motorist claim. It gives [the insurer] no more information that [sic] it had before it received the letter. It is reasonable to assume that every policyholder with underinsured motorist coverage might make such a claim if the offending vehicle is underinsured. Here, the language of [the claimant’s] letter did not notify Petitioner that a claim was going to be made.” The court then went on to hold that the first

actual notice of an intention to make claim, given more than eighteen (18) months after the accident, was untimely. The Second Department affirmed in April of this year.

Secondly, in *Transportation Ins. Co. v. Pecoraro*, \_\_ AD2d \_\_, 705 NYS2d 155 (4<sup>th</sup> Dept. 2000), the court recently reminded that when the notice provision of a policy specifies that notice be in writing, other forms of notice will not suffice.

### **NOTICE OF LEGAL ACTION**

In our column of November 9, 1999, we wrote about an additional notice requirement that represents another condition precedent to UM/SUM overage – the requirement to “immediately” forward to the insurer a copy of the summons and complaint and/or other “legal papers” served in connection with the underlying lawsuit against the tortfeasor. We noted numerous decisions in which the courts had applied the “Notice of Legal Action” provision to defeat an insured’s claim or UM/SUM benefits, and noted that the trend appeared to be for a strict application of that condition. Two very recent decisions out of the Second Department continue to highlight that trend. In *Nationwide Ins. Co. v. Shedlick*, \_\_ AD2d \_\_, \_\_ NYS2d \_\_, 2000 WL 1025619 (2d Dept. 2000), although the claimant commenced a lawsuit against the tortfeasor in January 1996, he did not forward copies of the summons and complaint until November 1998. The court held that the arbitration demanded by the claimant should be permanently stayed because he waited more than 2½ years after commencing the underlying lawsuit before forwarding copies of the summons and complaint to the SUM insurer. And, in *Nationwide Mutual Ins. Co. v. Charles*, \_\_ AD2d \_\_, \_\_ NYS2d \_\_, 2000 WL 1123642(2d Dept. 2000), the court

also permanently stayed arbitration based upon the claimant's failure to forward a copy of the summons and complaint until nine (9) months after he demanded arbitration.

Here, too, the admonition to "be careful -- be very careful" is worth repeating.