

## IMPORTANT NEW LAWS AFFECTING UM/UIM/SUM LAW AND PRACTICE

The 1997 session of the New York State Legislature was an unusually active one in the area of insurance law. In this column, we take note of and describe four (4) significant new laws that will no doubt have a great impact upon the practice of uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law.

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### Arbitration of Infant's Claims

The first of these new laws is an amendment of CPLR §1209 (“Arbitration of controversy involving infant, judicially declared incompetent or conservatee”) to eliminate the need to seek a court order when submitting an infant’s personal injury claim to arbitration where the claim is brought pursuant to Insurance Law §3420(f)(1) or (2) – the sections governing UM/UIM/SUM coverage.<sup>1</sup>

This amendment, which became effective August 5, 1997, is intended to remedy an inequity in the old law and to bring it more in line with present day realities. When CPLR 1209 was first enacted in 1962 to protect the interests of infants (and incompetents), very few personal injury claims brought by or on behalf of infants were submitted to arbitration. With the advent of the UM/UIM/SUM laws, however, thousands of such claims are filed annually with the American Arbitration Association for arbitration pursuant to Insurance Law §3420(f)(1) or (2). In such cases, under CPLR §1209, the infant’s representative was required to preliminarily seek and obtain an Order directing that the claim be submitted to arbitration. The cost of obtaining such Orders, which were routinely

granted, was considerable. In addition to the cost of legal representation, there were expensive filings fees: \$170.00 for an index number and \$75.00 for the RJI – a total of \$245.00. These costs then had to be expended again when, after the conclusion of the arbitration, the award in favor of the infant had to be approved and finalized by a judge through an infant's compromise pursuant to CPLR 1207 and 1208.

It was felt by the proposers of this legislation that because most UM and SUM claims are now being brought before professional, full-time arbitrators who are and have proved themselves fully capable of protecting the rights of infants during the arbitration process, the necessity of a court order for submission of the claim to arbitration could, and should, be eliminated.

Obviously, this measure will make it easier and less expensive for an infant's UM/UIM/SUM claim to proceed to arbitration.

#### CPLR 306-b

The second new law, although not specifically addressed to UM/UIM/SUM cases, will no doubt have a substantial impact on the procedure for commencing a Special Proceeding to Stay Arbitration – a common staple of practice in this area of the law. Effective January 1, 1998, and applicable to all actions commenced on or after that date, CPLR §306-b has been repealed and an entirely new §306-b has been added.<sup>2</sup>

The most significant aspects of this amendment are: (1) the elimination of the “deemed dismissed” provision of the prior law; (2) the introduction of court discretion to extend the time for service; and (3) the elimination of the requirement of filing proof of service.

Prior to this amendment, for special proceedings commenced in the Supreme Court or County Courts, CPLR 306-b mandated filing proof of service of a Notice of Petition or Order to Show Cause for a Stay of Arbitration of a UM/UIM/SUM claim within fifteen days of the expiration of the applicable 20-day limitations period (see CPLR 7503(c)), unless the Respondent had appeared prior thereto. Failure to so file resulted in the proceeding being “deemed dismissed.” To provide a safe harbor in cases where service could not be made within fifteen days of the expiration of the limitations period, or where service was made but was thereafter determined to be defective, the statute gave petitioners an opportunity to start over and, upon payment of a new filing fee, commence a new proceeding within fifteen days of the dismissal, without statute of limitations repercussions (provided the prior action was timely commenced). CPLR 306-b contained no provision comparable to Federal Rule of Civil Procedure 4(m), affording the court express authority under appropriate circumstances to extend the time for service beyond fifteen days.

Especially when service of the Petition had to be made upon an insurance company (additional respondent) by service upon the Insurance Department as authorized by Insurance Law §1212, it was often difficult, if not impossible, to comply with the filing of proof of service requirements of the statute. Moreover, the filing of proof of service – a ministerial act that was designed merely to serve as a mechanism for evidencing that timely service had been made, had acquired jurisdictional significance.<sup>3</sup>

The statute was completely rewritten to rectify these problems and to make it easier to commence a Special Proceeding and other actions.

### DISCLOSURE OF B.I. LIMITS

The third new law to arrive on the scene amends Insurance Law §3420(f)(2)(A) by requiring the insurer of any owner/operator of a motor vehicle that may be liable for damages to an insured/SUM claimant, *i.e.*, the tortfeasor, to disclose, within forty-five days of a written request and of disclosure of the claimant's own bodily injury and SUM limits, the bodily injury insurance limits of the tortfeasor's coverage. The time for the SUM claimant to make a claim against his or her own carrier for SUM benefits is to be tolled during the period that the tortfeasor's carrier fails to disclose this coverage.<sup>4</sup>

The enactment of this law, which is to become effective on January 8, 1998, was motivated by the fact that pursuant to Insurance Law §3420(f)(2) and Regulation 35-D's SUM endorsement, SUM coverage is triggered when the bodily injury liability limits of any tortfeasor's coverage are less than bodily injury liability limits than the claimant's coverage.<sup>5</sup> In addition, pursuant to Regulation 35-D's SUM endorsement, the claimant is required to provide notice of claim "as soon as practicable," a time limit which has often been interpreted to be as short as ninety (90) days following an accident. The courts have rather strictly enforced the requirement of prompt reporting of SUM claims and have invalidated claims wherein it has been determined that notice was not given "as soon as practicable" and/or that the claimant did not act with "due diligence" in ascertaining the insurance status and coverage of the offending tortfeasor.<sup>6</sup>

Under the pre-amendment state of the law, neither the statute nor the Regulation provided a means for the claimant to obtain the tortfeasor's policy information necessary to facilitate compliance with the SUM notice requirements. No mechanism existed for obtaining disclosure of the tortfeasor's policy limits other than through CPLR discovery

mechanisms available after a lawsuit against the tortfeasor has been commenced – mechanisms which were almost never prompt enough for the purpose for which they were required. Further difficulty in obtaining the necessary insurance information was created by the fact that for the past several years, it takes three or more months to obtain a police report in New York City (because of budgetary cutbacks). As a result of these difficulties, claimants often resorted to putting their SUM carriers on notice of a potential SUM claim even before they knew if such a claim existed, thus requiring the carriers to open and process files and set up reserves even in cases where no claim may actually arise. Other claimants waited until the facts were in and by doing so, vitiated the coverage under their policies.

The dilemma faced by claimants in these circumstances was the subject of an interesting and well-written opinion by Justice Miller in *Allstate Ins. Co. v. Haroian*, NYLJ, August 2, 1996, p. 26, col. 4 (Sup. Ct. Rockland Co.). Therein, the accident occurred on March 27, 1994; the claimant inquired of the tortfeasor's insurer as to its policy limits on June 8, 1994, but the insurer refused to disclose those limits until November 29, 1995. Within five days of learning of the tortfeasor's limits, which were less than claimant's own, claimant filed a notice of claim. This notice was given nineteen months after the accident. Because the SUM carrier failed to demonstrate that the claimant had "any other means at her disposal to learn the tortfeasor's insurance limits" and was thus "unable to determine whether she possessed a claim pursuant to the SUM provisions of her policy," the court held the notice to have been timely.

The *Haroian* decision illustrated the ambiguity of the existing regulatory framework in that each time the timeliness of notice is challenged by an insurer, the courts will be

forced to conduct a factual inquiry into what steps the claimant took to determine the tortfeasor's coverage limits. The new amendment cures this problem by mandating prompt disclosure of the tortfeasor's limits and thus facilitating and accelerating the trigger comparison, making it simpler and easier to make claims against the SUM insurer "as soon as practicable," restoring certainty to SUM claims from the standpoint of the insurer, and reducing the insurer's costs of file maintenance.

#### Increased SUM Limits

The fourth and final new law also amends Insurance Law §3420(f)(2) and contains a two-part amendment. The first part of the amendment to §3420(f)(2)(A), which is to become effective on March 9, 1998, increases the current amount of SUM coverage required to be offered by insurers for purchase at the option of the insured from the former \$100,000 for injury and death of one person in an accident and, subject to that limit for one person, \$300,000 for the injury or death of two or more persons in an accident, to \$250,000 and \$500,000, respectively, or a combined single limit policy of \$500,000 for bodily injury or death to one or more persons in any one accident. This amendment further provides that the insurer can still offer only a \$100,000/\$300,000 SUM policy if it also offers to the insured a personal umbrella policy that covers SUM claims and has limits "up to at least \$500,000."

Under the prior law, automobile insurance policyholders could purchase liability insurance to protect the potential exposure of their assets with limits that far exceeded the SUM coverage available to them. The motivation behind this amendment was that a person purchasing SUM coverage to protect against uninsured and underinsured drivers

should be able to purchase increased coverages to protect the insured when he or she is the victim of an accident as when he or she is liable for an accident.

The second part of the amendment, to §3420(f)(2)(B), requires the SUM insurer to provide to the consumer at least once a year a notification of availability of SUM coverage, which may be more simplified than the notice it must send to the consumer when he or she first purchases SUM coverage, but which must include: (1) “a concise statement that supplementary uninsured/underinsured motorist coverage is available”; (2) “an explanation of such coverage” and (3) “the coverage limits that can be purchased from the insurer.”

The rationale behind this amendment is that by providing the consumer with a more simplified notice, the consumer will be more likely to read it and may, in turn, be more readily aware of the optional SUM coverages available. In addition, simplifying the notices will also have a benefit to the insurers by cutting down on unnecessary printing and mailing costs.

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## ENDNOTES

1. Pursuant to the amendment, CPLR § 1209 now specifically provides that “a claim brought on behalf of an infant pursuant to paragraph one or two of subdivision (f) of section three thousand four hundred twenty of the insurance law may be submitted to arbitration without a court order.”

2. The new CPLR §306-b provides as follows:

“306-b. Service of the Summons and Complaint, Summons with Notice, or of the Third-Party Summons and Complaint. Service of the summons and complaint, summons with notice, or of the third-party summons and complaint, shall be made within one hundred twenty days after their filing, provided that in an action or proceeding where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.”

3. See Barsalow v. City of Troy, 208 AD2d 1144 (3d Dept. 1994); Gershel v. Porr, 89 NY2d 327, 332 (1996). Cf. Fry v. Village of Tarrytown, 89 NY2d 714 (1997) (failure to file signed Order to Show Cause is a defect that can be waived by failure to make a timely objection).

4. The disclosure of bodily injury limits amendment provides as follows:

“Upon written request by any insured covered by supplementary uninsured/underinsured motorists insurance or his duly authorized representative and upon disclosure by the insured of the insured’s bodily injury and supplementary uninsured/underinsured motorists insurance coverage limits, the insurer of any other owner or operator of another motor vehicle against which a claim has been made for damages to the insured shall disclose, within forty-five days of the request, the bodily injury liability insurance limits of its coverage provided under the policy or all bodily injury liability bonds. The time of the insured to make any supplementary uninsured/underinsured motorist claim shall be tolled during the period the insurer or any other owner or operator of another motor vehicle that may be liable for damages to the insured fails to so disclose its coverage.”

5. See Maurizzio v. Lumbermens Mut. Cas. Co., 73 NY2d 951 (1989); Prudential Prop. & Cas. Ins. Co. v. Szeli, 83 NY2d 681 (1994); 11 NYCRR §60-2.3(e)(1)(c)(3)(i).

6. See, e.g., Schiebel v. Nationwide Mutual Ins. Co., 166 AD2d 520 (2d Dept. 1990) (decided prior to the effective date of Regulation 35-D, but under a similarly-worded notice provision); Nationwide Mut. Ins. Co. v. Edgeron, 195 AD2d 56 (2d Dept. 1993).