

INSOLVENCY & UM COVERAGE / THE “TOP TEN”

It is well-recognized that the purpose of uninsured motorist coverage is the protection of innocent victims of motor vehicle accidents caused by financially irresponsible motorists, *i.e.*, those individuals who, for various reasons, cannot be counted on to make their victims whole. *See Vanguard Ins. Co. v. Polchlopek*, 18 NY2d 376 (1966); *Nationwide Mut. Ins. Co. v. Riccadulli*, 183 AD2d 111 (2d Dept. 1992). The uninsured motorist statute attempts to place the injured person in the same position as that of a person injured in an accident caused by an identifiable automobile covered by a standard automobile liability policy with the statutorily prescribed limits of coverage in effect at the time of the accident. *See Beagle v. MVAIC*, 26 AD2d 313 (4th Dept. 1966).

It has long been established that in cases where the offending vehicle was, at one time, covered by a valid automobile liability insurance policy, but that policy is either properly canceled prior to the accident, or the coverage thereunder is properly denied or disclaimed prior to or subsequent to the accident, the offending vehicle is deemed an “uninsured motor vehicle,” and the injured party may, therefore, pursue an uninsured motorist claim. The question of whether the same rule applies in cases where the insurer of the offending vehicle becomes insolvent and, therefore, unable to satisfy a claim for damages, is one which was fully litigated in the years prior to the adoption of Regulation 35-D and its SUM endorsement (11 NYCRR §60-2.3, *et. seq.*) and under the pre-Regulation 35-D endorsements. This question has not been decided in the Regulation 35-D context – that is, until October 1998 (five years after the Regulation became effective), when Justice John S. Lockman of the Supreme Court, Nassau County decided that issue

in *GEICO v. Silber*, __ Misc.2d __, 679 NYS2d 552 (Sup. Ct. Nassau Co. 1998), discussed below.

Pre-Regulation 35-D Law

The uninsured motorist statute -- Insurance Law §3420(f)(1) (formerly §167(2-a)), effective January 1, 1959, the original mandatory uninsured motorist endorsement -- the New York Automobile Accident Indemnification Endorsement, also promulgated in 1959, and the new, Revised Uninsured Motorists Coverage Endorsement -- New York, effective September 1, 1996, in their definitions of an “uninsured” motor vehicle, all refer, as pertinent hereto, to a motor vehicle that is otherwise insured but the insurer “disclaims liability or denies coverage.” [Emphasis added]. Neither the statute nor the mandatory endorsements contain any specific reference to insurer insolvency.

Curry

In *State-Wide Ins. Co. v. Curry*, 43 NY2d 209 (1977), the Court of Appeals, deciding the question of “whether a person involved in an automobile accident is an ‘uninsured motorist’ within the meaning of the New York Automobile Accident Indemnification Endorsement where the person is insured by a domestic insurer which becomes insolvent subsequent to the accident,” held that under that specific endorsement, that question should be answered in the negative because a domestic (NY licensed) insurer would be covered by the New York Motor Vehicles Liability Security Fund, which would assume the obligations owed to the insured for the full amount of the policy, up to a limit of \$1,000,000. See Insurance Law §7604. Because under those circumstances, the injured party could look to the Security Fund for coverage, he or she would be precluded from seeking

uninsured motorist benefits. See also *Bailey v. MVAIC*, 67 AD2d 707 (2nd Dept. 1979); *Empire Mut. Ins. Co. v. Impliazzo*, 57 AD2d 824 (1st Dept. 1972).

Noncovered Insolvencies

Insofar as the statutory uninsured motorist scheme presupposes that no other liability coverage, such as that provided by the Security Fund, exists to compensate the injured party, the courts recognized that if, in fact, the Security Fund is unavailable, such as where the tortfeasor's insurer was not licensed to do business in New York and was, therefore, not required to, and did not, contribute to the Fund, the insolvency of the insurer and resultant failure to defend its insured and satisfy the claim would be deemed to constitute a "denial of coverage" or "disclaimer of liability." Such a "denial" or "disclaimer" would be sufficient to render the offending vehicle "uninsured" and the injured party would, in that circumstance, be allowed to proceed under the uninsured motorist endorsement. See *Taub v. MVAIC*, 31 AD2d 378 (1st Dept. 1969); *Travis v. General Accident Group*, 31 AD2d 20 (3d Dept. 1968).

Thus, in sum, prior to the enactment of Regulation 35-D and its new prescribed SUM endorsement, a distinction was made between insurer insolvencies covered by the Security Fund, which did not give rise to uninsured motorist claims, and insolvencies not covered by the Security Fund, which were held to give rise to such claims.

Regulation 35-D and the SUM Endorsement

The SUM endorsement prescribed by Regulation 35-D, applicable to all new and renewal policies issued to become effective on or after October 1, 1993, defines the term "uninsured motor vehicle," in pertinent part, as a vehicle for which there is a bodily injury

liability insurance coverage or bond applicable at the time of the accident, but “the insurer writing such coverage or bond denies coverage, or such insurer is or becomes insolvent.” Thus, in contrast to the earlier endorsements, Regulation 35-D does not make any distinction between covered and noncovered insolvencies, but, instead, adds a new category of “uninsured vehicles” – the broadly stated category of insolvency.

During the critical pre-enactment public comment period, we personally called to the attention of the Insurance Department the fact that its inclusion in the Regulation of the words “or becomes insolvent,” without any distinction between covered and non-covered insolvencies, appeared to represent a departure from prior policy language and prior interpretations, and could, therefore, be cause for confusion and/or the subject of challenge -- unless, of course, this change was contemplated and intentional. See Dachs, N. and Dachs, J., “Pinpointing Potential Pitfalls in Proposed Regulation 35-D,” NYLJ, December 10, 1991, p. 3, col. 1; “SUM Regulation Redux,” NYLJ, June 9, 1992, p. 3, col. 1.

Notwithstanding our comments, and despite the fact that the Insurance Department had opportunity to amend Regulation 35-D and its prescribed endorsement prior to its enactment, and has had occasion to amend same twice since its enactment, it has consciously refused or declined to make any changes to the insolvency provision, choosing instead to maintain its original broadly-stated and unconditional language. Had the Insurance Department intended to carry on the prior distinction between covered and non-covered insolvencies, it would have been easy for it to do so by expressly stating that an “uninsured vehicle” is a vehicle whose insurer became insolvent and was not covered by the Security Fund. This, however, it expressly chose not to do. As a result, in numerous

lectures in the ensuing years, we espoused the position that, pursuant to the express terms of the Regulation 35-D endorsement, any and all insolvencies give rise to an uninsured motorist claim -- whether those insolvencies were covered or noncovered.

GEICO v. Silber

In GEICO v. Silber, *supra*, the claimants made the foregoing arguments and further noted that at the time the Insurance Department enacted Regulation 35-D, it was obviously well aware of the existence of the Security Fund and of the Court of Appeals' decision in State-Wide v. Curry, *supra*, it having participated in that case by filing an amicus curiae brief therein. Claimants argued, therefore, that the Superintendent of Insurance had determined that insolvencies -- of whatever nature, covered or non-covered -- were to be included in the definition of an "uninsured motor vehicle," and that his determination, being neither irrational nor unreasonable, should be accorded great deference and, indeed, should be upheld. Ins. L. §§201, 301; Ostrer v. Schenck, 41 NY2d 782 (1977); Howard v. Wyman, 28 NY2d 434 (1971).

In a well-written and, we must concede, well-reasoned opinion, Justice Lockman noted that, indeed, "The language [of Regulation 35-D] can be read to include all insolvent insurers, thus allowing a claimant to choose his remedy and proceed against the fund or proceed against his own carrier," and, therefore, "were the language of the endorsement controlling on its face there would be nothing here to decide." However, he further noted that "the term 'uninsured motor vehicle' is a term of art, and its meaning must be understood by reference not only to the regulations, but also to the statutes upon which they are based and any judicial interpretation of those statutes." Justice Lockman also

agreed with claimants that the Superintendent of Insurance “must be deemed to have been aware of the case law [prior to the enactment of Regulation 35-D], however, he reached a completely different conclusion from that fact. In Justice Lockman’s view, “the language used in Regulation 35-D was intended to incorporate the judicial gloss then in existence and to distinguish between covered and non-covered insolvencies.” Indeed, he added, “No other conclusion can be reached, as the Superintendent is without authority to overrule a judicial interpretation of a statute by the Court of Appeals While the Legislature may rewrite a statute to, in effect, overrule the Court of Appeals, the Insurance Superintendent is without such authority, notwithstanding his regulatory power.” Thus, rather than invalidate the regulatory provision, Justice Lockman interpreted it in a way so as to make it consistent with prior judicial interpretations of the governing statute.

Accordingly, insofar as the insolvent insurer in *GEICO v. Silber* was licensed to do business in New York and was required to make payments to the Security Fund, and the offending vehicle was, therefore, not “uninsured,” Justice Lockman granted GEICO’s Petition to Stay Arbitration and directed the Claimants to “proceed against the fund.”

THE "TOP TEN"

It is once again that time of year when we have the privilege of reporting upon Insurance Department's "Annual Ranking of Automobile Insurance Complaints." The Annual Ranking for 1997, the latest year for which such data is available, ranks 51 insurance companies or groups of companies by the number of private passenger automobile insurance complaints upheld against them and closed by the Insurance Department in 1997, divided by their average 1996-1997 average private passenger automobile premium volume in New York State. Because many complaints closed in any given year are initiated the previous year, the complaint ratios are computed using an average of two years' premium data. All companies or groups of companies with at least \$10,000,000 in average annual private passenger auto premiums in 1996-1997 are included in the ranking. Companies or groups with less than \$10,000,000 in average premiums are not included unless they had ten or more complaints upheld against them.

Thousands of complaints are handled by the Insurance Department's Consumer Services Bureau each year. In 1997, the Consumer Services Bureau closed 11,473 private passenger auto insurance complaints alone. (The Insurance Department also handles commercial auto complaints.) Only complaints that are justified to some degree, i.e., in which the company was "at fault," are counted against a company and measured as part of the rankings. If a company acted in a legally responsible manner, it is not penalized. The Department does, however, also publish the total number of complaints for informational purposes. Complaints made directly to the company, rather than through the Insurance Department are not counted. Complaints about money settlements are the most common complaints, followed by complaints about policy terminations. This year, for

the first time, complaints against insurers for late payment of no-fault arbitration awards are also included. In all, 275 such complaints were included, 161 of which were upheld. Twenty-six companies or groups had such no-fault complaints upheld against them. For six of these companies, these complaints accounted for less than 10% of their upheld complaints; for nine companies, the complaints accounted for 10% to 20% of all upheld complaints; and for 11 companies, they accounted for more than 20% of all upheld complaints. By listing the companies in terms of the ratio of complaints to average annual premiums, consumers are able easily to compare small companies with large companies.

The 1997 overall complaint ratio for all companies or groups, including those with less than \$10,000,000 in premium, was 0.19 per \$1,000,000 in premium. This average ratio is derived by dividing the number of complaints upheld against all those companies (1,555) by their average premium for 1996-1997 (8,049 million). Nearly two-thirds of the insurers listed fared better than average on this year's ranking and the State's largest auto writer, Allstate Insurance Company, was no exception.

The first chart below lists the "Top 10," i.e., the ten companies with the fewest complaints against them, or, the ten best performers of 1997. It should be noted that this list contains four repeat performers from last year -- TIG, Amica Mutual, Netherlands and Tri-State. For purposes of comparison, these companies' rankings in 1995 and 1996 are also shown. TIG Insurance Group -- with no complaints upheld against it -- took the top spot in the ranking for the second year in a row. This group of companies, like many others in New York, has established a multi-tier rating program under legislation passed by Governor Pataki in 1995. The law permits insurers to incorporate a multi-rate structure to encourage depopulation of the Assigned Risk Plan. (The Plan acts as an insurer of last

resort in New York State for drivers who cannot obtain coverage in the voluntary market.) The tier structure allows automobile insurers to insure not only good drivers but also those who -- although relatively "good" risks -- might otherwise be forced to secure their coverage through the Assigned Risk Plan. Amica Mutual Insurance Company ranked 2nd with a complaint ratio of 0.01, followed by USAA Group and Netherlands Insurance Companies, each with a ratio of 0.03. Amica and Netherlands were also among the top five performers in last year's ranking. USAA, in 12th place in last year's ranking, writes coverage for only military personnel and their dependents.

The second chart reveals the opposite side of the spectrum; it lists the ten auto insurers with the worst performance record for the calendar year 1997. In this chart, the company with the highest ratio is ranked first; the company with the lowest ratio is ranked last. Thus, those ranked near the top of this list had the worst performance. These companies' rankings in 1996 and 1995 are also shown. It should be noted that five of the listed companies -- Country-Wide, Winterthur and Leucadia, Merchants Mutual and American International -- appeared on last year's worst list as well. The Insurance Department cautions, however, that because it includes virtually all auto insurers in the State in its rankings, some must be at the bottom of each year's list even if every company is performing well. Companies do improve over time and sometimes only one or two additional complaints per year can make a big difference in the rankings. A good example of this is Country-Wide, which was ranked last in 1996, with a complaint ratio of 1.70, and which was ranked last again in 1997 despite significantly improving to a 1.15 ratio.

Finally, for those interested in the performance records of the ten largest auto insurers in New York State, we offer the third chart, which indicates those companies' 1997 rankings, complaints ratios, and 1996-1997 premiums.

The "Top 10":
The 10 Best Performers of 1997

	<u>Company or Group</u>	<u>1997 Complaint Ratio</u>	<u>1997 Ranking</u>	<u>1996 Ranking</u>	<u>1995 Ranking</u>
1.	TIG	0.00	1/51	1/52	13/57
2.	Amica Mutual	0.01	2/51	4/52	5/57
3.	USAA	0.03	3/51	12/52	12/57
4.	Netherlands	0.03	4/51	5/52	2/57
5.	State-Wide	0.04	5/51	24/52	1/57
6.	Allmerica Financial*	0.05	6/51	20/52	9/57
7.	Farm Family	0.05	7/51	36/52	38/57
8.	Tri-State Consumer	0.06	8/51	9/52	3/57
9.	Berkshire-Hathaway (GEICO)	0.09	9/51	11/52	14/57
10.	Atlantic	0.09	10/51	18/52	39/57

*Was America Group in 1996 ranking.

The 10 Worst Performers of 1997

	<u>Company or Group</u>	<u>1997 Complaint Ratio</u>	<u>1997 Ranking</u>	<u>1996 Ranking</u>	<u>1995 Ranking*</u>
1.	Country-Wide	1.15	51/51	52/52	57/57
2.	Winterthur U.S. Holdings	0.55	50/51	47/52	54/57
3.	Legion	0.46	49/51	—	—
4.	Leucadia	0.44	48/51	50/52	49/57
5.	Merchants Mutual	0.44	47/51	46/52	47/57

	<u>Company or Group</u>	<u>1997 Complaint Ratio</u>	<u>1997 Ranking</u>	<u>1996 Ranking</u>	<u>1995 Ranking*</u>
6.	Amex Assurance	0.41	46/51	32/52	19/57
7.	American International	0.33	45/51	44/52	53/57
8.	Eveready	0.32	44/51	2/52	50/57
9.	PW Group	0.29	43/51	—	—
10.	Utica National	0.28	42/51	25/52	40/57

The "Big 10"
The Largest Auto Insurers in New York

	<u>Company or Group</u>	<u>1997 Ranking</u>	<u>Complaint Ratio</u>	<u>1996-1997 Average Premium (In Millions)</u>
1.	Allstate	30/51	0.18	\$1,537.50
2.	State Farm	36/51	0.21	\$1,080.80
3.	Berkshire-Hathaway (GEICO)	9/51	0.09	\$689.60
4.	Travelers	28/51	0.18	\$450.90
5.	Nationwide	31/51	0.18	\$405.20
6.	Progressive	32/51	0.19	\$379.50
7.	Liberty Mutual	15/51	0.11	\$301.20
8.	Leucadia	48/51	0.44	\$269.60
9.	NY Central Mutual Fire	17/51	0.12	\$269.30
10.	General Accident	35/51	0.20	\$218.40