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UM EXCLUSIONS; THE "TOP 10," ET AL

The "Livery Exclusion"

In McCarthy v. MVAIC, 16 AD2d 35 (4th Dept. 1962), aff'd. 12 NY2d 922 (1963), claimant sought to recover uninsured motorist benefits for injuries caused by an assault and battery committed by an insured motorist. The insurance company covering the assailant's automobile was absolved from liability upon the ground that the assault and battery was not an "accident" within the meaning of the liability insurance policy. Holding that the uninsured motorist endorsement provided no coverage, the Court of Appeals reasoned that the endorsement was not intended to extend the protection of a standard automobile liability policy but, rather, was intended to give the same protection to a person injured in an accident caused by an uninsured automobile as he would have had if he had been injured in an accident caused by an automobile covered by such a standard policy. Thus, not being an "accident" within the meaning of a standard automobile liability policy, an assault could not be an "accident" within the meaning of the uninsured motorist endorsement either. Therefore, defendant's automobile having been covered by a standard automobile liability policy, it was not an "uninsured" automobile within the meaning of the uninsured motorist endorsement.

Hogan

In the recently decided case of Liberty Mut. Ins. Co. v. Hogan, ___ NY2d ___ [decided 10/21/93], N.Y.L.J. 10/27/93 p. 24,

col. 4, the issue was whether a "livery exclusion" contained in an uninsured motorist coverage endorsement was valid. The Court of Appeals held that such exclusion was not based on statute or regulation and, being inconsistent with the purpose of the uninsured motor vehicle statutes and the public policy of the State, was unenforceable. In so doing, we submit, the Court without so much as an oblique reference to McCarthy, abandoned the concept it announced thirty years earlier.

The Hogan Court held that the fact that the exclusion for livery conveyances was permitted under 11 NYCRR 60-1.2(a) was irrelevant since that rule referred only to liability insurance and not to the uninsured motorist endorsement. In the words of the Court:

"First, a provision in the uninsured motorists coverage endorsement of a liability insurance policy, such as the one in Liberty Mutual's policy, that excludes from coverage vehicles used 'to carry persons or property for a fee,' is not based on any statute or regulation Insurance Law §3420(f)(1) requires that every automobile insurance policy contain an uninsured motor vehicle endorsement. Neither that statute nor any regulations applicable to it mentions any exclusions. That is in contrast to the regulations for liability coverage (see, 11 NYCRR 65-1.2), no fault (see, 11 NYCRR 65.12) and supplemental uninsured/underinsured (see, 11 NYCRR 60-2.3), all of which specify what exclusions are allowed. The conclusion to be drawn is that when the Legislature and the State want to allow exclusions, they say so. In the absence of an express statutory or regulatory provision permitting such an exclusion, this Court declines to endorse that exclusion. The concurrence states that 'the livery exclusion authorized by regulation (11 NYCRR 60-1.2[a]) may be equally applicable to compulsory uninsured motorists coverage' (concurring opn. at 1).

The more logical view is that since the Legislature enacted a compulsory uninsured motorist coverage statutory scheme, any exclusions to that scheme should also be expressly authorized by statute or regulation.

"As the Court stated in Rosado v. Eveready Ins. Co. (34 NY2d 43, 49), once an insurance company issues a liability policy to an insured, `its obligation, with the exception of permitted exclusions, [arises] by operation of law and [is] as broad as the requirements of the applicable statutes.' If an attempted exclusion is not permitted by law the insurer's liability under the policy cannot be limited (id.; accord, Planet Ins. Co. v. Bright Bay Classic Vehicles, Inc., 75 NY2d 394, 399).

"Second, enforcement of the livery exclusion in the uninsured motorists coverage endorsement of a liability insurance policy would be inconsistent with the strong public policy underlying the compulsory uninsured motor vehicle statutes, `to ensure that innocent victims of motor vehicle accidents be recompensed for their injuries and losses' (Matter of Allstate Ins. Co. v. Shaw, 52 NY2d 818, 819). The purpose of the compulsory uninsured motor vehicle statutory scheme is to provide coverage `to insured persons who suffer automobile accident injuries at the hands of financially irresponsible motorists' (Matter of Country-Wide Ins. Co. v. Wagoner, 45 NY2d 581, 586). The aim, to make the prescribed compensation available in all such cases, calls for a policy of inclusion rather than exclusion in determining whom it covers (id.). Enforcement of a `livery exclusion' in an uninsured motor vehicle endorsement would be contrary to the purpose underlying this State's compulsory uninsured motor vehicle statutes and would reduce the scope of coverage required by the statutory mandate."

Questions Raised

While the Court of Appeals thus invalidated the "livery exclusion" in an uninsured motorist endorsement, it did not explain why the uninsured motorist claim would not be invalid even without a separate, specific exclusion in the uninsured motorist endorsement under the McCarthy analysis. If, under a standard liability policy, livery conveyances are permissibly excluded, and if the uninsured motorist coverage was not intended to provide greater protection than that which would have been afforded under the liability coverage, why is there coverage under the uninsured motorist endorsement when non-coverage under the liability policy results from a permissible exclusion? If an assault is not covered under the uninsured motorist endorsement because it is not covered under the liability policy, why, then, is a livery conveyance accident covered under the uninsured motorist coverage even though it is excluded under the liability policy?

Moreover, what will now happen to other exclusions contained in the standard New York Automobile Accident Indemnification Endorsement? For example, coverage is excluded "to bodily injury to an insured while operating an automobile in violation of an order of suspension or revocation" Where is the statutory or regulatory authority for this exclusion to be found? Yet the Court of Appeals had no trouble relying upon that exclusion to defeat an uninsured motorist claim in Aetna Cas. & Sur. Co. v. Gonzalez, 84 AD2d 528, 443 NYS2d 613 (1st Dept. 1981), aff'd. 55 NY2d 970 (1982). What about other exclusions, such as the one relieving an insurer from liability if the insured settles with or prosecutes to judgment any action against any person who may be legally liable for the insured's injuries? And will the same rationale be applicable to other provisions of the endorsement, not expressed as exclusions but as limitations on the amount of coverage, e.g., offset and reduction in coverage clauses, for which

no specific legislative or regulatory authority may be found apart from the general grant of authority given to MVAIC to prescribe the New York Automobile Accident Indemnification Endorsement with the approval of Superintendent of Insurance (Ins. Law §3420; Valente v. Prudential, 77 NY2d 894 (1991))?

Unfortunately, we can only ask these questions at this point, not answer them.

Insurance Company Rankings

Yet again, with the cooperation of the Superintendent of Insurance, Salvatore R. Curiale, we bring you the "Annual Ranking of Automobile Insurance Complaints" for the latest year for which such data is available, 1992. As in the past, this ranking reflects the claims-handling ability of New York State's automobile insurers and serves as an indicator of policyholder satisfaction. Thousands of complaints are handled by the New York State Insurance Department's Consumer Services Bureau each year. Complaints that were upheld against an insurer, were deemed justified to some degree, or that raised a question of fact beyond the jurisdiction of the Department were used as the basis for the ranking.

The complaint ratio was calculated by dividing the number of private passenger auto complaints charged against an insurer and closed by the Consumer Services Bureau in 1992 by the insurer's 1991-1992 average private passenger auto premium volume in New York State. All companies or groups of companies with at least \$5,000,000 in average private passenger auto premiums for 1991 and 1992 were included in the ranking. Companies or groups with less than \$5,000,000 in premiums were included only if they had ten or more complaints charged against them. A total of 60 auto insurance groups, representing 177 companies, were ranked in the report.

In the words of Superintendent Curiale, "New York's auto insurers must handle the claims of their policyholders fairly and expeditiously. The Department will take appropriate action against insurers if, through our market conduct investigations, a pattern of poor claims handling emerges. Insurers that perform poorly are expected to take steps to improve their standing. I encourage consumers to carefully review this complaint ranking . . . before selecting an auto insurer."

Listed below are the ten auto insurers with the worst performance record for the calendar year 1992. As in the past, we sarcastically refer to this list as the "Top 10." It should be noted that four of these companies appeared in last year's "Top 10" as well. The next chart contains the real "Top 10" -- i.e., the ten best performers of 1992:

THE 10 WORST PERFORMERS OF 1992

	<u>Company or Group</u>	<u>1992 Complaint Ratio</u>	<u>1991 Ranking</u>	<u>1990 Ranking</u>
1.	<u>Eveready Ins. Co.</u>	3.29	3	3
2.	<u>Crum & Forster</u> (International Ins. Co.; North River Ins. Co.; U.S. Fire Ins. Co.; Westchester Fire Ins. Co.)	2.78	11	7
3.	<u>Lincoln National</u> (American Economy Ins. Co.; American States Ins. Co.; Covenant Ins. Co.)	1.36	N/A	N/A
4.	<u>Reliance Group</u> (United Pacific Ins. Co. of NY)	1.30	14	37
5.	<u>Interboro Mutual Indemnity</u>	1.19	17	30
6.	<u>CIGNA</u> (Bankers Standard Ins. Co.; Century Indemnity Co.; Indemnity Ins. Co. of N.A.; Ins. Co. of N.A.; Pacific Employers Ins. Co.)	1.14	5	4
7.	<u>Country-Wide Ins. Co.</u>	1.11	2	1
8.	<u>Home Mut. of Binghamton</u>	1.03	15	28
9.	<u>Zurich-American Group</u> (American Guarantee & Liab. Assur. Co. of America; Maryland Cas. Co.; Northern Ins. Co. of NY; Universal Underwriters Ins. Co.; Zurich Ins. Co.)	0.89	7	15
10.	<u>Leucadia Group</u> (Allcity Ins. Co.; Colonial Penn Franklin; Colonial Penn Ins. Co.; Empire Ins. Co.)	0.83	51	27

THE 10 BEST PERFORMERS OF 1992

	<u>1992 Complaint</u>	<u>1992</u>	<u>1991</u>	<u>1990</u>
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	<u>Company or Group</u>	<u>Ratio</u>	<u>Ranking</u>	<u>Ranking</u>	<u>Ranking</u>
1.	<u>Executive Ins. Co.</u>	0.00	60	50	49
2.	<u>Tri-State Consumer Ins. Co.</u>	0.09	59	59	52
3.	<u>State-Wide Ins. Co.</u>	0.13	58	45	55
4.	<u>USAA Group</u>	0.14	57	55	53
5.	<u>Farm Family Mutual Ins. Co.</u>	0.15	56	54	50
6.	<u>Amica Mutual</u>	0.15	55	61	59
7.	<u>Providence Washington Ins. Co.</u>	0.18	54	N/A	N/A
8.	<u>Chubb Group</u> (Federal Ins. Co.; Great Northern Ins. Co.; Pacific Indemnity Co.; Vigilant Ins. Company)	0.19	53	47	56
9.	<u>Electric Ins. Co.</u>	0.21	52	31	6
10.	<u>U.S. Capital Ins. Co.</u>	0.25	51	4	N/A

The Insurance Department encourages any New Yorker unable to resolve a complaint against an insurance company, broker, agent or adjuster to contact its Consumer Services bureau by writing or calling, in New York City, 160 West Broadway, New York, New York 10013, (212) 602-0203; in Albany, Agency Building One, Empire State Plaza, Albany, New York 12257, (518) 474-6600; in Buffalo, Walter J. Mahoney Office Building, 65 Court Street, Room 7, Buffalo, New York 14202, (716) 847-7618. The toll-free number for consumer complaints is (800) 342-3736.

NEW CHARTS

This year, as an added bonus, we offer you the following additional chart -- the five largest auto insurance writers in New York State and their rankings -- as well as two new, unrelated charts depicting the 1992 market share of the ten largest property/casualty companies and the ten largest life insurance companies licensed in New York, ranked by assets as of December 31, 1992:

THE FIVE LARGEST AUTO INSURERS IN NEW YORK STATE

<u>Company or Group</u>	<u>1992 Complaint Ratio</u>	<u>1992 Ranking</u>	<u>1991 Ranking</u>	<u>1990 Ranking</u>
1. <u>Allstate Ins. Co.</u>	0.39	42	46	41
2. <u>State Farm</u>	0.45	36	40	36
3. <u>Government Employees</u>	0.30	49	49	42
4. <u>Aetna Life & Cas.</u>	0.52	31	29	34
5. <u>General Accident</u>	0.51	32	39	16

MARKET SHARE OF TEN LARGEST

PROPERTY/CASUALTY COMPANIES, 1992¹

(dollar amounts in millions)

<u>COMPANY</u>	<u>DIRECT PREMIUMS WRITTEN²</u>	<u>MARKET SHARE</u>	<u>CUM. SHARE</u>
1. <u>Allstate</u>	\$1,736	8.6%	8.6%
2. <u>State Insurance Fund³</u>	1,472	7.3	15.9
3. <u>State Farm Mutual Auto</u>	846	4.2	20.1
4. <u>National Union Fire</u>	753	3.7	23.8
5. <u>Aetna Casualty & Surety</u>	571	2.8	26.6
6. <u>Liberty Mutual Fire</u>	442	2.2	28.8
7. <u>Federal Ins. Co.</u>	427	2.1	30.9
8. <u>Continental Ins. Co.</u>	345	1.7	32.6
9. <u>State Farm Fire & Cas.</u>	326	1.6	34.2
10. <u>General Accident of NY</u>	313	1.6	35.8

¹Source: The Bulletin, New York State Insurance Department (September/October 1993), p. 9.

²Direct premiums written in New York State as reported in the 1992 Annual Statements filed with the New York State Insurance Department.

³The State Insurance Fund is a New York State Agency that sells workers' compensation and disability benefits at competitive rates to employers through New York State.

TEN LARGEST LIFE COMPANIES
LICENSED IN NEW YORK
RANKED BY ASSETS
DECEMBER 31, 1992¹

(dollar amounts in billions)

	<u>COMPANY</u>	<u>ADMITTED ASSETS²</u>	<u>MARKET SHARE</u>	<u>CUM. SHARE</u>
1.	<u>Prudential</u>	\$154.8	15.9%	15.9%
2.	<u>Metropolitan Life</u>	118.2	12.1	28.0
3.	<u>Teachers Ins. & Ann.</u>	61.8	6.3	34.3
4.	<u>Aetna Life</u>	50.9	5.2	39.5
5.	<u>New York Life</u>	46.9	4.8	44.3
6.	<u>Equitable Life</u>	46.6	4.8	49.1
7.	<u>Connecticut General</u>	44.1	4.5	53.6
8.	<u>Northwestern Mutual</u>	39.7	4.1	57.7
9.	<u>John Hancock Mutual</u>	39.1	4.0	61.7
10.	<u>Principal Mutual Life</u>	35.1	3.6	65.3

¹Source: The Bulletin, New York State Insurance Department (September/October 1993), p. 9.

²Total admitted assets as reported in the 1992 Annual Statements filed with the New York Insurance Department. Note that date are for individual companies only; they do not reflect the assets of groups with which these companies are affiliated. Columns may not always add to total due to rounding.

No-Fault Arbitrations

Finally, while we're on the subject of statistics, we thought we'd pass on to you another interesting statistic that was recently brought to our attention, this one having to do with no-fault arbitrations. During the calendar year 1993, of all no-fault cases disposed of in arbitration, only 39.95% (2,325 cases) were concluded by means of a contested award, 39.12% (2,277 cases) were concluded by means of a consent award, and 20.89% (1,216 cases) were transferred, consolidated, or, in largest measure, withdrawn.

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