

UM & SUM COVERAGE FOR DERIVATIVE CLAIMS

Every once in a while a case comes along that causes you to pause and question, or at least doubt, that which you thought you knew as an irrefutable and indisputable fact. Such a case for us, was the decision of the Appellate Division, First Department in *Travelers Insurance Company v. Lianides*, 246 AD2d 490 (1st Dept. 1998) on the issue of UM and SUM coverage for derivative claims.

Lianides

Although presumably most frequently to be cited for the proposition that, in the First Department (as opposed to the Second and Third Departments), an insured's actual knowledge of an accident and the claimant's injuries may constitute sufficient notice to satisfy the UM or SUM notice requirement, even if such information is not imparted to the insurer by the insured, or is imparted via a no-fault notice rather than a UM or SUM notice, (*contra*, *Nationwide Ins. Co. v. Bietsch*, 224 AD2d 623 (2d Dept. 1996); *Allstate Ins. Co. v. Dewyea*, 245 AD2d 661(3rd Dept. 1997)), the *Lianides* case also contains the following disconcerting and somewhat puzzling holding: "[B]ecause the uninjured respondent, the injured respondent's wife and guardian, was not involved in the accident, she is not entitled to benefits under the uninsured motorist endorsement, and, accordingly, a stay of arbitration should have been granted as to her."

Immediately upon reading this decision, we were struck by the following questions: Was the court correct in concluding, as it appeared to do, that there can be no recovery under an uninsured motorist policy for an uninjured spouse of an injured party -- i.e., does the uninsured motorist endorsement not provide coverage for derivative claims such as loss of services?¹ Was the *Lianides* court's decision on the derivative claim issue based

solely upon the specific language of the specific UM endorsement involved in that case and, therefore, to be limited to its facts? Would the same court have ruled differently if it was construing either the new UM endorsement (effective September, 1996) or the SUM endorsement under Regulation 35 (effective October 1, 1993)? Was the *Lianides* court's decision on the derivative claim issue consistent with rulings by the professional SUM arbitrators?

In an effort to answer these questions, we have researched and reviewed the facts and arguments in the *Lianides* case, the definitional provisions of various UM and SUM endorsements, and the reported SUM arbitrators' decisions since 1995. The results of this research and the conclusions we have reached therefrom are set forth below.

Policy Provisions

A review of the Briefs and discussions with counsel in *Lianides* reveals that the case involved an alleged hit-and-run accident that took place on April 17, 1991 and, therefore, a policy that was written sometime in 1990, i.e., prior to the enactment of Regulation 35-D and prior to the enactment of the new, revised mandatory uninsured motorist endorsement. While the insured, Leon Lianides, was injured in the accident, his wife, Aphrodite Lianides, was not involved in the accident and was not injured. Notwithstanding that fact, both Leon Lianides and Aphrodite Lianides filed a demand for uninsured motorist arbitration against Travelers. Travelers' contention that Aphrodite Lianides could not recover under the uninsured motorist endorsement for her derivative loss of services claim was based upon the contention that the policy at issue only afforded coverage for bodily injury, sickness or

disease. This contention was based upon the fact that the policy provided, in pertinent part, as follows:

“INSURING AGREEMENTS

1. Damages for Bodily Injury Caused by Uninsured Automobiles.

The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness, or disease, including death resulting therefrom, hereinafter called ‘bodily injury’ sustained by the insured caused by accident. . . .” [Emphasis contained in Travelers’ Brief].

The above-quoted Insuring Agreement provision is precisely the same as that which is contained in the original mandatory UM endorsement, the New York Automobile Accident Indemnification Endorsement (see 2 NYPJI 1004-1011). It is also, in all significant and relevant respects, the same as the subsequent, Revised Uninsured Motorist Endorsement -- New York, effective September 1, 1996, and the Supplementary Uninsured/Underinsured Motorist Endorsement-- New York, effective October 1, 1993, the pertinent portions of which are quoted in full below.² In pertinent part, all of these endorsements refer to damages “because of bodily injury.”

Perhaps because they were convinced that Leon Lianides’s injuries, in and of themselves, warranted an award in excess of the available policy limits, Respondents did not address the derivative claim issue and did not oppose Travelers’ arguments in that regard. It is perhaps for that reason that the court apparently failed to focus upon other provisions in the applicable endorsement, which, if noted, might have and, we submit, should have, resulted in a different determination. As previously noted, the very paragraph quoted and relied upon by Travelers provided that the company would pay damages

“because of bodily injury. . . sustained by the insured.” [Emphasis added.] Moreover, the next paragraph of the endorsement at issue in *Lianides*, contained a definition of an “insured,” i.e., a person or persons to whom coverage is to be afforded thereunder, which includes “any person, with respect to damages he is entitled to recover because of bodily injury to which the coverage applies sustained by an insured” [Emphasis added.]

The above-quoted definitional provision is precisely the same as that which is contained in the original mandatory UM endorsement, the New York Automobile Accident Indemnification Endorsement, and is, in all significant and relevant respects, also the same as the subsequent, Revised Uninsured Motorist Endorsement -- New York, effective September 1, 1996, and the Supplementary Uninsured/Underinsured Motorists Endorsement -- New York, effective October 1, 1993, the pertinent portions of which are quoted in full below.³

A close analysis of all of the quoted policy provisions reveals that they all -- even the specific provision considered by the *Lianides* court -- refer to damages sustained “because of bodily injury” to an insured. Whether because one construes such language as clearly and explicitly referring to derivative claims for consequential costs, expenses and other losses suffered as a result of (“because of”) the injuries to the injured insured, or as, at the very least, an ambiguous provision susceptible to such an interpretation (and, therefore, in accordance with well-accepted rules of insurance policy construction, to be read in a manner consistent with that interpretation), it seems clear that the claim of an uninjured spouse, parent or guardian for such losses was intended to be and/or is encompassed within the terms of the UM and SUM policies and should, therefore, be covered thereby.

SUM Arbitration Decisions

A review and analysis of the SUM arbitration decisions reported in the American Arbitration Association's "New York State No-Fault/SUM Arbitration Reports" since September, 1995 (when the SUM decisions were first reported) has revealed a striking paucity of awards for derivative claimants and what appears to be at least, a difference of opinion among the SUM arbitrators as to the validity of such claims under the SUM endorsement. Presumably, the small number of derivative claims can be attributed to a belief among most practitioners that such claims were not covered. Of the 210 reported SUM awards to date, only eight (8), or less than 4%, involved claims asserted by derivative claimants, such as spouses, parents or guardians. In five (5) of the eight (8) such cases, the validity of such claims was recognized and/or awards were rendered in favor of the derivative claimant; of the remaining three (3) cases, two (2) of the derivative claims were withdrawn prior to the rendering of the award and one (1) was decided against the derivative claimant.

In the first reported SUM decision in which a claim was asserted by an injured person as well as an uninjured spouse, H. Christine Howell, as legal guardian of David W. Howell, SUM 17, Arbitrator Thomas Bogan noted the existence of a claim made by the wife as guardian of her husband and on her own behalf, and then determined that the claimants -- both of them -- were entitled to recover the full SUM policy limits by factoring in "the amount that a jury would be most likely to award for Mr. Howell's past and future conscious pain and suffering, as well as the amount it might award Mrs. Howell for the loss of her husband's services." [Emphasis added.]

In several decisions that followed, Arbitrator Bogan has consistently awarded compensation to derivative claimants under UM and SUM policies. In Joseph and

Margaret Smythe v. State Farm, SUM 74, which involved a claim by an 89-year-old injured man and his 83-year-old uninjured wife, Arbitrator Bogan rejected the insurer's argument that the wife's derivative claim should be rejected because she did not submit such a claim to the tortfeasor's insurer, noting that this argument lacked merit because the tortfeasor's liability limit was, in fact, exhausted. Arbitrator Bogan then went on to award the husband \$75,000 and the wife \$15,000 (which amounts were reduced by the amount of the tortfeasor's coverage of \$50,000). In Mark and Catherine Wolfgang v. New York Central Mutual, SUM 137, which involved a claim by a 45-year-old injured woman and her uninjured husband, the underlying claim had been decided in a non-jury proceeding prior to reaching the arbitration forum. In that proceeding, which was not binding upon New York Central Mutual, the injured plaintiff was awarded \$65,000 and the husband was awarded \$7,500. Arbitrator Bogan accepted the findings of the court and also awarded \$65,000 to the wife and \$7,500 to the husband. And, in Jose M. David and Joy J. David v. Prudential, SUM 197, Arbitrator Bogan awarded the full available SUM limits to the injured male claimant and stated "I make no award with regard to the derivative claim for loss of services, although I acknowledge that the claim has merit." [Emphasis added.]

Arbitrator Peter Horenstein has two reported decisions dealing with derivative claims. In Fred and Karla Lomangino v. State Farm, SUM 25, Arbitrator Horenstein noted that the derivative claim of the injured party's husband was withdrawn prior to the rendering of the award. There is, of course, no way to know why that claim was withdrawn. In Martinetti v. Allstate, SUM 55, Arbitrator Horenstein dismissed the claim of the injured Richard Martinetti because the \$25,000 SUM coverage at issue was fully offset by the

\$25,000 received from the tortfeasor. Arbitrator Horenstein also noted, however, that “no evidence was presented of any injury to claimant Tracie Ann Martinetti” -- thus clearly implying that her derivative claim would have been denied in any event.

In the derivative claim cases presented to Arbitrator Sheila Paticoff, it appears that her decisions may have been influenced by the agreements and/or stipulations of the parties. In the first case, *Lillian Schechtel and Jack Schechtel v. Interboro Mutual Indemnity*, SUM 31, involving a claim for injuries sustained by Mrs. Schechtel and a claim for loss of services by Mr. Schechtel, Arbitrator Paticoff noted that “the parties agree that there is \$100,000 in underinsurance coverage available which is to be shared by both claimants” (emphasis added).” Accordingly, she awarded \$78,000 to Mrs. Schechtel and \$4,000 to Mr. Schechtel on his derivative claim. In *Marino Melo v. State Farm*, SUM 37, Arbitrator Paticoff noted that although the Demand for Arbitration was filed on behalf of both Zaida and Marino Melo, “the parties agreed to withdraw Zaida Melo’s (derivative) claim by stipulation.” Again, there is no way to know why that claim was withdrawn.

We have been advised that Arbitrator Seymour Lesser has taken the position that derivative claims are not covered by the UM and SUM endorsements and has never rendered an award in favor of a derivative claimant.

Coverage Limits

Arbitrator Paticoff’s decision in *Schechtel* also brought up another interesting issue pertaining to derivative claims -- where only one person is physically injured, does the fact that a derivative insured also makes claim entitle either claimant to the benefit of the

increased policy limits available when injury is sustained by more than one person? Stated differently, is the derivative insured entitled to his or her own “per person limits?” The answer to these questions, as properly recognized by Arbitrator Paticoff, is “No.” In the words of Arbitrator Paticoff, “Claimant Jack Schechtel’s claim is for loss of services, therefore, the value of Mr. Schechtel’s derivative damage claim must be added to the value of Mrs. Schechtel’s direct damage claim in order to determine the limits of liability for bodily injury sustained by one person. Loss of services cannot be recovered in excess of the policy limitations relating to bodily injury to one person.” See also Redcross v. Aetna Cas. & Sur. Co., 146 AD2d 125 (3rd Dept. 1989) (“derivative damages and direct damages are added together to determine the limit of liability for bodily injury sustained by one person”); Wireman v. Reith, 220 AD2d 582 (2d Dept. 1995); Champagne v. State Farm Mut. Auto. Ins. Co., 185 AD2d 835 (2d Dept. 1992).

Conclusion

Based upon the foregoing, it appears that, contrary to what may have been popular belief, there should be no prohibition against awarding damages for loss of services or other derivative claims in a UM or SUM case, provided, of course, that the derivative claimant makes a separate claim, demands arbitration on that separate claim and proves the particular derivative damages claimed, and that the total award (for the injured party and the derivative claim together) is within the “per person” limit of coverage. Still, those intending to make and pursue such a claim will have to deal somehow with the precedent of the Lianides case.

ENDNOTES

1. Derivative claims by an uninjured spouse, parent or guardian are to be distinguished from zone of danger claims by uninjured parties.

2. The Revised Uninsured Motorists Endorsement -- New York, effective September 1, 1996, provides, in pertinent part, as follows:

“1. Damages for Bodily Injury Caused by Uninsured Motor Vehicles. We will pay all sums which the insured, as defined herein, or the insured’s legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, and caused by an accident. . . . “

The Supplementary Uninsured/Underinsured Motorist Endorsement -- New York, effective October 1, 1993, provides, in pertinent part, as follows:

“II. Damages for Bodily Injury Caused by Uninsured Motor Vehicles:

We will pay all sums that the insured or the insured’s legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by an accident. . . . “

3. The Revised Uninsured Motorists Endorsement -- New York, effective September 1, 1996, provides, in pertinent part, as follows:

“Insured. The unqualified term ‘insured’ means: * * * (3) Any person, with respect to damages such person is entitled to recover because of bodily injury to which this coverage applies sustained by an insured. . . . “

The Supplementary Uninsured/Underinsured Motorists Endorsement -- New York, effective October 1, 1993, provides, in pertinent part, as follows:

“Insured. The unqualified term ‘insured’ means: * * * (3) any person, with respect to damages such person is entitled to recover, because of bodily injury to which this coverage applies sustained by an insured. . . . “