

## **UNINSURED AND UNDERINSURED MOTORIST COVERAGE:**

### **1994: THE YEAR IN REVIEW**

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Last year, I presented in these pages a survey of significant 1993 decisions on uninsured and underinsured motorist coverage.<sup>1</sup> Insofar as Regulation 35-D (11 NYCRR §60-2, et. seq.), the Insurance Department's long-awaited regulation revamping the entire field of uninsured and underinsured motorist coverage, had not become effective until October 1, 1993, it was not at all surprising that all of the cases reported in that article were cases decided under the "old law."

As in 1993, litigation of uninsured and underinsured motorist coverage disputes in 1994 did not slow down in anticipation of Regulation 35-D. In fact, as in 1993, uninsured and underinsured motorist disputes were among the most actively litigated areas of the law. Of course, it is beyond the scope of this article to cover all of the reported cases of the past year. The purpose of this article is to note and discuss some of the more significant of the newest "old law" cases on uninsured and underinsured motorist coverage -- those that were decided during the calendar year 1994.

### **APPLICABILITY OF REGULATION 35-D**

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Regulation 35-D is, by its terms, applicable to all new and/or renewal policies issued on or after October 1, 1993. The regulation was clearly not intended to be applied retroactively, or to accidents occurring after that date under policies issued prior to that date. Several cases decided in 1994 discussed the applicability of Regulation 35-D, with some courts, notwithstanding their recognition of the regulation's non-applicability to the case before them, nevertheless adopting and applying its provisions in resolving UM or UIM disputes.<sup>2</sup>

#### **DUTY TO INFORM INSUREDS OF SUM COVERAGE**

Regulation 35-D requires insurers to provide a written notice to their insureds containing the following information: (1) a statement that SUM coverage is available, including the SUM limits being offered for purchase; (2) the provisions set forth in the Regulation (at 11 NYCRR §§ 60-2.1(a)(b) & (c)) regarding the basics of SUM coverage; and (3) the examples about the application of SUM coverage set forth in the Regulation (at NYCRR § 60-2.2(b)). This requirement, however, was applicable only to newly issued policies after October 1, 1993, and to policies renewed between October 1, 1993 and September 30, 1994. The regulation, as enacted, did not extend the period applicable to renewal policies beyond September 30, 1994.

Chapter 425 of the Laws of 1994, signed into law on July 20, amended §3420(f)(2) of the Insurance Law by adding a new subdivision (B), requiring auto insurers to notify their insureds, in writing, at least once each year, of the availability of supplementary uninsured motorist (SUM) coverage and to explain the nature of the coverage and the amounts in which it could be purchased -- similar to the requirements previously set forth in the regulation. This statute became effective on the 90th day after it was enacted, i.e., October 18, 1994.

Shortly before the one-year period set forth in the regulation expired, on September 16, 1994, Superintendent of Insurance Salvatore R. Curiale promulgated, as an emergency measure, a "Second Amendment" to Regulation 35-D (60-2.2[a]) -- to take effect immediately -- so as "to provide minimum standards that must be met by insurers to comply with the new law by its effective date." The regulation now provides that "every insurer writing automobile liability insurance that satisfies the requirement of Article 6 or 8 of the Vehicle and Traffic Law shall, with all new policies issued to become effective on and after October 1, 1993, and all policies renewed to become effective on and after October 18, 1994, provide a written notice" that includes the information previously set forth.

Thus, the insurer's written explanatory notice requirement is now based upon both statute and regulation.

#### TRIGGER OF UNDERINSURED MOTORIST COVERAGE -- GENERALLY

In *Prudential Prop. & Cas. Ins. Co. v. Szeli*, 83 NY2d 681, 613 NYS2d 113 (1994), the Court of Appeals reaffirmed that the limits to be used in the comparison to determine whether underinsured motorist coverage is triggered are the tortfeasor's bodily injury limit and the insured's bodily injury limit (and not the limit contained in the underinsured motorist endorsement).<sup>3</sup>

The law remains clear that where the bodily injury liability limits of the tortfeasor and the claimant are the same, the tortfeasor is not "underinsured" and the underinsured motorist coverage is not triggered.<sup>4</sup>

[Note: Regulation 35-D also provides that SUM coverage is triggered when the claimant's bodily injury liability limits exceed the tortfeasor's bodily injury liability limits.]

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**-- COMBINED SINGLE LIMIT POLICIES**

In *Prudential Prop. & Cas. Ins. Co. v. Szeli*, *supra*, the Court of Appeals reversed the Second Department<sup>5</sup> and agreed with the trial court<sup>6</sup> that in a multiple-victim accident, where the tortfeasor had a \$300,000 combined single limit policy and the claimant had a \$100,000/\$300,000 split limit bodily injury policy, because the claimant's policy would provide \$300,000 in bodily injury coverage plus an additional amount for property damage, and, by contrast, the tortfeasor's policy would provide \$300,000 for bodily injury less any amount payable to property damage, the tortfeasor would be deemed underinsured for purposes of Insurance Law §3420(f)(2).

The Court also concluded that in multiple victim situations, the proper comparison to the tortfeasor's bodily injury liability limits is with the claimant's "per accident" limits, rather than his or her "per person" limits, even if only one claimant is making claim under the particular policy.

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**-- MULTIPLE TORTFEASORS**

The question of how underinsured motorist coverage is triggered when there are multiple tortfeasors involved -- i.e., whether the claimant must exhaust all of the underlying coverage of the tortfeasors before proceeding with an underinsured motorist claim -- has resulted in an apparent conflict among the Departments.

The rule in the Second Department is and has been for quite some time, that underinsured motorist coverage is triggered as long as at least one of the tortfeasors' coverage was offered and exhausted.<sup>7</sup>

Recent cases in the First and Fourth Departments, however, have enunciated a contrary rule. In *Hanover Ins. Co. v. Gaeta*, NOR, NYLJ, February 17, 1994, p. 24, col. 5 (Sup. Ct. N.Y. Co.), the trial court, on the authority of the earlier First Department case of *Garcia v. Mercado*, 194 AD2d 334, 598 NYS2d 259 (1st Dept. 1993), held that because the claimant settled her claims against one of several tortfeasors for less than the full amount of the policy, i.e., did not fully exhaust against that tortfeasor, her demand for arbitration would be stayed (assuming the Petition to Stay Arbitration was timely).

Similarly, in *S'Dao v. National Grange Mutual Ins. Co.*, \_\_ AD2d \_\_, 616 NYS2d 836 (4th Dept. 1994), the court held that a passenger in one of two vehicles involved in an accident was not entitled to underinsured motorist benefits after she (and four other injured persons) settled with the tortfeasors by exhausting the coverage of only one of the two vehicles. The court found that plaintiff failed to satisfy the statutory condition precedent to the recovery of underinsurance benefits [citing *Garcia v. Mercado*, supra].

The Court of Appeals has recently granted leave to appeal in the *S'Dao* case and will, presumably, resolve the conflicting decisions on this important issue.<sup>8</sup>

[Note: Regulation 35-D follows the rule of the Second Department by permitting a SUM claim as long as at least one insured motor vehicle offers its policy limits and those limits are lower than the claimant's limits, and by requiring exhaustion of the limits available "for any one person who may be legally liable for the bodily injury sustained by the insured."]

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**-- EXCESS/UMBRELLA POLICIES**

In *State Farm Mut. Auto Ins. Co. v. Roth*, 206 AD2d 376, 613 NYS2d 713 (2d Dept. 1994), mot. for leave to appeal denied 84 NY2d 812 (1995), the court rejected the insured's attempt to trigger his underinsured motorist coverage by adding the limit of an umbrella policy issued to him by a different insurer to his underlying bodily injury limits so as to establish that his coverage was greater than the tortfeasor's. In the words of the court, "Neither the case law nor the applicable statute . . . authorizes an injured party to combine its liability coverage from several policies, to determine whether or not the underinsurance benefits of one of the policies is triggered (citations omitted)."

#### THE SUM "CATCH-22"

*State Farm Auto. Ins. Co. v. Blanco*, \_\_ AD2d \_\_, 617 NYS2d 898 (2d Dept. 1994), mot. for leave to appeal denied \_\_ NY2d \_\_, \_\_ NYS2d \_\_ (1995) (NYLJ, February 21, 1995, p. 25, col. 6), was 1994's example of the "Catch-22" of underinsured motorist coverage at work. Upon receipt of a settlement offer of the tortfeasor's full policy limits, the claimant wrote to State Farm, his underinsured motorist carrier, stating that the settlement offer "has been accepted, unless we receive objection from [State Farm] within 10 days . . . ." The letter did not include a copy of the release that the claimant intended to issue upon acceptance of the offer, which release did not protect or preserve State Farm's subrogation rights. When State Farm failed to respond to the letter, the claimant accepted the settlement offer. State Farm subsequently rejected claimant's claim for underinsured motorist benefits on the ground that he failed to obtain its written consent to the settlement as required by the policy. State Farm's Petition to Stay the arbitration demanded by claimant was granted, which stay was affirmed on appeal.

In last year's article, I reported on two cases that dealt with ways to overcome the "Catch-22." In the first case, *Tri-State Consumer Ins. Co. v. Hundley*, N.O.R., NYLJ, March 2, 1993, p. 33, col. 2 (Sup. Ct. Nassau Co.), Justice Goldstein adopted and applied the "Release or Advance" procedure contained in Regulation 35-D (despite the fact that the Regulation had not yet become effective), and ordered the underinsured motorist carrier to decide, within 30 days, whether to consent to the settlement with the tortfeasor without demanding that its subrogation right be protected, or, in the alternative, withhold its consent, in which case it would have to pay the claimant the amount of the settlement offer and be subrogated to the claimant's rights against the tortfeasor.

In the second case, *Prudential Prop. & Cas. Ins. Co. v. King*, 198 AD2d 421, 604 NYS2d 136 (2d Dept. 1993), the court overcame the "Catch-22" by concluding that the claimant satisfied the conditions precedent to arbitration by advising the insurer of the settlement offer, by requiring the insurer's right of subrogation to be preserved and by requesting the insurer's consent to settle the underlying claim on numerous occasions. As stated by the *King* court, "[The insurer] cannot arbitrarily withhold its consent and at the same time argue that a condition precedent has not been complied with."

In 1994, in *Tri-State Consumer Ins. Co. v. Hundley*, \_\_\_ AD2d \_\_\_, 618 NYS2d 41 (2d Dept. 1994), the Second Department unanimously affirmed Justice Goldstein's Order and reaffirmed the principles set forth in *Prudential v. King*, *supra*. The court held that because, as in *King*, *supra*, the claimant advised the insurer of the settlement offer, sought its consent, and cooperated with the insurer's investigation, "she satisfied the conditions precedent to arbitration." Under those circumstances, the court held that the insurer "cannot arbitrarily withhold consent and at the same time argue that the [claimant] has not complied with a condition precedent [citing *King*,

supra] . . . ." Moreover, the court held that it was "not an improvident exercise of discretion for the Supreme Court to . . . fashion a remedy which would permit the resolution of the [claimant's] personal injury claims."<sup>9</sup>

#### **REDUCTION-IN-COVERAGE CLAUSES**

In last year's article, I reported on the important case of *Allstate Ins. Co. v. Stolarz*, 81 NY2d 219, 597 NYS2d 904 (1993), in which the Court of Appeals distinguished its prior decision in *United Community Ins. Co. v Mucatel*<sup>10</sup>, by holding that in the limited situation where the declaration sheet of the policy indicates a single limit amount for both uninsured motorist and underinsured motorist coverage, the reduction-in-coverage provision would be upheld because, at least in the uninsured motorist context, it was not fatally ambiguous. In the context of underinsured motorist coverage alone, however, the *Mucatel* rule invalidating such provisions remains in place.<sup>11</sup>

*Stolarz* appeared conclusively to settle the reduction-in-coverage issue -- the clauses were valid in policies with combined un/underinsured coverage and invalid in policies with only underinsurance coverage. However, after *Stolarz*, the Second Department, in *Nationwide Mutual Ins. Co. v. Davis*, 195 AD2d 561, 600 NYS2d 482 (2d Dept. 1993), rejected a reduction-in-coverage clause in a single limit un/underinsured policy. The court reasoned that the policy was misleading because its declaration page did not indicate that the payment of underinsured motorist benefits would be subject to a reduction, notwithstanding the fact that it did indicate a similar reduction for collision and comprehensive coverages. The court further found the policy misleading to the extent that it purported to reduce the underinsurance coverage so as to spare the carrier from ever having to pay the coverage limit.

Interestingly, Davis did not refer to Stolarz. Nationwide's motion to reargue on the basis of Stolarz was denied, as was leave to appeal to the Court of Appeals.<sup>12</sup>

In 1994, in Nationwide Mutual Ins. Co. v. Corizzo, 200 AD2d 621, 606 NYS2d 719 (2d Dept. 1994), the Second Department, citing, inter alia, Davis, again held that a reduction-in-coverage clause was invalid where the declaration sheet did not indicate that the payment of underinsured motorist benefits would be subject to a reduction, as it did for collision coverage and where the policy purported to reduce underinsurance coverage "so as to spare the carrier from ever having to pay the coverage limit."

In the more recent cases of Nationwide Mutual Ins. Co. v. Baraket, NOR, NYLJ, November 17, 1994, p. 33, col. 5 (Sup. Ct. Westchester Co.) and Nationwide Ins. Co. v. Damaskinos, NOR, NYLJ, January 6, 1995, p. 29, col. 2 (Sup. Ct. Nassau Co.), both courts held that the decisions in Davis and Corizzo remain viable notwithstanding Stolarz, in light of Regulation 35-D, which requires that the declaration page of policies issued or renewed after October 1, 1993 contain language warning the insured of the coverage reduction created by an offset provision. Even where, as in those prior cases, the policies were not subject to Regulation 35-D insofar as they were issued prior to its effective date, both courts recognized that the regulation was, as the Court of Appeals noted, in Stolarz, "persuasive."

It is, therefore, now apparent that an exception to Stolarz may exist. Neither Stolarz nor Mucatel expressly considered the additional inconsistency and ambiguity contained in the declaration sheets of the policies identified and described by the Davis and Corizzo courts. The applicability of Stolarz to a particular case is, therefore, not to be the end of the inquiry. The declaration sheet must be carefully examined. Where, as in the above cases, the declaration sheet notes a reduction-in-coverage pertaining to collision and/or comprehensive coverage, but does not similarly provide

for underinsured motorist coverage, the reduction-in-coverage provision will be deemed void notwithstanding Stolarz.

[Note: Regulation 35-D avoids the Mucatel/Stolarz problem by specifically approving and including a reduction-in-coverage provision for amounts received from the tortfeasor in the new standard SUM endorsement. The Regulation further cures and eliminates the ambiguity problem by requiring the declaration sheet of each SUM policy to set forth and explain the reduction-in-coverage provision).

#### **INSURER'S DUTY TO PROVIDE PROMPT WRITTEN NOTICE OF DENIAL OR DISCLAIMER**

In State Farm Mut. Auto. Ins. Co. v. Cote, 200 AD2d 622, 606 NYS2d 721 (2d Dept. 1994), the court recited the well-established rule that "an insurance carrier may not disclaim liability if it fails to give the injured party timely notice of the disclaimer 'as soon as is reasonably possible' after it learns of the accident or grounds for disclaimer or denial of coverage (Insurance Law §3420[d] . . . ." In that case, even assuming that the insurer's commencement of the special proceeding to stay arbitration constituted a sufficient written notice of disclaimer, its unexplained delay of approximately seven (7) months was held to be unreasonable as a matter of law.

Several other courts addressed the issue of untimely notices of denial or disclaimer in 1994, and held that delays ranging from two (2) months to one (1) year were unreasonably and untimely as a matter of law.<sup>13</sup>

In Aetna Cas. & Sur. Co. v. Rosen, 205 A.D.2d 684, 613 N.Y.S.2d 664 (2d Dept. 1994), the court reaffirmed the principle that a reservation of rights letter does not constitute a written notice of denial or disclaimer under Insurance Law §3420(d).

## TRIAL DE NOVO

In *Amica Mutual Ins. Co. v. Stone*, NOR, NYLJ, October 27, 1994, p. 28, col. 6 (Sup. Ct. N.Y. Co.), Justice Helen E. Freedman held that the insurance policy's de novo provision "violates public policy and accordingly is unenforceable," adopting the view of her colleague, Justice Edward Lehner, in *Hanover Ins. Co. v. Losquadro*, 157 Misc.2d 1014, 600 NYS2d 419 (Sup. Ct. N.Y. Co. 1993). In the view of the court, "permitting a trial de novo of the previously arbitrated issue of damages would thwart policy goals of: (1) encouraging the use of arbitration to provide a relatively speedy, informal and inexpensive procedure for dispute resolution; and (2) promoting judicial economy." Moreover, the provision is "unconscionable" because: "(1) the policyholder had no opportunity to negotiate the terms of his policy; and (2) because, despite an illusion of mutuality, the provision in reality unfairly favored insurers by allowing them a means to re-litigate awards."

The Supreme Court, Nassau County arrived at the directly opposite conclusion in *Allstate Ins. Co. v. Masie*, NOR, NYLJ, July 28, 1994, p. 26, col. 4, wherein Justice Alan Winick held, in accordance with *Allstate Ins. Co. v. Purdy*, 159 Misc.2d 783, 606 NYS2d 535 (Sup. Ct. Orange Co. 1994), that "[m]easured against the mores and business practices of the time, the provision is neither unreasonable nor unconscionable. Indeed, it offers an insured, as well as an insurer, an opportunity to litigate an arbitration award over \$10,000, either on grounds of inadequacy in the case of the insured, or excessiveness in the case of the insurer."

The court further noted that "At the time the parties entered into the contract, such a provision was not prohibited by the regulations of the Insurance Department, the right to demand a trial de novo was recognized in case law [citations omitted], and . . . was a fairly standard provision in policies issued throughout the country."

The first appellate level decision on this issue was rendered this year, as well. In *Allstate Ins. Co. v. Jacobs*, \_\_ AD2d \_\_, 617 NYS2d 360 (2d Dept. 1994), the Second Department upheld the validity of the de novo review provision as being "consistent with the Insurance Law and relevant public policy, as is evidenced in part by the New York State Superintendent of Insurance's approval of the policy provision (see, e.g., *Reichel v. Government Employees Ins. Co.*, 107 AD2d 463)". Moreover, the court found the de novo provision "not unconscionable" because, in essence, it does not necessarily benefit only the insurance carrier.

In *General Accident Ins. Co. v. Giacomazzo*, 204 AD2d 236, 612 NYS2d 43 (1st Dept. 1994), the First Department affirmed the ruling of the trial court (NOR, NYLJ 2/16/93, p. 26, col. 2 [Sup. Ct. N.Y. Co.]) to the effect that the insurer waived its right to a trial de novo by acquiescing in the appointment of a single arbitrator and proceeding in accordance with the rules of the arbitral forum designated in claimant's demand for arbitration, instead of three arbitrators and the procedures set forth in the policy. Under the rules of claimant's forum, the award was to be binding.

In *Eckart v. Aetna Cas. & Sur. Co.*, \_\_ AD2d \_\_, 616 NYS2d 789 (2d Dept. 1994), the court held that the insurer effectively waived its right to invoke the trial de novo provision in its policy by proceeding to arbitration in accordance with the rules of the American Arbitration Association and not in accordance with the policy's arbitration provisions.

In *Gersten v. American Transit Ins. Co.*, 161 Misc.2d 57, 613 NYS2d 555 (Sup. Ct. N.Y. Co. 1994), the court held that a de novo action can be abandoned by a failure to prosecute and that the result of such abandonment would be the reinstatement of the original arbitration award.

[Note: Regulation 35-D eliminates the de novo trial provision entirely.]

## CONCLUSION

The first several months of 1995 have shown no let down in the degree of activity in the volatile areas of uninsured and underinsured motorist coverage, making it certain that sufficient material will exist for a similar article next year. By then, presumably, Regulation 35-D will be in full swing and the majority of cases will be decided under its governing provisions. Accordingly, it can reasonably be anticipated that next year's article will be entitled "The Sum of SUM Cases Decided in 1995." Until then, however, it is important to understand and remember the "old law" cases described herein.