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Appellate Division: Recent Departmental Conflicts

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The Appellate Division of the Supreme Court of the State of New York is a single statewide court divided into four departments for administrative convenience. See N.Y. Const. Article 6, §4; *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663 (2d Dept. 1984). Thus, the doctrine of stare decisis requires a trial court in any particular department to follow precedents set by the Appellate Division of another department until the Appellate Division in its own department or the Court of Appeals pronounces a contrary rule. Id., see also, *Kirby v. Rouselle Corp.*, 108 Misc2d 291 (Sup. Ct. Monroe Co. 1981).

As the *Mountain View* court put it, "This is a general principle of appellate procedure [citations omitted] necessary to maintain uniformity and consistency [citations omitted]."

Still, while there is a general conception that one department of the Appellate Division should accept the decisions of a sister department as persuasive, each Appellate Division is free to reach its own conclusion, even if contradictory results ensue; one department is free to decline to follow another department. See *Mountain View*, supra, 102 AD2d at 665. When a conflict among or between departments arises, a motion for leave to appeal to the Court of Appeals will commonly follow, seeking clarification by the state's highest court of the correct rule of law to be followed by all of the courts. See 22 NYCRR §500.22 (b) (4) (Rules of the Court of Appeals) (which includes among the grounds for obtaining permission to appeal to the Court of Appeals that the issues "present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division").

Several recent decisions have been issued by the appellate divisions which establish conflicts among the departments. In two such cases, this conflict was created by one department explicitly noting a disagreement with another department's precedent and, in a third case, the conflict was created by one department implicitly overruling the precedent of another department. Whether these cases end up before the Court of Appeals for resolution of the conflict and clarification of the correct and applicable law, remains to be seen.

Arbitration of UM/SUM Claims

In *National Grange Mut. Ins. Co. v. Louie*, 39 AD3d 292 (1st Dept. 2007) (decided April 10, 2007), the question presented was whether an insured is entitled to proceed to arbitration of an uninsured motorist (UM; supplementary uninsured motorist, SUM) claim arising from an accident in New York State when the policy pursuant to which the claim was made—a Connecticut policy, issued to a Connecticut resident by a Connecticut insurer, authorized to business in New York State—did not provide for such arbitration. In rejecting the petitioner's contention that Connecticut law governed the demand for arbitration, and thus precluded arbitration in the absence of any entitlement to same under the policy and/or Connecticut law, the First Department observed that "we have long held that where the obligation to arbitrate is not found in the policy but is instead imposed on that agreement in the New York State Insurance Law [presumably Ins. L. §5107], it 'is imposed not only upon New York policies but also upon policies written for nonresidents when their automobiles are operated in this State and the insurer is authorized to transact business here'" [citing the First Department's earlier decision in *Ohio Casualty Group v. Avellini*, 54 AD2d 632 (1st Dept. 1976)]. Notably, the First Department specifically stated that "To the extent the Second Department has more recently held otherwise (*Matter of State Farm Mut. Auto. Ins. Co. v. Torcivia*, 277 AD2d 321 [2000], we decline to follow that ruling."

In *State Farm Mut. Auto. Ins. Co. v. Torcivia*, 277 AD2d 321 (2d Dept. 2000), the Second Department did, in fact, reach a contrary conclusion. Therein, the claimant, a resident of South Carolina, whose vehicle was registered in South Carolina and insured by the petitioner under a policy issued in South Carolina, was involved in a hit-and-run accident in New York. Upon his demand for arbitration of a UM claim, the petitioner timely sought a permanent stay of arbitration on the ground that the policy at issue did not contain a provision for UM arbitration. In upholding the trial court's grant of a permanent stay of arbitration, the Second Department stated that "a party will not be compelled to arbitrate, and thus surrender the right to litigate a dispute in court, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes [citations omitted]." Since the claimant conceded that the policy at issue did not provide for the arbitration of uninsured motorist claims, the court held that the petitioner could not be compelled to arbitrate. Further, and more to the point, the court observed that "there is no requirement under the New York no-fault statutes and regulations that mandates arbitration where, as here, a policy issued out of State meets the minimum financial security requirements of Insurance Law §5107."

It is interesting to note that in rejecting the Second Department's view as expressed in *Torcivia*, the First Department failed to take any note of its own prior holding consistent with *Torcivia*. In *United States Services Automobile Association v. Melendez*, 27 AD3d 296 (1st Dept. 2006), the same court (including two of the same justices) held that a permanent stay of arbitration was properly granted to the petitioner where the policy it issued in Connecticut covering the vehicle in which the claimants were passengers at the time they were injured in an accident in New York, provided for arbitration only if both parties agreed and the petitioner declined to arbitrate. After noting that the policy contained UM coverage sufficient to satisfy the requirements of Ins. L. §5107, the court stated: "[T]here is no requirement under the New York no-fault [and uninsured] statutes and regulations that mandates arbitration where, as here, a policy issued out of State meets the minimum financial security requirements of Insurance Law §5107"—citing *Torcivia*. It thus appears that in rejecting the Second Department's holding in *Torcivia*, the First Department has now also rejected its own prior holding in *Melendez*. Clarification is definitely in order.

Superintendent of Insurance

• ***Equitable Estoppel Against Superintendent of Insurance***

In *Serio (Superintendent of Insurance of State of New York) v. United States Fire Ins. Co.*, AD3d , NYS2d (2d Dept. 2007) (decided June 5, 2007), one of the issues before the Second Department was whether the superintendent

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of Insurance, as ancillary receiver of an insolvent insurance company, was subject to the doctrine of equitable estoppel and, therefore, barred from disclaiming the duty to indemnify the insolvent insurer's insured. As argued by the superintendent in his brief to that court, (written by the authors of this article): "The Superintendent of Insurance acts herein not only as Receiver of the insolvent insurer but as Administrator of the Property/Casualty Insurance Security Fund pursuant to Insurance Law §7601(e). In reality, because the insolvent insurer lacks the funds to pay the claims, it is the Security Fund to which the parties look for protection and for allowance of their claims. Thus, when the Superintendent acts to determine whether the insured would have been entitled to protection under the policy, i.e., whether the claim presented is a 'policyholder claim' [Ins. Law §7602(10] or an 'injured party claim' [Ins. Law §7602(h)], he acts primarily as Administrator of the Fund, not as liquidator of the insolvent insurer. Thus, while the insurer that had been defending an action, albeit that no coverage exists, may, in an appropriate case, be estopped from denying coverage, the Fund should not be so estopped because the statute requires that the Fund be used to pay only allowed claims of injured parties and policyholders. Injured party claim is defined in §7602(h) as an injury arising out of an insured incident 'within the coverage of the policy.'" (See also 'Policyholder Claim' under §7601(1)).

"The Fund is not an insurer. In *Liquidation of Midland Ins. Co. (Claim of LAC D'Amiante)*, 269 AD2d 50 (1st Dept. 2000), the court stated:

> Regardless of whether Midland's obligations had become fixed prior to its entry into liquidation, the fact remains that it is no longer a viable underwriter with readily available coverage. Furthermore, the Security Fund is not insurance, but a pool of money contributed by insurers doing business in New York for the payment of allowed claims of policyholders and injured parties (see, *Matter of Allcity Ins. Co. [Kondak]*, 66 AD2d 531, 537, appeal dismissed in part, denied in part 48 NY2d 629).

"This significant distinction was recognized in *Aloha Pacific, Inc. v. California Insurance Guarantee Ass'n*, 79 Cal. App. 4th 297, 93 Cal. Rptr. 2d 148 (2000), which held that the California Insurance Guarantee Association (CIGA), the equivalent of New York's Property/Casualty Insurance Security Fund, was not estopped from asserting that a claim was not covered by reason of the insolvent insurer's delay in denying coverage and its defense of the action on behalf of the purported insured. See also, *Prince Carpentry, Inc. v. Cosmopolitan Mut. Ins. Co.*, 124 Misc2d 919, (NY Sup. 1984) ('...although Cosmopolitan had acknowledged coverage for contractual indemnity, and had undertaken to defend, the Liquidator is not obligated to continue the defense').

"Finally, the decision in *Serio v. Andra Insurance Co.*, 304 AD2d 362 (1st Dept. 2003), lv. to app. dismissed 100 NY2d 576 (2003), lv. to app. den. 100 NY2d 516 (2003), is dispositive. There, in an action by the Superintendent as Liquidator, the court reaffirmed the established principle that 'the doctrine of equitable estoppel will not bar a governmental agency from changing its position in the exercise of a governmental function.' See also *New York State Medical Transporters Assn. v. Perales*, 77 NY2d 126, 130 (1990) ('we have repeatedly made clear that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties'); *Parkview Associates v. City of New York*, 71 NY2d 274, 282 (1988) ('estoppel is not available to preclude a municipality from:...correcting errors, even where there are harsh results']."

Notwithstanding those arguments, the Second Department, in *Serio v. U.S. Fire Ins. Co.*, supra, held that "The Supreme Court erred in holding that the Superintendent was not estopped from disclaiming coverage of the Defendant [insurer] in the underlying action." In so holding, the court quoted from a case involving the State Insurance Fund—an entirely different entity from the Liquidation Bureau and the Property and Security Fund—for the proposition that "While the State Insurance Fund is an agency of the State, its function is akin to that of a private insurance carrier, and especially in matters of litigation, it is considered to be an entity separate from the State itself.... It follows that in a proper case, laches and estoppel may be comparted to the fund."

Coincidentally, just two days later, on June 7, 2007, the First Department in *Ancillary Receivership of Reliance Ins. Co., GZA GeoEnvironmental, Inc. v. New York State Liquidation Bureau*, __AD3d__, NYS2d (1st Dept. 2007), came to the exact opposite conclusion from the Second Department, holding that "the Liquidator, acting in its governmental capacity, was not subject to estoppel for failure to respond to claimant's requests to consent to the proposed settlement [citing *Serio v. Andra Ins. Co.*, supra]."

A motion for reargument and/or leave to appeal to the Court of Appeals, is in the process of being made in the *Serio v. U.S. Fire Ins. Co.* case, seeking a correction of that portion of the decision which held that estoppel could be invoked against the superintendent of Insurance.

'Serious Injury' Threshold

• Applicability of "Serious Injury" Threshold Requirement

In *Meegan v. Progressive Ins. Co.*, AD3d , NYS2d (4th Dept. 2001) (decided June 8, 2007), the Fourth Department, by a 3-2 decision, expressly disagreed with the prior holding of the Second Department in *Raffellini v. State Farm Mut. Auto. Ins. Co.*, 36 AD3d 92 (2d Dept. 2002), on the issue of whether a claimant seeking supplementary uninsured/underinsured motorist benefits pursuant to Ins. L. §3420 (f) (2) is required to establish a "serious injury" as a condition precedent to recovery.

In *Raffellini*, a case that has attracted a great deal of attention in these pages and elsewhere (see e.g., Lustig, Mitchell S. and Schatz, Jill L., "'Raffellini,' Serious Injury Under SUM Endorsement," NYLJ, Dec. 28, 2006, p. 4, the Second Department held that the provision in the insurance contract (the SUM endorsement prescribed by Regulation 35-D, 11 NYCRR §60-2.3, et seq.) imposing a "serious injury" threshold requirement in the underinsurance context should not be given effect. As recognized by that court, "the Legislature made a point of imposing the serious injury threshold requirement in [Ins. L.] §3420 (f) (1), which governs mandatory, uninsured motorists coverage...but] omitted that threshold from the ensuing section, section 3420 (f) (2) which governs the optional coverage an insured may, for an additional premium, purchase from his or her insurer." Thus, the Second Department reasoned, the omission of the serious injury threshold requirement in §3420 (f) (2) renders "legally irrelevant" a defense of lack of serious injury, and the regulations imposing such a requirement "would appear unauthorized." The *Raffellini* court went on to note that Ins. L. §3420(a) provides for certain mandatory policy provisions that are to be "equally or more favorable to the insured" and that a provision in a contract (policy) imposing a serious injury threshold requirement is less favorable to an insured than §3420(f)(2) and thus should not be enforced. 36 AD2d at 103-105.

In expressly disagreeing with the decision of the Second Department in *Raffellini*, and concluding that the plaintiffs were required to establish serious injury in order to recover under their SUM policy, the Fourth Department majority in *Meegan* noted that the language of the SUM endorsement came "directly from the insurance regulations containing the requirements for SUM endorsements, which include the exclusion that SUM coverage does not apply to noneconomic damages unless the insured has sustained a 'serious injury' as defined in Insurance Law §5102 (d) (see 11 NYCRR 60-2.3[f])." Moreover, the Fourth Department majority observed that the superintendent of Insurance, who promulgated Regulation 35-D, had the power to promulgate regulations, which are valid "as long as they are not inconsistent with a specific statutory provision." In their view, the regulations requiring a person to establish that he or she sustained a serious injury in order to be entitled to SUM coverage "are not inconsistent with §3420 (f) (2) or any other provision of the Insurance Law." As further explained, "Insurance Law §3420 (f) (2) does not explicitly dispense with the serious injury threshold requirement and, because 'the statute is silent [on the issue], the regulations [implementing the statute and imposing that requirement] in no way conflict with the statute."

The majority further concluded that the regulations did not impose a requirement that is less favorable to the insured than §3420(f)(2) because the regulations "simply impose the same legal requirement that an injured plaintiff would have against an adequately insured driver and an uninsured driver" (see §3420 [f] [1]; §5104). The regulations were not promulgated "on a blank slate without any legislative guidance, nor did (they) effectuate a profound change in...policy [citation omitted]. The obvious purpose of section 3420 (f) (2) and its corresponding regulations is to permit drivers to protect themselves under the same terms as they protect others injured as a result of their negligence. It was not the intent of the Legislature to provide a person injured by an underinsured driver with greater rights or a lesser burden of proof than an injured person otherwise would have against an adequately insured driver, when both actions arise from the same incident. To so conclude would be unreasonable and contrary to the purpose and intent of the no-fault law."

It should be noted that the Second Department granted leave to State Farm to appeal the *Raffelini* decision to the Court of Appeals and that appeal is, in fact, going forward. Insofar as there were two dissents in *Meegan*, the plaintiffs also have the right to appeal to the Court of Appeals. Whether they do so and, if so, whether their appeal will be consolidated with the *Raffelini* appeal, is something that we will investigate and report on in the future.