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INSURANCE LAW

BY NORMAN H. DACHS AND JONATHAN A. DACHS

Recent Evidentiary Rulings

Several recent decisions have addressed issues of interest and importance pertaining to the evidentiary showings required in the context of certain insurance disputes.

Norman H. Dachs

Jonathan A. Dachs

Business Records Exception

• ***To the Hearsay Rule.*** In *Hochhauser v. Electric Ins. Co.*, 46 AD2d 174 (2d Dept. 2007), the Appellate Division, Second Department addressed the question of the admissibility of insurance investigation reports and testimony regarding such reports under the business records exception to the hearsay rule.[1]

That case arose from a motor vehicle-pedestrian accident that occurred while the plaintiff was vacationing in Florida when she was struck by a motor vehicle driven and owned by an uninsured motorist. Within three months after the accident, the plaintiff submitted a claim for uninsured motorist benefits under her son's automobile insurance policy, claiming that she was a resident of his household and, therefore, entitled to coverage under his policy as a "resident relative."

After completing an investigation, which included an interview with the insured (plaintiff's son), the supplementary uninsured motorist (SUM) carrier disclaimed coverage on the basis, inter alia, that the insured had advised the investigator that the plaintiff (his mother) resided at an address different from his, and that she had so resided for the past 30 years. Further, the insured had allegedly reported that the plaintiff visited his home only "occasionally spending weekends."

In an action commenced by the plaintiff against her son's insurer to recover uninsured motorist benefits, the court directed a framed issue hearing to determine the issue of "whether the plaintiff was a resident of the insured's household." At that hearing, the plaintiff testified that she owned two homes and resided in both of them. Moreover, her son (the insured) and his family lived in one of the two homes she owned, and, prior to the accident she resided with her son and his family an average of three weekends per month, plus holidays.

To counter that testimony, the insurer presented its investigator, who had prepared the investigation report upon which the disclaimer was based, which, as noted, concluded, based upon the statements of the insured, that the plaintiff was not a resident of the insured's household.

At the outset of the investigator's testimony, the plaintiff objected and the presiding judicial hearing officer (JHO) overruled the objection. Following foundational testimony, the insurer sought to introduce the investigator's report into evidence as a business record. The plaintiff again objected, explaining that "anything that is contained in this record which is a recitation of what [the insured] allegedly told to [the investigator] is hearsay." The JHO overruled the objection and allowed the investigator to testify that the insured informed him that the plaintiff stayed with him and his family "for a weekend every other month, now, since the accident, more frequently." Thereafter, the JHO ruled that, for insurance purposes, the plaintiff was not a resident of the insured's household, and granted the judgment in its favor.

No Business Duty

On the plaintiff's appeal, the Second Department focused on the issue of whether the investigator's testimony was based upon impermissible hearsay and, concomitantly, whether the insurance investigation report was properly admitted into evidence under the business records exception to the hearsay rule. The plaintiff argued that neither the testimony nor the record was properly admitted since the insured lacked a business duty to report the information regarding the plaintiff's residence to the insurer. The Second Department agreed, and reversed the order in the insurer's favor.

After reiterating the definition and general principles of hearsay and the business records exception to the hearsay rule, the court observed that "each participant in the chain producing the [business] record, from the initial declarant to the final extrant must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception." (See *Matter of Leon RR*, 48 NY2d 117, 122 [1979]; *Johnson v. Lutz*, 253 NY 124 [1930]). Applying those general rules to the facts and circumstances of this case, the court held that the insured [the son] was outside the insurer's enterprise, and, thus, under the rationale presented in *Johnson v. Lutz*, supra and *Matter of Leon RR*, supra, and the policy underlying the business records hearsay exception, the insured's statement regarding the plaintiff's residence and the investigator's testimony regarding that statement constituted inadmissible hearsay.

The court went on specifically to reject the insurer's contention that the insured had a duty to speak with the investigator based upon the underlying contractual duty which requires all insureds to cooperate with their insurer during an insurance investigation. The court concluded that the duty to cooperate with an insurer does not equate to a business duty to report information during an insurance investigation.

In the view of the courts where, as here, the insured is acting pursuant to the terms of his contractual relationship with the insurer, which requires cooperation in providing requested information during an insurance investigation, the insured is "acting in his or her own interest and not necessarily in the interest of the insurance enterprise."

As the court explained further, "despite potential consequences which may befall an insured who fails to provide accurate and truthful information to, or to cooperate with, an insurer, the insured's statement to the insurance investigator regarding the plaintiff's residence was not made under circumstances which create

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Norman H. Dachs *and* **Jonathan A. Dachs** *are with the firm of Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola, N.Y.*

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a high probability that the statement was truthful. The insured's statement within the insurance investigator's report is not, therefore, inherently trustworthy —the very foundation of the business records exception to the hearsay rule [citations omitted]. The contractual relationship between the insured and the insurer is, thus, insufficient to cloak the insured's statement with the needed trustworthiness to except it from the general rule prohibiting the admission of hearsay statements in evidence [citations omitted]."

There being no independent basis upon which the admission of the challenged statements could rest (i.e., they were not admissible as a statement against interest because they were not against the insured's interest, only against the plaintiff's), the court held the statements to be inadmissible and their admission to constitute reversible errors. Thus, under circumstances similar to these, the proponent of such a report or testimony must produce the actual declarant or find another exception to the hearsay rule upon which to rely.

Present Sense Impression

• ***Past Recollection Recorded.*** In *Phoenix Ins. Co. v. Golanek,* 50 AD3d 1148 (2d Dept. 2008), the subject accident took place when the offending vehicle, identified by an eyewitness as a white pickup truck, moved from the right lane of the roadway into the center lane, where it struck a vehicle, which forced that vehicle into the left lane, where it struck a third vehicle (the claimant's vehicle), and the white pickup then fled the scene. The police accident report set forth a license plate number for the alleged hit-and-run vehicle, and noted that this number had been observed by an eyewitness. This plate number was found to correspond to a vehicle that matched the description of the offending vehicle, but the owner of that vehicle denied involvement in the accident.

At the framed issue hearing on the issue of involvement, directed by the court in the proceeding to stay arbitration brought by the claimant, the eyewitness testified that after the accident, she and her mother followed the offending vehicle and she wrote down its plate number. On her way back to the scene of the accident, the eyewitness encountered a police officer and gave him the plate number, which the officer recorded in his memo book. The eyewitness testified that she saw the officer write the number down and that he did so accurately. There was no evidence at the hearing that the officer to whom the plate number was reported was one of the two officers who responded to the scene of the accident, or whether he was involved in preparing the police accident report. Neither the papers on which the eyewitness wrote the plate number nor the police officer's memo book were offered into evidence, and neither the officer who spoke with the eyewitness nor the officer who prepared the report testified at the hearing.

At the conclusion of the hearing, the insurer sought to introduce the police accident report into evidence, as a means of identifying the offending vehicle. The court referee ruled this document to be admissible pursuant to the present sense impression exception to the hearsay rule. The referee then determined that the identified truck was involved in the accident and, thus, granted the petition and permanently stayed arbitration.

Exceptions Rejected

On appeal, the Second Department reversed. The court held that the police accident report was inadmissible under the present sense impression exception because the report made by the eyewitness to the officer she encountered was not based on any present sense she had of the offending vehicle's plate number.

As the court explained, "After she wrote that number on a piece of paper, she was no longer relying upon a present sense of the number, but was relying entirely on the contents of her own writing. Thus, the officer's memo book, and certainly the police accident report generated some time later, did not 'reflect[] a present sense impression rather than a recalled or recent description of events that were observed in the recent past' [citation omitted]." Furthermore, the court pointed out that "the evidence at the hearing in this case did not establish how much time elapsed between the eyewitness' observation of the license plate and her statement to the police officer, or how much additional time elapsed between that statement and the preparation of the police report."

The court also rejected the insurer's alternative contention that the police accident report was admissible pursuant to the past recollection recorded exception to the hearsay rule since the eyewitness did not give, and could not have given, testimony to the effect that the police accident report correctly represented her knowledge and recollection when made since she was not present when that report was prepared. As the court explained, "there can be no more than supposition on the critical question of whether what was observed [and reported by the eyewitness] corresponded with what was heard by the [author of the police report] and written down."

Based upon the conclusion that the police accident report was improperly admitted into evidence, and the fact that there was "no other competent evidence" that the identified vehicle was involved in the subject accident, the court concluded that the petition to stay arbitration should have been denied.

Miscellaneous Cases

In *American Transit Ins. Co. v. Wason,* 50 AD3d 609 (1st Dept. 2008), another uninsured motorist case involving the issue of whether a particular identified vehicle was involved in the subject accident, the evidence at the framed issue hearing directed by the court established that the taxi in which the claimant was a passenger was involved in an accident with a dark-green, four-door vehicle, which fled the scene.

Upon exiting the taxi, the claimant and the taxi driver discovered a bumper with a license plate attached to it. They placed the bumper in the trunk of the taxi and transported it to a nearby police precinct, but it was subsequently left in the possession of the taxi driver.

Approximately one week later, the taxi driver delivered the license plate, detached from the bumper, to the claimant, who provided it to her attorney. The plate was registered to an individual, Palache, who acknowledged owning a dark green, four-door vehicle, but denied involvement in the accident. On the basis of this evidence, the special referee held that Palache's vehicle was involved in the accident, and the Appellate Division upheld that determination. As stated to the court, "It was within the province of the Special Referee to reject the claim of custody arguments proffered by additional respondents and conclude that the license plate discovered at the scene of the accident was the same one produced at the hearing."

In *Sitbon v. Unitrin Preferred Ins. Co.*, 52 AD3d 498 (2d Dept. 2008), a hit-and-run uninsured motorist case involving the issue of whether the claimant complied with the condition precedent of notice to the police or the commissioner of Motor Vehicles within 24 hours or as soon as reasonably possible, the court held that the insurer made a prima facie showing of its entitlement to judgment in its favor by demonstrating, through the testimony of the plaintiff at his examination under oath, and documentary evidence, that timely notice was not provided to either the police or the commissioner.

The court further held that the plaintiff failed to raise a triable issue of fact as to whether he, or anyone on his behalf, provided such timely notice because he failed to oppose the insurer's motion for summary judgment with an affidavit or affirmation from the individual who prepared the original of the unsigned, partially completed, MV-104 (Report of a Motor Vehicle Accident) form attesting to the filing of the report with the commissioner and when it was filed. The court further observed that the plaintiff's sworn statements as to his knowledge of who prepared the report on his behalf were "directly contradictory," with no explanation of the contradiction. Moreover, the commissioner's form report of a motor vehicle accident specifically provides, in bold lettering, that an accident report is not considered complete and filed unless it is signed.

Accordingly, the court ruled in favor of the insurer and dismissed the plaintiff's complaint against it.

Web Page Information

In *Government General Employees Ins. Co. v. Constantino*, 49 AD3d 736 (2d Dept. 2008), the court addressed a different type of evidentiary issue. Therein, in a case involving a hit and-run accident to a bicycle rider in which the question presente was whether the injured party, th fiancé of the insured, was a "residen relative" of the insured entitled t recover underinsured motorist ben efits under her policy, the claiman attempted to rely upon a page of a Web site maintained by GEICO that listed him as a 'driver [] covered" and an "individual covered" under the policy. The policy at issue listed only the insured (and not her fiancé) as the named insured, and by its terms, afforded SUM benefits to her, her spouse, and their relatives, provided they were residents of her household. The injured claimant was not mentioned in the policy and it was undisputed that he was neither married to, nor related to, the insured.

As for the Web page in question, the court refused to give it credence or legal effect. As noted by the court, "the policy provides that its 'terms and provisions...cannot be...changed, except by an endorsement issued to form a part of this policy.' The Web page does not constitute such an endorsement. In an event, inasmuch as the language o the policy admits of no ambiguity resort may not be had to the extrinsi Web page which is not part of th policy [citations omitted]." Accord ingly, the court upheld the rejectio of the claimant's claim.

1. A previous article on these page briefly addressed the *Hochhauser* decisio See Barshay and Lustig, "No-Fault Insuranc Wrap-Up: Inquiries and Business Record E ception to Hearsay Rule," NYLJ Nov. 9, 200 p. 3, col. 1.