BY NORMAN H. DACHS AND JONATHAN A. DACHS

The "Top 10" and the Insurance Case of the Year

It is once again that time of year when we have the privilege of reporting upon Insurance Department's "Annual Ranking of Automobile Insurance Complaints."

The 2005 Annual Ranking, which is based upon data for the calendar year 2004, ranks 48 automobile insurance companies or groups of companies by the number of private passenger automobile insurance complaints upheld against them and closed by the Insurance Department in 2004, divided by their average 2003-2004 average private passenger automobile premium volume in New York State.

Norman H. Dachs

Jonathan A. Dachs

Thousands of complaints are handled by the Insurance Department's Consumer Services Bureau each year. In 2004, the department closed a total of 13,023 private passenger auto insurance complaints, of which 2,127 were upheld. The department also handles commercial auto complaints, which are not included in determining the complaint ratios. In addition, complaints made directly to the insurer are not counted in the ratios. An upheld complaint occurs when the department agrees with a consumer that an auto insurer made an inappropriate decision. Typical complaints are those involving monetary disputes, such as the value of a total loss. Complaints about policy terminations and failures to pay claims are also common.

The 2004 average complaint ratio for all companies or groups, including those with less than $10 million in premium, was 0.20 per $1 million in premiums (down from 0.27 in 2003.) This equates to one upheld complaint for every $5.0 million in premium. This average ratio was derived by dividing the number of complaints upheld against all companies in 2004 (2,127) by the average premium for 2003-2004 for all companies ($10,678.4 million, or $10.68 billion).

Most of the "Top 10" (best) ranked insurers were relatively small companies. None had over $200 million in average annual premium, and only three—USAA, Amica Mutual and Unitrin—wrote more than $100 million in average premium.

Of the three largest New York State auto insurers, both Allstate and GEICO showed slight improvement in their rankings. Allstate moved from a rank of 32 in 2003 to 30 in 2004; GEICO improved from 38 to 34. With a complaint ratio of 0.11, State Farm ranked 20 in 2004—the best among the state's biggest three insurers, but below its 15th-place ranking of the previous year. State Farm has finished in the top 25 in each of the past three years.

Also of note is the performance of several companies that demonstrated great improvement in their performance over the prior year. For example, Allianz, which had ranked 17 in 2002, but slipped dramatically to 37 in 2003, improved again in 2004 to 13. Another impressive improvement was made by Fairfax Financial, which went from 43 in 2003 to 19 in 2004.

Tables

The first table (Table 1) below lists the "Top 10," i.e., the 10 companies with the fewest complaints against them, or, the 10 best performers of 2004. This list contains six repeat performers from last year—American Modern, Electric, Amica, Preferred Mutual, USAA, and Harleysville. Moreover, four of these companies—Electric, Amica, Preferred Mutual and USAA—finished in the top 10 in each of the previous two annual rankings. For purposes of comparison, companies' rankings in 2003 and 2002 are also shown. Companies listed in boldface are notable for having finished among the top 25 auto insurers in each of the past three years.

Table 2 (below) reveals the opposite side of the spectrum; it lists the 10 auto insurers with the worst performance record for the calendar year 2004, i.e., the "Bottom 10." In this table, the company with the highest ratio is ranked first; the company with the lowest ratio is ranked last. Thus, those ranked at the top of this list had the worst performance. These companies' rankings in 2003 and 2002 are also shown. Companies listed in boldface are notable for having ranked among the 10 lowest in each of the past three years. Five of the insurers with the highest complaint ratios—Mercury Casualty, Lumbermens, Clarendon, Safeco and Infinity—were carryovers from the previous year's "Bottom 10."

Table 3 (below) lists the performance records of the 10 largest auto insurers in New York State. As can be seen, 76.7 percent of auto insurance consumers purchase their insurance from one of these 10 companies. Market share for three of the four largest insurers increased over the year, with GEICO showing the biggest increase, from an average 13.9 percent market share in the previous year's ranking to a 15.8 percent share in this year's ranking. State Farm was the only insurer among the four to lose market share over the year, falling from a 13.0 percent share to a 12.1 percent share. Several smaller insurers among the 10-largest auto insurers also lost market share, including AIG, White Mountain and Nationwide.

The Insurance Department notes that its rankings should not be the only factor considered when selecting an auto insurer. Price is also a major factor, as are recommendations from family, friends, coworkers and neighbors. The department's annual Consumers Guide to Automobile Insurance contains representative price information for 25 New York auto insurers in addition to the Assigned Risk Plan. Copies of the guide and the ranking may be obtained free of charge by calling the department's toll-free telephone number 800-342-3736. In addition, both publications are accessible on the Internet at the department's Web-site address: www.ins.state.ny.us.

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

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Table 1

The "Top 10": The 10 Best Performers of 2004

Company or Group	2004 Complaint Ratio	2004 Ranking	2003 Ranking	2002 Ranking
1 **American Modern**	0	1/48	7-49	18/50
2 **Electric**	0	2/49	8-49	2/50
3 **Amica**	0.03	3/48	1/49	3/50
4 Amex Assurance	0.04	4/48	22/49	28/50
5 **Preferred Mutual**	0.04	5/48	4/49	7/50
6 **USAA**	0.06	6/48	2-49	4/50
7 **National Grange**	0.06	7/48	14/49	15/50
8 Harleysville	0.06	8/48	10-49	36/50
9 Country-wide	0.06	9-48	25/49	37/50
10 Unitrin	0.07	10-48	17/49	26/50

Table 2

The "Bottom 10": The 10 Worst Performers of 2004

Company or Group	2004 Complaint Ratio	2004 Ranking	2003 Ranking	2002 Ranking
1 **Empire Insurance Co.**	6.45	48/48	49/49	49/50
2 **Infinity**	2.99	47/48	47/49	46/50
3 Long Island Ins. Co.	2.59	46/48	—	—
4 **American Financial**	1.66	45/48	45/49	46/50
5 Tri-State Consumer	0.84	44/48	35/49	33/50
6 Safeco	0.67	43/48	44/49	38/50
7 **Clarendon**	0.65	42/48	46/49	50/50
8 White Mountains	0.45	41/48	36/49	16/50
9 Lumbermens	0.39	40/48	41/49	27/50
10 Mercury Casualty	0.37	39/48	42/49	—

Table 3

The "Big 10": The Largest Auto Insurers in New York

Company or Group	2004 Ranking	2004 Complaint Ratio	2003-2004 Average Premium (In Millions)	Market Share
1 Allstate	30/48	0.2	$1,784.50	16.70%
2 Berkshire-Hathaway (GEICO)	34/48	0.24	$1,689.70	15.80%
3 State Farm	20/48	0.11	$1,288.90	12.10%
4 Progressive	16/48	0.1	$784.10	7.30%
5 St. Paul Travelers	21/48	0.12	$637.20	6.00%
6 Liberty Mutual	23/48	0.13	$613.10	5.70%
7 AIG	33/48	0.22	$386.80	3.60%
8 New York Central	18/48	0.11	$374.10	3.50%
9 Nationwide	22/48	0.13	$319.90	3.00%
10 White Mountains	41/48	0.45	$315.60	3.00%
The "Big Ten"			$8,193.90	76.70%

The "Top 10" and the Insurance Case of the Year

Insurance Case of the Year

Continuing with the theme of year-end "Top 10" lists, we discuss below the case that we have placed as the number one, top, most-interesting and, perhaps, most-significant insurance law case of the past 12 months.

In *Kleynshvag v. GAN Insurance Co.*, 13 AD3d 588, 789 NYS2d 160 (2d Dept. 2004), affd. as modified and remanded, 21 AD3d 999, 801 NYS2d 383 (2d Dept. 2005), the alleged insurer for the offending vehicle was joined as a party respondent to a proceeding to stay arbitration of a claim for uninsured motorist benefits. The purported insurer failed to appear in that proceeding and, as a result, a judgment was entered in which the uninsured motorist (UM) carrier's petition was granted on the ground that the tortfeasor's insurer insured the offending vehicle. The finding of coverage was rendered upon the insurer's default in the stay proceeding.

Thereafter, the plaintiff commenced an action against the tortfeasors. Notwithstanding the prior proceedings and judgment, the defendants' insurer refused to accept service of the summons and complaint, contending that it did not insure the defendants. One of the defendants defaulted and, upon inquest, a judgment was entered against him in the sum of $125,000. The plaintiff served a copy of that judgment with notice of entry upon the insurer and, shortly thereafter, brought an action against the insurer pursuant to Insurance Law §3420(a)(2), to recover the amount of the unsatisfied judgment. In its answer to the complaint in that action, the insurer asserted as an affirmative defense that it never issued a policy covering the subject accident. However, in motion papers, the insurer subsequently conceded that its search of its records to determine whether, in fact, a policy had been issued was performed by name, reverse name, and address only, and that its records were not maintained in a fashion that would allow a search by vehicle identification number (VIN) or state registration number.

The insurer waited five years after the initial order granting the petition to stay and finding coverage before moving to vacate that order. Not surprisingly, that motion was denied. The Supreme Court then granted the plaintiff's motion for summary judgment and denied the insurer's cross-motion for summary judgment, but held that the insurer's liability was limited to $25,000, rather than the full $125,000 of the judgment. The Supreme Court explained that it was "constrained" by the earlier finding that there was a policy applicable at the time of the accident, but that faced with the task of "ascertain[ing] the terms of a policy which, in fact, does not appear to exist," the court limited the insurer's liability to the statutory minimum limits set forth in New York Vehicle and Traffic Law (VTL) §311(4)(a), i.e., $25,000. As further explained by the Supreme Court, "Indeed, the maximum exposure set forth herein is what plaintiff would have been entitled to in an uninsured motorist claim against his own insurer in the event there was no coverage for the [offending] vehicle."

On appeal, the Appellate Division, Second Department upheld the finding of liability of the insurer, but, interestingly, increased the amount of the insurer's liability to $125,000— the full amount of the underlying judgment against its "insureds"— plus interest, costs and disbursements, thus making a total recovery of $162,252. On the issue of liability, the court found that the plaintiff established (as the Supreme Court found) the existence of a policy by showing that the insurer was made a party respondent to the proceeding to stay arbitration "and knowingly chose not to participate therein." Under the circumstances, the court held that the insurer was collaterally estopped from litigating the issue of coverage, even though that issue was initially determined on its default in the arbitration.

With respect to the issue of damages, the court held that "[i]t was [the insurer's] burden to prove any limitation on the plaintiff's right to recover" and that "having ignored every step in the judicial processes leading to this action, one which may have been unnecessary had [the insurer] chosen to participate earlier, [the insurer] should not be heard to complain now that it is called upon to satisfy a judgment that was entered following its calculated decision to ignore earlier stages of the plaintiff's claim." The court concluded that the insurer had the burden of proving the limits of the relevant coverage under its policy and rejected outright the insurer's contention that since it did not issue a policy at all, any liability on its part arose by operation of law and should be limited to the statutory minimum in effect at the time of the accident. Since the insurer did not meet its burden of showing that its liability should be limited to any amount less than the full amount of the plaintiff's Judgment, the court held that the insurer was liable for the full judgment amount.

Lessons to Be Learned

Several critical lessons can be learned from this fascinating decision. First and foremost, the parties to a dispute involving an issue of insurance coverage must be cognizant of the significance and legal consequences of a default in the context of such a dispute. While several recent cases have dealt generally with the issue of defaults in answering petitions to stay arbitration—see e.g., *Allstate Ins. Co. v. Hayes*, 17 AD3d 669 (2d Dept. 2005) (affirmation of the defaulting respondent's attorney explaining his failure to appear on the fifth adjourned date of the hearing, after having appeared on the four previous dates, was sufficient to establish a reasonable excuse for the default, together with counsel's showing of a meritorious claim, this was sufficient to vacate the default); *Hartford Ins. Co. v. Creinis*, 8 AD3d 381 (2d Dept. 2004) (court refused to vacate respondent insurer's default in opposing the petition because respondent failed to demonstrate a reasonable excuse for its default); *American Transit Ins. Co. v. Reyes*, 3 AD3d 462 (1st Dept. 2004) (motion to vacate order entered on default properly denied in the absence of a showing of merit); *Travelers Property Casualty v. Bocharova*, 2 AD3d 533 (2d Dept. 2003) (motion to vacate default in opposing petition denied in the absence of any excuse, let alone a reasonable excuse, for the failure to appear and respond to the petition)—none have furnished as fine an example of the risks and ramifications of allowing such defaults to take place or of failing to timely seek the vacatur of such defaults as does *Kleynshvag*.

Secondly, the parties must be cognizant of the burden of proof on an insurer attempting to demonstrate that it never issued a particular policy. The alleged insurer must present proper and credible evidence of a full, thorough and complete investigation or search of its records and files in order successfully to meet that burden. See *General Accident Ins. Co. v. Lamotta*, 149 AD2d 322 (1st Dept. 1989); *Allstate Ins. Co. v. Holmes*, 173 AD2d 260 (1st Dept. 1991); *Hartford Ins. Co. v. Nunez*, 226 AD2d 639 (2d Dept. 1996); *Eagle Ins. Co. v. Patrik*, 233 AD2d 327 (2d Dept. 1996). Insurers should take note that a record search using only the parameters of names and addresses will no longer be deemed sufficient. More is required to meet the prima facie burden of demonstrating the absence of a policy, such as the ability to search and the actual completion of searches of policy records by vehicle identification or state registration numbers.

The insurer in *Kleynshvag* learned its lessons the hard way because an astute claimant's attorney learned these lessons first. All practitioners should be guided accordingly.