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The Insurance 'Top 10,' Notice of Lawsuit Trigger

We are privileged once again to report (albeit somewhat belatedly) upon the state of New York Insurance Department's "Annual Ranking of Automobile Insurance Complaints." In addition, this article discusses an interesting and significant case that is on its way to the Court of Appeals, which deals with the type of service that triggers the notice of lawsuit requirement under a liability policy.

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2007 Annual Ranking

The 2007 "Annual Ranking of Automobile Insurance Complaints," which is based upon data for the calendar year 2006, ranks 44 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 2006, divided by their 2005-2006 average private passenger automobile premium volume in New York state.

In 2006, the Insurance Department's Consumer Services Bureau received a total of 7,914 private passenger auto insurance complaints (down from 9,939 the year before), of which 1,629 (up from 1,600) were upheld. Neither commercial auto complaints nor complaints made directly to the insurer are included in determining the complaint 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 the promptness of insurance payments are also common.

The 2006 average complaint ratio for all companies or groups, including those with less than $10 million in premiums, was 0.16 per $1 million in premiums (up from 0.15 in 2005). This equates to approximately one upheld complaint for every $6.2 million in premiums paid to insurance companies. This average ratio was derived by dividing the number of complaints upheld against all companies in 2006 (1,629) by the average premium for 2005-2006 for all companies ($10.1 billion).

Of the top 10 finishers in 2006, five—Atlantic, Amica Mutual, Erie, Preferred Mutual, and Electric—were in the top 10 in 2005 as well. Electric, Amica and Preferred Mutual finished in the top 10 in each of the previous three annual rankings. Of the three-largest New York state auto insurers, only Berkshire-Hathaway (GEICO) showed improvement in its rankings. Allstate moved from a rank of 26th in 2005 to 30th in 2006; State Farm moved from 14th to 16th position, but with a complaint ratio of 0.08 (the same as in 2005), State Farm ranked the best among the state's biggest three insurers. State Farm has finished in the top 25 in each of the past five annual rankings.

Berkshire-Hathaway (GEICO) remained the largest private passenger auto insurer in New York based on 2005-2006 average premiums, with a 20 percent market share (increased from 17.9 percent the year before). Overall, the top 10 auto insurers comprised 79 percent of the market in the current ranking, up from 77.6 percent the previous year.

Tables

The first table for this article (Page 7), lists the "Top 10," i.e., the 10 companies with the fewest complaints against them, or, the 10 best performers of 2006. For purposes of comparison, companies' rankings in 2005 and 2004 are also shown.

The second table, (Page 7), reveals the opposite side of the spectrum; it lists the 10 auto insurers with the worst performance record for the calendar year 2006, 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 2005 and 2004 are also shown. Six of the insurers with the highest complaint ratios—Long Island Ins. Co., Infinity, American International, Tri-State Consumer, Credit Suisse, and Hanover—were carryovers from the previous year's "Bottom 10."

The third table (Page 7), lists the performance records of the 10-largest auto insurers in New York State. As can be seen, 79 percent of auto insurance consumers purchase their insurance from one of these 10 companies. State Farm was the only insurer among the four-largest insurers to lose market share over the year, falling from a 10.8 percent share to a 10.0 percent share. Several smaller insurers among the 10-largest auto insurers also lost market share, including St. Paul Travelers, Liberty Mutual, and Central Services.

Copies of the Insurance Department's annual Consumers Guide to Automobile Insurance and the annual 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: www.ins.state.ny.us.

Notice of Lawsuit Trigger

In *Briggs Avenue LLC v. Insurance Corporation of Hannover*, 516 F.3d 42, (2d Cir. 2008), the U.S. Court of Appeals Second Circuit certified to the New York Court of Appeals the following question:

When an injured party begins its suit against an insured by serving process on the Secretary of State, who, under New York corporate and limited liability company law, is the insured's

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agent for such service, does this service suffice to trigger the provisions in the relevant insurance policy that require the insured to inform its insurer in a timely manner that a suit has been brought, where: (a) the insurance policy does not expressly refer to notice that a suit has been brought being given to an insured's 'representative' rather than the insured itself, and (b) the insured plausibly argues that—due to its failure to update its address with the Secretary of State—it had not received actual notice that the suit had been brought?

In that case, the insurer argued: (1) that the notice that its insured, Briggs, received, when the underlying plaintiff served its agent in law, the secretary of State, with his complaint, should suffice to trigger the notification requirement of the insurance policy, and (2) that an eight-month delay was, as a matter of law, untimely notification under the policy.

Briggs responded by claiming that its insurance policy required actual, rather than constructive, notice and, hence, that the service on the Secretary of State, without evidence of actual notice to Briggs, did not obligate Briggs to inform the insurer "as soon as practicable" of the suit.

The '26 Warren Corp.' Case

Specifically, the insurer cited to and relied upon a First Department case, *26 Warren Corp. v. Aetna Cas. & Sur. Co.*, 253 AD2d 375, 676 NYS2d 173 (1st Dept. 1998), which held, in a similar situation, that the defendant insurer was not obligated to defend or indemnify the insured, because:

> [t]he subject insurance policy's notice of claim condition precedent to coverage, that 'the insured shall immediately forward to [the insurer] every demand, notice, summons or other process received by him or his representative,' is devoid of ambiguity, and the receipt of service of the Summons and Complaint by the Secretary of State, as plaintiff's designated agent, constituted receipt by a representative within the meaning of the policy. The fact that plaintiff itself did not actually receive a copy, due solely to its own failure to notify the Secretary of State of a change in address of its representative to whom the Secretary was authorized to forward process, does not excuse its noncompliance with the notice requirement of the policy.

The Second Circuit said, a rule that makes notice served on the Secretary of State the equivalent of notice on the insured penalizes insureds who fail to update their addresses.... [It] reinforces appropriate norms of corporate behavior, providing, ... 'incentive for businesses to familiarize themselves with the law....'

Briggs asserted that it did comply with the policy provisions, as it only became "practicable" for it to notify the insurer when Briggs actually "became aware that the lawsuit had been commenced." In distinguishing *26 Warren Corp.*, supra, Briggs argued that because its policy (unlike that in *26 Warren Corp.*) did not include the words "process received by him or his representative," the policy intended that only actual notice would trigger the notification requirement.

Recent Case Law

The Second Circuit noted that recent case law in the federal district courts had come to disparate conclusions on this issue. Compare *Noveau Elevator Indus. Inc. v. Continental Cas. Ins. Co.*, No. 05 Civ. 0813, 2006 WL 1720429 (EDNY 2006); and *105 St. Assoc.; LLC v. Greenwhich Ins. Co.*, 507 F.Supp.2d 377 (SDNY) (finding that it was the "or his representative" language in the *26 Warren Corp.* policy that served as the "term by which receipt by the Secretary of State triggered the duty to notify the insurance company, and that it was the actual notice of the suit that was the appropriate starting point from which to judge the reasonableness of the notice to the insurer) with *Briggs Avenue LLC v. Insurance Corporation of Hannover*, No. 05 Civ. 4212, 2006 WL 1517606 (S.D.N.Y. 2006) and *U.S. Underwriters Ins. Co. v. 203-211 West 145th St. Realty Corp.*, No. 99 Civ. 8880, 2001 WL 604060 (S.D.N.Y. 2001) vacated on other grounds, 37 Fed. Appx. 575 (2d Cir. 2002) (finding that even where the "or his representative" language is absent, notice to the Secretary of State was sufficient to commence the duty to give notice to the insurer of the lawsuit).

The court then went on to conclude that, "Were the issue up to us, we would agree with these latter district courts. Given the rule in *26 Warren Corp.*, we do not believe that the presence of words like 'or his representative' can be determinative. And we would reject the notion that such a phrase is necessary for service on the Secretary of State to trigger the notification requirement."

As the court further explained,

> a rule that makes notice served on the Secretary of State the equivalent of notice served on the insured penalizes those insureds who fail to update their addresses with the Secretary of State. Such a rule reinforces appropriate norms of corporate behavior, providing, as the district court said, 'greater incentive for businesses to familiarize themselves with the law's requirements.' *Briggs*, No. 05 Civ. 4212, 2006 WL 1517606, at *7. Yet, as the court below also stated, the result may well be 'harsh,' id., particularly for a small business owner who fails, through ignorance, to update his address. If the rule deems service on the Secretary of State in all cases to furnish actual notice to the insured, it may be harsher yet in the rare case in which the Secretary of State, through no fault of the insured, fails to give notice to it. Cf. *Micarelli v. Regal Apparel, Ltd.*, 381 NYS2d 511, 512 (App. Div. 1976). But, cf. *Hilldun Corp. v. Scarboro Textiles Inc.*, 422 NYS 417, 417 (App. Div. 1979). We do not know, or presume to suppose, whether in the total contours of insurance law in New York, the New York Court of Appeals would agree that the result is harsh, and choose to temper it, or whether it would instead find the rule not to be harsh at all, but only justly merited.

Conclusion

On March 13, 2008, the New York Court of Appeals accepted the certification. See, *Briggs Ave. LLC v. Insurance Corp. of Hannover*, __NY3d__, __NYS2d__, 2008 WL 656510 (2008). Thus, the issues presented by this interesting case will be considered after briefing and argument before the Court. We should see in a few months, therefore, whether the Court of Appeals will agree or disagree with the federal court on this significant notice issue.

The 10 Best Performers of 2006

	Company or Group	2006 Complaint Ratio	2006 Ranking	2005 Ranking	2004 Ranking
1.	American Modern Ins. Group	0	1/44	25/45	1/48
2.	Atlantic Companies	0	2/44	1/45	27/48
3.	Electric Ins. Group	0	3/44	9/45	2/48
4.	Chubb & Son, Inc.	0.03	4/44	14/45	11/48
5.	Amica Mutual	0.03	5/44	4/45	3/48
6.	Erie Ins. Group	0.03	6/44	6/45	24/48
7.	USAA	0.04	7/44	17/45	6/48
8.	Preferred	0.04	8/44	7/45	5/48
9.	American Express Group	0.04	9/44	24/45	4/48
10.	Metropolitan	0.05	10/44	28/45	29/48
10.	Country Wide Ins. Group	0.05	11/44	15/45	9/48

* Metropolitan and Countrywide had the same ratio, and therefore, may be considered tied for 10th place.

The 10 Worst Performers of 2006

	Company or Group	2006 Complaint Ratio	2006 Ranking	2005 Ranking	2004 Ranking
1.	Long Island Ins. Co.	6.53	44/44	45/45	46/48
2.	Infinity	1.57	43/44	43/45	47/48
3.	American International	1.56	42/44	40/45	33/48
4.	Tri-State Consumer	0.88	41/44	44/45	44/48
5.	Kingsway Group	0.82	40/44	N/A	N/A
6.	Mercury General Group	0.43	39/44	20/45	39/40
7.	Credit Suisse Group	0.38	38/44	42/45	38/48
8.	Safeco Ins. Group	0.36	37/44	38/45	43/48
9.	Hanover Group	0.31	36/44	41/45	N/A
10.	American National Financial	0.25	35/44	35/45	N/A

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

	Company or Group	2006 Ranking	2006 Complaint Ratio	2005-2006 Average Premium (in Millions)	Market Share
1.	Berkshire-Hathaway (GEICO)	23/44	0.11	$1,991.05	20.0 percent
2.	Allstate	30/44	0.15	$1,793.82	18.0 percent
3.	State Farm	11/44	0.08	$1,024.62	10.0 percent
4.	Progressive	17/44	0.08	$853.10	8.0 percent
5.	St. Paul Travelers	24/44	0.11	$570.79	6.0 percent
6.	Liberty Mutual	18/44	0.08	$522.33	5.0 percent
7.	White Mountain Group	34/44	0.25	$307.09	3.0 percent
8.	Nationwide	20/44	0.09	$304.12	3.0 percent
9.	Central Services	13/44	0.07	$298.66	3.0 percent
10.	Metropolitan	10/44	0.05	$267.50	3.0 percent
The "Big Ten"				$7,933.08	79.0 percent
Total (all companies, including those with less than $10 million in premiums)				$10,104.57	100.0 percent