INSURANCE LAW

Court of Appeals Addresses Uninsured, Underinsured Motorists Coverage

As we observed last year in reporting on a then-recent decision of the Court of Appeals,[1] "When the Court of Appeals speaks on insurance law issues, it is noteworthy (at least in this space)." How much more so is this statement true when the state's highest Court speaks on the subject of uninsured/underinsured motorist insurance twice within a span of three weeks, as it did last month. The recent decisions by the Court of Appeals on issues pertaining to the practicalities and logistics of insurance law, discussed below, are interesting, important, and instructive to practitioners and litigants alike.

The first decision, on the issue of the "trigger" of SUM (Supplementary Uninsured/Underinsured Motorists) coverage, rendered by the Court of Appeals, on June 4, 2009, involved two separate cases with remarkably similar facts. In *Clarendon National Ins. Co. v. Nunez*,[2] the insurer issued an automobile insurance policy to Mr. Nunez with liability and SUM coverage of $25,000 per person/$50,000 per accident. Nunez, his wife, and their two infant children were injured when they were struck by a vehicle insured by Progressive, which also carried $25,000/$50,000 liability coverage limits. Progressive tendered its full policy limit of $50,000 to all four injured claimants, paying $15,000 each to three of them, and $5,000 to the fourth family member. The four claimants then sought SUM benefits from Clarendon, contending that coverage was triggered because none of them received the $25,000 per person limit at least theoretically available to them.

In *Allstate Ins. Co. v. Rivera*,[3] the insurer issued an auto policy to Petra Mercdo, which provided liability and SUM coverage of $25,000 per person/$50,000 per accident. Ms. Mercado and five (unrelated)

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passengers in her car were injured when they were struck by a vehicle insured by GMAC, which carried $25,000/$50,000 bodily injury liability coverage limits. GMAC tendered its full policy limit of $50,000 to all six of the claimants, paying $25,000 to Ms. Mercado, and $5,000 to each of the five passengers. The five passengers then sought SUM benefits under Ms. Mercado's Allstate policy, claiming that SUM coverage was triggered because they each received less than the $25,000 per person limit of the Allstate policy.

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Allstate and Clarendon both denied SUM coverage; the claimants demanded arbitration; and the insurers timely brought proceedings to stay arbitration. The claimants argued, in pertinent part, that SUM coverage was triggered under a provision of the Supplementary Uninsured/Underinsured Motorist Endorsement, prescribed by Regulation 35-D (specifically, §60-2.3[f][c][3][ii]), which states that another vehicle is "uninsured" when its insurance coverage "has been reduced, by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of this [the SUM] policy." The authors were counsel for the appellants in both *Clarendon* and *Allstate*.

In both cases, the Appellate Division, Second Department ruled in favor of the insurers and permanently stayed the demanded arbitrations. In *Clarendon*, the court stated that "when determining whether a tortfeasor's vehicle is underinsured for purposes of triggering SUM coverage, 11 NYCRR 60-2.3(f)(c)(3)(ii) does not require an insurer, in comparing the third-party bodily injury liability limits of the policy it issued to its insureds (hereinafter the claimants) with those of the tortfeasor's policy, to reduce the tortfeasor's policy limits by payments the tortfeasor made to the claimants. 11 NYCRR 60-2.3(f)(c)(3)(ii) requires such reduction for payments made 'to other persons' [citations omitted]." Similarly, in *Allstate*, the court stated that "[p]ayments made to 'other persons' injured in the accident did not reduce the amount of the bodily injury coverage provided by the GMAC policy to an amount 'less than' the third-party bodily injury liability limit of the Allstate policy. While occupying Mercado's vehicle as passengers, the appellants were insureds under the Allstate policy. GMAC's payments to them, therefore, were not payments to 'other persons' injured in the accident."

In addition, in *Clarendon*, the Appellate Division held that the insurer was entitled to an offset of the full $50,000 received by the claimants from Progressive against its $50,000 total SUM limits, thereby precluding any recovery by any claimant under the SUM endorsement. In *Allstate*, the court simply rejected as "without merit" the arguments set forth by the claimants with regard to the offset provision.

As pertinent to the "trigger issue," the appellants in both cases argued that the Appellate Division erred in concluding that the reference to "other persons injured in the accident" in the Regulation 35-D SUM endorsement should be interpreted to mean "other persons" besides the claimants under the particular SUM policy at issue, notwithstanding the absence of any indication or suggestion that such a limitation, exception or restriction was intended by the drafters of the regulation and/ » Page 9

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or the parties to the insurance agreement.

By a 5-2 vote, the Court of Appeals affirmed on both appeals, rejecting appellants' contentions, and concluding that neither SUM endorsement was triggered. Notably, the Court did not address the offset issue at all, thus effectively leaving the Appellate Division's holding on that issue undisturbed.

In ruling as it did on the "trigger" issue, the majority quoted the pertinent provision from the underinsured motorist statute (Ins. L. §3420[f]]2]), which, it found, provided that "SUM coverage is only triggered where the bodily injury liability insurance limits of the policy covering the tortfeasor's vehicle are less than the third-party liability limits of the policy under which a party is seeking SUM benefits," and observed that the statute "calls for a facial comparison of the policy limits without reduction from the judgment of other claims arising from the accident." The Court also noted that "section 3420(f)(2) 'was enacted to allow policyholders to acquire the same level of protection for themselves and their passengers as they purchased to protect themselves against liability to others [citations omitted]."

While recognizing the power and authority of the Superintendent of Insurance "to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation," and not "counter to the clear wording of a statutory provision [citations omitted]," the majority interpreted the Regulation in a manner that it believed was consistent with the statute. Thus, the majority concluded that "the 'payments to other persons' that may be deducted from the tortfeasor's coverage limits for purposes of rendering the tortfeasor 'uninsured' under a SUM endorsement do not encompass payments made to anyone who is an insured under the endorsement."

As the majority further explained, "As each claimant here falls within the endorsement's definition of an 'insured,' which encompasses all passengers in the covered vehicle, claimants are not 'other person[s].' Insureds are therefore able to reduce the coverage limits of the tortfeasor's policy only when payments made under the tortfeasor's policy are to individuals—such as occupants of the tortfeasor's vehicle, injured pedestrians or those operating a third vehicle—not covered under the SUM endorsement. This guarantees that those who have purchased SUM coverage will receive the same recovery they have made available to third parties they injured—but no more." As noted by the majority, to allow the claimants in these cases to recover additional coverage—up to an additional $50,000 in SUM benefits—after they received a total $50,000 from the tortfeasor (a total of $100,000) would be to provide an insured/policyholder with more coverage than that provided to an injured third party under his or her policy ($50,000)—a result that, in the majority's view, was not intended and should not be allowed.

Dissenting Opinion

The dissent, written by Judge Carmen Beauchamp Ciparick (joined by Chief Judge Jonathan Lippman) agreed with the appellants' contentions regarding the status of the co-claimants as "other persons" pursuant to the clear and plain language of the Regulation. In support of that position, the dissenters noted the Regulation's silence as to "any exception, limitation, or other qualification to the phrase 'other person,'" which they deemed "powerful evidence that no such limiting gloss was meant to be read into [the Regulation]." They thus characterized the majority's definition of "other persons" as "artificial and strained," "unwarranted and inconsistent with the plain language of the Regulation as incorporated into these insurance policies."

Notably, the dissenters viewed the purpose of SUM coverage differently from the majority, observing that it "'is designed to increase the level of protection afforded to policyholders injured by negligent drivers who lack adequate liability insurance" [citation omitted], and was "devised to mitigate the liability coverage deficit caused by an inadequately insured vehicle—underinsured vehicles. It was not meant to be restricted to uninsured motorists." As noted by Judge Ciparick, "Where there appears to be a parity between the policies, in a motor vehicle accident involving numerous passengers, the tortfeasor's liability will be dramatically less than the per person coverage under the claimant's policy. Such coverage was meant to alleviate the liability gap."

As noted by the majority in 'Clarendon' and 'Allstate,' to allow the claimants in these cases to recover additional coverage—up to an additional $50,000 in SUM benefits—after they received a total $50,000 from the tortfeasor would be to provide an insured/policyholder with more coverage than that provided to an injured third party under his or her policy—a result that, in the majority's view, was not intended and should not be allowed.

'Central Mutual v. Bemiss'

The second decision, rendered by the Court of Appeals on June 25, 2009, involved the interpretation of the consent to settle and subrogation-protection provisions of the Regulation 35-D SUM endorsement.

In *Central Mutual Ins. Co. v. Bemiss*,[4] the insured/claimant, Beverly Bemiss, was injured in a multi-vehicle, chain reaction accident, when the vehicle she was operating, and which was insured by Central Mutual, was rear-ended by a vehicle owned and operated by Katie Kowalczyk and insured by GEICO, and then a second time, when the Kowalczyk vehicle was itself rear-ended by a vehicle owned and operated by John Genski and insured by Progressive.

GEICO offered its full policy limits of $25,000 to claimant. Ms. Bemiss properly notified Central of this settlement offer and requested its consent to settle, and Central failed to respond in a timely fashion (30 days) thereto. Ms. Bemiss thus went ahead and settled with Ms. Kowalczyk/GEICO for $25,000, and then proceeded to settle with Mr. Genski/Progressive by accepting an offer of $2,500 (out of its $25,000 per person coverage). Ms. Bemiss executed a single general release in favor of Ms. Kowalczyk/GEICO, Mr. Genski/Progressive in the combined amount of $27,500. This release did not protect Central's subrogation rights with respect to any payment it might make under the SUM coverage, which had limits of $100,000 combined single limit. Ms. Bemiss did not notify Central of her intent to settle with Mr. Genski/Progressive.

After Central disclaimed on the ground that claimant violated the endorsement's conditions for coverage by settling with Ms. Kowalczyk and Mr. Genski without its consent and signing a general release that did not protect the right to subrogation, Ms. Bemiss demanded arbitration; Central petitioned to stay arbitration; and the Supreme Court granted the petition on the basis that Ms. Bemiss was obligated to protect Central's subrogation rights against both Ms. Kowalczyk and Mr. Genski and her failure to do so vitiated the SUM coverage.

The Appellate Division, Third Department, with one justice dissenting, affirmed. Initially, the majority agreed with Ms. Bemiss (contrary to the Supreme Court's

holding), that the terms of the policy (Condition 10—"Release or Advance") permitted her to settle with Ms. Kowalczyk without presenting Central's subrogation rights with respect to Ms. Kowalczyk because she did give Central timely written notice of the settlement and Central Mutual did not agree to advance the settlement amount. The majority also agreed with Ms. Bemiss that once she exhausted the full policy limits of one tortfeasor's policy, she was entitled to proceed with an SUM claim.[5] However, the majority rejected Ms. Bemiss' additional claim that once she qualified for SUM payments in exhausting Ms. Kowalczyk's policy, she was free to settle with Mr. Genski without obtaining Central's prior written consent or protecting its subrogation rights.

In the words of the Appellate Division majority, the last sentence of Condition 10, which provides that "an insured shall not otherwise settle with any negligent party, without our written consent, such that our [subrogation] rights would be impaired," is not limited "to where a party seeks in the first instance to settle for the full available policy limits of one tortfeasor. Rather, its function is to make clear that the method described in the first sentence on paragraph 10 is the one and only way to enter a settlement with 'any negligent party' which impairs petitioner's rights without its consent. There is no dispute that respondent failed to obtain petitioner's consent or reserve petitioner's rights against the second tortfeasor here."

In a unanimous decision, the Court of Appeals affirmed. Following a lengthy discussion of the history of UM/SUM coverage, including the development of Regulation 35-D (replete with citations to several of our previous Insurance Law columns), the Court rejected Ms. Bemiss' argument to the effect that once she settled with Ms. Kowalczyk for that tortfeasor's full policy limits after notifying Central of her intent to do so, she was not required to also notify Central in advance of her intent to settle with the second tortfeasor, Mr. Genski, or preserve Central's subrogation rights as to him because she was not required to exhaust his liability limits prior to proceeding with her SUM claim.

Carefully examining the language and structure of Condition 10 ("Release or Advance"), the Court held that while Ms. Bemiss contended that "any negligent party" referred only to the first tortfeasor whose policy was exhausted so as to make SUM benefits payable, "this is not readily apparent from the words used or the regulatory history."

As explained by the Court, "in short, Condition 10 delineates the sole situation in which an insured may settle with any tortfeasor in exchange for a general release, thus prejudicing the insurer's subrogation rights without the carrier's written consent. Here Bemiss violated Condition 10 when she settled with Genski for less than the maximum available policy limits without Central's written consent, such that its subrogation rights were impaired....In this case, Bemiss settled with Kowalczyk in compliance with Condition 10, thereby also fulfilling the exhaustion requirement in Condition 9. At that point, she was entitled to make a claim for $75,000 under her SUM coverage and, if Central disagreed, to proceed to arbitration. That is, she did not have to pursue a claim against Genski in order to become eligible to collect up to the remaining limits of her SUM policy. But once having chosen to resolve her claim against Genski, she was not free under the SUM endorsement to compromise Central's subrogation rights unilaterally."

1. See Dachs, N. and Dachs, J., "Raffellini: Status Quo Restored," NYLJ, January 8, 2008, p. 3. col. 1.

2. 48 AD3d 460, 850 NYS2d 639 (2d Dept. 2008), aff'd sub nom *Allstate Ins. Co. v. Rivera*, NY3d, NYS2d , 2009 WL 1543764 (2009).

3. 50 AD3d 680, 855 NYS2d 217 (2d Dept. 2009) aff'd NY3d , NYS2d , 2009 WL 1543764 (2009).

4. 54 AD3d 499, 862 NYS2d 654 (3d Dept. 2009), aff'd NY3d , NYS2d , 2009 WL 1789120 (2009).

5 See *S'Dao v. National Grange Mut. Ins. Co*, 87 NY2d 853, 854-55 (1995).