INSURANCE LAW

Recovering 'Excess Economic Loss' In Litigation or SUM Arbitration

One of the more interesting questions that has been posed to us in recent days pertains to whether, in order to recover lost earnings over and above "basic economic loss," either in a lawsuit or a supplementary uninsured motorist (SUM) arbitration proceeding, the claimant must first demonstrate that he or she has fully exhausted the $50,000 "basic economic loss" coverage.

Our analysis of this question and our answer are set forth below.

Analysis must begin with the Court of Appeals' decision in *Montgomery v. Daniels,* 38 NY2d 41, 47-48 (1975), the seminal case on No-Fault coverage, wherein the Court stated that "an injured party may bring a third-party tort action and may recover therein for economic loss over $50,000, for treatment expenses not ascertainable within one year of injury, for lost earnings which exceed $1,000 [now $2,000] per month or continue beyond three years, and for other reasonable and necessary expenses which exceed $25 per day or continue after one year."

From this it can be seen that it is not only economic loss in excess of $50,000, but also those specific items of damages that are outside the statutory definitions of "basic economic loss" that may be recovered in a third-party action and, presumably, an SUM arbitration as well. See also *Tortorello v. Landi,* 136 AD2d 545 (2d Dept. 1988) ("Notwithstanding the issue of whether a plaintiff has sustained a serious injury, recovery can be sought for lost earnings which continue beyond the three-year statutory period").

In *Barnhart v. Branch Motor Lines Inc.,* 107 Misc2d 47 (Sup. Ct. Broome County 1980), the court observed that:

> Subdivision 1 of section 673 [now 5104(a)] provides that there will be no recovery for 'basic economic loss' in any personal injury action by one 'covered person' against another. Subdivision 1 of section 671 [now 5102] clearly states that 'basic economic loss' means, up to fifty thousand dollars per person: for (a) all reasonable and necessary expenses for medical etc., treatment unlimited as to time provided that within one year after the accident it is ascertainable that further such expenses will be incurred and for (b) loss of earnings up to $1,000 [now $2,000] a month for not more than three years and for (c) all other reasonable and necessary expenses up to $25 a day for one year from the date of the accident.

This language clearly requires that the 'basic economic loss' made up of those three items must exceed $50,000 before there can be any recovery for medical expenses, lost earnings during the first three years, or other expenses during the first year. There is a further limitation that before there can be any recovery for lost earnings within the first three years the earnings so lost must exceed $1,000 [now $2,000] a month.

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The issue: Whether, to recover earnings above "basic economic loss," in a lawsuit or SUM arbitration, claimant must show he has exhausted the $50,000 "basic" coverage.

Although this statement has been cited for the proposition that unless a covered person had an aggregate basic economic loss in excess of $50,000, he or she could not sue to recover his or her lost earnings which exceeded $1,000 [$2,000] per month (see *Pascente v. Stoyle,* 116 Misc2d 641 (City of Rochester, 1982) and *Goodkin v. United States of America,* 600 F.Supp. 1459, 1464 [EDNY 1985], revd. in part, 773 F.2d 19 [2d Cir. 1985]). Read carefully, we believe that this statement actually supports the notion that there can be recovery for lost earnings in excess of the amount included within the statutory definition of "basic economic loss," regardless of whether the $50,000 has been exhausted.

'Pascente'

In *Pascente v. Stoyle,* supra, the plaintiff sued to recover the difference between what he would have earned in one month ($4,699) and what he recovered as first party benefits ($1,000), claiming that "lost earnings which exceed $1,000 per month are not part and parcel of 'basic economic loss' and, therefore, that plaintiff may bring an action in tort to recover them."

Defendant, on the other hand, argued that plaintiff could not recover for these lost earnings because plaintiff's aggregate loss for medical bills, lost earnings and miscellaneous expenses did not exceed $50,000. The question presented to the court was "whether the No-Fault Law has abrogated a 'covered person's' common law cause of action sounding in negligence against another 'covered person' for lost wages which exceed $1,000 per month where the plaintiff has not suffered an aggregate loss in excess of $50,000 for medical expenses, lost wages and statutorily accepted miscellaneous expenses."

After analyzing the history and intent behind the No-Fault Law, the court stated, as follows:

> This court has undertaken extensive search of the legislative history and can find nothing which would yield the conclusion that

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in dealing with the compensation prong of the legislative scheme the placing of limits on the amounts recoverable from one's own insurance carrier was intended to take away a person's common law cause of action to sue for lost earnings that are not recoverable under the no-fault plan from his own carrier. Thus, this Court's holding agrees with the dicta in *Montgomery*, supra, that a covered person may bring an action to recover his lost wages to the extent that they exceed $1,000 per month.

However, the learned Judge in *Barnhart v. Branch Motor Lines* (107 Misc2d 47) held that unless a covered person had an aggregate basic economic loss in excess of $50,000 he or she could not sue to recover his or her lost earnings which exceeded $1,000 [$2,000] per month. This court's review of the legislative history of the No-Fault statute, the policies underlying its enactment, and its dictum construction by the Court of Appeals in *Montgomery v. Daniels* (supra), leads it to respectfully disagree with the conclusion reached in *Barnhart*. For the result of an interpretation of the statute consistent with *Barnhart* flies in the face of the language of the statute and abrogates a common-law right by implication. In so doing, it has an extremely harsh effect which this court does not deem to be consistent with the intent of the Legislature. The sad effect of the rationale in *Barnhart* is that those who for either lack of foresight and/or money do not buy extra insurance (Additional Personal Injury Protection) (see 11 NYCRR 65.13) but who make more than basic wages, i.e., in excess of $1,000 [$2,000] a month, are left without remedy or relief.

And clearly this was not the intent of the Legislature in enacting No-Fault. Rather the Act sought an immediate compensation so as to save accident victims from becoming destitute as a result of lost earnings and medical expenses. It is clear from reading the Act as well as reviewing its legislative history that citizens of this State retain their common law right to sue for serious loss of earnings (those in excess of $1,000.00 per month).

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Admittedly, the continued existence of the common law right to bring an action for lost earnings outside the scope of 'basic economic loss' may mean that some relatively small lawsuits can be brought. But, No-Fault was a compromise act and had as one goal the reduction, not the elimination, of tort actions. And, the existence and availability of extra insurance coverage gives those with foresight and economic resources an alternative to litigation.

Thus, strictly constructing the structure of New York's No-Fault Law, both its foundation of public policy considerations and its framework of plain language, compels this Court to conclude that lost earnings in excess of $1,000 [$2,000] per month are not within the definition of 'basic economic loss' as that term is defined by Insurance Law §671 [5102] for limitation of action purposes. Therefore, a 'covered person's' common law right to bring an action in tort against another 'covered person' to recover these sums is not abrogated by Insurance Law §673 [5104]. 116 Misc2d at 646-648.

'Goodkin'

In *Goodkin v. United States*, supra, the court stated, as follows:

> Although there is some authority for the proposition that a covered defendant cannot be held liable for any portion of loss of earnings sustained during the first three years following an accident unless basic economic loss reaches $50,000, *Barnhart*, supra, we disagree. Lost earnings, to the extent that they exceed $1,000 [$2,000] per month, do not constitute basic economic loss, and may always be recovered from a negligent covered defendant. *Pascente*, supra. 600 F.Supp. at 1464, N.1.

Pattern Jury Instructions

In addition to all of the foregoing, and in further support there-

of, the Introduction to New York Pattern Jury Instructions (PJI), §2:75, states, in pertinent part, as follows:

> The $50,000 figure does not represent a threshold requirement that must be met before further economic loss may be recovered in a common law negligence suit. It represents the maximum amount that the no-fault insurer is obliged to pay.
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> Basic economic loss affects two issues. First, it is considered in connection with the liability of the covered person's insurance carrier to provide first party benefits. Second, where economic loss [special damages] exceeds basic economic loss, an action may be maintained against a covered tortfeasor only for recovery of such excess, Ins. L. §5104(a).
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> Given the manner in which basic economic loss is computed, recovery may be had in a common law negligence action for the difference between basic economic loss and actual economic loss, whether or not the actual economic loss is more or less than $50,000.

And, in the Commentary to PJI 2:290, the following statements of interest appear:

> If the economic loss is less than $50,000, *and does not include items excluded by the no-fault law,* there can be no award made to plaintiff, other than for pain and suffering [emphasis added].... Plaintiff may be entitled to recover certain expenses not covered by the no-fault law: i.e., medical expenses not incurred or ascertainable during the year following the accident, Ins. L. §§5102(a)(1), and the excess of other daily expenses over $25 per day, or incurred more than one year after the accident, Ins. L. §5102(a)(3), which are not covered under the no-fault law and may be recovered in an action without regard to the 'basic economic loss' limitation.
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> Regardless of whether the injured party has suffered a 'serious injury' or sustained 'basic economic loss,' he or she may recover for lost earnings in excess of the $2,000 per month paid as first party benefits, *Pascente v. Stoyle,* 116 Misc2d 641, 456 NYS2d 633 (at time of decision, basic economic loss for loss of earnings capped at $1,000 per month, rather than current $2,000 per month cap, Ins. L. §5102[a][2]).

SUM Endorsement

In addition to the foregoing, it should be noted that the SUM Endorsement prescribed by Regulation 35-D (11 NYCRR §60-2.3, et seq.) provides, in Condition 11, that "[t]his SUM coverage shall not duplicate any of the following...(c) any amounts recovered or recoverable pursuant to article fifty-one of the New York Insurance Law or any similar motor vehicle insurance payable without regard to fault."

Insofar as lost earnings in excess of "basic economic loss" are not payable pursuant to the No-Fault Law, there is no bar to awarding such damages in an SUM arbitration.

One final point bears mention. In calculating whether, in fact, the $50,000 "basic economic loss" coverage has been exhausted—an unnecessary calculation under the circumstances discussed herein—the statutory set-offs set forth in the No-Fault statute (Ins. L. §5102[b][1],[2],[3]) are counted as part of the total. Thus, it is not the amounts actually received by the claimant, but, rather, the full amount of "first-party benefits" including the offsets, such as the 20 percent deduction for lost earnings, that goes into the computation of "basic economic loss." *Normile v. Allstate Ins. Co.,* 87 AD2d 721 (3d Dept. 1982), affd.on opinion below 60 NY2d 1003 (1983).

Conclusion

Thus, the question presented should be answered in the negative: It is not necessary first to exhaust the full $50,000 "basic economic loss" coverage before proceeding with an action or arbitration to recover lost earnings over and above "basic economic loss."