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Issue Preclusion and UM/UIM/SUM Cases

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Several recent judicial decisions have addressed the doctrines of res judicata and collateral estoppel in the context of uninsured and underinsured motorist claims and related personal injury lawsuits.

Privity

In *Goepel v. City of New York*, 23 AD3d 344 (2d Dept. 2005), the court held that the defendant, who brought and fully participated in an unsuccessful underinsured motorist (UIM) arbitration, was collaterally estopped from contesting liability in a subsequent personal injury action brought against him.

However, the codefendant, City of New York, the defendant's employer at the time of the accident—which was not a party to the defendant's underinsured motorist arbitration proceeding, had no knowledge that it was going on, and had no incentive, other than the possibility of issue preclusion, to become involved in that proceeding, which was a relatively minor matter in contrast to the catastrophic damages claimed in the action against the defendant—was not in privity with the defendant merely because the defendant was operating a city-owned vehicle with permission, and, thus, could not be collaterally estopped from contesting the defendant's liability merely because he was operating the vehicle in the course of his employment.

In *Culpepper v. Allstate Ins. Co.*, 31 AD3d 496 (2d Dept. 2006), prior to the trial of the plaintiff's personal injury action against the tortfeasor, the tortfeasor conceded liability in exchange for the plaintiff's agreement not to seek recovery against him personally in excess of his coverage limits of $25,000. The plaintiff had supplementary uninsured motorist (SUM) coverage of $100,000 with the same carrier that insured the tortfeasor. That carrier also agreed, in exchange for the concession of liability, not to seek recovery against the tortfeasor for the amounts it would pay the plaintiff under the SUM coverage. At the trial of the underlying action, the jury awarded the plaintiff $115,000 in damages. After the carrier paid its liability limits of $25,000 in (partial) payment of the judgment, the plaintiff sought to recover under her SUM coverage, but the carrier refused to pay that claim. Plaintiff thereafter sued the carrier for breach of contract.

The court granted the plaintiff's motion for summary judgment on the basis that the carrier was collaterally estopped from contesting the issue of damages because the sole issue litigated at the trial of the personal injury action was the same issue that the carrier sought to litigate in the breach of contract action. In the damages-only trial, the carrier's interest and the tortfeasor's interests did not diverge and the carrier was the only party with a financial risk in that action. Thus, the carrier and the tortfeasor were "in privity" on the issue of damages for the purposes of the doctrine of collateral estoppel. Moreover, the amounts at issue in the underlying action were not "trivial stakes." Thus, the carrier was collaterally estopped from contesting the issue of damages.

Declaratory Judgment Action

In a very interesting recent lower court decision, *State Farm Mutual Auto Ins. Co. v. Sceviour*, New York Law Journal, Sept. 8, 2006, p. 26, col. 1 (Sup. Ct. Nassau County), Justice Dana Winslow addressed whether a determination in a declaratory judgment (DJ) action involving one insurer may be binding, under the doctrine of collateral estoppel, upon another insurer in a separate proceeding.

In that case, the respondent, Mr. Sceviour, was struck as a pedestrian by a motor vehicle allegedly insured by Clarendon National Insurance Co. Clarendon disclaimed coverage, on the basis, inter alia, that it never insured the offending vehicle, and commenced a DJ action in which it sought to be relieved of the obligation to defend and indemnify its insured in Mr. Sceviour's personal injury action. In the DJ action, in which Mr. Sceviour was a party, the court upheld Clarendon's disclaimer.

Thereafter, Mr. Sceviour filed a claim with his own insurer, State Farm, for uninsured motorist (UM) benefits, based upon the prior determination that the offending vehicle was not insured. In moving to stay arbitration of that claim, State Farm argued that a hearing was required on the issue of Clarendon's coverage because the determination in the DJ action was not binding upon State Farm, which was not a party to that proceeding.

In rejecting State Farm's contention, the court observed that:

> a nonparty may be said to have had sufficient opportunity to be heard in the prior proceeding if the nonparty was, for purposes of that proceeding, in privity with a party who fully litigated the issue. Privity does not have a technical and well-defined meaning. Rather, it is an amorphous concept, not capable of easy application [citations omitted]. Generally, one in privity has a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation (citation omitted).

Finding that in this case, there was no doubt that the issue of Clarendon's coverage was "necessarily decided" in the DJ action, and that Mr. Sceviour "asserted meaningful and comprehensive opposition to Clarendon's motions," the court found that there was privity between State Farm and Mr. Sceviour in the prior proceeding because "as [Mr.] Sceviour's UM carrier, State Farm's obligations are contingent upon [Mr.] Sceviour's rights, albeit inversely. That is, State Farm's obligation to provide UM coverage would arise only if it were determined that [Mr.] Sceviour had no right to recover from [Clarendon]" [citations omitted].

In the prior action, the interests of State Farm and Mr. Sceviour were aligned; "both would be served by a finding that [Clarendon] was required to provide coverage. State Farm bore the financial risk of an adverse ruling, if not

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exclusively, then in tandem with Mr. Sceviour [citing *Culpepper,* supra]."

Finally, the court concluded that this result was not unfair insofar as

> State Farm had notice of the issues to be decided in the declaratory judgment action, and of the potential impact upon its own interests, but it never sought to intervene. Fairness does not require this Court to reward State Farm's decision to 'sit idly by' during the prior litigation by allowing it a second chance to proffer the same arguments and evidence that [Mr.] Sceviour asserted without success. Nor does it require the imposition of a duplicative evidentiary burden upon Clarendon.

Cf. *Town of Wilton v. Tarrant Mfg. Co.*, Index No. 2005-2585, Sup. Ct. Saratoga Co., June 13, 2006, involving separate fire damage subrogation claims by two different insurers—one of which insured a garage, and the other of which insured the cars therein—wherein the Supreme Court declined to find the requisite privity between the two insurers to invoke the doctrine of collateral estoppel on behalf of the alleged tortfeasor to bind the second insurer to the determination in favor of the tortfeasor and against the first insurer.

Fair Opportunity—Default

In *Allstate Ins. Co. v. Williams*, 29 AD3d 688 (2d Dept. 2006), the respondents were involved in an accident with a vehicle that fled the scene. Although the vehicle's operator was unknown, the policereport contained the license plate number and identity of the registered owner of the vehicle. Respondents commenced an action for personal injuries against the registered owner, who alleged, in defense, that his license plates had been removed from his vehicle and placed on another vehicle without his permission. Respondents thereafter filed a demand for uninsured motorist benefits, and the SUM carrier moved to stay arbitration on the ground that the alleged offending vehicle was insured. The petition to stay arbitration was subsequently granted on default. Respondents did not appeal that order or seek a severance, or any other relief. Instead, they continued to pursue their action against the driver, which action ultimately resulted in dismissal after the owner produced proof that his license plates had been stolen. Thereafter, respondents filed a second demand for arbitration and the carrier brought a second proceeding to stay arbitration, which was granted on the grounds of res judicata. As explained by the court,

> the policy against relitigation of adjudicated disputes is strong enough to bar a second action or proceeding even when further investigation indicates that the prior determination was erroneously made, whether due to the parties' oversight or court error [citation omitted].... The doctrine [of res judicata] is applicable to an Order or Judgment entered upon default that has not been vacated, as well as to issues that were or could have been raised in the prior proceeding [citations omitted].

have contested the insurer's assertions in the prior proceeding, the doctrine of res judicata was applied. Having been aware of the owner' stolen license plate defense prior to their filing of the initial demand for arbitration, after the court stayed the arbitration on default of the other insurer, they could have sought a severance and requested a hearing on the stolen license plate issue. Instead, they took no further action in that proceeding and did not seek appellate review. That failure was deemed fatal.

Damages

One of the most significant areas in which these preclusionary doctrines play a role is the area of damages. In *Velasquez v. Water Taxi, Inc.*, 49 NY2d 762 (1980), the Court of Appeals held that where an arbitration award is rendered under an uninsured motorist endorsement, the award must be accepted, prima facie, as constituting the total damages due for noneconomic loss in any legal action commenced by the claimant to recover damages for the same injuries. The Court, however, suggested that there was a limitation to this general rule. It pointed out that "had plaintiff established that the arbitrator did adjudicate only the dollar value of the hit-and-run vehicle's apportioned share of the liability, this might well be a different case."

Moreover, the Court noted that "there is no indication that the [then-] $10,000 maximum on uninsured motorist awards influenced the amount of damages set by the arbitrator. If the arbitrator had found that total damages were in excess of $10,000, surely he would not have awarded plaintiff the significantly lower sum of $2,500."

'Leto' and Progeny

Just over a year later, in *Leto v. Petruzzi*, 81 AD2d 296 (2d Dept. 1981), the Second Department clarified that the rule set forth in *Velasquez* would only be applicable in cases where the arbitrator's award was for less than the policy limit.

> As stated by the court,
>
> we understand the Court of Appeals to mean, and so hold, that, where the arbitrator's award under an uninsured motorist endorsement is for less than [the maximum statutory amount], such award must be considered, prima facie, to be the total damages due for noneconomic loss, unless the arbitrator indicates that it is limited to the damages caused by the 'hit-and-run' [or uninsured] vehicle. However, where the arbitrator's award is for the maximum statutory amount, it should not be considered to be the total damages due for noneconomic loss, unless the arbitrator so indicates.

Thus, because, in that case, the arbitrator awarded the plaintiff the maximum allowable amount under the policy and the Insurance Law and expressed no opinion as to whether that amount would fully compensate the plaintiff for her noneconomic loss, the court held that the award could not be accepted, prima facie, as plaintiff's total damages and, thus, did not bar her cause of action for fied (and insured) tortteasors.

In *Gibe v. Hajek*, 166 AD2d 502 (2d Dept. 1990), it was undisputed that at the outset of the plaintiff's uninsured motorist arbitration, she specifically requested that the arbitrator limit his ruling to the uninsured motorist benefits. The arbitrator awarded plaintiff $7,500, stating that this award "is in full settlement of all claims submitted to this arbitration." The plaintiff subsequently commenced a personal injury lawsuit against the other tortfeasor. Although the Supreme Court granted the defendant's motion to dismiss the complaint on the ground that the action was barred by the arbitration award under the doctrine of collateral estoppel, the Appellate Division reversed, noting that the general rule of preclusion does not apply if the arbitrator indicates that the award is limited to the damages caused by the uninsured vehicle, and here the award was so limited.

More recently, in *Searchwell v. L.G.A. Transportation, Inc.*, 307 AD2d 348 (2d Dept. 2003), the plaintiff filed both an uninsured motorist claim based upon the liability of the uninsured tortfeasor and a personal injury action against other, insured tortfeasors.

In the uninsured motorist proceeding, the arbitrator awarded the plaintiff less than the then-applicable $10,000 statutory maximum available for noneconomic loss. In the personal injury action, the defendant argued that "since the arbitrator awarded plaintiff less than the $10,000 statutory maximum, the award must be presumed to constitute her total recovery for noneconomic loss, and she is barred from seeking additional recovery from joint-tortfeasors for the same injuries." The Court, citing *Leto* and *Velasquez*, supra, held that insofar as "the language of the subject arbitration award reflects an intent to limit damages to the uninsured vehicle's apportioned share of liability," "the arbitrator's award does not bar the plaintiff from pursuing this action against [the other tortfeasors]. Similarly, since the language of the award does not indicate that it was intended to represent the total compensation to which the plaintiff is entitled for her injuries, it cannot be accorded preclusion effect under the doctrines of res judicata, and collateral estoppel."

Most recently, in *New York Central Mutual Fire Ins. Co. v. Reinhardt*, 27 AD3d 751 (2d Dept. 2006), the claimant went to arbitration with the tortfeasor's insurer, in lieu of a lawsuit. The arbitration agreement provided that the maximum amount of the award would be $25,000, the limit of the tortfeasor's policy, but it also provided that this limitation would be confidential and would not be revealed to the arbitrator. The arbitrator awarded exactly $25,000 to the claimant. Because it was unclear whether the claimant sought to establish damages of a greater amount, or withheld proof of the full extent of her injuries in light of the arbitrator's limited authority, and, also, whether, despite the agreement to "keep the arbitrator in the dark" about the agreed-upon maximum recovery, the arbitrator was aware of it and conformed the award to this limitation, the court remitted the matter for a framed issue hearing on whether the claimant was barred by collateral estoppel from seeking additional recovery under the SUM endorsement.