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INSURANCE LAW

'Occupancy' And Uninsured Motorist Coverage

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When the concept of uninsured motorist coverage first came into being, in 1958, with the enactment of the Motor Vehicle Accident Indemnification Corporation Act (MVAIC)1, the benefits of such coverage were extended to qualified persons "occupying" the motor vehicle at the time of the accident.

Defining 'Occupying'

In reviewing the legislative history and intent of "occupying," the Court in Colon v. Aetna Cas. & Sur. Co., 48 NY2d 570 (1980) noted: 2

'Not content with the literal and customary meaning of the word, the Legislature explicitly provided that it was intended in that statute to embrace situations which would not normally be thought to be included in the term, i.e., in addition to including presence 'in or upon' the motor vehicle----the normal denotation of the word ---- 'occupying' was to extend as well to situations involving 'entering into or alighting from.' Thus, the Legislature gave the word a specially constructed definition for the purposes of [uninsured motorist] coverage. Taking guidance from this legislative signal, the courts have held that a person who is 'vehicle oriented' falls within the scope of the term for purposes of [uninsured motorist coverage]- now a very far cry from the lexicographer's definition of the word. From a policy standpoint this has accorded with the legislative declaration of purpose to secure to innocent victims of motor vehicle accidents recompense for the injury and financial loss inflicted upon them [citation omitted]. Inasmuch as 'occupying' is a term defining included coverage, the more expansive a meaning accorded the term, the broader the sweep of coverage. Accordingly, both Legislature and the courts have been disposed to stretch rather than to narrow the embrace of that critical word."

As will be demonstrated by the survey of cases that follows, the decisions in this area are factually specific and highly dependent upon the particular facts

and circumstances of each case. Counsel would do well to study these decisions in order to determine whether, at the outset, a valid claim for Uninsured Motorist and Supplementary Uninsured Motorist (UM/SUM) benefits exists under the policy covering a vehicle in which the claimant was either a driver or passenger at one time prior to his or her accident

'Occupancy' Found

In MVAIC v. Oppedisano, 41 Misc 2d 1029 (Sup Ct Nassau Co. 1964), the court, noting that the claimant "had been an occupant of his vehicle just prior to the impact and he intended to and would have continued as occupant but for the wrongful impact," held that "[h]is alighting from his vehicle for the purpose of releasing his vehicle which had skidded off the road and into high snow did not take him out of the category of 'occupant.' As further explained by the court, "It is inconceivable that this short, temporary, enforced break in the occupancy of his vehicle for the express purpose of continuing his occupancy should take these facts out of the protection intended by the Legislature. The provisions of the MVAIC Law should be construed according to the fair import of their terms, to promote justice and effect the objects of the law." Of course, the same reasoning would apply as well to the uninsured/underinsured/SUM law.

In State-Wide Ins. Co. v. Murdock, 31 AD2d 978 (2d Dept. 1969), affd. 25 NY2d 674 (1969), a panel truck stalled and its operator raised the hood to attempt to restart the engine. A passenger of the truck got out and walked toward the front to help the driver get the vehicle back on the road. He was struck by a vehicle within 4-5 seconds after alighting from the truck. Under those circumstances, the court held that the passenger was "occupying" the truck within the meaning of the truck's uninsured motorist endorsement.

In Allstate Ins. Co. v. Flaumenbaum, 62 Misc 2d 32 (Sup Ct NY Co 1970), the court noted that "one can come within the definition of 'occupying' a vehicle, even when he is not in physical contact with it ... [A] person has not ceased ' occupying' a vehicle until he has severed his connection with it - i.e., when he is on his own without any reference to it. If he is still vehicle-oriented, as opposed to highway oriented, he continued to 'occupy' the vehicle." That court cited with approval the earlier decisions in State-Wide Ins. Co., supra, and MVAIC, supra, and noted that in those cases, the courts considered the injured parties to have been "in" the vehicle, "even if literally outside of it, because the passenger had alighted in mid-trip due to unexpected circumstances, and he fully intended to reenter.'

In Estate of Cepeda v. USF&G Co., 37 AD2d 454 (1st Dept. 1971), the plaintiffs' decedents were passengers in an automobile owned by an individual named Giron. Believing that his vehicle had been struck by another vehicle, driven by Carey, Giron pulled his vehicle over to the side, as did Carey. Giron and Carey went to the rear of Giron's car to look for damage, and the passengers got out of the car

to join them. While they were all outside of the car, and "in the roadway," another car struck and killed the former passengers. In determining the question of "whether the decedents by stepping out of Giron's car in the manner in which they did ceased to be passengers and hence to have the coverage of Giron's insurance," the court noted that

'Not every physical departure from the vehicle results in termination of status as a passenger [citations omitted]. Where the departure is incident to some temporary interruption in the journey of the vehicle, as when there is a mechanical failure and the passenger gets out to help or even to observe the work of the driver, he does not cease to be a passenger .... Where the passenger alights following some temporary interruption at a place other than his destination, remains in the immediate vicinity of the vehicle and there is every reason to believe that, had it not been for the accident, he would shortly have resumed his place in the vehicle, his status as a passenger has not changed.'

Two years later, the Court of Appeals spoke on this issue in the well-known case of Rice v. Allstate Ins. Co., 32 NY2d 6 (1973). Citing with approval to, and building upon, the holding in Estate of Cepeda, supra, the Court of Appeals set forth the following general rule to be applied in all cases involving individuals who, for various reasons, leave a vehicle:

'Where a departure from a vehicle is occasioned by or is incident to some temporary interruption in the journey and the occupant remains in the immediate vicinity of the vehicle and, upon completion of the objective occasioned by the brief interruption, he intends to resume his place in the vehicle, he does not cease to be a passenger."

The Court added that, as noted in Cepeda, "the status of a passenger is not lost even though he is not in physical contact with [the vehicle], provided there has been no severance of connection with it, his departure is brief and he is still vehicle-oriented with the same vehicle."

In Nassau Ins. Co. v. Maylou, 103 AD2d 780 (2d Dept. 1984), the court applied the Rice rule to find that where the claimant got out of the taxicab he had been operating and was in the process of exchanging credentials with another driver on the side of the road when a third, uninsured, vehicle came along and struck the other vehicle in the rear, propelling it into him, he was still an "occupant" of the taxicab and, thus, was entitled to proceed to uninsured motorist arbitration under the taxicab's policy since he had "every intention to return to this taxicab" upon completion of the exchange of credentials.

'Occupancy' Not Found

On the other hand, there have also been numerous decisions in which individuals that were pedestrians at the time of the accident were held not to be occupants of a vehicle. For example, in Saunderson v. MVAIC, 54 AD2d 936 (2d Dept. 1976), the

determination that the claimant was not occupying the insured vehicle at the time of the accident was based upon the fact that despite the fact that the claimant may have intended to reenter the vehicle at some point, after he finished shopping, "he severed his connection with the vehicle upon alighting therefrom to perform a chore which was not vehicle-oriented."

In Fischer v. Aetna Ins. Co., 65 Misc 2d 191 (Sup Ct Nassau Co. 1971), affd. without opinion, 37 AD2d 917 (2d Dept. 1971), the plaintiff was driving an automobile owned by his employer, when he observed a man lying in the roadway. He parked his vehicle in an adjacent lot, removed the ignition key, and walked approximately twenty-five feet back to the injured man, and proceeded to administer first-aid to him. As he thereafter started to walk further away from his vehicle toward a nearby "firebox" to summon further assistance, he was struck by a hit-and-run vehicle.

After noting the cases discussed above, "which have construed the definition of the term 'occupying' used in the uninsured motorist endorsement as broad enough to cover claimants after they had gotten out of the vehicle," the Supreme Court distinguished those cases and ruled that Mr. Fischer was not an occupant of his vehicle at the time of the accident. As explained by the court, in each of the cited cases "the injured person's activities outside the vehicle were closely related to his prior presence in it. The claimant was either attempting to resume his journey which was interrupted in that journey ... or he was completing the transaction that had placed him in the vehicle in the first place ..." In Fischer, by contrast, the plaintiff's activities when he was struck were in no way related to the insured vehicle. "Had he been a pedestrian or a passenger in or operator of another vehicle passing that way, the activities that placed him in the path of the 'hit and run' driver would, doubtless, have still transpired." See also, Aetna Ins. Co. v. Espinosa, 92 Misc 2d 200 (Sup Ct Kings Co. 1977) (the intent to leave the vehicle must have some connection with the continued driving of the vehicle as distinguished from a parking of the vehicle to go elsewhere).

In Travelers Ins. Co. v. Wright, 202 AD2d 680 (2d Dept. 1994), the claimant's car broke down and she moved it out of traffic and parked it. She then went to a nearby restaurant to call for help. When she was unable to summon assistance, she returned to her car, gathered her belongings and left the car to go home. While walking away from the car, after abandoning it and with no intention to immediately return to it, she was struck by another car. Under these facts, the court held that claimant was not an occupant of her car because, inter alia, her departure from the car was not "'incident to some temporary interruption in the journey of the vehicle' such that her original occupancy of the car could be deemed continuing in nature."

In State Farm Automobile Ins. Co. v. Antunovich, 160 AD2d 1009 (2d Dept 1990), the claimant had just finished a repair job, deposited his tools in the back of his employer's van, and was walking around the van to the driver's side door when

he was struck by another vehicle. In holding that the claimant could not be considered an "occupant" of the van, the critical fact for the court was that the claimant did not have a prior, briefly interrupted, occupancy of the van that he was attempting to continue. Rather, he could not "be deemed to have been entering the van at the time he was injured merely because he was walking toward the door on the driver's side with the intent to enter," and he "had not yet reached the concededly locked driver's side door of the van when he was struck.'

Recent Cases

In Coregis Insurance Company v. Micelli, 295 AD2d 511 (2d Dept. 2002), Mr. Micelli, a fireman, was struck by a car (a taxicab) while he was in the process of assisting in the garaging of a firetruck which had returned to the firehouse from a call by standing in the street outside the firehouse and attempting to stop all vehicular and pedestrian traffic. There was no evidentiary proof to establish any pre-accident occupancy of the firetruck by Mr. Micelli. Nor, significantly, was there any competent or credible evidence to support or even suggest that he intended to return to the truck after he finished directing traffic, and after the truck was garaged. There was no evidence or indication that the actions taken by Mr. Micelli were for purposes having anything to do with the continuation of a journey on the firetruck; rather, the evidence, and the logic of the situation, indicated that the firetruck was being garaged for the express purpose of ending the journey. Mr. Micelli's actions were geared towards getting the firetruck off of the road so that he and his fellow fire fighters could end all connection to it - at least until they received the next alarm, whenever that might have been.

Under these circumstances, the court held that Mr. Micelli was not occupying the firetruck at the time of his accident. Notably, in so holding, the court cited favorably to Rice v. Allstate, supra, which decision was based upon the facts that, as in Micelli, it was the claimant's intent not to return to her car; the claimant had, for all intents and purposes, severed her connection with the car; and "[h]ad the accident not occurred, claimant would have completed her journey with no further connection with the car from which she had alighted." 32 NY2d at 11.

In Martinez v. MVAIC, 295 AD2d 277 (1st Dept. 2002), the court held that a tow truck driver was no longer occupying the tow truck when he was struck by a hit-and-run vehicle while he was walking towards the disabled vehicle he had been dispatched to assist. While he intended eventually to return to the truck, his absence therefrom was not intended to be brief and his immediate purpose was to attend to the disabled vehicle as necessary incident to his employment. This distinguished this case from those cases where "a mere temporary happenstance interrupted the operator's connection with the vehicle." 3

Most recently, in Coregis Ins. Co. v. McQuade, ___ AD3d ___, ___ NYS2d ___, 2004 WL 1157737 (2d Dept. 2004), the claimant was a sanitation worker who was struck by an underinsured vehicle while he was waiting near the curb for his sanitation

truck to return and pick up the garbage he had collected. The court held that while the claimant "intended to return to the truck, his departure from it was not 'incident to some temporary interruption in the journey of the vehicle' such that his original occupancy of the truck could be deemed continuing in nature [citations omitted]. Moreover, at the time of the accident, [the claimant] was not in the immediate vicinity of the truck which was between one and four blocks away [citations omitted]. Nor can [the claimant] be deemed to have been entering the truck at the time he was injured merely because he was waiting for it to arrive [citations omitted]." Thus, since the claimant was not "occupying" the insured vehicle, he did not qualify as an insured for purposes of the SUM endorsement.

1. Ins. L. §600, et seq., added by Laws of 1958, ch. 759, §2, eff. Jan. 1, 1959, recodified and renumbered §5201, et. seq. by Laws of 1982, ch. 686, §1, eff. Sep. 1, 1984).

2. See also Rowell v. Utica Mut. Ins. Co., 77 NY2d 636 (1991); and discussion in Colonial Penn Ins. Co. v. Curry, 157 Misc 2d 282 (Sup. Ct. Nassau Co. 1993) (Winick, J.).

3. But see American Alliance Ins. Co. v. Verdi, N.O.R., (Sup Ct, Nassau County, 2002), Index No. 013437/01 (tow truck operator injured in the course of directing traffic so as to allow co-worker to safely drive truck onto highway, and who intended to re-enter and drive truck thereafter was an "occupant" of the tow truck).

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