BY NORMAN H. DACHS AND JONATHAN A. DACHS

More Proposed Regulatory Amendments

In our previous column (The New York Law Journal, Sept. 13, 2005, p.3, col. 1), we marked the 12th anniversary of the effective date of Regulation 35-D (11 New York Codes, Rules and Regulations [NYCRR] §60-2.3, et seq.), the Insurance Department's regulation interpreting and implementing the statutory provisions pertaining to Supplementary Uninsured (SUM) and Underinsured Motorist (UM) Coverage (Insurance Laws §§3420[f][1] and [f][2]), by recommending several amendments or clarifications to the regulation or the statutes in order to eliminate ambiguity, minimize confusion and maximize the utility of this special brand of coverage.

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Space considerations did not allow us to present several additional recommendations, which involve as well the revised, mandatory UM endorsement—which itself just celebrated its ninth anniversary.

We take this opportunity to do so now, as well as to point out an apparent drafting error in the regulation governing the required provisions for automobile liability policies and a corrective interpretation thereof.

Proposed Regulatory Amendment

• ***'Hit-and-Run.'*** In drafting Regulation 35-D's SUM endorsement, the Insurance Department essentially incorporated the hit-and-run provisions of the original mandatory UM endorsement (promulgated in 1959), but with two noticeable exceptions. First, under the former mandatory UM endorsement, it was the identity of either the operator or the owner of the offending vehicle that must be ascertained or unascertainable in order for it to qualify as an "uninsured" motorist vehicle. By contrast, the language of both the Motor Vehicle Accident Indemnification Corp. (MVAIC) Act and Regulation 35-D's SUM endorsement was more restrictive. Pursuant to Insurance Law §5218(a), the appropriate test is "when the identity of the motor vehicle and of the operator *and* owner cannot be ascertained (emphasis added)." Under Regulation 35-D's SUM endorsement, a vehicle is a hit-and-run when "*neither* owner *nor* driver can be ascertained (emphasis added)."

Secondly, the former mandatory UM endorsement required the claimant to file a statement under oath with the insurer stating that he or she had a cause of action arising out of an accident with a person or person whose identity is unascertainable "within 90 days" after the accident. By contrast, in Regulation 35-D's SUM endorsement, the Insurance Department omitted the 90-day time limit and, instead, set forth no time period for providing the statement under oath.

Although these discrepancies were brought to the Insurance Department's attention prior to the final effective date of Regulation 35-D (see Dachs, N. and Dachs, J., "SUM Regulation Redux," NYLJ, June 9, 1992, p.3, col. 1), no changes were made to the SUM endorsement at that time.

For unknown reasons, when drafting the new, revised mandatory UM endorsement (effective Sept. 1, 1996), perhaps because they were attempting to combine the SUM endorsement with UM-related provisions, the drafters included within that endorsement two separate definitions of a "hit-and-run" vehicle. The first definition, which appears at §§2 (b)(2)(i), (ii), within the definition of a "uninsured motor vehicle," appears to be an exact duplication of the Regulation 35-D SUM endorsement's sections I(c)(2)(i), (ii). Thus, under this first definition, the insured must prove that "neither the owner nor the driver can be identified," but need not file the statement under oath within 90 days. However, the second definition, which appears at §2(c), under the heading "Hit-and-Run Motor Vehicle" appears to be an exact duplication of the prior mandatory UM endorsement's §II(c). Thus, under this second definition, the insured must prove that "there cannot be ascertained the identity of either the operator or the owner of "such 'hit-and-run motor vehicle,'" but must file the statement under oath within 90 days.

Although these discrepancies were also brought to the department's attention (see Dachs, N. and Dachs, J. "Revised Uninsured Motorists Endorsement—Part II," NYLJ, Jan. 14, 1997, p. 3, col. 1), no changes were made to the new mandatory UM endorsement, either.

Obviously, the existence of two contradictory definitions within the four corners of a single endorsement creates an ambiguity. What makes this even more interesting is that each of the definitions contains one aspect that is pro-claimant and one that is pro-insurer. This allows potentially for the situation where the claimant may attempt to construe both provisions against the insurer by picking and choosing the portions of the endorsement that are most beneficial to him or her. On the other hand, the insurer may argue that the second definition is superfluous and that the only one that really counts is the one that defines an "uninsured motor vehicle."

We once again recommend that the Insurance Department clarify this obviously inadvertent ambiguity by amending the revised mandatory UM endorsement in a manner consistent with its original intentions.

Proposed Regulatory Amendment

• ***Settlement Without Consent.*** In our previous column, we discussed several interesting questions of interpretation regarding the Exclusion in Regulation 35-D's SUM endorsement for settling any lawsuit against any person or organization that may be legally liable without the SUM carrier's written consent. Specifically, we noted the anomaly in that endorsement's language referring to the settlement of a lawsuit, rather than simply a settlement, which might, in some instances, occur prior to the actual commencement of a lawsuit. We also queried and discussed whether the exclusionary language should be construed broadly to include settlements with all tortfeasors, including

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More Proposed Regulatory Amendments

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nonmotor vehicle tortfeasors, or narrowly, to be limited to recoveries from other motor vehicle insurance policies.

It was only after further—and more careful—analysis of this exclusion that we recently discovered yet another discrepancy between Regulation 35-D's SUM endorsement and the revised mandatory UM endorsement.

In the revised mandatory UM endorsement, Exclusion 2 provides that UM coverage does not apply if the insured (or the insured's legal representative) "shall, without our written consent, make any settlement with *or prosecute to judgment any action* against any person or organization who may be legally liable...." [Emphasis added.]

In the first place, it is notable that in this endorsement the reference to settlement is different from the reference in the Regulation 35-D SUM endorsement and, indeed, is more akin to the amendment we previously suggested for that endorsement, insofar as it simply states "make any settlement," and does not tie the settlement to the actual commencement of a lawsuit. This change in the subsequently drafted revised mandatory UM endorsement, lends credence and weight to our previously recommended amendment to Regulation 35-D.

Perhaps more importantly, it is significant that the revised mandatory UM endorsement adds the provision dealing with the prosecution of an action to judgment, which does not appear in the Regulation 35-D endorsement. Insofar as it would appear that the prosecution of an action against the tortfeasor to judgment would have the same preclusive effects upon the SUM carrier's subrogation rights as the settlement of the claim against the tortfeasor, it would seem logical to include that language in the endorsement. In the absence of an explanation as to why that should be true with respect to the mandatory UM coverage, but not the SUM coverage, we recommend that the Regulation 35-D endorsement be amended by adding to Exclusion 1 the following words (after "settles any lawsuit," which we previously recommend be changed to "settles any claim"): "or prosecutes to judgment any action."

The elimination of the inconsistency between the two endorsements will help to reduce confusion and, perhaps, avoid unnecessary litigation.

Drafting Error

• ***Definition of "Insured."*** While we are on the subject of recommending amendments to regulatory provisions, our attention has recently been brought to what appears to be a drafting error in a portion of the Insurance Regulations dealing with "Minimum Provision for Automobile Liability Insurance Policies" (as opposed to UM/SUM policies)— specifically the portion that refers to the definition of an "insured." 11 NYCRR §60-1.1(c), part of Regulation 35-A, (last amended on Feb. 7, 1996), currently provides for a provision in all owners' policies of liability insurance which is equally or more favorable to the insured and judgment creditors and which includes as an "insured":

(1) the named insured and, if an individual, his or her spouse if a resident of the same household with respect to the motor vehicle or vehicles;

(2) any other person using the motor vehicle with the permission of the named insured or such spouse provided his or her actual operation or (if he or she is not operating) his or her other actual use thereof is within the scope of such permission; and

(3) any other person or organization but only with respect to his, her or its liability because of acts or omissions of an insured within paragraph (1) or (2) of this subdivision. *As respects any person or organization other than the named insured or such spouse the policy need not apply:*

(i) *to any person or organization, or to any agent or employee thereof, employed or otherwise engaged in operating an automobile sales agency, repair shop, service station, storage garage or public parking place, with respect to any accident arising out of the maintenance or use of a motor vehicle in connection therewith;*

(ii) *to any employee with respect to injury, sickness disease or death of a fellow employee injured in the course of his or her employment in an accident arising out of the maintenance or use of the motor vehicle in the business of their common employer; or*

(iii) *to any person or organization, or to any agent or employee thereof, with respect to bodily injury, sickness, disease or death, or injury to or destruction of property arising out of the loading or unloading of the motor vehicle. The insurance shall apply separately to each insured against whom claim is made or suit is brought, provided the inclusion of more than one insured shall not operate to increase the limits of the insurer's liability.* [Emphasis added.]

The grammatical construction of this section of the regulation, in which subdivision (3) of the definition has limiting language that incorporates three exceptions to the definition of who is an "insured," appears to direct the reader to limit the application of subparagraphs (i)-(iii) to paragraph (c)(3) only. However, in a response to a written inquiry, dated June 22, 2005, the Insurance Department has reviewed and interpreted the original language of the regulation and the intent of its drafters, and concluded therefrom that an unintentional writing error had occurred as a result of subsequent amendments to and recodification of these provisions and that, in fact, the exclusions of §60-1.1(c)(3)(i)-(iii) are also applicable to §§60-1.1(c)(1) and 60-1.1(c)(2), and the last sentence of subparagraph (iii) applies to the entire provision. Of course, since the exclusions do not relate to the insured and spouse, as a practical matter they only apply to paragraphs (c)(2) and (c)(3), and not paragraph (c)(1).

Conclusion

The Insurance Department has advised that it will be contacting the New York Department of State in order to correct this drafting error and clarify the appropriate application of the exclusions. We encourage such an amendment to the regulation, which will go a long way towards the laudable goal of eliminating confusion and, perhaps, avoiding unnecessary litigation.

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