INSURANCE LAW

BY NORMAN H. DACHS AND JONATHAN A. DACHS

'Raffellini': Status Quo Restored

Norman H. Dachs

Jonathan A. Dachs

When the Court of Appeals speaks on insurance law issues, it is noteworthy (at least in this space). Perhaps the biggest news of the past year in Insurance Law was the Court of Appeals' reversal, on Nov. 15, 2007, in *Raffellini v. State Farm Mutual Automobile Insurance Co.*, 9 NY3d 196, __NYS2d__, 2007 WL 3375436 (2007), rev'g 36 AD3d 92, 823 NYS2d 440 (2d Dept. 2006), which addressed the important question of whether the "serious injury" threshold requirement is applicable to claims for underinsured or supplementary uninsured motorist coverage, as it undoubtedly is for uninsured motorist claims.

As many of our readers may recall,[1] *Raffellini* was the case in which the Appellate Division, Second Department affirmed the decision of the Supreme Court, Kings County, and held that notwithstanding the existence of specific language in the Regulation 35-D SUM endorsement, applicable to both uninsured and supplementary uninsured/underinsured motorist claims, indicating that coverage does not apply "for non–economic loss resulting from bodily injury...unless the insured has sustained a 'serious injury' as defined in Section 5102(d) of the New York Insurance Law" (the No-Fault Law), a claimant is not required to demonstrate a "serious injury" in an action against his or her insurer to recover benefits under the optional, supplementary uninsured/underinsured motorist coverage portion of the policy (as opposed to the basic, mandatory uninsured motorist coverage), thus invalidating that portion of the endorsement as applicable to the underinsurance context on the basis that it was unauthorized and contrary to the enabling statute, Ins. L. §3420(f)(2). As noted, and as described more fully below, the Court of Appeals has now reversed the Appellate Division (and the lower court) and upheld the validity of the regulatory provision that requires proof of a "serious injury" as a condition precedent to a valid underinsured motorist claim (same as an uninsured motorist claim), effectively restoring the status quo ante.

Facts

In order properly and fully to understand and appreciate the *Raffellini* case and its significance, a review of its underlying facts may prove salutary. Plaintiff, Nicholas Raffellini, purchased an automobile liability policy from State Farm, which included supplementary uninsured/underinsured motorist coverage with limits of $100,000 per person/$300,000 per accident. Thereafter, he was injured in an accident with a vehicle owned and operated by an individual named Roman Seleznev, which vehicle was insured, albeit with limits of only $25,000 per person/$50,000 per accident. Thus, the Seleznev vehicle was "underinsured." After receiving an offer of settlement from Seleznev's insurer for the full $25,000 available limits of his policy, Mr. Raffellini requested State Farm's consent to settle. After waiting the appropriate 30 days without any response from State Farm, Mr. Raffellini went ahead and settled with Mr. Seleznev for $25,000.

Believing that $25,000 was not a sufficient amount to compensate him for his injuries, Mr. Raffellini sought to recover SUM benefits from State Farm, and, thus, submitted a claim for $75,000, representing the $100,000 SUM limits minus the $25,000 previously received from Mr. Seleznev's insurer (for which the SUM carrier was entitled to an offset or reduction in coverage). When State Farm refused to pay this claim, Mr. Raffellini commenced a lawsuit against State Farm, an action in contract, as it was his right to do because the coverage involved exceeded 25/50, seeking to recover $75,000 in SUM benefits. State Farm answered the complaint by denying all of the material allegations and asserting an affirmative defense alleging that Mr. Raffellini did not sustain a "serious injury" as defined by the No-Fault Law, thereby precluding the maintenance of the action. Mr. Raffellini then moved to dismiss that affirmative defense, contending that the "serious injury" threshold requirement was not applicable in an action brought pursuant to Ins. L. §3420(f)(2), as opposed to §3420(f)(1).

Lower Court

In granting that motion, Justice David Schmidt held that the "serious injury" threshold statute, by its terms, applied to actions for personal injuries by a "covered person" against another "covered person," and that while Mr. Raffellini was a "covered person," State Farm was not. In further support of his decision, Justice Schmidt observed that although §3420(f)(1), dealing with uninsured motorist coverage, specifically required an insured to sustain a "serious injury," that requirement was absent from §3420(f)(2), dealing with supplementary uninsured/underinsured coverage. Finally, Justice Schmidt said that, in any event, "the underlying action brought by [Mr. Raffellini] against the tortfeasor (Roman Seleznev) would not have been settled for the policy limits if not for the existence of a 'serious injury,'" thus implying that as a practical matter in any case involving an underinsurance claim the issue of "serious injury" would be academic or moot.

Appellate Division

The Second Department, on State Farm's appeal, after reviewing the factual history of the case and examining the history and purposes behind the uninsured motorist and underinsured motorist provisions of the statute as well as the history and purposes of Regulation 35-D affirmed Justice Schmidt's decision and concluded that while a claimant must demonstrate a "serious injury" in order to recover uninsured benefits, he or she need not do so in order to recover supplementary uninsured/underinsured benefits. The court held that it need not follow the regulation because this matter concerned

Norman H. Dachs *and* **Jonathan A. Dachs** *are with the firm of Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola.*

Continued on page

'Raffellini': Status Quo Restored

Continued from page 3

pure statutory construction, which did not require deference to the Insurance Department's expertise. Having imposed the "serious injury" requirement in one context, the Legislature surely could have imposed it in the other context, but chose, for some reason, not to do so.

Interestingly, the Appellate Division rejected the notion that the mere fact that the underlying action was settled for the full policy limits constituted proof that a "serious injury" had been sustained by the plaintiff, stating, as follows: "In many instances, the issue presented in this case probably will not arise because the underlying personal injury matter will involve a serious injury. But that will not always necessarily be the case. Here, for example, Mr. Seleznev's insurer may have tendered his $25,000 policy limit to settle the plaintiff's claim because the plaintiff sustained a serious injury (although that issue does not appear to have been litigated), or simply because, regardless of the serious injury issue, the insurer simply chose to avoid the cost of litigation."

The Appeal

State Farm's position on its appeal to the Court of Appeals (granted by leave of the Appellate Division) can be summarized as follows:

(1) Regulation 35-D specifically addresses the "serious injury" issue and, to the extent not expressly stated in the statute, explicitly requires claimants under the voluntary SUM coverage to establish the existence of a "serious injury";

(2) The plain language of §3420(f)(2), when read together with its immediately preceding subsection, §3420(f)(1), requires an insured to establish a "serious injury" before recovering SUM benefits. The use of the term "any such policy" in the beginning of §3420(f)(2), incorporates the provisions of §3420(f)(1) by reference;

(3) The legislative history surrounding the statutory scheme underscores that the existence of a "serious injury" is a prerequisite to the recovery of SUM benefits. The concept of providing the same level of protection for oneself and one's family as is provided to others is equally applicable in both the uninsured and the underinsured contexts; and

(4) The courts have consistently treated "serious injury" as part of an SUM claim and, in the face of these decisions the Legislature remained silent, thus signaling its acquiescence or agreement with this judicial determination.

'Meegan'

Notably, between the filing of State Farm's initial brief and its reply brief, the Fourth Department decided the same issue and, by a 3-2 vote, came to the opposite conclusion from the Second Department in *Raffellini*. In *Meegan v. Progressive Ins. Co.*, 43AD3d 182, 838 NYS2d 748 (4th Dept. 2007), the court expressly disagreed with *Raffellini*, and held that the plaintiff in an action to recover underinsured motorist benefits, pursuant to Ins. L. §3420(f)(2), is required to establish a "serious injury" as defined by the No-Fault Law. As stated by the *Meegan* court (in words that must have been music to State Farm's counsel's ears):

> In our view the regulations requiring a person to establish that he or she sustained a serious injury in order to be entitled to SUM coverage are not inconsistent with §3420(f)(2) or any other provision of the insurance law.... Insurance Law §3420(f)(2) does not explicitly dispense with the serious injury threshold requirement and, because 'the statute is silent [on the issue], the regulations [implementing the statute and imposing that requirement] in no way conflict with the statute' [citation omitted]. We further conclude that the regulations do not impose a requirement that is less favorable to the insured than section 3420(f)(2). The regulations simply impose the same legal requirement that an injured plaintiff would have against an adequately insured driver and an uninsured driver. The regulations were not promulgated 'on a blank slate without any legislative guidance, nor did [they] effectuate a profound change in ... policy' [citation omitted]. The obvious purpose of section 3420(f)(2) and its corresponding regulations is to permit drivers to protect themselves under the same terms as they protect others injured as result of their negligence. It was not the intent of the Legislature to provide a person injured by an underinsured driver with greater rights or a lesser burden of proof than an injured person otherwise would have against inadequately insured driver, when both actions arise from the same incident. To so conclude would be unreasonable and contrary to the purpose and intent of the no-fault law. We further note that SUM coverage is optional, and that an insured elects to obtain such coverage upon the specified terms and conditions of coverage. In sum, we conclude that because the conditional and exclusionary language of the policy is not explicitly prohibited by the statute, and because the regulations implementing such policy provisions are authorized and not inconsistent with the language or purpose of Insurance Law §3420(f)(2) or any other provision of the Insurance Law, the policy provision containing the serious injury threshold requirement exclusion is valid and enforceable.

Of course, the dissenting opinion in *Meegan* was modeled upon the Second Department's decision in *Raffellini*.

Court of Appeals Decision

In its order of reversal in *Raffellini*, the Court of Appeals rejected the plaintiff's contention that, by referencing "serious injury" in subsection (f)(1) of Insurance Law 3420, i.e., the mandatory uninsured motorist provision, but not in subsection (f)(2), the supplementary uninsured/underinsured motorist provision, the Legislature permitted insurers to condition the recovery of mandatory uninsured motorist benefits on the existence of a "serious injury" but intended to preclude them from conditioning recovery of supplementary benefits on such a finding. In the view of the Court, that argument "runs contrary to the interpretation of the Superintendent of Insurance expressed in Regulation 35-D." Moreover, the Court held that "the relevant statutory provision and the regulation are not contradictory" because "Insurance Law §3420(f)(2) is silent on the issue of whether an insured can recover SUM benefits absent a serious injury and that silence does not, in this case, imply that the Legislature intended to permit such recovery."

Further, "the legislative history of the relevant provisions refutes the argument that, by placing the serious injury exclusion in the mandatory benefits provision, but not the supplementary benefits provision, the Legislature intended to preclude the Superintendent from authorizing application of a serious injury exclusion for supplementary benefits."

After analyzing at length the history of the drafting of the two statutory provisions, including the fact that, initially, both provisions appeared as two paragraphs within a single section, with the second paragraph reading as a continuation of the first, providing that "[a]ny such policy, shall at the option of the insured, also provide supplementary uninsured/underinsured motorist insurance...," and that the Court has always viewed underinsured motorist coverage as an extension of uninsured motorist coverage, the Court concluded that the "serious injury" exclusion "can reasonably be viewed as having been intended to apply to both categories of benefits."

Indeed, as the Court stated, "based on the structure of [the predecessor statute to §3420(f)], we cannot say that the Legislature's failure to restate the serious injury provision in the second paragraph evinced an intent to preclude application of such an exclusion to supplementary benefits." Moreover, when, in 1984, the two paragraphs were separated into two subsections, resulting in the placement of the serious injury exclusion in Insurance Law §3420(f)(1) and not in Insurance Law §3420(f)(2), "this modification was not meant to effect a substantive change in the law—certainly, there is no reason to conclude that the Legislature split the two paragraphs into separate subsections to create a distinction between the two types of coverages that did not already exist."

Finally, "since the purpose of supplementary coverage is to extend to the insured the same level of coverage provided to an injured third-party under the policy, the insured must also meet the serious injury requirement before entitlement to supplementary benefits. If this were not the case, the insured would receive coverage more comprehensive than that available to a third-party injured by the insured."

Thus, the "serious injury" threshold requirement remains a force to be reckoned with in all UM/SUM/UIM contexts.

1. See Dachs, N. and Dachs, J., "Appellate Division: Recent Departmental Conflicts," NYLJ, July 10, 2007, p. 3, col. 1.