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UM/SUM Coverage: Proposed Statutory, Regulatory Amendments

As the 12th anniversary of the effective date of Regulation 35-D, adopted by the New York Insurance Department to interpret and implement the statutory provisions pertaining to supplementary uninsured and underinsured motorist coverage, i.e., Insurance Law §§3420(f)(1) and (f)(2), and its prescribed supplementary uninsured/underinsured motorist endorsement, rapidly approaches,[1] we thought it would be beneficial to focus on this critically important policy endorsement, as we have done in the past,[2] this time in the light of experience and actual practice.

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It is a well-established principle of law that policy or endorsement provisions that conflict or are inconsistent with the requirements of a statute are deemed to be invalid and the statutory provisions are applied.[3] This rule is applicable as well with respect to supplementary uninsured/underinsured motorist endorsement provisions.[4]

Recent case law interpreting the language of the statutes and certain provisions of the UM/SUM endorsements have established that, although there are no provisions in the prescribed endorsements that are inconsistent with or contrary to the terms of the governing statutes, by clarifying the meaning and intent of certain statutory provisions, potential confusion and, thus, potential litigation, can be avoided. In addition, careful analysis of the provisions of the prescribed endorsements reveals that certain internal inconsistencies and discrepancies exist, which can easily be clarified and remedied.

Accordingly, set forth below are several examples of amendments to the statutes and the regulations that we recommend be made to further the laudable goals of Regulation 35-D, i.e., "to eliminate ambiguity," "minimize confusion" and "maximize the utility" of this special type of coverage.[5]

Proposed Amendments: Exhaustion

The pertinent provision of §3420(f)(2)(A), dealing with "exhaustion" of the underlying limits, reads as follows: "As a condition precedent to the obligation of the insurer to pay under the supplementary uninsured/underinsured motorists insurance coverage, the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements." Because the statutory language did not specify whether "the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident" referred to only one tortfeasor or more than one tortfeasor in a multiple party accident, this issue arose in several cases. The overwhelming weight of authority, including a decision by the Court of Appeals, concluded that it is the coverage of only a single vehicle and not the total number of vehicles involved that must be exhausted.[6]

In promulgating Regulation 35-D, the Insurance Department adopted the majority rule discussed above, by specifically providing in its "Exhaustion Required" provision, that the condition precedent to payment of SUM benefits was satisfied when the limits of liability "in regard to *any one person* who may be legally liable for the bodily injury sustained by the insured" (emphasis added) are exhausted.

Thus, it is clear, via case law and the regulations, that it is the coverage of only a single vehicle, and not the total number of vehicles involved, that must be exhausted as a condition precedent to an underinsured motorist claim. Under the circumstances, it is our opinion that §3420(f)(2), in order to be consistent and to avoid confusion, should be amended. Accordingly, we recommend that the final sentence of §3420(f)(2)(A) be amended to read as follows [new matter emphasized]:

> As a condition precedent to the obligation of the insurer to pay under the supplementary uninsured motorists insurance coverage, the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident *in regard to any one person who may be legally liable for the bodily injury sustained by the insured* shall be exhausted by payment of judgments or settlements.

[It should be noted that, of course, the supplementary uninsured motorist arbitration or litigation that arises from a claim against one of several tortfeasors, whose coverage was exhausted, will deal solely with the liability of that particular underinsured tortfeasor].

Trigger of SUM Coverage

The pertinent provision of Insurance Law §3420(f)(2)(A), dealing with the "trigger" of coverage, defines an underinsured motor vehicle as one which is covered by a bond or insurance policy (and is, therefore, not "uninsured"), but "the limits of liability under all bodily injury liability bonds and insurance policies ...are in a lesser amount than the bodily injury liability insurance limits of coverage provided by *such policy*" (emphasis added). Because it was unclear whether "such policy" referred to the claimant's bodily injury liability policy to which the SUM policy was attached, or to the SUM policy itself, a question arose whether the appropriate comparison for purposes of the trigger of SUM coverage was between the tortfeasor's bodily injury coverage and the claimant's bodily injury coverage, or between the tortfeasor's bodily injury coverage and the claimant's SUM or underinsured motorist coverage. Although several early cases held that the latter comparison was the appropriate one, the overwhelming majority of cases held that the proper comparison is between bodily injury coverages.[7] Some courts even went so far as to conclude that the statute was so clear in directing the comparison to the claimant's bodily injury limits and not to the claimant's underinsured motorist limits that contrary language in any underinsured motorist endorsement was void and uncontrolling.[8]

In promulgating Regulation 35-D, the Insurance Department adopted the majority opinion set forth above and

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expanded the definition of an "uninsured motor vehicle" to include a motor vehicle for which there is a bodily injury liability insurance coverage or bond applicable at the time of the accident but "the amount of such insurance coverage or bond is less than *the third-party bodily injury liability limits of this policy*," i.e., the policy to which the SUM endorsement is attached (emphasis added).

In view of the foregoing, we recommend amending the second sentence of §3420(f)(2) to read as follows [new material emphasized]:

> Supplementary uninsured/underinsured motorists insurance shall provide coverage, in any state or Canadian province, if the limits of liability under all bodily injury liability bonds and insurance policies of another motor vehicle liable for damages are in a lesser amount than the *third-party* bodily injury liability insurance limits of coverage provided for by *the policy to which the supplementary uninsured motorists endorsement is attached [or annexed].*
>
> or
>
> ...in a lesser amount than the *third party* bodily injury liability insurance limits of coverage provided for by *the insured's own policy.*

Settlement Without Consent

The provisions in the SUM endorsement—dealing with the requirement that the claimant obtain the consent of the SUM carrier prior to entering into any settlement with the tortfeasor, have raised several interesting questions of interpretation.

Regulation 35-D's SUM endorsement specifically provides, in Exclusion 1, that the coverage thereunder does not apply "To bodily injury to an insured...if such insured...without our written consent, settles any lawsuit against any person or organization that may be legally liable for such injury, care or loss of services, but this provision shall be subject to Condition 10 ['Release or Advance']."

In a recent unreported decision, Justice Daniel Martin, of Supreme Court, Nassau County, held that Exclusion 1 was inapplicable in a case where the claimant/insured reached a settlement with the tortfeasor and issued an unrestricted general release before actually commencing a lawsuit. As stated by the court, "Exclusion 1, above, does not control because it is applicable only to the settlement of lawsuits which as set forth in respondent's opposition papers is not the case here. Respondent settled with petitioner [sic] prior to commencing an action."[9]

To our knowledge, this is the first time any court has focused on the specific "settle any lawsuit" language of the exclusion. We do not believe, however, that the drafters of the regulation intended to limit the applicability of the exclusion to the release of the tortfeasor only in the context of a pending lawsuit, rather than in any context where release is given which has the capacity to defeat or destroy the SUM carrier's subrogation rights. Only this latter determination squares with the other provisions of the endorsement dealing with consent to settle, such as Condition 10 ("Release or Advance"), which refers solely to settlement with and release of any negligent tortfeasor, and Condition 13 ("Subrogation"), which refers only to the transfer of the right of recovery against the tortfeasor and does not specifically refer to a lawsuit.

Thus, we recommend that Exclusion 1 of the SUM Endorsement be amended/corrected to eliminate the words "any lawsuit against" and replace them with "any claim," or simply state "settles with." Such amendment would reflect the intention of the drafters and eliminate unnecessary, improper, and overly narrow interpretations of the exclusion.

Yet another question that arises in this context is whether Exclusion 1 and the "Subrogation" Condition are addressed to and concerned with settlements with and/or recoveries from other motor vehicle insurance policies and not settlements with and/or recoveries from non-auto tortfeasors.

In this regard, it should be noted that in contrast to the exclusion, which broadly refers to settlements with "*any person or organization that may be legally liable* for...injury, care or loss of services," and the "subrogation" provision, which broadly refers to "*any person legally responsible* for the bodily injury or loss" [emphasis added], Condition 6 ("Maximum SUM Payments") and Condition 10 ("Release or Advance") refer to and are specifically concerned with settlements with and/or recoveries from *other motor vehicle insurance policies*—i.e., "motor vehicle bodily injury liability insurance or bond payments" and "the available limit of motor vehicle bodily injury liability coverage," respectively.

In analyzing this issue, it is significant to note that Condition 10 was drafted by the Superintendent of Insurance with the intention of remedying and/or resolving what was known as the "Catch-22" of underinsured motorist claims—i.e. the conflict that inevitably arose between policy provisions that require the insured/claimant to exhaust the underlying limits by payment and those provisions that require the insured/claimant to obtain the underinsured motorist carrier's written consent to the settlement with the tortfeasor, while simultaneously forbidding the claimant to in any way prejudice the insurer's subrogation rights.[10]

The "Release or Advance" provision alleviates the "catch-22" problem by shifting the burden from the insured to the insurer and by allowing the insured greater freedom and flexibility in settling with the tortfeasor with the SUM carrier's consent—expressed or implied—or completely avoiding the necessity of releasing the tortfeasor.[11]

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If Exclusion 1 and the "Subrogation" provision are determined to specifically include non-motor vehicle tortfeasors, as distinct from motor-vehicle tortfeasors only, the necessary conclusion would be that, despite the clear intentions of the drafters of Regulation 35-D, a "Catch-22" still exists for claimants/insureds that has not been alleviated or removed. The logic of removing one "Catch-22" while leaving another would be difficult to fathom. In accordance with the well-established rule of contract interpretation which requires the avoidance of absurd, unintended results, such interpretation should be rejected.[12]

In another recent unreported decision, Justice Gloria Dabiri, of Brooklyn Supreme Court rejected the SUM insurer's contention that the claimant/insured's settlement of a lawsuit against the City of New York for negligence in the design of the roadway where the accident occurred, without consent and without preserving the SUM carrier's subrogation rights, vitiated the SUM coverage and warranted a permanent stay of arbitration.[13]

As pertinent hereto, the court rejected the carrier's contention that the "Subrogation" provision was violated because "Condition 13 only gives the insurer the right of subrogation against a person legally responsible for the loss to the insured, for a payment which the insurer had to pay under the SUM coverage endorsement....Condition 13 thus relates only to subrogation rights as against multiple vehicle tortfeasors, who are underinsured. This is made plain by its specific reference to Condition 10,

which...permits an insured to settle 'for the available limit of motor vehicle bodily injury liability coverage' after giving thirty days written notice to the insured. Contrary to [the carrier's] assertions, Condition 10 only relates to motor vehicle tortfeasors." Specifically rejecting the carrier's contention that the concluding sentence of Condition10, which provide that "[a]n insured shall not otherwise settle with any negligent party, without our written consent, and such that our rights would be impaired" addresses settlement with non-motor tortfeasors, the court stated that "It is apparent from its plain meaning, context, and statutory purpose that this sentence in Condition 10 continues to refer to motorist tortfeasors and does not impose any consent requirement or create any offset rights in favor of the insurer where its consent is not obtained and subrogation rights are not preserved in a settlement with a non-motor tortfeasor."

Finally, the court rejected the carrier's reliance upon Exclusion 1, stating that "It is apparent from the context of this Exclusion, which is expressly made 'subject to Condition 10,' when read with the other policy provisions, such as Condition 9...and Condition 10, that the aforementioned language refers to lawsuits against persons legally liable for the injuries sustained by the insured which would impact on the insured's entitlement to SUM coverage, to wit, persons who are underinsured motorists whose policy limits have been used up under all motor vehicle bodily injury liability insurance policies or bonds applicable at the time of the accident [citations omitted]."

The intentions of the drafters of Regulation 35-D should be made clearer by amending the endorsement to clearly and accurately state whether the consent to settle and protection of subrogation rights provisions are intended to include settlements with non-motor vehicle tortfeasors.

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1. See 11 NYCRR §60-2.3, et seq., effective Oct. 1, 1993.

2. See Dachs, N. and Dachs, J., "The Uninsured Motorist," NYLJ, Dec. 11, 1990; "Underinsured Motorist Coverage—Update," July 9, 1991; "Pinpointing Potential Pitfalls in Proposed Regulation 35-D," Dec. 10, 1991; "SUM Regulation Redux," June 9, 1992; " New Rules on 'SUM' Coverage and Lost Earnings" Sept. 8, 1992; "The Latest on Regulation 35-D" Nov. 10, 1992; "Regulation 35-D—A Reality at Last," Sept. 14, 1993; "Regulation 35-D: Prospective or Retroactive?" Jan. 10, 1995; "The Revised Mandatory Uninsured Motorist Endorsement," Dec. 9, 1996; "Revised Uninsured Motorists Endorsement—Part II," Jan. 14, 1997.

3. See *Public Service Mutual Ins. Co. v. Katcher*, 36 NY2d 295 (1975); *Askey v. General Accident Fire & Life Assurance Corp.*, 30 AD2d 632 (4th Dept. 1968), affd. 24 NY2d 937 (1969).

4. See *Michigan Mut. Ins. Co. v. Miller*, 170 AD2d 102 (2d Dept. 1991); *Automobile Ins. Co. v. Stillway*, 165 AD2d 572 (1st Dept. 1991).

5. See 11 NYCRR §60-2.0(c) ("Preamble").

6. See *S'Dao v. National Grange Mutual Ins. Co.*, 87 NY2d 855 (1995); see also, *Colonial Penn Ins. Co. v. Salti*, 84 AD2d 350 (1st Dept. 1982); *Passaro v. Metropolitan Prop. & Liab. Ins. Co.*, 128 Misc.2d 21 (Sup. Ct. Queens Co. 1985), affd. 124 AD2d 647 (2d Dept. 1986); *Aetna Cas. & Sur. Co. v. Gourdet*, NYLJ, December 28, 1996, p. 33, col. 3 (Sup. Ct. Nassau Co.); *Valley Forge Ins. Co. v. O'Brien*, NYLJ, April 22, 1993, p. 28, col. 6 (Sup. Ct. Nassau Co.); but see *Garcia v. Mercado*, 194 AD2d 334 (1st Dept. 1993).

7. See *Maurizzio v. Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 540 NYS2d 982 (1989); *Prudential Prop. & Cas. Ins. Co. v. Szeli*, 193 AD2d 748 (2d Dept. 1993), revd. on other grounds, 83 NY2d 681 (1994); *Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*, 93 NY2d 487 (1999); *Liberty Mutual Ins. Co. v. D'Antonio*, 266 AD2d 393 (2d Dept. 1999); *Allstate Ins. Co. v. DeMorato*, 262 AD2d 557 (2d Dept. 1999); *State Farm Mut. Ins. Co. v. Amaroso*, 208 AD2d 545 (2d Dept. 1994); *State Farm Mut. Auto. Ins. Co. v. Roth*, 206 AD2d 376 (2d Dept. 1994); *Prudential Prop. & Cas. Ins. Co. v. Cooper*, 192 AD2d 935 (3d Dept. 1993).

8. See *Automobile Ins. Co. v. Stillway*, 165 AD2d 572 (1st Dept. 1991); *Nationwide Ins. Co. v. Figliomeni*, 147 AD2d 942 (4th Dept. 1989).

9. *General Casualty Co. v. Guidice*, Sup. Ct. Nassau Co., Index No. 016607/04.

10. See Dachs, N. and Dachs, J., "The Catch in Underinsured Motorist Coverage," NYLJ, June 11, 1991.

11. See also, *Huth v. Nationwide Ins. Co.*, 148 Misc.2d 1003 (Sup. Ct. Suffolk Co. 1990); *Allstate Ins. Co. v. Sullivan*, 230 AD2d 232 (2d Dept. 1996).

12. See *ATM One, LLC v. Landaverde*, 307 AD2d 922 (2d Dept. 2003) ["When the proper construction to be placed on a regulation or statute is open to debate, we should adopt that construction which more reliably tends to avoid results which are absurd, unreasonable or mischievous" (citations and internal quotation marks omitted)].

13. *Assurance Company of America v. Fricioni*, Sup. Ct. Kings Co., Index No. 14888/04.