BY NORMAN H. DACHS AND JONATHAN A. DACHS

The 'Top 10'/Insolvency and the PMV Fund

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We are privileged once again to report (albeit somewhat belatedly) upon the state Insurance Department's "Annual Ranking of Automobile Insurance Complaints."

In the second part of this article, we discuss recent case law developments with respect to the definition of an "uninsured" motor vehicle—specifically the issue of the insolvency of the tortfeasor's insurer in cases involving the Public Motor Vehicle (PMV) Fund.

2006 Annual Ranking

The 2006 Annual Ranking of Automobile Insurance Complaints, which is based upon data for the calendar year 2005, ranks 45 automobile insurance companies or groups of companies by the number of private passenger automobile insurance complaints upheld against them and closed by the Insurance Department in 2005, divided by their average 2004-2005 average private passenger automobile premium volume in New York State.

In 2005, the Insurance Department's Consumer Services Bureau closed a total of 9,939 private passenger auto insurance complaints (down from 13,023 the year before), of which 1,600 (down from 2,127) were upheld. Neither commercial auto complaints nor complaints made directly to the insurer are included in determining the complaint ratios. An upheld complaint occurs when the department agrees with a consumer that an auto insurer made an inappropriate decision. Typical complaints are those involving monetary disputes, such as the value of a total loss. Complaints about policy terminations and failures to pay claims are also common.

The 2005 average complaint ratio for all companies or groups, including those with less than $10 million in premium, was 0.15 per $1 million in premiums (down from 0.20 in 2004.) This equates to approximately one upheld complaint for every $6.6 million in premium. This average ratio was derived by dividing the number of complaints upheld against all companies in 2005 (1,600) by the average premium for 2004-2005 for all companies ($10,485.9 million, or $10.5 billion).

Most of the "Top 10" (best) ranked insurers were relatively small companies. The only two with over $100 million in premiums were Progressive and Amica Mutual. Of the top 10 finishers in 2005, three—Electric, Amica Mutual and Preferred Mutual—were in the top 10 in 2004 as well. Of the three-largest New York State auto insurers, both Allstate and State Farm showed improvement in their rankings. Allstate moved from a rank of 30th in 2004 to 26th in 2005; State Farm improved from 20th to 12th position. With a complaint ratio of 0.08, State Farm ranked the best among the state's biggest three insurers. State Farm has finished in the top 25 in each of the past four annual rankings.

Berkshire-Hathaway (GEICO) became the largest private-passenger auto insurer in New York based on 2004-2005 average premium, with a 17.9 percent market share (increased from 15.8 percent the year before). Overall, the top 10 auto insurers comprised 77.6 percent of the market in the current ranking, up from 76.7 percent the previous year.

Also of note is the performance of several companies that demonstrated great improvement in their performance over the prior year. For example, Atlantic, which had ranked 27th in 2004, improved in 2005 to 1st place. Other impressive improvements were made by Fairfax Financial, which went from 19th in 2004 to 3rd in 2005, Erie, which improved from 24th to 6th, and Mercury General, which went from 39th to 20th.

Tables

Table 1 lists the "Top 10," i.e., the 10 companies with the fewest complaints against them, or, the 10-best performers of 2005. As noted, this list contains three repeat performers from last year—Electric, Amica, and Preferred Mutual. Indeed, these three companies finished in the top 10 in each of the previous two annual rankings. For purposes of comparison, companies' rankings in 2004 and 2003 are also shown. Companies listed in boldface are notable for having finished among the top 25 auto insurers in each of the past three years.

Table 2 reveals the opposite side of the spectrum; it lists the ten auto insurers with the worst performance record for the calendar year 2005, i.e., the "Bottom 10". In this chart, the company with the highest ratio is ranked first; the company with the lowest ratio is ranked last. Thus, those ranked at the top of this list had the worst performance. These companies' rankings in 2004 and 2003 are also shown. Companies listed in boldface are notable for having ranked among the 10 lowest in each of the past three years. Five of the insurers with the highest complaint ratios—Infinity, Long Island Ins. Co., Tri-State Consumer, Safeco and White Mountains—were carryovers from the previous year's "Bottom 10."

Table 3 lists the performance records of the 10 largest auto insurers in New York State. As can be seen, 77.6 percent of auto insurance consumers purchase their insurance from one of these 10 companies. State Farm was the only insurer among the four-largest insurers to lose market share over the year, falling from a 12.1 percent share to a 10.8 percent share. Several smaller insurers among the 10-largest auto insurers also lost market share, including St. Paul Travelers, Central Services and Liberty Mutual.

The Insurance Department's annual Consumers Guide to Automobile Insurance contains representative price information for 25 New York auto insurers in addition to the Assigned Risk Plan. Copies of the guide and the annual ranking may be obtained free of charge by calling the department's toll-free telephone number (800) 342-3736. In addition, both publications are accessible

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on the Internet at the department's Web site address: www.ins.state.ny.us.

Table 1

The Top 10
The 10 Best Performers of 2005

	Company Or Group	2005 Complaint Ratio	2005 Ranking	2004 Ranking	2003 Ranking
1	Atlantic Companies	0	1/45	27/48	6/49
2	Eveready	0	2/45	14/48	13/49
3	Fairfax Financial	0	3/45	19/48	43/49
4	Amica Mutual	0.01	4/45	3/48	1/49
5	Response Ins. Group	0.02	5/45	12/48	11/49
6	Erie Ins. Group	0.03	6/45	24/48	3/49
7	Preferred Mutual	0.04	7/45	5/48	4/49
8	Merchants Mutual	0.04	8/45	17/48	18/49
9	Electric Ins. Group	0.06	9/45	2/48	8/49
10	Progressive Ins. Group	0.07	10/45	16/48	19/49

Source: New York State Insurance Department

Table 2

The Bottom 10
The 10 Worst Performers of 2005

	Company Or Group	2005 Complaint Ratio	2005 Ranking	2004 Ranking	2003 Ranking
1	Long Island Ins. Co.	8.24	45/45	46/48	-----
2	Tri-State Consumer	1.39	44/45	44/48	35/49
3	Infinity Ins. Co.	1.31	43/45	47/48	47/49
4	Credit Suisse Group	0.84	42/45	38/48	5/49
5	Hanover Group	0.56	41/45	-----	----
6	American International Group	0.36	40/45	33/48	40/49
7	White Mountains Group	0.3	39/45	41/48	36/49
8	Safeco Ins. Group	0.28	38/45	43/48	44/49
9	Zurich Ins. Group	0.21	37/45	37/48	39/49
10	State-Wide Ins. Group	0.2	36/45	36/48	33/49

Table 3

The Big 10:
The Largest Auto Insurers in New York

	Company or Group	2005 Ranking	2005 Complaint Ratio	2004-2005 Average Premium (In Millions)	Market Share
1	Berkshire-Hathaway/ (GEICO)	34/45	0.19	$1,879.80	17.90%
2	Allstate	26/35	0.13	$1,813.50	17.30%
3	State Farm	12/45	0.08	$1,132.20	10.80%
4	Progressive	10/45	0.07	$857.40	8.20%
5	St. Paul Travelers	27/45	0.13	$617.90	5.90%
6	Liberty Mutual	13/45	0.08	$580.10	5.50%
7	Central Services	11/45	0.07	$345.20	3.30%
8	White Mountains	39/45	0.3	$317.10	3.00%
9	Nationwide	21/45	0.11	$315.10	3.00%
10	Metropolitan	28/45	0.13	$278.80	2.70%
The "Big Ten"				$8,137.10	77.60%
Total (all companies, including those with less than $10 million premiums)				$10,485.90	100.00%

Insolvency and the PMV Fund

One of the more interesting questions in the context of uninsured or supplementary uninsured motorist coverage involves the issue of the insolvency of the tortfeasor's insurer. Although the mandatory Uninsured Motorists (UM) endorsements contain no specific reference to insolvency in their definitions of an "uninsured" vehicle, the Supplementary Uninsured Motorists (SUM) endorsement prescribed by Regulation 35-D, on the other hand, specifically includes within the definition of an "uninsured" vehicle a vehicle whose insurer "is or becomes insolvent." (See 11 NYCRR §60-2.3[c][c][iii]).

In cases decided prior to the promulgation of Regulation 35-D (effective Oct. 1, 1993), the question of whether the insolvency of a vehicle's insurer rendered that vehicle "uninsured" depended upon the distinction between insolvencies that were covered by a security fund and those that were not so covered.

Simply put, the statutory uninsured motorist scheme presupposed that no other liability coverage, such as that provided by a security fund, existed to compensate the innocent victim of a motor vehicle accident. Thus, if, in fact, a security fund was inapplicable, as would be the case if the insolvent insurer was not licensed to do business in the state of New York, and was, therefore, not required to, and did not, contribute to such a fund, the insolvency of the insurer and resultant failure to defend and/or indemnify its insured would be deemed a "denial of coverage" or "disclaimer of liability," thus invoking the UM coverage. On the other hand, where the offending vehicle is insured by a domestic insurer, which would be covered by the security fund, which, in turn, would assume the obligations owed to the insured for the full amount of the policy, up to $1 milion, the insolvency of such an insurer would not result in a UM claim because the injured party could look to the fund for compensation. See *State-Wide Ins. Co. v. Curry,* 43 NY2d 298 (1977).

The 'Morgan' Rule

In *American Manufacturers Mut. Ins. Co. v. Morgan,* 296 AD2d 491 (2d Dept. 2000), the court held that under Regulation 35-D, any situation in which the tortfeasor's insurer has become insolvent (in liquidation)—whether covered by the security fund or not—results in an "uninsured" motorist situation, entitling the claimant to pursue a UM claim. Pursuant to *Morgan,* in a Regulation 35-D case involving an insurer insolvency, the claimant can proceed directly to SUM arbitration and if the SUM carrier wishes to pursue a subrogation claim against the tortfeasor and the insolvent insurer, it, rather than the claimant, would then have to pursue a claim against the security fund, and be subject to the delays and risks of nonpayment associated with such claims in liquidation.

In several cases that followed *Morgan*, the courts clarified that the *Morgan* rule is limited to Regulation 35-D SUM endorsement cases, and that in non-Regulation 35-D, UM cases, i.e., cases involving the basic, mandatory UM endorsement, the old rule still applies. See *Metropolitan Prop. & Cas. Ins. Co. v. Carpentier,* 7 AD3d 627 (2d Dept. 2004); *Eagle Ins. Co. v. Persaud,* 1 AD3d 356 (2d Dept. 2003); *Eagle Ins. Co. v. St. Julian,* 297 AD2d 737 (2d Dept. 2002); *Allcity Ins. Co. v. Cedena,* 6 Misc.3d 1007(A) (Sup. Ct. Kings Co. 2004) (Schmidt, J.).

'Denials' by the Fund

In *Eagle Ins. Co. v. Hamilton,* 16 AD3d 498 (2d Dept. 2005), the court held that where an insured policyholder is entitled to UM coverage,

but not SUM coverage, from his or her own insurer, and the alleged tortfeasor's insurer has paid into the New York Public Motor Vehicle Liability Security Fund—(the PMV fund, which is codified at Insurance Law §7604 and created to protect policyholders from the predicament of being held liable for damages because their insurer was financially unable to provide the protection they purchased)—but has been declared insolvent after the underlying accident, the insured's recourse is not against the UM carrier, but against the PMV Fund via the superintendent of Insurance, pursuant to Insurance Law Article 74. See also, *Agway v. DeLeon*, 5 Misc3d 1018(A) (Sup. Ct. Queens Co. 2004) (Rios, J.).

'Eagle Ins.' held that where an insured policyholder is entitled to UM coverage, but not SUM coverage, and the alleged tortfeasor's insurer has paid into the PMV Fund, but has been declared insolvent..., the insured's recourse is not against the UM carrier, but against the PMV Fund.

The *Hamilton* court further discussed the question of what is to occur if the superintendent of Insurance, as administrator of the PMV Fund, denies the claimant recovery from the fund. Specifically, the court inquired whether this would constitute a denial of coverage within the meaning of Ins. L. §3420(f)(1), thereby triggering the insured's right to UM coverage from his own carrier. Insofar as the only evidence in the record in that case on the issue of whether the superintendent of Insurance was denying the claim was a letter from the superintendent stating that coverage from the PMV Fund was being denied "at this time" due to "financial strain," the court referred the question of whether such letter constituted a denial for a hearing, at which the superintendent would be joined as a party and invited to participate and present evidence.

In *American Transit Ins. Co. v. Barger*, 13 Misc3d 386 (Sup. Ct. N.Y. Co. 2006), the Liquidation Bureau sent out a similar letter with respect to the status of Legion Insurance Company as insolvent and in liquidation and noting that the PMV Fund, which would otherwise provide coverage, was "financially strained." Justice Paul G. Feinman held that the letter from the Liquidation Bureau did not constitute a disclaimer of liability or a denial of coverage. As explained by the court, "The letter states in part that if the claim is on the trial calendar, the Liquidation Bureau will attempt to settle the claim. The very text of the letter reveals the availability of compensation from the Liquidation Bureau and the PMV Fund."

Thus, according to the court, the remedy of the claimant, who did not purchase SUM coverage, was with the PMV Fund and not with his uninsured motorist carrier.

Recent Decisions

Most recently, in *Progressive Ins. Co. v. Elias*, 15 Misc3d 1113(A) (Sup. Ct. Queens Co. 2007) (decided March 28, 2007), the issue before the court was whether a letter from the New York State Liquidation Bureau advising a claimant that the PMV Fund was "financially strained" constitutes a denial of coverage within the meaning of Ins. L. §3420(f)(1). Following a hearing at which the parties, including the superintendent of Insurance, relied upon their evidentiary submissions, which included a copy of the Liquidation Bureau's letter, and an affidavit from the supervisor of the

PMV Fund, with copies of the fund's income and disbursement reports for the pertinent period, and after reciting the history of the PMV Fund and the pre- and post-Regulation 35-D case law on the issue of insolvency and UM coverage, Justice Jaime A. Rios noted that insofar as the insured did not purchase SUM coverage, but, rather, only mandatory, basic UM coverage, and the tortfeasor's insolvent insurer paid into the PMV Fund, the claimant was required to seek payment from the fund rather than her own insurer unless the insured could establish that the fund "is denying them coverage based upon its inability to pay any allowed claims."

The court went on dispositively to hold that "notwithstanding the 'financial strain' language in the letter of June 27, 2005, the letter from the Liquidation Bureau/PMV Fund, without more, does not demonstrate an inability of the PMV Fund to pay allowed claims. To the contrary, the letter confirms that the claim is a covered claim and advises the Reliance insured...of a certain set of procedures to follow in the event a claim is pursued against him."

Indeed, the court noted that the fund supervisor's affidavit "sets forth that all allowed claims applied for payment out of the PMV Fund by the New York State Supreme Court are processed and paid by the Liquidation Bureau in order of receipt" and that, based upon that affidavit, "it appears that as of Dec. 31, 2006, the PMV fund had a balance of $113,352, unpaid claim obligations of $3,464,353, and the claims next in line to be paid by the PMV fund were received by the bureau on Feb. 1, 2006.

The court further noted that "Pursuant to Ins. L. §7606, insurers issuing insurance policies or surety bonds described in VTL §370 shall continue to make payments of three percent of all net direct written premiums of such policies to the PMV Fund on a quarterly basis until the net value of the PMV Fund equals 15 percent of the outstanding claim reserves of all authorized insurers contributing to the PMV Fund." Clearly, the court stated, the PMV Fund did not have sufficient funds to pay all pending claims at once. However, the fund supervisor's affidavit and annexed financial documents demonstrated that "despite some delay, allowed claims are being paid." Thus, since the evidence failed to demonstrate that the claimants had been denied compensation from the PMV Fund due to its inability to pay, they were "unable to establish that the [tortfeasor's] vehicle was an uninsured motor vehicle pursuant to Insurance Law §3420(f)(1) and, thus, are precluded from seeking UM arbitration from Progressive."

See also, to same effect, *Integon National Ins. Co. v. Cittadino*, Sup. Ct. Queens Co., Index No. 15836/04 (Rios, J.), decided March 28, 2007 (As of Aug. 24, 2006, the PMV Fund had a balance of $2,361,054, unpaid claim obligations of $6,246,404, and the claims next in line to be paid from the PMV Fund were received by the bureau on July 11, 2005).