Insurers as 'Necessary' Additional Respondents

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During the past 25 years that we have had the honor and pleasure of writing this column together, we have always endeavored to answer questions of interest to our readers. In this month's column, we find ourselves asking a question for which we do not have a definitive answer—does an uninsured motorist (UM) or supplementary uninsured motorist (SUM) insurer actually have standing and/or authority to name the alleged tortfeasor's purported insurer as a party to the proceeding, in order to obtain a determination regarding the status of that other insurer's policy, and, if not, does it matter?

Question Presented

Our inquiry into this issue was prompted by a recent posting by Dan Kohane of Hurwitz & Fine, in his LinkedIn "New York Insurance" law blog, where he observed that it is an almost daily occurrence in the Second Department, and, perhaps elsewhere, that an insurer served with a demand for arbitration of a UM claim based upon a denial of coverage by the tortfeasor's carrier, believing that the tortfeasor is not, in fact, uninsured, brings an application to stay arbitration under Article 75 within 20 days, and names tortfeasor's carrier as a (proposed) additional respondent in the special proceeding. In Kohane's words, "It has become the 'lore' around the land, and the common law in at least the [Second] Department that it is not only appropriate, but downright mandatory, that the UM carrier add the tortfeasor's carrier to the mix as a necessary party." The question asked by Kohane and re-asked by us, is, however, whether this is, in fact, appropriate and correct.

Necessary Parties?

CPLR §1001 mandates that joinder of parties is necessary in the following circumstances: (1) where that party is necessary if complete relief is to be accorded between the persons who are parties to the action; or (2) where the unnamed party might be inequitably affected by a judgment in the action (CPLR 1001[a]). The principal justification for the requirement of joining certain parties is to avoid multiplicity of actions, and to protect those parties who have a material interest in the subject matter.[1]

> After 'Lang,' would the UM/SUM carrier have standing to join the tortfeasor's insurer in an Article 75 proceeding to stay arbitration?

Consistent with this philosophy, when an insurer against whom a UM or SUM claim has been filed receives a demand for arbitration thereof and seeks to stay such arbitration upon grounds such as that the tortfeasor's vehicle was not "uninsured," that the tortfeasor's insurer's attempted cancellation of the tortfeasor's policy was improper, or that its purported disclaimer is invalid, the courts routinely will set the matter down for a preliminary hearing to determine the issues, if any, raised by the petition.

Because complete relief cannot be accorded to the parties already in the proceeding for the simple reason that the tortfeasor's insurer will not be bound by any determination that is adverse to it, the courts invariably, and most commonly in response to a specific request made by the UM/SUM carrier, direct that said insurer (as well as the tortfeasor[s]) be joined as additional respondents. Examples of this methodology abound.[2]

A Question of Standing

More than seven years ago, the Court of Appeals, in *Lang v. Hanover Ins.*, 3 NY3d 350 (2004), took the position that no one but the insured was entitled to bring a direct action against his or her insurer, and that Insurance Law §3420[a][1] "grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances—the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days." Thus, not even a declaratory judgment, which seeks only a judicial determination, rather than money damages or other coercive relief, is allowed by the injured party until the injured party has obtained a judgment in the underlying personal injury action.

The question naturally arises, after *Lang*, whether, or why, the UM/SUM carrier would have standing to join the tortfeasor's insurer in an Article 75 proceeding to stay arbitration, or, for that matter, in a breach of contract action to recover UM/SUM benefits? To again quote Kohane: "In whose shoes is [the UM/SUM carrier] standing?... Do these cases survive *Lang* or are they vestiges of *Lang*?"

Notwithstanding the *Lang* prohibition, clearly announced by the Court of Appeals, the courts—particularly the Second Department—have continued, post-*Lang*, to direct in Article 75 proceedings to stay arbitration that tortfeasors' insurers be joined "as necessary parties."[3] Only the Third Department has, to date, recognized *Lang's* impact upon this issue.

Third Department Case

In *Symonds v. Progressive Ins.*, 80 AD3d 1046 (3d Dept. 2011), the Third Department, citing to *Lang*, supra, held that the injured party's carrier, which had been sued in a breach of contract action for failure to pay SUM benefits, » Page 9

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lacked standing to bring a third-party action against the tortfeasor's insurer for a declaration that the latter's policy was in full force and effect at the time of the accident. As the court explained, "since defendant, as plaintiff's subrogee, stands in the shoes of its subrogor and is subject to any claims or defenses which may be raised against the subrogor, and since plaintiffs have not obtained a judgment against [the tortfeasor], defendant does not have standing to seek a declaratory judgment against [the tortfeasor's] carrier...."

To date, *Symonds* has not been cited in any reported decision by any other court. It is also worth emphasizing that *Symonds* involved a third-party action in the context of a breach of contract lawsuit, rather than an Article 75 petition to stay arbitration of a UM/SUM claim naming an additional respondent—although it is not at all clear whether that distinction should make any difference at all.

Thoughtful Recent Decision

A very recent decision by Justice Patrick NeMoyer, of the Supreme Court, Erie County, has brought this topic into focus once again. In *GEICO General Ins. v. Cruz and A. Central Ins.*, 34 Misc.3d 1201(A) (Sup. Ct. Erie Co., Dec. 21, 2011), the court suggested that an insurer served with a demand for arbitration should not be permitted to join the tortfeasor as an additional respondent in a proceeding to stay arbitration. While acknowledging that he was bound to "yield to the dictates of the Appellate Courts," which, as noted above, consistently have allowed such procedure, NeMoyer nevertheless expressed "serious doubts as to the procedural and substantive sense of allowing a UM insurer in this context to challenge another insurer's disclaimer of coverage under a policy different from the one under which the arbitration is being sought." As he explained, "At bottom, this Court cannot understand why, upon being served with a demand for arbitration initiating a claim for certain substantive relief by party A pursuant to a contract between party A and B, party B would think it appropriate to seek unrelated determinations or relief...against party C, a stranger to both the A/B contract and to any substantive claim and arbitration request that might arise thereunder."

In NeMoyer's view, the issue of the validity of A. Central's disclaimer under a different policy had nothing at all to do with whether the claimant, Cyd Cruz, possessed or lacked "a present statutory or contractual right to arbitrate and recover on her UM claim against GEICO." The governing statute, regulations and/or pertinent policy explicitly give the claimant the right to seek arbitration of a UM claim under appropriate circumstances, including where the tortfeasor's liability carrier denied or disclaimed coverage after the accident.

However, as NeMoyer noted, "Neither the statute/regulation nor the insurance policy makes any reference to the validity or invalidity of any such disclaimer or denial of coverage, its timeliness or untimeliness, or any other such factor as a basis for either the denial of access to the arbitration forum or for the rejection of the UM claim as a substantive matter." Moreover, he noted, "even if A. Central's disclaimer of coverage is to be deemed invalid, that invalidity would not alter the fact that the tortfeasor's vehicle was in fact covered by insurance on the date of the accident and that such coverage was subsequently disclaimed. Those two circumstances, in conjunction, provide all necessary and sufficient support for Cruz's demand for arbitration against GEICO. Thus, in seeking to stay arbitration on the ground that A. Central's disclaimer of coverage was invalid, GEICO raises an issue not at all logically responsive—and thus completely immaterial—to Cruz's demand for arbitration and to her substantive right to UM coverage."

Based upon the foregoing, NeMoyer stated that "this Court believes it inappropriate for two insurers to use a proceeding to stay arbitration as either a 'poor man's' declaratory judgment action or as a substitute for an enforcement-of-judgment-against-insurer suit pursuant to Insurance Law §3420(a)(2) and (b)(3). In that latter regard, the Court notes that permitting the two insurers to battle out their issues as part of this application to stay arbitration of the UM claim seems to run afoul of explicit limitations on standing set forth in Insurance Law §3420(a)(2) (see also §3420[b][i]-[3]). That statute precludes an injured party or his subrogated insurer from proceeding against the tortfeasor's insurer unless and until a judgment has been obtained against the tortfeasor and remains unsatisfied for a specified time.

...To put the matter in simplest terms, the supposed needs of and or evident desires of the two insurers for a current resolution of their (potential) loss-shifting dispute should not trump the (immediate and unequivocal) arbitration rights of Cruz as GEICO's insured."[4]

Prior Precedent

Whatever one's immediate impression of NeMoyer's dicta, it should be noted that it is not without precedent. Indeed, the concept of allowing the SUM claimant to recover benefits irrespective of, and/or prior to, the resolution of issues between insurers has an antecedent in the jurisprudence of this state.

In this regard, a bit of history is in order. Until the Appellate Division, Second Department's holding in *Matter of American Manufacturers Mutual Ins. v. Morgan*, 296 AD2d 491 (2d Dept. 2002) (discussed below), the issue was not open to debate in light of the Court of Appeals' much earlier holding in *MVAIC v. Malone*, 16 NY2d 1027 (1965).[5]

In *Malone*, supra, the Second Department had affirmed an order denying MVAIC's petition to stay arbitration, rejecting its contention that "before respondent is entitled to proceed with the arbitration, a preliminary judicial determination of the validity of the disclaimer [by the tortfeasor's insurer] must be made" 19 AD2d 542 (2d Dept. 1963). The court noted, "Since there is no requirement in the statute [citation omitted] that the disclaimer be a valid one, we reject petitioner's contention that, as a condition precedent to arbitration, the insured must first obtain a judicial determination of the right of the insurer of the motorist allegedly responsible for the accident to disclaim validity." 19 AD2d at 543.

The Court of Appeals reversed, however, and granted the petition, holding that "before being required to go to arbitration on the question of liability and damage the insurer (MVAIC here) has a right to a preliminary trial on the question of whether or not the alleged tort-feasor was or was not insured," i.e., whether the tortfeasor's policy failed to take effect or was validly canceled.

'Morgan'

Morgan, supra, 37 years later, involved a provision under the SUM endorsement that defined an "uninsured motor vehicle" to include a vehicle that had an applicable bodily injury liability insurance coverage or bond at the time of the accident, but "the insurer writing such insurance coverage or bond...is or becomes insolvent." 11 NYCRR §60-2.3(c)(3)(iii).[6] In that case, where the tortfeasor's insurer did, in fact, become insolvent, the court held that once such insolvency was shown, the claimant was entitled to proceed to arbitration notwithstanding that the Motor Vehicle Liability Security Fund provided protection for accident victims where the liability insurer is insolvent. In so holding, the court distinguished its seemingly contrary decision in *State-Wide Ins. v. Curry*, 43 NY2d 298 (1977), on the basis that *Curry* involved the mandatory UM coverage, while *Morgan* involved the Regulation 35-D SUM endorsement, which provided a "greater breadth of SUM coverage."

Thus, in *Morgan*, the SUM carrier was required to pay the claim and then seek to recoup its loss from the security fund, if so inclined. As stated by the court, quoting the Superintendent of Insurance, "The individual insured for supplementary uninsured motorist coverage should not be required to wait for a recovery from the security fund on behalf of the insolvent insurer. Since the SUM insurer has a subrogation claim against the insolvent carrier, the Security Fund would still remain liable, but the insured would be provided a more prompt recovery from his or her own insurer (N.Y. Reg., July 8, 1992, at 10)."

By parity of reason, it may reasonably be argued that because the regulation defines an "uninsured motor vehicle" to include one whose insurer "denies coverage," and does not specify that the insurer's denial of coverage must be valid, the claimant has satisfied his or her burden once it has been demonstrated that the insurer denied coverage—valid or not—and that it is up to the SUM insurer to seek reimbursement from the tortfeasor's insurer after it has satisfied its obligation to the SUM claimant.[7]

Conclusion

There is much that can be said on both sides of this issue. Certainly, the concept of providing claimants a fast, efficient, and economical method for resolving SUM disputes is a laudable goal, and certainly there is support in the case law and statutory/regulatory language and analysis for the notion that claimants should not be in any position other than first in line. Equally laudable, perhaps, are the interests of judicial and party economy, given force by the "necessary party" provisions of the CPLR, noted above, which dictate that it is in everyone's best interest to have all of these issues resolved at one time, in one proceeding, in a manner that will be binding upon all concerned.

As the insurers argued in *GEICO v. Cruz*, allowing the SUM car-

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Justice Patrick NeMoyer in 'Cruz' stated, "this Court believes it inappropriate for two insurers to use a proceeding to stay arbitration as either a 'poor man's' declaratory judgment action or as a substitute for an enforcement-of-judgment-against-insurer suit pursuant to Insurance Law §3420(a)(2) and (b)(3).

rier and the tortfeasor's carrier to litigate in the context of the stay proceeding the validity of the disclaimer of coverage "will help the insurers avoid a needless circuity of action." If the court does not address the validity of the disclaimer in that procedural context, and if it does not stay arbitration on that basis, the petitioner carrier must: (1) await the outcome of the arbitration before (2) recovering on its subrogation claim against the tortfeasor, and then (3) suing to enforce any judgment directly against the tortfeasor insurer (only then and thereby litigating the validity of the disclaimer).

The possibility of inconsistent determinations also exists under this approach. Of course, on the other hand (as pointed out by NeMoyer), several other potential scenarios exist under which there would be no multiplicity of actions, such as where the SUM claimant does not prevail at the arbitration, or where the SUM carrier does not prevail on its subrogation claim against the tortfeasor. In such instances, the need for the court to entertain an inter-insurer action or dispute, or otherwise address the validity of the disclaimer would be eliminated.

In view of the foregoing, perhaps a vote for the status quo is in order. To the extent that the system that has been in use for so many years "ain't broke," it might be best not to try to "fix it." To implode the current system based upon a purist view of the law and purpose of the statute and regulation, as opposed to well-accepted and longstanding practice and procedure might not be a good thing for either policyholders or insurers.

Policyholders should not be placed in jeopardy of losing coverage because of inconsistent decisions, and carriers should not be placed in the precarious position of having to "pay and chase" where there may, in fact, be nobody to chase. Forcing an SUM carrier to pay the claim, bring a subrogation action against the tortfeasor, take judgment and then bring a direct action against the tortfeasor's carrier under Ins. L. §3420(a) does appear to constitute a waste of money and judicial resources.

Lang, or not, perhaps the current system is best left alone. Whether the clarion call sounded by NeMoyer and by the Third Department will be picked up and responded to by other courts, or by the Legislature, remains to be seen.

1. See *Castaways Motel v. Schuyler*, 24 NY2d 120, 125 (1969) (non-parties are "indispensable" where the determination of the court will adversely affect their rights); *Joanne S. v. Carey*, 115 AD2d 4, 7 (1st Dept. 1986) ("The primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter").

2. See e.g., *Allstate Ins. v. Anderson*, 303 AD2d 496 (2d Dept. 2003) (Allstate commenced proceeding to permanently stay arbitration of UM claim on basis that offending vehicle was insured by Nationwide, or, in the alternative, to add Nationwide as an additional respondent to the proceeding and to obtain a framed issue hearing. The court found that Allstate made a prima facie showing of coverage by Nationwide, and that Nationwide's disclaimer letter, submitted by the claimant in opposition to the Petition, raised issues of fact as to whether Nationwide timely and validly disclaimed. "Thus, Nationwide must be joined as a party respondent to the proceeding and the matter remanded to the Supreme Court... for an evidentiary hearing to resolve these issues"); *Eagle Ins. v. Villegas*, 307 AD2d 879 (1st Dept. 2003) ("The Petition should not have been granted without first joining [the alleged insurers for offending vehicle and operator, as well as the individual owner and operator] as necessary parties, affording each of those parties an opportunity to submit competent evidence, and conducting an evidentiary hearing in order to adequately determine the factual basis and validity of [the] asserted disclaimer"); *Atlantic Mutual Ins. v. Matera*, 304 AD2d 572 (2d Dept. 2003); *Eagle Ins. v. Lucero*, 276 AD2d 695 (2d Dept. 2000).

3. See *Government Employees Ins. v. Morris*, 83 AD3d 709, (2d Dept. 2011) ("...matter remitted to the Supreme Court...for joinder of the proposed additional respondents as necessary parties."]; *Victoria Select Ins. v. Munar*, 80 AD3d 707, (2d Dept. 2011) ("...the Supreme Court must direct the joinder of GEICO, Patricia Allen, and Timothy Allen (the tortfeasors) as necessary parties..."); *N.Y. Central Mutual Ins. v. Davalos*, 39 AD3d 654, (2d Dept. 2007) ("However, the court should have added Allstate Insurance and the owner and operator of the offending vehicle as additional respondents").

4. The court in *GEICO v. Cruz*, supra, went on to hold that A. Central's disclaimer was proper and valid, and, thus, denied GEICO's application for a permanent stay of arbitration.

5. See also, *Carlos v. MVAIC*, 17 NY2d 614 (1966); *Empire Mutual Ins. v. Stroud*, 36 NY2d 719 (1975).

6. The authors of this article participated in *American Manufacturers Mutual Ins. v. Morgan*, supra, as counsel for the respondent-respondent, Karen Morgan.

7. Indeed, that is precisely what Justice Edward W. McCarty, III, of the Supreme Court, Nassau County, held in *Phoenix Ins. v. Bepat*, N.O.R., Index No. 173/02 (Sup. Ct. Nassau Co., Nov. 23, 2002), a case involving the Regulation 35-D SUM Endorsement, in which the claimants (represented by the authors of this article) contended that merely by asserting and establishing that the offending vehicle's insurer had denied coverage to its insured for the subject accident, they had established their right to proceed to SUM arbitration, irrespective of the validity of the disclaimer. In a decision characterized in a news article in these pages as "a major departure from uninsured motorist procedural law" (see Jones, Leigh, "Preference Is Granted to SUM Policyholders," *NYLJ*, Oct. 28, 2002), McCarty, finding that there was "no discernible difference" between the issue addressed in *Morgan*, supra, i.e., the issue of insurer insolvency, and the issue of the validity of an offending vehicle's insurer's denial of coverage, insofar as in both cases a right of subrogation existed, denied the petition to stay and directed arbitration to proceed, holding that insurers that file petitions to stay arbitration on the basis of offending vehicle coverage should be ousted from the head of the line and, instead, put their demands behind those of policyholders with SUM coverage. "....A SUM respondent should not have to await a determination as to a disclaimer's validity when he or she has paid for the right not to." See also, *Travelers Indem. v. Ciambra*, 5 Misc.3d 643 (Sup. Ct. Nassau Co. 2004) (Winslow, J.).

It is also worth noting that the concept of "pay and chase" finds company under another aspect of SUM coverage, particularly where the tortfeasor is underinsured. In that context, if the SUM insurer believes that the underinsured tortfeasor has personal assets that may be available to satisfy a judgment in excess of policy limits and, therefore, declines to consent to a settlement in the amount of the tortfeasor's policy limit, the SUM insurer must "front" the amount that the SUM claimant might otherwise receive, and, thereafter, seek to recover that amount and the amount it is required to pay to its insured directly from the tortfeasor.