INSURANCE LAW

The SUM Offset/Reduction In Coverage Provision

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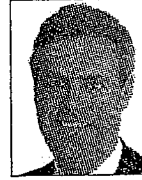

By **Norman H. Dachs** And **Jonathan A. Dachs**

A recent decision of the Appellate Division, Second Department, on the SUM "offset" or "reduction of coverage" issue could, if not read and analyzed carefully, lead to confusion regarding the types of payments/recoveries that may be included in the SUM carrier's offset or reduction under the "Supplementary Uninsured/Underinsured Motorists Endorsement—New York" prescribed by Insurance Department Regulation 35-D (11 NYCRR §60-2.3[e]). We, therefore, take this opportunity to provide our analysis of this case, *Liberty Mutual Ins. Co. v. Walker*, 84 AD3d 960 (2d Dept. 2011), as well as a brief historical perspective on the SUM offset/reduction in coverage provisions.

Historical Perspective

Prior to the promulgation of Regulation 35-D—the Insurance Department Regulation that introduced the prescribed SUM Endorsement, supplementary uninsured or underinsured motorist endorsements typically provided that the stated policy coverage limits would be reduced by "all sums paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible." Such policies also typically provided that any amounts otherwise payable for damages under this coverage would be reduced by "all sums paid or payable because of the 'bodily injury' under any of the following or similar law: (1) workers' compensation law; or (2) disability benefits law." Significant changes were made in the Regulation 35-D endorsement to both of these provisions.

Regulatory Changes

With respect to the latter offset or reduction in coverage, for Workers' Compensation/disability benefits, although the Court of Appeals in 1991, in *Valente v. Prudential Property & Casualty Ins. Co.*, 77 NY2d 894 (1991), upheld the validity and enforceability of the Workers' Compensation offset in the context of the voluntary, supplementary uninsured or underinsured motorist coverage, and allowed for the reduction in coverage by amounts paid or payable in Workers' Compensation benefits over and above the statutory mandated minimum coverage (then $10,000), in so holding, the Court suggested that any change in this state of the law must come from the Legislature. 77 NY2d at 896.

> By virtue of a quirk in the language of 'Liberty,' it is possible that its holding may be misconstrued and misapplied in future cases.

Thus, when Regulation 35-D was enacted two years later (in 1993), *Valente* was effectively overruled by the omission in the Limits of Liability and Maximum SUM Payments sections of the new, prescribed SUM endorsement of the offsets for benefits received under Workers' Compensation or disability benefits laws. The only reference to such laws in the prescribed Regulation 35-D SUM endorsement is contained in the separate "non-duplication" provision, which simply avoids duplicative payments for the same items or types of damage, but does not constitute an offset or reduction in coverage.

As to the former offset/reduction in coverage, for amounts received from the offending tortfeasor, a similar dramatic change was introduced with the promulgation of Regulation 35-D. In place of the former broadly stated offset or reduction for all sums paid by all persons or organizations who may be legally responsible for the claimant's bodily injuries, the new regulation provided in its "Maximum SUM Payments" condition (Condition 6), in much more limited language, that "Regardless of the number of insureds, our maximum payment under this SUM endorsement shall be the difference between: (a) the SUM limits [stated in the Declarations] and (b) *the motor vehicle bodily injury liability insurance or bond payments* received by the insured or the insured's legal representative, from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured [emphasis added]."

That the specific reference to "motor vehicle bodily injury liability insurance or bond payments" was intended by the drafters of the regulation to distinguish recoveries from parties responsible for the use or operation of a motor vehicle covered under a motor vehicle liability policy from other, non-motor vehicle, tortfeasors, such as, for example, dram shop defendants (bars), municipalities responsible for a defective traffic light or stop sign, or doctors who committed medical malpractice, is apparent not merely from the change in language noted above, but also from the numerous examples of SUM coverage set forth in the regulation and required to be set forth in written notices to new and renewal insureds in order to "illustrate the proper application of SUM coverage," all of which depict and demonstrate recoveries by the claimant from "the negligent owner or operator of the other motor vehicle" or the "other motor vehicle owner or operator" (11 NYCRR §60-2.2[b][1]-[4]).

'Liberty v. Walker'

In *Liberty Mutual Ins. Co. v. Walker*, supra, the claimant, » Page 8

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SUM Offset

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who had a $100,000 SUM policy with Liberty, was struck by a car as a pedestrian. The bodily injury coverage on the offending vehicle was $25,000. The claimant sued the owner and operator of the offending vehicle, as well as Verizon Communications Inc. and Verizon New York, which had trucks parked at the intersection where the accident took place, the placement of which presumably contributed to the accident. The claimant ultimately settled the underlying action for a total of $675,000—$25,000 from the vehicle owner/operator, and $650,000 from Verizon. Liberty Mutual consented to this settlement, but noted that "pursuant to the express terms of the SUM endorsement," because the claimant received an amount well in excess of her $100,000 SUM limits, she did not have a valid SUM claim.

The claimant thereafter demanded arbitration of her claim to SUM benefits under her Liberty policy. Liberty timely sought a stay, and the Supreme Court, Richmond County, granted the petition to stay arbitration, agreeing with Liberty that the offset/reduction in coverage provision in its SUM policy effectively eliminated its coverage obligations to the claimant.

In affirming the grant of a permanent stay of arbitration, the Second Department first observed that, as conceded by Liberty, the offending motorist was, in fact, an underinsured motorist, and that the claimant was not required to exhaust the coverage limits of all tortfeasors before her entitlement to submit a SUM claim was triggered, provided that she exhausted the full liability limits of at least one tortfeasor (see *S'Dao v. National Grange Mut. Ins. Co.*, 87 NY2d 853).

However, the court went on to note that the "pertinent issue here is not whether [the claimant] may submit a SUM claim as an initial matter, but whether any additional recovery is possible." The court then stated that "As the petitioner observes, paragraph six of the applicable SUM endorsement sets forth the petitioner's maximum payment under that endorsement as the difference between the SUM coverage limit, here $100,000, and the amounts 'received by the insured or the insured's legal representative, from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured.'"

Because in this case, the claimant "received a cumulative total of $675,000 'from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured,' well in excess of her $100,000 SUM coverage limit," the court concluded that "no further recovery was possible, and arbitration was rendered academic, as there was nothing to arbitrate [citations omitted]."

While this decision is clearly correct, and the result in this case is clearly proper under the terms of the applicable SUM endorsement because, in fact, both settlements actually came from "motor vehicle bodily injury liability insurance" policies, by virtue of a quirk in the language of the decision, it is possible that its holding may be misconstrued and misapplied in future cases. For reasons that we simply do not understand, in quoting Condition 6 of the SUM endorsement (maximum SUM payments), the court only quoted a portion of the pertinent provision, rather than the entire provision, which, as previously noted, actually includes the limiting language "the *motor vehicle bodily injury liability insurance or bond payments* received by the insured or the insured's legal representative, from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured." (emphasis added)

It is unclear why the court decided to omit the highlighted words, above, which are actually key in making this decision make sense. Although on the surface it may appear from *Liberty v. Walker* that any settlements from any types of tortfeasors/defendants are to be included in the SUM offset/reduction equation, the fact of the matter is that this rule and this result only apply to "motor vehicle bodily injury liability insurance" policies or bonds, and not to non-motor vehicle policies.

Condition 6 is, by its terms—its complete terms—applicable only to motor vehicle tortfeasors and motor vehicle liability insurance payments. Thus, if in *Liberty v. Walker*, instead of Verizon's liability and payments having arisen from its negligent parking and use of its trucks, they arose out of its negligence placement of telephone cables, the result in the case should have been, and we submit, would have been, different.

We have often espoused the critical importance of always reading the policy carefully in approaching any insurance law issue. To that important caveat, we can now add a new one: Always quote the pertinent policy provisions carefully and fully so as to avoid unnecessary confusion and/or misinterpretation.