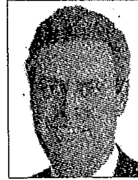
Expert Analysis

INSURANCE LAW

SUM Insurance Dilemma Hits the Mainstream



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

Usually confined to the province of legal treatises and journals (such as this one), the subject of Supplementary Uninsured Motorist (SUM) insurance has hit the mainstream press in a big way over the past several weeks. Prompted, or provoked, by a posting on one man's Tumblr account about the facts of a single SUM dispute in Maryland, SUM coverage quickly became a hot topic in newspaper articles, radio and television shows and blogs throughout the country. In this geographical area, attention has also been called to certain pending legislation relating to the purchase and available limits of this important form of coverage. One of the most interesting aspects of this newfound attention to SUM coverage—at least from our perspective—is the growing recognition and realization that it is one of the least understood, or most misunderstood, forms of insurance coverage around.

In this article we offer a brief summary of the now celebrated case of *Fisher v. Progressive*, which spawned the new focus on SUM coverage, and of the proposed statutory amendment to §3420(f)(2) of the New York Insurance Law, which has recently been submitted for Governor Andrew Cuomo's signature, and we offer some explanatory background into the nature, scope, purpose, and function of SUM coverage in this state, in the hopes of answering and clearing up some of the questions and misunderstandings raised by recent events and news stories.

The 'Progressive' Case

"The Auto Insurance Case That Blew Up on the Internet," as it was called in a recent *New York Times* article,[1] started out simply, but tragically, enough as a claim to recover damages for the wrongful death of a 24-year-old woman named Kaitlyn Fisher as a result of an intersection collision in Baltimore, Md., on June 19, 2010. As is often the case in such situations, there was some dispute about which driver had the traffic signal in their favor. The decedent, Fisher, had an auto policy issued by Progressive, with a bodily injury liability limit of $100,000 per person. That policy also provided SUM coverage in the same amount. The other vehicle involved in the accident was insured by Nationwide, with bodily injury liability limits in the minimum allowable amount of $25,000 per person. Thus, by definition, the other vehicle was underinsured as to Fisher.

> The fact is that every SUM claim presented by an insured to his or her insurer automatically places those parties in an adversarial relationship.

Upon presentation of liability claims against Fisher brought by three other individuals injured in the accident—her passenger and the driver and passenger of the other vehicle—Progressive promptly settled those claims within its bodily injury liability coverage limits in order to protect its insured's estate. In the words of Maria Marsteller, identified as "the business leader in Progressive's legal department for claims," and quoted in the Times article referenced above, "If we determine that we shouldn't pay any third parties, our insured can get sued and be responsible for any amount over the limit. If we make the wrong call and don't pay them and perhaps we should have, there is an issue for her estate." Unspoken by Marsteller, but no less true, is the fact that the failure to settle a claim within the policy limits when the opportunity to do so presents itself can, in certain (albeit limited) circumstances, also expose the liability insurer to a claim of "bad faith."[2]

SUM Claim

At around the same time, Fisher's estate asserted a liability claim against the other driver, as well as a claim against her own insurer, Progressive, for SUM benefits. Pursuant to the terms of the SUM policy, in the event that the estate were to recover the full amount of the other vehicle's liability coverage, i.e., $25,000, it would be entitled to recover an additional $75,000 in SUM benefits—provided, of course, that it could establish that the other vehicle was liable (negligent), and that its damages warranted such additional recovery—a showing that would not be very difficult in the context of a death case. While Nationwide promptly offered its full $25,000 in settlement of the claim against its insured, Progressive refused to pay its $75,000 SUM coverage, based upon its assessment of the liability situation in the accident—i.e., its conclusion that the other vehicle, the underinsured vehicle, was not at fault for the accident.

Unable to settle the SUM claim with Progressive, the estate chose to sue the driver and owner of the other vehicle in court in order to determine the issue of fault for the accident. Although we cannot help but wonder whether a judgment in that lawsuit would otherwise have been binding upon Progressive, a non-party thereto, Progressive chose to intervene in that action, and thus became a party. As reported in the Times article, during the course of the trial, Progressive's lawyer sat alongside and assisted the other driver's lawyer in attempting to establish the absence of fault (liability) of that driver—i.e., that the accident was the fault of Fisher.[3] » Page 8

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SUM

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Notwithstanding those efforts, the jury returned a verdict in favor of Fisher's estate, finding that she was not at all liable for the accident.

Angry Blog

It was the sight and sound of Progressive's lawyer attempting to blame Fisher for her own death that motivated her very angry brother to take to the Internet to blast Progressive. In an Aug. 13, 2012 Tumblr posting, provocatively titled, "My Sister Paid Progressive Insurance to Defend Her Killer in Court,"[4] Matt Fisher described the situation as set forth above, and wrote: "At the trial, the guy who killed my sister was defended by Progressive's legal team. If you are insured by Progressive, and they owe you money, they will defend your killer in court in order to not pay you your policy." He, therefore, urged all of his readers not to buy insurance from Progressive.

Not surprisingly, this posting engendered a fast and furious fire storm of online reaction and protest against Progressive, most of which characterized Progressive and its conduct in the *Fisher* case as the symbol of all that is wrong with insurance companies. Putting aside one's obvious sympathies for Mr. Fisher for his and his family's loss, and understanding his anger and frustration at the situation, it is fair to ask whether his complaints were correct, whether the public's reaction was justified, and, indeed, whether Progressive, acting as the SUM carrier, did anything wrong in the circumstances presented. For that, a general discussion of SUM coverage is in order.

SUM Coverage—Generally

SUM insurance is, no doubt, one of the most complex and ever-changing areas of insurance law. It is based upon statutes (Ins. L. §3420[f]), Insurance Department (now Department of Financial Services) regulations (Regulation 35-D, 11 NYCRR §60-2.3, et seq.), and a very active body of case law, which requires constant monitoring in order to be fully informed of the subtleties of the law and practice in this area. It is no surprise, then, that it is an area of law and practice that is often not fully understood by practitioners (and even judges), and is usually misunderstood—or worse, unknown—by the consuming public.

New York's uninsured motorist, underinsured motorist, and supplementary uninsured motorist protection scheme developed out of a need to protect the innocent victims of motor vehicle accidents caused by "financially irresponsible motorists," i.e., those who either have no insurance for a variety of reasons, or who carry an amount of insurance that is less than the amount carried by the claimant, and, thus, cannot be counted on to make their victims whole.[5] The purpose of such coverage has been regarded, therefore, as "social and economic."[6]

As distinct from earlier laws regarding motor vehicle financial responsibility and compulsory insurance, which served as an incentive to procure insurance, but did not protect the innocent victim, a source of recovery was made available to the innocent victim with the simultaneous enactment in 1959 of legislation that created the Motor Vehicle Accident Indemnification Corporation (MVAIC) and mandated the inclusion of an uninsured motorist endorsement in all automobile liability policies.[7] In 1977, the legislative policy of protecting motorists and providing victims with a means of obtaining compensation for their injuries was extended to those situations where the tortfeasor, although not uninsured, was nevertheless inadequately insured, by the creation of "supplementary uninsured" or "underinsured" motorist coverage.[8]

The uninsured motorist statutes attempt to place the injured person in the same position as that of a person in an accident caused by an identifiable motor vehicle covered by a standard automobile liability policy with the statutorily prescribed limits of liability in effect at the time of the accident.[9] The same basic policy of minimizing losses and placing the victim in the position "he should have been in" also underlies the SUM provisions. It has been stated many times that the purpose of supplementary uninsured or underinsured motorist coverage is to allow insureds, at their own option, to obtain the same level of protection for themselves and their passengers as they purchased to protect themselves against liability to others.[10]

Hybrid Form of Insurance

Of critical importance for analyzing the propriety of Progressive's conduct in the *Fisher* case is the fact that the coverage afforded by the uninsured and underinsured motorist statutes represents a hybrid form of insurance. The concept of first-party insurance, where the insured looks to his or her own policy (or the policy of the vehicle he or she was occupying), is combined with traditional concepts of negligence and tort, requiring proof of fault.[11]

The UM/UIM/SUM insurer effectively stands in the shoes of the uninsured or underinsured tortfeasor, and its liability is based upon the liability of that tortfeasor.[12] Thus, in order to recover pursuant to an uninsured or underinsured motorist policy, the insured/claimant must establish a legal entitlement to recovery. Unlike the situation involved under the no-fault statute (Ins. L. §5101, et seq.), the UM/UIM/SUM claimant must establish that the tortfeasor was negligent or otherwise at fault.

Adversarial Relationship

Accordingly, the fact is that every SUM claim presented by an insured to his or her insurer automatically places those parties in an adversarial relationship. It is for that reason that the insurer is required to appoint separate counsel to defend the insured under its bodily injury liability coverage and to defend against the insured's SUM claim. The insured/claimant is seeking to recover benefits for his or her injuries directly from the insurer, and the insurer is no doubt entitled to defend that claim. Those defenses may include whatever defenses are in the insurer's arsenal, including procedural defenses, defenses to coverage based upon policy breaches, and exclusions. In addition, insofar as the SUM insurer's liability is dependent upon a finding of liability against the uninsured or underinsured tortfeasor, and the SUM insurer is thus standing in the shoes of the tortfeasor, an obvious defense to the claim is that the tortfeasor was not negligent and/or that the accident was caused solely by the claimant.

Judging Progressive

In New York, in cases involving coverage in excess of the statutory minimum of $25,000/$50,000, the insured has the right either to arbitrate or litigate his or her claim in court. In either event, in such a direct claim scenario, it would be a common occurrence for the SUM insurer to take the defensive position that it was not liable for the payment of benefits because the offending tortfeasor, in whose shoes it stood, was not negligent as a matter of law. Many carriers have taken such a position in arbitration and/or litigation—and have even succeeded in defeating claims on that basis—without incurring the wrath of the public, as Progressive has done in the *Fisher* case.

The difference in the *Fisher* case appears to be in the fact that Progressive did not wait for the claim to be arbitrated or litigated directly against it, at which point it would have been in a (defensible) defensive posture, but, instead, chose to act more aggressively (offensively) by intervening in the insured's action against the tortfeasor and acting in a manner that sought to be detrimental not only to the SUM claim but also to the insured's action against the tortfeasor. Had Progressive chosen to sit back and wait for the results of the estate's action against the other driver, it could have used any negative finding against the estate to its benefit, but would not have been bound by any determination in favor of the estate, pursuant to the rules of collateral estoppel/res judicata. Thus, Progressive's actions, while perhaps not technically improper, appear to have been overly aggressive and unnecessarily contrary to its insured's interests.

At the very least, the appearance of impropriety in Progressive's actions should have been considered more carefully for public relations purposes. Perhaps the biggest difference between the *Fisher* case and prior cases is its demonstration of the overwhelming and undeniable power of social media—no doubt a force to be reckoned with in the future by insurers, and insureds alike.

Limits of SUM Coverage

Prior to the enactment of Regulation 35-D, motor vehicle liability insurers were required to provide supplementary uninsured or underinsured motorist coverage to their insureds, at their request, "in an amount up to the bodily injury liability insurance limits of coverage" provided under their basic policy.[13] This statutory requirement was interpreted to mean that "no insurance company will be permitted to refuse to provide supplementary uninsured motorist coverage if the insured requests it."[14] However, it was also held that insurers had no duty to inform their insureds of the availability of such coverage.[15]

The New York State Senate and Assembly have passed a bill that would effectively change the required amount of SUM coverage to be offered by the insurer from a maximum amount that is the same as the insured's bodily injury liability coverage to a required amount that is the same as the bodily injury liability limits.

Pursuant to Regulation 35-D, motor vehicle liability insurers are required to take affirmative action to advise their insureds, in writing, at the time of writing or renewing a policy, of the availability and desirability of supplementary uninsured motorist coverage, and to explain the benefits for such coverage and provide examples of its application in a variety of situations.[16] Insurance Law §3420(f)(2)(B) also requires auto insurers to notify their insureds, in writing, at least once each year, of the availability of SUM coverage and to explain the nature of the coverage and the amounts in which it can be purchased—similar to the requirements of Regulation 35-D.[17]

Effective March 9, 1998, the limits of SUM coverage required by statute to be offered were increased to a maximum $250,000 per person and $500,000 per accident, or a combined single limit of $500,000 per accident.[18] Under the current statute, the insurer can still offer only a $100,000/$300,000 SUM policy (the previous maximum amount) if it also offers to the insured a personal umbrella policy that covers SUM claims and has limits "up to at least $500,000."[19] Insurers can,

and frequently do, offer coverage with higher limits. However, the "supplementary uninsured" or "underinsured" motorist coverage available to the insured may still not exceed the third-party liability coverage purchased by that insured.[20]

Notwithstanding the foregoing, many insureds elect underinsured motorist coverage in lesser amounts than the coverage provided for in their bodily injury liability policy.[21] Whether this is because of a lack of understanding of the importance and need for such coverage, a failure to appreciate that increases in the coverage are extremely inexpensive, or because insurance agents and/or brokers are simply not doing a good enough job in pushing for this coverage at the highest possible levels, the fact is that no insured should protect strangers more than themselves and their families, and this failure of knowledge and understanding does create a problem for insureds. Several recent articles in the mainstream press have provided graphic examples and illustrations where victims of accidents with underinsured motorists have been cut short and remained undercompensated by their unnecessarily low levels of SUM coverage.[22]

New Proposed Legislation

In an effort to ensure that drivers are fully protected by supplementary insurance equal to the bodily injury liability insurance coverage they select, the New York State Senate and Assembly have passed a bill (S7787 and A10784) that would effectively change the required amount of supplementary uninsured/underinsured motorist coverage to be offered by the insurer from a maximum amount that is the same as the insured's bodily injury liability coverage (which the insurer must provide if the insured elects to purchase) to a required amount that is the same as the bodily injury liability limits (which the insurer must provide unless the insurer opts to decline SUM coverage or to purchase lower amounts of SUM coverage than the bodily injury liability limits).

The insurer or agent would be required to disclose and explain to the insured what SUM coverage is and how much SUM coverage the insured may purchase, and, indeed, to urge the insured to consider purchasing the maximum SUM coverage available. If the insured opts to reject or take less SUM coverage than his or her bodily injury limits, he or she must acknowledge such choice in a signed writing, audio recording, electronic signature or any other means evidencing such choice.

Not surprisingly, plaintiffs' groups, such as the New York State Trial Lawyers Association, are strongly in favor of this bill, and insurance industry groups, such as the New York Insurance Association, have opposed it (preferring an "opt-in" plan to an "opt-out" plan). It remains to be seen whether Cuomo will sign this SUM bill into law, but we will certainly report on it further when and if he does.

1. See Lieber, Ron, "The Auto Insurance Case That Blew Up on the Internet," *New York Times*, Aug. 18, 2012.
2. See *Pavia v. State Farm Mut. Auto. Ins.*, 82 NY2d 445 (1993).
3. In a posting on his Tumblr account on Aug. 14, 2012 (http://mattfisher.Tumblr.com/post/29432884849), Fisher's brother, Matt Fisher, who was an observer during the trial, described seeing Progressive's attorney sit next to and confer with the defendant, give an opening statement to the jury, in which he argued that the defendant should not be found negligent, cross-examined the plaintiff's witnesses, questioned all of the defense's witnesses on direct examination, made objections on behalf of the defendant, and gave a closing argument, in which he argued that Ms. Fisher was responsible for the accident that killed her.
4. See http//mattfisher.Tumblr.com/post/29338478278.
5. See *Vanguard Ins. v. Polchlopek*, 18 NY2d 376 (1966); *Raffellini v. State Farm Mut. Auto Ins.*, 36 AD3d 92 (2d Dept. 2006), rev'd 9 NY3d 196 (2007).
6. *Travis v. General Accident Group*, 31 AD2d 20 (3d Dept. 1968).
7. See Ins. L. §3420(f)(1).
8. See Ins. L. §3420(f)(2).
9. See *State Farm Mut. Auto Ins. v. Langan*, 16 NY3d 349 (2011); *Rafffellini v. State Farm Mut. Auto Ins.*, supra; *Englington v. Medical a/s/o Cruz v. MVAIC*, 81 AD3d 223 (2d Dept. 2011).
10. See Memorandum of the State Executive Dept. in support of the enactment of Ins. L. §3420(f)(2), 1977 N.Y. Laws, at 2446. See also *Allstate Ins. v. Rivera*, 12 NY3d 602 (2009); *Metropolitan Prop. & Cas. Ins. v. Mancuso*, 93 NY2d 487 (1999); *Raffellini v. State Farm Mut. Auto Ins.*, supra.
11. See No-Fault and Uninsured Motorist Automobile Insurance, §1.30[2] (Matthew Bender); see also, Dachs, Jonathan, 2 New Appleman New York Insurance Law, §28.02[1], p. 28-8.
12. See *Nationwide Mut. Life Ins. v. Holbert*, 39 Misc.2d 782 (Sup. Ct. Broome Co. 1962).
13. See Ins. L. §3420(f)(2); see also *Automobile Ins. v. Stillway*, 165 AD2d 572 (1st Dept. 1991).
14. See *Downey v. Allstate Ins.*, 638 F. Supp. 322, 324 (S.D.N.Y. 1988).
15. Id.
16. See *GEICO v. Lovinger*, 251 AD2d 664 (2d Dept. 1998).
17. See Ins. L. §3420(f)(2)(B), amended by L. 1994, Ch. 425 (signed July 20, 1994, and effective Oct. 15, 1994), and as amended by L. 1997, Ch. 568, eff. March 9, 1998.
18. See L. 1997, Ch. 568, eff. March 9, 1998.
19. Id.
20. Ins. L. §3420(f)(2)(A). See, also, 11 NYCRR §60-2.1(e)(5) ("Notwithstanding any other provision of this subdivision, an insurer shall not provide in a policy SUM limits in an amount that exceeds the third-party injury limits offered by the insurer and purchased by the policyholder in that policy").
21. See e.g., *Mele v. General Accident Ins.*, 198 AD2d 731 (3d Dept. 1993) (petitioner's parent's policy contained bodily injury liability limits of $250,000 per person and underinsurance coverage of only $10,000 per person).
22. See e.g., Jorgensen, Jillian, "Pitfall in Auto Insurance at Crux of Staten Island Couple's Plight," Staten Island Advance, Aug. 12, 2012 (www.silive.com/news/index.ssf/2012/08/pitfall_in_auto_insurance_at_c.html); Gabryszak, Dennis H., "New Yorkers Deserve Good Insurance Options," WGRZ.com (http://downtown.wgrz.com/news/families/68594-new-yorkers-deserve-good- insurance-options); Titone, Matt, Op. Ed., Staten Island Advance, Aug. 21, 2012.