Expert Analysis

INSURANCE LAW

SUM Legislation— Good News/Bad News

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On Dec. 17, 2012, Governor Andrew Cuomo vetoed a bill that dealt with the amount of SUM (supplementary uninsured/underinsured motorist) coverage required to be made available to consumers, but approved and signed into law another bill that dealt with the scope of SUM coverage, expanding the definition of "insured" under the SUM Endorsement to a class of individuals not previously included therein. In this article, we offer a follow-up/status report on the SUM limits bill (S.7787/A.10784) we previously reported on (see Dachs, N. and Dachs, J., "'SUM' Hits the Mainstream," NYLJ, Sept. 19, 2012, p. 3), and report on and discuss for the first time, the Firefighter/Ambulance Worker bill (S.7312B/A.10080B).[1]

The SUM Limits Bill

In our September 2012 article, we reported that, in an effort to ensure that individuals are fully protected by first-party supplementary insurance to the same extent as third parties, the New York State Legislature passed a bill (S.7787 and A.10784), that would have required insurers to provide SUM coverage in amounts that match the bodily injury liability coverage purchased by the insured to protect others, unless the insured formally "opts out" by rejecting such supplementary coverage completely, or elects to purchase such coverage in an amount less than the bodily injury limits. In fulfillment of our promise to keep our readers informed of the status of that bill, we take this opportunity to advise that it was vetoed by the governor, with the following message:

> This bill, if enacted, would, among other things, reverse existing law by requiring consumers to pay for SUM coverage unless they affirmatively opt out of such coverage. No other optional coverage is treated this way. Consumers should be free to choose what level of SUM coverage makes sense for them.
>
> I will not add to the financial burden already faced by New York's consumers. The Department of Financial Services will be exploring ways to increase consumer education on the benefits of SUM coverage so consumers can make a more informed decision about whether or not to purchase it, but I will not sign into a law that places such an unacceptable choice on New Yorkers.

An amendment clarifies that SUM coverage in a fire department or ambulance service insurance policy extends to both professional and volunteer firefighters and emergency service workers.

Firefighter/Ambulance

Simultaneous with his refusal to increase the amount of coverage available to consumers of SUM insurance coverage, the governor did agree to expand the scope of the individuals entitled to protection under certain types of SUM policies by signing into law Bill No. S.7312B/A.10090B, described as "[a]n act to amend the Insurance Law, in relation to uninsured and underinsured motorist coverage for ambulance services, volunteer fire departments and voluntary ambulance services." The drafters of the original bill were motivated by a strong sense of displeasure and dissatisfaction with the state of the law that narrowly construed the definition of "insured" in SUM policies in which the "named insured" was a corporation or business entity to exclude individuals associated with such entity.[2] Such individuals include relatives of the named insured corporation's officers/sole shareholders while not engaged in corporation-related activities (see *Buckner v. MVAIC*, 66 NY2d 211 [1985]; *Travelers Prop. Cas. v. Hershman*, 287 AD2d 412 [1st Dept. 2001]); and officers, directors and shareholders of the named insured corporation themselves while not engaged in corporate business (see *Continental Ins. v. Velez*, 134 AD2d 348 [2d Dept. 1987]; *Royal Ins. v. Bennett*, 226 AD2d 1074 [4th Dept. 1996]; *Travelers Indemn. of Am. v. Venito*, 303 AD2d 592 [2d Dept. 2003]).

A further expansion of that narrow approach was to individuals, particularly firefighters and members of volunteer fire companies, injured while in the course and scope of their employment with and for the named insured corporation/entity (see *Coregis Ins. v. Miceli*, 295 AD2d 511 [2d Dept. 2002]; *Gallaher v. Republic Franklin Ins.*, 70 AD3d 1359 [4th Dept. 2010]; lv. to appeal denied, 14 NY3d 711 [2010]; *American Alternative Ins. v. Pelszynski*, 85 AD3d 1157 [2d Dept. 2011], lv. to appeal denied, 18 NY2d 803 [2012]).

Particularly irked by the latter line of cases, which excluded volunteer emergency and rescue workers from SUM coverage, the drafters of the original bill sought "to ensure that volunteer firefighters and volunteer ambulance crews, while acting in the scope of their duties, shall be covered by the maximum available supplemental uninsured/underinsured motorist coverage in an insurance policy that names such volunteer fire department or ambulance as a named insured." Particular credit for spearheading the » Page 7

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Legislation

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drive for this legislation, which was introduced and championed in the Legislature by Assemblyman Joseph Morelle and Senator James Seward, must go to Matthew Belanger, of Faraci, Lange, in Rochester, the attorney for the excluded volunteer fireman in *Gallaher*, supra, who felt strongly that volunteer firefighters, such as James Gallaher, deserved better.

'Gallaher'

In *Gallaher*, the plaintiff was a volunteer firefighter who was struck by a car after he had exited the volunteer fire company's truck and was directing traffic away from the scene of an accident to which he and the truck had responded. His claim for SUM benefits under the volunteer fire company's policy was denied because, first of all, he was not a named insured under policy, which (in accordance with the prescribed SUM endorsement set forth in Regulation 35-D, 11 NYCRR §60.2.3) defined an "insured" as "You, as the named insured and while residents of the same household, your spouse and the relatives of either you or your spouse." As explained by the court, "The named insured was the fire company, and thus '[y]ou' in the SUM endorsement referred only to the fire company and did not, as plaintiff contended, also refer to an employee of the company."

In so concluding, the court referred to and relied upon the Court of Appeals' earlier decision in *Buckner v. MVAIC*, 66 NY2d 211 (1985), which held that a policy of insurance issued to a corporation did not provide uninsured motorist coverage for the son of the officers and sole shareholders of the corporation who resided with them, and who was injured when struck by a hit-and-run driver while riding his bicycle, not in the course and scope of the corporation's business. The *Buckner* court reasoned that the policy made clear that the named insured was the corporation and not an individual, and that the policy description of the insured as "you or any family member" would not commonly be understood to be applicable to a corporation, which could not suffer bodily injury or have a "spouse," "relative" or "household."[3]

The *Gallaher* court also denied the plaintiff's SUM claim for the additional reason that the plaintiff was not entitled to coverage under the policy provision that included within the definition of an "insured" a person "occupying" a motor vehicle insured for SUM under the policy because, having exited the truck and engaging in conduct (directing traffic) that was "unrelated to the [truck] and was not incidental to his exiting it," the plaintiff was no longer "occupying" the truck within the meaning of that term in the policy.

The Problem

Gallaher illustrated quite clearly that, as noted by the bill sponsors, the definition of "insured," as interpreted by the courts, "creates a gap in coverage for volunteer firefighters and ambulance crews injured by uninsured or underinsured vehicles in the scope of their duties for the 'named insured' entity." Not only is half of the coverage usually provided by SUM policies—i.e., coverage under the first definition of "insured"—simply not provided when the named insured is a corporation, with presumably no reduction in the premium, (see *Roebuck v. State Farm Mutual Auto Ins.*, 80 AD3d 1126 [3d Dept. 2011]: "The policy language is not rendered ambiguous by the inclusion of words such as 'you,' 'spouse' and 'relatives' when a corporation is the named insured, because it is obvious to the average reader, construing the language according to common speech, that a corporation cannot have family members; those portions of the mandatory policy language are merely inapplicable to the corporate insured"), but even the second definition, pertaining to occupancy of an insured vehicle, will frequently not come into play by virtue of the nature of such individuals' jobs and functions, which often require them to exit their vehicles.

As further explained by the sponsors, "This means that unless the definition of the term 'insured' is clarified, a volunteer fire department, or ambulance service will be unable to provide SUM coverage for its officers, employees, or members who face risks from uninsured or underinsured vehicles in the course of their employment after exiting from covered vehicles. The danger is particularly acute for volunteer firefighters and ambulance crews all of whom are exposed to vehicle hazards after they have exited a covered vehicle."

The statutory amendment to Insurance Law §3420(f) that was signed by the governor as Chapter 496 of the Laws of 2012 created a new subdivision (5), effective April 16, 2013, and applicable to any policies issued or renewed on or after that date, which, in its original form, required that all policies under which a volunteer fire department,

ambulance service, or "voluntary ambulance service" was a named insured, would be deemed to provide UM or SUM coverage to an individual employed by such entities who was injured by an uninsured or underinsured vehicle while acting in the scope of his or her duties for the named insured entity.

It is interesting to note that in his Approval Memorandum of the original bill, Governor Cuomo recognized the bill sponsors for "taking an important step in addressing the problem of lack of supplemental uninsured motorist coverage for emergency workers who are injured by an uninsured or underinsured driver while at the scene of an incident." This memorandum also contains a rather cryptic reference to "certain technical deficiencies in the bill that would make it inapplicable to certain groups that the sponsors intended to cover." Thus, the bill was approved "with the understanding that legislation to address these concerns will be enacted."

> We think it fair to ask why shouldn't all employees of corporate or business entity insureds be entitled to coverage under their employers' policies when they are injured by an uninsured or underinsured motorist while acting in the course and scope of their employment with that entity?

Chapter Amendment

There thus followed in due course a "chapter amendment," which amended the law to clarify who would be covered as a result of Ins. L. 3420(f) (5) and when. Specifically, this amendment (S.2757/A.1832, dated Jan. 23, 2013), clarified that "when a fire department or ambulance service purchases an insurance policy that includes SUM coverage, such coverage extends to both *professional* and volunteer firefighters and emergency service workers who are employed by or members of the fire department or ambulance service and who are injured while acting within the scope of their duties, *except with respect to the use or operation by such individuals of a motor vehicle not covered under the policy*" [emphasis added]. Id.

The text of the amended law, which has already passed the Assembly and is fully expected to pass the Senate and be signed by the governor, and to be effective on the same April 16, 2013 date as the original bill, is set forth below, with the pertinent changes noted [matter in capital letters is new; matter in brackets is old law to be omitted]:

"(5) [A] THIS PARAGRAPH SHALL APPLY TO A POLICY THAT PROVIDES SUPPLEMENTARY UNINSURED/UNDERINSURED MOTORIST INSURANCE COVERAGE FOR BODILY INJURY AND IS A POLICY: (A) ISSUED OR DELIVERED IN THIS STATE THAT INSURES AGAINST LIABILITY ARISING OUT OF THE OWNERSHIP, MAINTENANCE, AND USE OF A FIRE VEHICLE, AS DEFINED IN SECTION ONE HUNDRED FIFTEEN-A OF THE VEHICLE AND TRAFFIC LAW, WHERE THE FIRE VEHICLE IS PRINCIPALLY GARAGED OR USED IN THIS STATE; OR (B) AS SPECIFIED IN PARAGRAPH ONE OF THIS SUBSECTION. EVERY SUCH policy that [names] INSURES a [volunteer] fire department, FIRE COMPANY, AS DEFINED IN SECTION ONE HUNDRED OF THE GENERAL MUNICIPAL LAW, an ambulance service, or a voluntary ambulance service, as defined in section three thousand one of the public health law, [as a named insured] shall [be deemed to] provide [the maximum uninsured or underinsured] SUCH SUPPLEMENTARY UNINSURED/UNDERINSURED motorist INSURANCE coverage [available under the provisions of the policy] to an individual employed by OR WHO IS A MEMBER OF the FIRE DEPARTMENT, FIRE COMPANY, ambulance service, or [a member of the board of directors of such ambulance service, volunteer fire department or] voluntary ambulance service and who is injured by an uninsured or underinsured MOTOR vehicle while acting in the scope of the individual's duties for the [volunteer] fire department, FIRE COMPANY, ambulance service, or voluntary ambulance service [listed as the named insured] COVERED UNDER THE POLICY, EXCEPT WITH RESPECT TO THE USE OR OPERATION BY SUCH AN INDIVIDUAL OF A MOTOR VEHICLE NOT COVERED UNDER THE POLICY."

Questions Remain

Although it appears that the governor's reference in his Approval Memorandum to "certain groups that the sponsors intended to cover" related to professional (non-volunteer) firefighters, who were otherwise omitted from the original bill, we have learned that the very first drafts of the bill reflected the sponsors' original intention to cover more than firefighters and ambulance workers within the scope of the statutory amendment. Indeed, those initial drafts included the terms "corporate and business

entity" and individuals employed by a "corporate or business entity"—thereby greatly expanding the reach of the statute, and, thus, SUM coverage, to all employees of corporate or business named insureds injured while acting in the course and scope of their employment.

Although, undoubtedly, that broad language was removed for political reasons, we think it is fair to ask why the amendment, which is obviously a good thing for firefighters and ambulance workers (albeit too late for Gallaher) should be so limited. While, of course the desire to protect firefighters and ambulance workers, who often place themselves in harm's way to protect the public, is understandable and laudable, it is difficult to argue that the rationale of protecting these specific types of emergency responders from highway/roadway accidents after they leave their vehicles should not equally be applied to police officers, highway/roadway repair crews, sanitation workers, and even delivery people, who may be similarly exposed to such danger.

Moreover, we think it fair to ask why shouldn't all employees of corporate or business entity insureds be entitled to coverage under their employers' policies when they are injured by an uninsured or underinsured motorist while acting in the course and scope of their employment with that entity? The public policy of this state strongly favors the provision of coverage to protect individuals who suffer automobile accident injuries at the hands of financially irresponsible motorists, and the courts have consistently held that the aim of making such coverage available calls for "a policy of inclusion rather than exclusion in determining whom it covers." *Country-Wide Ins. v. Wagoner*, 45 NY2d 581, 586 (1978); *Liberty Mutual Ins. v. Hogan*, 82 NY2d 57, 61 (1993). The purpose of SUM coverage is to protect individuals who are injured by uninsured or underinsured drivers. It does not provide property damage, and it does not protect entities or things, which cannot, by definition, suffer bodily injuries. Thus, logically, it would appear that the only benefit provided to a corporate insured under an SUM policy is "occupancy" coverage for its employees and others occupying its insured vehicles; the "named insured" prong of the coverage is illusory, unless the policy can be construed to cover and protect the individuals associated with the corporate entity that purchased the insurance, who might become injured in the line of duty by an uninsured or underinsured motor vehicle.

It is a well-known and irrefutable proposition that a corporation can only act through the individuals associated with it. See *Reed v. Federal Ins.*, 71 NY2d 581, 587 (1988) ("the corporate entity necessarily acts only through its agents); *Standard Fruit and Steamship v. Waterfront Commissioner of New York Harbor*, 43 NY2d 11, 15-16 (1977) ("a corporation can only act through its officers and employees"). While a corporation certainly cannot have a household, spouse or relative, it does have officers, shareholders and employees whose actions can bind the corporation, and whom it has an interest in protecting, especially when they are acting in its behalf.

In determining the intent of the parties to an insurance contract, "[o]ur guide is the reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract." *Album Realty v. American Home Assur.*, 80 NY2d 1008, 1010 (1992); see also *Miller v. Continental Ins.*, 40 NY2d 675, 676, 678 (1976). Moreover, it is axiomatic that "a construction which makes a contract provision meaningless is contrary to the basic principles of contract interpretation." *In the Matter of Columbus Park Corp. v. Department of Housing Preserv. & Dev. of City of N.Y.*, 80 NY2d 19, 31 (1992).

It requires little creativity or imagination to interpret the references to "you" in a corporate-owned policy to refer to the officers, shareholders or even employees of the corporation. We submit that such an interpretation would be consistent with the reasonable expectations of most (if not all) insureds, who are not told otherwise by the policy or Declarations pages, and who most likely are unfamiliar with the case law that suggests to the contrary, and who likely believe that they are paying for something, rather than nothing, for their employees who may become injured by uninsured or underinsured drivers while performing corporate/business-related activities outside of corporate/business vehicles.

While insurers will no doubt oppose any efforts to expand the scope of "named insured" coverage beyond its current limits, we fully expect that such efforts will be made in the near future, and we once again promise to keep our readers informed of any developments in this area.

1. Matthew F. Bélanger of Faraci, Lange, and Justin F. Wilcox, legislative director, Office of New York State Senator Ted O'Brien, provided legislative documents and information that form the basis for this article.

2. While such individuals might be eligible for UM/SUM coverage if formally designated as individual named insureds on the policy, and/or when "occupying" a covered vehicle, the statutory amendment discussed herein assumes that neither is the case.

3. See also, *Hogan v. CIGNA Prop. & Cas.* 216 AD2d 442 (2d Dept. 1995); *Siragusa v. Granite State Ins.*, 65 AD3d 1216 (2d Dept. 2009).