'Sandy' Moratorium And SUM Trigger

Recent events have once again thrust issues of insurance coverage into the forefront. In this article, we bring attention to recent actions taken by the Superintendent of the New York State Department of Financial Services, in response to the extensive power outages, loss of life and property, and ongoing harm to public health and safety wrought by Hurricane/Storm Sandy, for the protection of policyholders. We then turn to the more mundane—a recent decision of first impression on a question that has intrigued us for many years—the applicability of an excess or umbrella policy in the coverage comparison that determines the trigger of SUM (Supplementary Uninsured/Underinsured Motorist) coverage.

By Norman H. Dachs And Jonathan A. Dachs

'Sandy' Suspensions

Much has been written and remains to be written regarding the devastating effects of Hurricane Sandy, the litigation that is certain to ensue, and the measures taken by the government to assist those in need. Many of our readers may already be aware that Governor Andrew Cuomo, in the exercise of his authority (pursuant to Executive Law Article 2-B, section 29-a) to temporarily suspend specific provisions of any statute, local law, ordinance, orders, rule or regulation, or part thereof, of any agency during a state disaster emergency if such provisions would prevent, hinder or delay action necessary to cope with the disaster, has, by Executive Order dated Oct. 31, 2012, temporarily suspended—from Oct. 26, 2012, until further notice—specific provisions of several statutes pertaining to time limitations on actions and the time in which to take an appeal.[1]

What many may not know, however, is that the Superintendent of the New York State Department of Financial Services (formerly the New York State Insurance Department) has similar powers of suspension, and, indeed, has recently exercised those powers to temporarily suspend certain provisions of the Insurance Law (and the Banking Law).[2]

Superintendent's Authority

Insurance Law §3425(p) empowers the superintendent to modify or suspend certain provisions of the Insurance Law for a limited period (not to exceed three months, unless extended for an additional three months) for any area of the state declared by the governor (or the president of the United States) to be in a state of emergency due to disaster or catastrophe. Financial Services Law §302(a) empowers the superintendent to issue orders and guidance that interpret the Insurance Law and effectuate any power given to the superintendent thereunder that are not inconsistent with the Insurance Law.

> The Superintendent of the New York State Department of Financial Services has exercised powers to temporarily suspend certain provisions of the Insurance Law.

Temporary Moratorium

Finding that in the wake of "Sandy" certain variations in, and modifications of, the Insurance Law are necessary to protect storm-affected consumers and to safeguard the efficient operations of the insurance industry, and that such variations and modifications are in the public interest, by (Amended) Order, dated Nov. 5, 2012, the superintendent has ordered that, effective Oct. 26, 2012, a moratorium exists in the counties that suffered the greatest storm damage—New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange—for 30 days, or until further order of the superintendent, prohibiting the termination, cancellation, or non-renewal of any "covered policy," as that term is defined by Insurance Law §§3425(a), 3426(a), and policies issued under Articles 53 and 54 of the Insurance Law.

Insurance Law §3425(a), which deals with property/casualty insurance policies, defines "covered policy" as: (1) "automobile insurance" issued or issued for delivery in New York, on a risk located and resident in New York, covering against losses or liabilities arising out of the ownership, operation, or use of a motor vehicle, predominantly used for non-business purposes, when a natural person is the named insured under the policy; (2) a "personal lines insurance" policy issued or issued for delivery in New York, on a risk located or resident in New York, insuring against loss of or damage to real property used predominantly for residential purposes [not more than four dwelling units], other than hotels and motels; loss of or damage to personal property in which natural persons have an insurable interest, except personal property used in the conduct of any business; and other liabilities for loss of, or damage to, or injury to persons or property, not arising from the conduct of a business, when a natural person is the named insured under the policy; and (3) a personal umbrella liability policy.

Insurance Law §3426(a), which deals with commercial lines insurance, defines "covered policy" as a commercial risk insurance, professional liability insurance, or public entity insurance policy. Article 53 of the Insurance Law pertains to policies written under the Motor Vehicle Insur- » Page 9

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« Continued from page 3

ance Assigned Risk Plans, and Article 54 of the Insurance Law pertains to policies written under the New York Property Insurance Underwriting Association, which deals with fire and extended coverage insurance, in homeowners and commercial multiple peril policies.

The superintendent's order also provides that in addition to the moratorium on terminations, cancellations, and non-renewals, any automatic policy renewal provision contained in a "covered policy" will not be effective during the period of the moratorium. The order also sets forth exceptions to the moratorium. The moratorium order will not preclude or prevent the owner of a "covered policy" from voluntarily terminating the policy during the moratorium period, and the moratorium will not apply to any "covered policy," as that term is defined in Insurance Law §3426(a), where the headquarters or principal base of operations of the policyholder is not located in one of the affected counties listed above.

Excess/Umbrella Policies

It is well-established that in determining whether a claimant's SUM motorist coverage is "triggered," i.e., applicable and effective, in accordance with the terms of Ins. L. 3420(f)(2), the proper comparison is between the claimant's bodily injury coverage and the tortfeasor's bodily injury coverage.[3] The very same trigger comparison is specifically incorporated in Regulation 35-D, which, in its prescribed SUM Endorsement, expands the definition of an "uninsured motor vehicle" to include a motor vehicle for which there is a bodily injury liability insurance coverage or bond applicable at the time of the accident, but "the amount of such coverage or bond is less than the third-party bodily injury liability limit of this policy" (see 11 NYCRR §60-2.3(e)(1)(c)(3)(i)).

A question that naturally arises in the context of the SUM trigger comparison is the effect, if any, of an applicable excess or umbrella policy in determining whether a tortfeasor is, definitionally, underinsured, thus giving rise to a SUM claim. This is a question that we asked in these pages more than 18 years ago,[4] but which was not fully answered until this summer.

Interpretation of Language

Insurance Law §3420(f)(2) provides, in pertinent part, that supplementary uninsured motorist coverage is available "if the limits of liability under *all* bodily injury liability bonds and insurance *policies* of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by *such policy*" [emphasis added]—"such policy" being the claimant's liability policy to which the SUM Endorsement is attached. Similarly, as noted above, Regulation 35-D's SUM Endorsement defines an "uninsured motor vehicle" to include one where "the bodily injury liability insurance *coverage* or bond *applicable* to such motor vehicle... is less than the third party bodily injury limits of *this policy*" [emphasis added]—"this policy" again referring to the liability policy to which the claimant's SUM policy is attached.

As we observed in our earlier article, the singular references to "such policy" and "this policy" with regard to the claimant/insured suggest that only the policy limits of the claimant/insured's automobile bodily injury liability policy, and none other, should be considered for purposes of the trigger comparison.[5] Indeed, many courts have so held.

For example, in *Federal Ins. v. Reingold*, 181 AD2d 769 (2d Dept. 1992), the court stated that "Neither the case law nor the applicable statute...authorizes an injured party to combine her liability coverage from several policies, to determine whether or not the underinsurance benefits of one of the individual policies is triggered...." Similarly, in *Astuto v. State Farm Mut. Auto. Ins.*, 198 AD2d 503 (2d Dept. 1993), the court held that "The petitioner's attempt to base his claim on a consideration of the existence of an umbrella policy issued by a different insurer by which he was also covered is precluded by the pertinent provision of the policy on which he had made his claim. And, in *State Farm Mut. Auto. Ins. v. Roth*, 206 AD2d 376 (2d Dept. 1994), the court stated that "Neither the case law nor the applicable statute...authorizes an injured party to combine its liability coverage from several policies, to determine whether or not underinsurance benefits of one of the policies is triggered...."

On the other hand, we also pointed out, the broader, plural, references in the statute and the Endorsement to "all bodily injury liability bonds and insurance policies" and "the bodily injury coverage" with regard to the defendant/tortfeasor suggest equally clearly that the defendant/tortfeasor's applicable limits for trigger purposes may be expanded to include the limits of any applicable bodily injury policies, as well as any excess or umbrella policies covering the defendant/tortfeasor. We pointed out, however, that, although we felt that this logic appeared to be unimpeachable, we had not found any case to that date that had specifically ruled on the applicability of excess or umbrella policies on the defendant/tortfeasor's side of the trigger comparison.[6] Such a case has just now arrived on the scene.

> On July 6, 2012, in 'Bobak v. AIG Claims Services Inc.,' a case of first impression in New York, the Fourth Department specifically ruled on the applicability of an excess or umbrella policy on the defendant/tortfeasor's side of the SUM coverage trigger comparison.

The 'Bobak' Case

On July 6, 2012, in *Bobak v. AIG Claims Services*, 97 AD3d 1103 (4th Dept. 2012), lv. to appeal denied, 98 AD3d 1326 (4th Dept. 2012), a case of first impression in New York, the Appellate Division, Fourth Department, specifically ruled on the applicability of an excess or umbrella policy on the defendant/tortfeasor's side of the SUM coverage trigger comparison. In that case, the petitioner, Adam Bobak, was seriously injured when a truck that he was driving for his employer, which was insured by New Hampshire Insurance Company (NHIC), with bodily injury and SUM limits of $1 million, was struck by a steel coil that fell off the flatbed trailer of a truck that had been leased by B-Right Trucking Company. The B-Right truck was insured under a motor vehicle liability policy issued by Reliance National Indemnity Company, but Reliance was placed into liquidation after the subject accident, and the Ohio Insurance Guaranty Association, which administered B-Right's indemnity protection, had a $300,000 coverage limit, which it contended was not applicable on a primary basis, but, rather, only as excess to all other available coverage.

In addition, B-Right was insured under a "Form Excess Liability Policy" (also titled a "Commercial General Liability" policy) issued by Travelers, with $1 million coverage limits. Although Travelers issued a reservation of rights letter, taking the position that its excess/umbrella policy should not drop down to provide coverage in response to Reliance's insolvency, it never disclaimed on that ground, and, indeed, following the entry of a $3.315 million dollar judgment against its insureds, it tendered its $1 million coverage to Bobak.

Majority Opinion. In a 4-1 decision, the Fourth Department reversed a lower court order that had confirmed a $1 million SUM arbitration award against NHIC. The majority observed that the NHIC SUM policy afforded coverage where, inter alia, a person covered by the policy is involved in an accident with a motor vehicle that is uninsured, including the situation in which the other vehicle's insurer disclaims coverage or becomes insolvent.

With respect to the trigger issue, the majority held that although the evidence in the record established that the other vehicle's primary insurer, Reliance, was insolvent, and that no benefits would be afforded to Bobak by the guaranty association, the evidence also established that there was a $1 million excess policy issued by Travelers, and that Travelers did not disclaim coverage. Thus, the majority held that NHIC's $1 million in SUM coverage was not implicated.

Dissenting Opinion. The lone dissenting justice, Justice Edward Carni, would have confirmed the arbitration award in favor of Bobak because he felt that the SUM was triggered by Reliance's insolvency.[7] He disagreed with the majority's conclusion that the B-Right truck was not an "uninsured motor vehicle," which conclusion was based on their determination that an excess/umbrella policy is a "bodily injury liability insurance policy" under the SUM Endorsement, the Insurance Law, the VTL, and Insurance Department regulations.

In Carni's view, "Where, as here, a vehicle is insured by a motor vehicle liability policy issued by an insolvent insurance company and is thus an 'uninsured motor vehicle,' the existence of an excess insurance policy does not change its status as such. In other words, an excess or umbrella policy does not constitute a 'bodily injury liability insurance policy' for purposes of determining whether a motor vehicle is 'an insured motor vehicle' triggering SUM coverage." Further, Carni specifically opined that "the amount of a tortfeasor's coverage under a motor vehicle liability policy may not be combined with the amount of his or her coverage under a commercial general liability excess policy in determining whether SUM coverage is implicated." 97 AD3d at 1106-07.

Interestingly, Carni noted the apparent discrepancy created by the majority's decision between the rule applicable to the claimant/insured's side of the trigger comparison equation (set forth in the above cited cases) and the rule applicable to the defendant/tortfeasor's side (now set forth in *Bobak*). As he explained, "[I]f under the existing decisional law a claimant cannot combine coverage limits from different types of policies in order to trigger SUM coverage, it logically follows that insurers are precluded from combining coverage limits from different types of policies to prevent a SUM trigger." Of course, in this regard, Carni did not take into account the discrepant policy language (singular vs. plural) noted above.

Although Bobak's motion to the Appellate Division for leave to appeal to the Court of Appeals has been denied, his subsequent motion for leave to appeal addressed to the Court of Appeals itself is presently pending. We will follow for the decision on that motion and report upon same when it is rendered.

Conclusion

Based upon the *Bobak* decision, the questions we asked in our earlier article—"is underinsured motorist or SUM coverage triggered if, for example, the claimant/insured has a $300,000 bodily injury liability policy and a $1 million excess or umbrella policy, when the defendant/tortfeasor has a $500,000 bodily injury liability policy? Conversely, if the claimant/insured has a $500,000 bodily injury liability policy and the defendant/tortfeasor has a $300,000 bodily injury liability policy and a $1 million excess or umbrella policy, is the underinsured motorist or SUM coverage triggered?"—may now be answered with some degree of confidence.

Under current uncontradicted Appellate Division decisions, both questions would be answered in the negative. That is to say, SUM coverage would neither be triggered where the claimant/insured has a $300,000 bodily injury liability policy and a $1 million excess or umbrella policy, but the tortfeasor has a $500,000 bodily injury liability policy, nor where the claimant/insured has a $500,000 bodily injury liability policy and the defendant/tortfeasor has a $300,000 bodily injury liability policy and a $1 million excess or umbrella policy.

1. See e.g., CPLR §§201, 5513; Court of Claims Act §25; Criminal Procedure Law §§30.10, 3030, 310.10(2), 460.10, 460.30, 460.50 and Article 460; and Family Court §1113, as well as "any other statute, local law, ordinance, order, rule or regulation or part thereof establishing limitations of time for the filing or service of any legal action, notice or other process or proceeding that the courts lack authority to extend through the exercise of discretion, where any limitation of time concludes during the period commencing from the date that the disaster emergency was declared pursuant to Executive Order Number 47, issued on Oct. 26, 2012, until further notice."

2. This article will not address those portions of the Superintendent of Financial Services' Order that are addressed to the Banking Law.

3. See *Metropolitan Prop. & Cas. Ins. v. Mancuso*, 93 NY2d 487 (1999); *Prudential Prop. & Cas. v. Szeli*, 83 NY2d 681 (1994); *Maurizzio v. Lumbermens Mut. Cas.*, 73 NY2d 951 (1989).

4. See Dachs, N. and Dachs, J., "SUM Coverage and Excess/Umbrella Policies," NYLJ, Sept. 13, 1994, p.1, col.3.

5. Id.

6. Id.

7. See *Metropolitan Prop. & Cas. Ins. v. Carpentier*, 7 AD3d 627, 628 (2d Dept. 2004); *American Mfrs. Mut. Ins. v. Morgan*, 296 AD2d 491, 494 (2d Dept. 2002), 11 NYCRR §60-2.3 [f] [i] [C] [3] [iii].