INSURANCE LAW

Settlement With Non-Motor Vehicle Tortfeasor Under SUM Endorsement

By **Norman H. Dachs**

And **Jonathan A. Dachs**

The coverage provided under the Supplementary Uninsured/Underinsured Motorist (SUM) Endorsement prescribed by Regulation 35-D (11 NYCRR §60-2.3, et seq.), is, by its terms, "subject to the Exclusions, Conditions and Limits" set forth in the endorsement. In this article, we examine one of the exclusions and two of the conditions contained in the SUM endorsement, and their interpretation and interplay in the context of one specific, not uncommon, scenario—where the bodily injury sustained by the insured/claimant is claimed to be caused by the negligence/fault of both a motor vehicle tortfeasor and a non-motor vehicle tortfeasor. Several interesting questions are raised in such circumstances, which have recently been addressed by the courts.

Pertinent Policy Provisions

Exclusion 1 of the SUM endorsement provides, in pertinent part, that, except as provided by Condition 10 (discussed below), if an insured, without the SUM carrier's written consent, "settles any lawsuit against *any person or organization that may be legally liable for such injury*," coverage is excluded [emphasis added].

Condition 10, the "Release or Advance" provision, referred to in Exclusion 1, provides that: "In accidents involving the insured and one or more negligent parties, if such insured settles with *any such party* for the available limit of the *motor vehicle bodily injury liability coverage* of such party, release may be executed with such party after thirty calendar days actual written notice to [the SUM carrier] unless within this time period [the SUM carrier] agree[s] to advance such settlement amounts to the insured in return for the cooperation of the insured in [the SUM carrier's] lawsuit on behalf of the insured."

This condition further provides that the SUM carrier "shall have a right to the proceeds of any such lawsuit equal to the amount advanced to the insured and any additional amounts paid under this SUM coverage. Any excess above those amounts shall be paid to the insured." And, Condition 10 concludes by providing, in a separate paragraph, that: "An insured shall not otherwise settle with *any negligent party* without our written consent, such that our rights would be impaired" [emphasis added].

> In 'Day' the Fourth Department was faced with the question of whether an insured/claimant can settle with a non-motor vehicle tortfeasor, without preserving the subrogation rights of the SUM carrier, and still pursue SUM coverage.

Condition 13, the "Subrogation" provision, provides that where the SUM carrier makes a SUM payment, it has the right to recover the amount of that payment from "*any person legally responsible* for the bodily injury or loss" [emphasis added] for which the payment was made, to the extent of the payment. It further provides that: "Except as permitted by Condition 10, such person shall do nothing to prejudice this right."

In addition to the foregoing provisions that deal specifically with settlements and subrogation rights, several other conditions in the SUM endorsement also make reference to the tortfeasor(s) and/or tortfeasors' insurers. Condition 6, for example, titled "Maximum SUM Payments," provides that the maximum SUM payment "shall be the difference between: (a) the SUM limits; and (b) *the motor vehicle bodily injury liability insurance or bond payments* received by the insured...from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured" [emphasis added].

Similarly, Condition 9, titled "Exhaustion Required," provides that, except as provided in Condition 10, above, the SUM carrier will pay SUM benefits "only after the limits of liability have been used up under all *motor vehicle bodily injury liability insurance policies or bonds* applicable at the time of the accident in regard to any one person who may be legally liable for the bodily injury sustained by the insured" [emphasis added].

And, Condition 11, titled "Non-Duplication," provides that the SUM coverage will not be duplicative of "any amounts recovered as bodily injury damages from sources *other than motor vehicle bodily injury liability insurance policies or bonds*" [emphasis added].

Question Presented

As can be seen from the foregoing, some of the policy provisions broadly refer to any or all persons who may be legally liable for the insured's injuries—a phrase that can be construed to include motor vehicle tortfeasors, as well as non-motor vehicle tortfeasors—while others more narrowly restrict their focus only to motor vehicle tortfeasors, i.e., those who carry "motor vehicle bodily injury liability insurance."

It is this state of affairs that prompted us, almost seven years ago, in this space, to question "whether Exclusion 1 and the 'Subrogation' Condition [Condition 13] are addressed to and concerned with settlements with and/or recoveries from other motor vehicle insurance policies [only] and not settlements with and/or

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NORMAN H. DACHS *and* JONATHAN A. DACHS *are partners at Shayne, Dachs, Corker, Sauer & Dachs, in Mineola.*

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recoveries from non-auto tortfeasors." See Dachs, N. and Dachs, J., "UM/SUM Coverage: Proposed Statutory, Regulatory Amendments," NYLJ, Sept. 13, 2005, p. 3, col. 1. In responding to this question, we, inter alia, took note of a then-recent unreported Supreme Court decision in *Assurance of America v. Fricioni*, Sup. Ct. Kings Co. Dabiri, J., Index No. 14888/04 (Feb. 7, 2005), wherein the court rejected the SUM carrier's contention that the claimant/insured's settlement of a lawsuit against the City of New York (a non-motor vehicle tortfeasor) for negligence in the design of the roadway where the accident occurred, without consent and without preserving the SUM carrier's subrogation rights, vitiated the SUM coverage and warranted a permanent stay of arbitration.

In so holding, the *Fricioni* court rejected the carrier's contention that the "Subrogation" provision was violated because, in the court's view, "Condition 13 only gives the insurer the right of subrogation against a person legally responsible for the loss to the insured, for a payment which the insurer had to pay under the SUM coverage endorsement...,Condition 13 thus relates only to subrogation rights as against multiple vehicle tortfeasors, who are underinsured. This is made plain by its specific reference to Condition 10, which...permits an insured to settle 'for the available limit of motor vehicle bodily injury liability coverage' after giving thirty days written notice to the insured. Contrary to [the carrier's] assertions, Condition 10 only relates to motor vehicle tortfeasors."

Specifically rejecting the carrier's contention that the concluding sentence of Condition 10, which provides that "[a]n insured shall not otherwise settle with *any negligent party*, without our written consent, such that our rights would be impaired" [emphasis added] addresses settlement with non-motor vehicle tortfeasors, the court stated that "It is apparent from its plain meaning, context, and statutory purpose that this sentence in Condition 10 continues to refer to motorist tortfeasors and does not impose any consent requirement or create any offset rights in favor of the insurer where its consent is not obtained and subrogation rights are not preserved in a settlement with a non-motor [vehicle] tortfeasor."

Finally, the court rejected the carrier's reliance upon Exclusion 1, stating that "It is apparent from the context of this Exclusion, which is expressly made 'subject to Condition 10,' when read with the other policy provisions, such as Condition 9...and Condition 10, that the aforementioned language refers to lawsuits against persons legally liable for the injuries sustained by the insured which would impact on the insured's entitlement to SUM coverage, to wit, persons who are underinsured motorists whose policy limits have been used up under all motor vehicle bodily injury liability insurance policies or bonds applicable at the time of the accident [citations omitted]."

See also, *American Home Assurance v. Sweeney*, Sup. Ct. Nassau Co., Adams, J., Index No. 1026/00 (June 23, 2000) ("Under [Condition 10], the respondent was not required to obtain the carrier's consent to settle with the City. It is undisputed that the City was self-insured, and that its liability was not predicated on the negligence in the operation of a motor vehicle, but on its unique liability as a municipality to replace and repair traffic control devices. Since the City's payment did not involve settlement 'for the available limit of the motor vehicle bodily injury liability coverage of such party,' and that it is the only circumstances in which consent is required, the respondent did not breach this provision of this contract").

For many years, these two lower court decisions were the only words on the subject. However, the interplay between the consent to settle and subrogation provisions of the SUM endorsement was the subject of two more recent decisions—one by the Court of Appeals and one (most recently) by the Appellate Division, Fourth Department—which are discussed below.

Court of Appeals' Decision

Central Mutual Ins. v. Bemiss, 12 NY3d 648 (2009), did not involve a motor vehicle tortfeasor and a non-motor vehicle tortfeasor, but, rather, two motor vehicle tortfeasors in a multi-vehicle, chain reaction accident.[1] As pertinent hereto, the plaintiff in *Bemiss* unsuccessfully urged the court to conclude that "'where multiple tortfeasors are involved and the insured has permissibly settled with one tortfeasor for his/her policy limits, ...the insurer has no right under Regulation 35-D to be notified of and withhold consent to a settlement with another tortfeasor for less than his/her policy limit' even though Condition 10 mandates that 'an insured shall not otherwise settle with any negligent party, without our written consent, such that our rights would be impaired.'"

Carefully examining the language and structure of Condition 10, the Court of Appeals held that while Beverly Bemiss contended that "any negligent party" referred only to the first tortfeasor whose policy was exhausted so as to make SUM benefits payable, "this is not readily apparent from the words used or the regulatory history." As explained by the court, "In short, Condition 10 delineates the sole situation in which an insured may settle with any tortfeasor in exchange for a general release, thus prejudicing the insurer's subrogation rights without the carrier's written consent."

> The 'Bemiss' court held that Bemiss violated Condition 10 when she settled with the second tortfeasor for less than the maximum available policy limits without the SUM carrier's written consent, such that its subrogation rights were impaired.

Thus, the court held that Bemiss violated Condition 10 when she settled with the second tortfeasor for less than the maximum available policy limits without the SUM carrier's written consent, such that its subrogation rights were impaired.

Fourth Department Decision

Just less than two weeks ago, in *Day v. One Beacon Ins.*, 2012 N.Y. Slip Op. 05281, 2012 WL 2478206 (4th Dept. June 29, 2012), the Fourth Department was faced with the question of whether an insured/claimant can settle with a non-motor vehicle tortfeasor, without preserving the subrogation rights of the SUM carrier, and still pursue SUM coverage. As will be seen, that appellate court viewed the situation much differently from the Supreme Courts in *Fricioni*, and *Sweeney*, supra, and, thus, rendered a decision completely at odds with those earlier decisions.

The insured/claimant, Winifred Day, was injured in a motor vehicle accident when the Ford minivan in which she was riding as a passenger was involved in a collision with a pickup truck operated by Peter Lazik. Upon impact, Day's car seat became detached from the floor of the minivan, and she became airborne in the vehicle as it spun out of control, causing her to sustain severe and permanent personal injuries.

Lazik was insured under a policy with motor vehicle bodily injury limits of $100,000; Day's vehicle was insured by One Beacon with a policy that contained the SUM endorsement and provided SUM coverage of $500,000. Ford, against whom a products liability action existed based upon alleged defectively designed seat-to-floor latches that failed to hold the seat in place upon impact, was self-insured with assets presumed to be sufficient to cover Day's damages.

Day timely placed One Beacon on notice of her potential SUM claim (based on the liability of the underinsured Lazik vehicle), and commenced a personal injury action against Lazik (sounding in negligence) and Ford (sounding in strict products liability). Following mediation, Lazik's insurer offered to settle for its policy limits of $100,000, and Ford offered to settle for an additional $475,000.

Day formally notified One Beacon of the settlement offers she had received, and advised that she intended to accept those offers unless One Beacon advanced the

full amount of the settlement offers, i.e., $575,000, within 30 days, in accordance with Condition 10 of its SUM endorsement. One Beacon responded that pursuant to Condition 10, it was only obligated to advance the $100,000 limit of Lazik's motor vehicle bodily injury liability policy, and was not obligated to advance the settlement offer from Ford, and that pursuant to Conditions 10 and 13, Day could not thereafter settle her action with Lazik.

One Beacon further responded that those conditions also prohibited Day from settling her action with Ford without its consent, which it refused to provide. Although One Beacon did, in fact, offer to advance the $100,000 limit of Lazik's policy, Day rejected that offer, and, instead, upon the theory that One Beacon's limited offer did not comply with Condition 10, proceeded to settle her underlying action against Lazik and Ford for $100,000 and $475,000, respectively, and to issue general releases to both of those parties.

In an action by Day for breach of contract seeking $400,000 in SUM coverage under One Beacon's policy, One Beacon asserted several affirmative defenses, including, as pertinent hereto, that Day violated Conditions 10 and 13 of the SUM endorsement. Day moved to dismiss these affirmative defenses, and One Beacon cross-moved for summary judgment dismissing Day's complaint.

In unanimously reversing the grant of Day's motion and the denial of One Beacon's cross-motion, and granting summary judgment to One Beacon, the Fourth Department held, first of all, that Day had violated Conditions 10 and 13 of the SUM endorsement by settling with the motor vehicle tortfeasor, i.e., Lazik, without One Beacon's consent.

As noted by the court, "Pursuant to Condition 10, defendant was obligated either to consent to the settlement with the motorist tortfeasor or to advance the $100,000 settlement funds offered by that tortfeasor's insurer. That release or advance condition, however, applies only to settlements 'for the available limit of the motor vehicle bodily injury liability coverage of such party,' and therefore does not apply to the settlement offer by Ford, which was not based upon a motor vehicle bodily injury policy. Thus, defendant satisfied its obligation to plaintiff under Condition 10 by offering to advance the $100,000 offered by the motorist tortfeasor...and was not obligated to advance the $475,000 offered by Ford, as plaintiff had demanded."

Next, the court concluded that Day had also violated conditions 10 and 13 by settling with Ford without One Beacon's written consent, finding that although One Beacon was not obligated to advance the settlement offer made by Ford, Ford was nevertheless a party "legally responsible" for Day's injuries, and, thus, under the express language of conditions 10 and 13, Ford was a party against whom One Beacon had a subrogation right to recover its SUM payments, and, thus, a "negligent party" with whom Day was not allowed to settle without One Beacon's written consent.

Finally, the court expressly rejected Day's contention that the last sentence of Condition 10 applies only to motorist tortfeasors, and not to settlement with non-motorists, such as Ford. As the court explained, "The provision on its face plainly refers to settlements with 'any negligent party,' and does not refer merely to motorist tortfeasors. We thus reject plaintiff's 'strained, unnatural and unreasonable' interpretation of that policy condition [citation omitted]. Plaintiff's interpretation would require the replacement of the word 'motorist' for 'party' in the last sentence of Condition 10, such that the phrase would read 'negligent motorist' rather than 'negligent party.' Had the sentence been intended to read in the manner suggested by plaintiff, it would have been easy enough to phrase it that way."

Conclusion

The lesson of *Day*, which, at least until the other appellate departments weigh in on the subject, will be binding precedent for all of the trial level courts (see *Mountain View Coach Lines v. Storms*, 102 AD2d 663 [2d Dept. 1984]), is be careful with whom you settle, and be careful how you do it.

1. See discussion of *Central Mutual Ins. v. Bemiss*, supra, in Dachs, N. and Dachs, J., "Court of Appeals Addresses Uninsured, Underinsured Motorists Coverage," NYLJ, July 14, 2009, p. 3, col. 1.