

INSURANCE LAW

'Top 10' Companies And Other Developments

We are privileged yet again to report upon the State of New York Insurance Department's "Annual Ranking of Automobile Insurance Complaints." In addition, this article discusses an interesting and significant decision on the issue of proof of damages in cases involving the No-Fault "serious injury" threshold.

2009 Annual Ranking

The 2009 "Annual Ranking of Automobile Insurance Complaints," which is based upon data for the calendar year 2008, ranks 39 automobile insurance companies or groups of companies by the number of private passenger automobile insurance complaints upheld against them and closed by the Insurance Department in 2008, divided by their average 2007-2008 private passenger automobile premium volume in New York State. All companies, or groups, with at least \$10 million in average premiums for 2007-2008 are included in the ranking. Insurers with less than \$10 million in premiums are included only if they had 10 or more complaints upheld against them.

In 2008, the Insurance Department's Consumer Services Bureau received a total of 7,238 private passenger auto insurance complaints (up from 6,301 the year before), of which 948 (up from 933) were upheld. Neither commercial auto complaints nor complaints made directly to the insurer are included in determining the complaint ratios. An upheld complaint occurs when the department agrees with a consumer that an auto insurer made an inappropriate decision. Typical complaints are those involving monetary disputes, such as the value of a total loss. Other common complaints involve insurers that



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do not renew policies. Complaints about policy terminations and the promptness of insurance payments are also common.

The 2008 average complaint ratio for all companies or groups, including those with less than \$10 million in premiums, was 0.10 per \$1 million in premiums (the same as the year before). This equates to approximately

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one upheld complaint for every \$9.7 million in premiums paid to insurance companies. This average ratio was derived by dividing the number of complaints upheld against all companies in 2008 (948) by the average premium for 2007-2008 for all companies (\$9,785.388 million, or \$9.78 billion).

Of the top 10 finishers in 2008, i.e., the 10 companies with the fewest complaints against them, six—Amica, American Express Group, Electric, Eveready, Chubb and Preferred Mutual—were in the top 10 in 2007 as well. Electric, Amica and Preferred Mutual finished in the top 10 in each of the previous five annual rankings. Most notable is the improved performance of QBE Insurance Group, which went all the way from No. 31 in 2007 to No. 4 in 2008. Also notable, in the other direction, is the performance of

Mercury General, which went from No. 1 in the rankings for 2007 to No. 34 in 2008, and Utica National, which fell in the rankings from 9th to 32nd.

Two of the three largest New York State auto insurers, Allstate and State Farm, showed some decline in their rankings; Allstate moved from a ranking of 23rd in 2007 to 29th in 2008; and State Farm, which had cracked into the "Top 10" in 2007, ranking 10th in that year, declined to 20th in 2008. Still, State Farm has finished in the top 25 in each of the past seven annual rankings. Berkshire Hathaway (GEICO), the state's largest auto insurer, ranked the best among the state's "big three" insurers, improving its ranking from 22nd in 2007 to 17th in 2008.

Charts

The first chart on page 7 lists the "Top 10" or the 10 best performers of 2008. For purposes of comparison, companies' rankings in 2007 are also shown.

The second chart reveals the opposite side of the spectrum; it lists the 10 auto insurers with the worst performance record for the calendar year 2008, i.e., the "Bottom 10." In this chart, the company with the highest ratio is ranked first; the company with the lowest ratio is ranked last. Thus, those ranked at the top of this list had the worst performance. These companies' rankings in 2007 are also shown. Six of the insurers with the highest complaint ratios—Long Island Ins. Co., Countrywide, Infinity, White Mountain Group, Tri-State Consumer, American International and Commerce Ins. Group—were carryovers from the previous year's "Bottom 10."

Copies of the Insurance Department's annual Consumers Guide to Automobile Insurance and the annual ranking may be obtained free of charge by calling the Department's toll-free telephone number (800) 342-3736. In addition, both publications are accessible on the Internet » Page 7

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Top 10

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at the Department's Web site
address: www.ins.state.ny.us.

'Serious Injury' Damages

It has long been established—but not always remembered—that once a prima facie case of "serious injury," as defined in the No-Fault Law (Ins. L. §5102[d]), has been made, the plaintiff is entitled to recover for all injuries incurred as a result of the accident. Stated another way, "Proof of a 'serious injury' permits recovery for the rest of the personal injuries...

resulting from the occurrence without establishing that every injury independently met the threshold criteria." 1A NY PJI Div. 2, G.1. Intro, II, b., 6, a. This is the clear holding of the Appellate Division, Second Department in *Prieston v. Massaro*, 107 AD2d 742 (2d Dept. 1985), and numerous cases decided thereafter. See e.g., *Marte v. New York City Transit Authority*, 59 AD3d 398 (2d Dept. 2009); *Obdulio v. Fabian*, 33 AD3d 418 (1st Dept. 2006); *Rizzo v. DeSimone*, 6 AD3d 600 (2d Dept. 2004); *Gallagher v. Samples*, 6 AD3d 659 (2d Dept. 2004); *Deyo v. Laidlaw Transit Inc.*, 285 AD2d 853 (3d Dept. 2001); *Kelley v. Balasco*, 226 AD2d 880 (3d Dept. 1996); *O'Neill*

v. O'Neill, 261 AD2d 459, 460 (2d Dept. 1999) ("If a plaintiff establishes a prima facie case that any one of several injuries that he or she sustained in an accident is a 'serious injury' within the meaning of Insurance Law §5102(d), he or she is entitled to seek recovery for all injuries incurred as a result of the accident"); *Prieston v. Young*, 239 AD2d 729, 731-32 (3d Dept. 1997); *Matula v. Clement*, 132 AD2d 739 (3d Dept. 1987).

These principles apply even where the only category of "serious injury" found by the jury to have been met is the "90/180 day" category. A plaintiff is not foreclosed from recovering damages

for future pain and suffering on the ground that he or she did not sustain a "serious injury" under the "significant limitation" or "permanent consequential limitation" statutory categories. See *Obdulio v. Fabian*, supra; *Rizzo v. DeSimone*, supra.

Recent Case

In *Swed v. Pena*, 65 AD3d 1033 (2d Dept. 2009), this issue was raised in an unusual context. The defendants appealed from those portions of an order of the Supreme Court, Kings County, which denied those branches of their motion which sought summary judgment dismissing the

The Top 10: Best Performers of 2008

	Company or Group	2008 Complaint Ratio	2008 Ranking	2007 Ranking
1.	Adirondack Ins. Exchange	0.00	1/39	N/A
2.	Amica Mutual Grp.	0.00	2/39	5/40
3.	Main Street America Grp.	0.00	3/39	12/40
4.	QBE Ins. Grp.	0.00	4/39	31/40
5.	American Express Grp.	0.00	5/39	2/40
6.	Balboa Life & Cas. Grp.	0.00	6/39	N/A
7.	Electric Ins. Grp.	0.00	7/39	4/40
8.	Eveready Ins. Grp.	0.00	8/39	3/40
9.	Chubb & Sons, Inc.	0.01	9/39	8/40
10.	Erie Ins. Grp.	0.02	10/39	21/40
11 (tie)	Preferred Mutual Ins. Co.	0.02	11/39	6/40

The Bottom 10: Worst Performers of 2008

	Company or Group	2008 Complaint Ratio	2008 Ranking	2007 Ranking
1.	Long Island Ins. Co.	12.19	39/39	40/40
2.	Countrywide	0.45	38/39	34/40
3.	White Mountain Grp.	0.40	37/39	33/40
4.	Tri-State Consumer	0.23	36/39	37/40
5.	American International	0.21	35/39	36/40
6.	Mercury General Grp.	0.20	34/39	1/40
7.	Commerce Grp.	0.18	33/39	32/40
8.	Utica National Ins. Grp.	0.16	32/39	9/40
9.	GMAC Ins. Holding	0.13	31/39	29/40
10.	Kingsway Grp. (Lincoln General)	0.12	30/39	15/40

complaint on the ground that the plaintiff did not sustain a "serious injury" because he did not sustain a "permanent consequential limitation of use" or a "significant limitation of use" under Ins. L. §5102(d). Defendants did not, however, appeal from that portion of the same order that granted the plaintiff's cross-motion for summary judgment in his favor on the "serious injury" threshold based upon his contention that he sustained an injury that qualified under the "90/180 day" category.

The Appellate Division dismissed the defendants' appeal as "academic" because "since the defendants did not dispute

that the plaintiff made out a prima facie case of serious injury pursuant to this last category, the plaintiff is entitled to seek recovery for all injuries he allegedly incurred as a result of the accident [citing *Marte, Obdulio, and Rizzo, supra*]." Accordingly, the court held that "the defendants' failure to appeal from that portion of the order has rendered the instant appeal academic, since any determination made by this Court on the appeal would not affect the rights of the parties with respect to this action, nor is there any basis in this case for invoking an exception to the mootness doctrine [citation omitted]."

The Big 10: Largest Auto Insurers in New York

	Company or Group	2008 Rank	2008 Complaint Ratio	2007-2008 Average Premium (In Millions)
1	Berkshire-Hathaway (GEICO)	17/39	0.06	\$2,212.829
2	Allstate	29/39	0.11	\$1,845.980
3	State Farm	20/39	0.07	\$1,025.897
4	Progressive	14/39	0.05	\$694.491
5	Liberty Mutual	22/39	0.08	\$546.901
6	St. Paul Travelers	23/39	0.08	\$545.646
7	Nationwide	18/39	0.06	\$286.693
8	Central Services	13/39	0.04	\$269.661
9	Metropolitan	19/39	0.06	\$225.592
10	Hartford	25/39	0.09	\$224.607