INSURANCE LAW

SUM Offsets: a Rare Reversal of 'Settled' Law

By Jonathan A. Dachs

One of the more interesting, and significant, insurance law questions that has been posed to the courts in recent years involves the issue of whether an "SUM" carrier is entitled to an offset or reduction in coverage for the amount(s) received from non-motor vehicle tortfeasors, such as municipalities, bars, and/or medical providers, in addition to amounts received by the insured/claimant from the motor vehicle tortfeasor involved in the accident. Although the initial decisions on that issue were consistent in expansively reading the SUM endorsement to maximize the number of potential offsets or reductions in the SUM insurer's policy limits (thereby minimizing the SUM coverage), a more recent decision by the Appellate Division, Second Department, in which that court, in a rare move, effectively overruled an earlier holding, has created a division of authority that leaves the question somewhat "unsettled."

Pertinent Policy Provisions

The Supplementary Uninsured/Underinsured Motorists (SUM) Endorsement—New York[1] prescribed by the Insurance Department in 1993 as part of Regulation 35-D,[2] provides in its "Maximum SUM Payments" Condition (Condition 6), that "Regardless of the number of insureds, our maximum payment under this SUM endorsement shall be the difference between: (a) the SUM limits [stated in the Declarations] and (b) the *motor vehicle bodily injury liability insurance or bond payments* received by the insured or the insured's legal representative, from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured [emphasis added]."

That the specific reference to "motor vehicle bodily injury liability insurance or bond payments" was intended by the drafters of the regulation to distinguish recoveries from parties responsible for the use or operation of a motor vehicle covered under a motor vehicle liability policy from other, non-motor vehicle, tortfeasors, such as, for example, Dram Shop defendants (bars), municipalities responsible for a defective traffic light or stop sign, or doctors who committed medical malpractice, is apparent from the change in language noted above. It is also apparent from the numerous examples of SUM coverage set forth in the regulation and required to be set forth in written notices to new and renewal insureds in order to "illustrate the proper application of SUM coverage,"[3] all of which depict and demonstrate recoveries by the claimant from "the negligent owner or operator of the other motor vehicle" or the "other motor vehicle owner or operator."

> While the state of the law appeared well-settled following 'Weiss' and 'Redeye,' another similar case was winding its way to the Second Department.

While it appears clear from the above that only motor vehicle bodily injury insurance policies received by the insured are to be considered when arriving at the maximum amount available to the claimant, there is another provision in the same prescribed Endorsement, which, at least according to some, clouds the issue.

Condition 11, titled "Non-Duplication," provides, in pertinent part, as follows:

> "This SUM coverage shall not duplicate any of the following:
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> * * *
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> (e) Any amounts recovered as bodily injury damages from sources *other than motor vehicle bodily injury liability insurance policies or bonds*" [emphasis added].

'Weiss v. Tri-State Consumer'

The first major case to deal with the interplay between Condition 6 and Condition 11 of the SUM endorsement was *Weiss v. Tri-State Consumer Ins. Co.*, 98 A.D.3d 1107, 951 N.Y.S.2d 191 (2d Dept. 2012). There, a vehicle owned and operated by Anton Goldenberg was struck by a vehicle owned by Christopher McGibbon and operated by Michael McGibbon, an off-duty New York City police officer, who was intoxicated. Goldenberg and his wife, a front-seat passenger, as well as Michael McGibbon, sustained fatal injuries in the accident. The McGibbon vehicle was insured by State Farm, with liability limits of $50,000/$100,000. The Goldenberg vehicle was insured by Tri-State, with liability and SUM limits of $250,000/$500,000.

The lawsuit brought against the McGibbons (negligence), as well as a bar and diner that served Michael McGibbon alcoholic beverages prior to the accident (Dram Shop liability), was settled, with Tri-State's consent, for a total of $355,000 settlement, consisting of the full $100,000 on the State Farm/McGibbon policy, plus $255,000 from the Dram Shop defendants. Plaintiffs' subsequent demand that Tri-State tender the $400,000 in SUM coverage available (i.e., the $500,000 per accident limit less the $100,000 received from the motor vehicle tortfeasor [McGibbon]) was rejected by Tri-State on the basis that, pursuant to the Non-Duplication provision of its SUM endorsement, any settlement money obtained from the Dram Shop defendants should be used to reduce its coverage, which in this case, would reduce the $500,000 available SUM coverage to $145,000.

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Both parties moved for summary judgment in their favor. Plaintiffs argued, inter alia, that the SUM endorsement, as a whole, was clear in its intention to consider only motor vehicle insurance in the offset/reduction in coverage calculus, and that the Non-Duplication provision, and Tri-State's interpretation thereof, did not warrant an offset or reduction for the sums received from the non-motor vehicle defendants.

Tri-State, on the other hand, although effectively conceding that if the plaintiffs had elected not to pursue their Dram Shop action they would have been entitled to seek the full $400,000 in SUM coverage, argued that the Non-Duplication provision "clearly applies to the Dram Shop settlement proceeds inasmuch as the settlement compensates plaintiffs for the same bodily injury damages for which the SUM coverage is sought," and that provision had never been held to be vague, ambiguous, or in conflict with any other provision of the endorsement."

Justice Bert A. Bunyan, of the Supreme Court, Kings County, held in favor of plaintiffs and against Tri-State, finding, as pertinent hereto, that "nothing within the offset provision of the endorsement (i.e., paragraph 6 of the Conditions) indicates that proceeds from a Dram Shop lawsuit will offset the SUM coverage,"

Notably, in what, as will be seen, would turn out to be a prescient statement, Justice Bunyan noted that "allowing Plaintiffs to retain the Dram Shop settlement without reducing the SUM limit by a like amount will not result in a duplicate recovery or windfall for Plaintiffs. In this regard, Plaintiffs must still prove damages before tapping into the $400,000 in available SUM coverage. As it is, given the underlying circumstances of this matter, it may well be that the damages are ultimately found to exceed the combined value of the SUM coverage, the Dram Shop settlement, and the $100,000 settlement paid by the offending vehicles' carrier."

Accordingly, Justice Bunyan granted plaintiffs' motion for summary judgment to the extent of determining that the available SUM coverage was $400,000.

On Tri-State's appeal, the Second Department reversed Justice Bunyan's order, and held that the amount of available SUM coverage was limited to $145,000 because the amount payable under the SUM endorsement was subject, by virtue of the Non-Duplication provision, to reduction for the amounts recovered from the Dram Shop defendants. The court held that the Dram Shop recovery constituted an "amount recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds" under Condition 11(e), which does not allow duplicate recovery of such damages.

The court further noted that plaintiffs were "not penalized" by the reduction of the amount payable under the SUM endorsement by the $255,000 received from the Dram Shop defendants "since they received the maximum amount for which they are covered under the SUM endorsement" (i.e., $500,000): $100,000 from the McGibbons' policy, $255,000 from or on behalf of the Dram Shop defendants, and $145,000 from Tri-State.

'Redeye v. Progressive'

Three years after *Weiss*, supra, was decided by the Second Department, the case of *Redeye v. Progressive Ins. Co.*, 133 A.D.3d 1261, 19 N.Y.S.3d 645 (4th Dept. 2015), lv. to appeal denied, 26 N.Y.3d 918, 26 N.Y.S.3d 764 (2016), was presented as a "matter of first impression" to the Fourth Department. Although plaintiff's counsel therein acknowledged that the issue presented had, in fact, been decided by the Second Department in *Weiss*, supra, he argued that "the Weiss court wrongly decided the issue...."

Plaintiff, Daniel Redeye, was a pedestrian struck by a motor vehicle owned and operated by Andrew J. Hoffman, an alleged drunken driver, who collided with a parked car and bounced off into plaintiff (and two other pedestrians). Hoffman was insured by GEICO, with bodily injury liability limits of $25,000/$50,000. Plaintiff had his own motor vehicle insurance policy with Progressive, with bodily injury and SUM limits of $50,000/$100,000.

As a result of this accident, plaintiff commenced an action against Hoffman for negligence, and against the Cold Spring Volunteer Fire Department for negligence and Dram Shop law violations, for having served alcohol to Hoffman prior to the accident. During the course of that litigation, GEICO offered its entire per accident policy limit of $50,000 to plaintiff and the other two pedestrians injured as a result of Hoffman's negligence—to be equally divided among them (i.e., $16,666.66 each). In addition, Selective Insurance Co., Cold Spring's commercial general insurer, offered $170,000 to plaintiff to settle the case against Cold Spring.

Plaintiff received Progressive's consent to both settlements, and then proceeded to file an SUM claim with Progressive for the amount of $33,333.34, reflecting the difference between the $50,000 in SUM coverage he purchased

and the $16,666.66 he received as payment from the motor vehicle policy covering the motor vehicle tortfeasor.

Progressive denied any obligation to compensate plaintiff under its SUM endorsement because, pursuant to the Non-Duplication provision of its SUM endorsement, and consistent with *Weiss*, supra, it was entitled to an offset or reduction in coverage for not only the $16,666.66 plaintiff received from GEICO, but also the $170,000 he received from Selective—which effectively reduced the available SUM coverage to zero.

In opposing Progressive's motion for summary judgment dismissing plaintiff's complaint to recover SUM benefits in the amount of $33,333.34, plaintiff asserted many of the same arguments as did the plaintiff in *Weiss*, and argued that *Weiss*, which he conceded was "directly on point," was "wrongly decided" by the Second Department, and should not be followed in the Fourth Department.

The Supreme Court, Erie County (O'Donnell, J.), in reliance upon *Weiss*, ruled in favor of Progressive and dismissed plaintiff's complaint on the ground that "Under the clear terms of the SUM endorsement, the Plaintiff's receipt of the Dram Shop recovery reduces, by that same $170,000, the amount payable under the SUM endorsement."

It is interesting to note that on his appeal, plaintiff, in addition to repeating the arguments mentioned above, also argued, alternatively, that even assuming, arguendo, that Condition 11 applied and provided for a further reduction of the SUM policy limits, "the Defendant did not meet its burden of proving a duplication of benefits." Specifically, plaintiff argued that "The value of the Plaintiff's injuries would be well in excess of the settlement he received in his underlying case which was a compromised settlement given the inherent difficulties in ultimately proving a dram shop action."

Plaintiff further argued that "[t]he settlement received by the Plaintiff did not fully compensate him for the value of his injuries or the different types of damages claimed. Consequently, in this case, the Plaintiff's claim for SUM benefits would not, in fact, duplicate the amount he already received from the non-motor vehicle liability policy payment because he was not fully compensated," and, therefore, the moving defendant did not establish that there was any duplication of the amounts plaintiff "already recovered or what he would be entitled to."

In affirming the Supreme Court's decision, the Fourth Department pointed to the Non-Duplication provision, and held that "Here, the payment plaintiff received from the fire company's insurer was for bodily injury damages, and thus the amount of SUM benefits available to plaintiff was properly reduced by that amount [citing *Weiss*, supra]." The court further held that the policy was not ambiguous, and that Condition 11 did not conflict with Condition 6, noting that Condition 6 does not state that the difference between the SUM limit and any payments received from a motor vehicle bodily injury liability policy is "the" SUM payment that is to be given to the plaintiff, but, rather, that the difference is the "maximum" payment, "which the average insured would understand to mean that it could be further reduced."

> The Second Department in 'Sherlock' noted that "The key to a proper understanding of Condition 11 is the recognition that 'shall not duplicate' is not aimed at preventing an insured from seeking full compensation by combining partial recoveries from several tortfeasors, but at preventing double recoveries for their bodily injuries."

A Rare Reversal: 'Sherlock'

While the state of the law appeared well-settled following *Weiss* and *Redeye*, supra, another similar case was winding its way to the Second Department at around the same time that *Redeye* was proceeding to the Fourth Department.

In *Government Employees Ins. Co. v. Sherlock*, __ A.D.3d __, 32 N.Y.S.3d 635 (2d Dept. 2016), the claimant's decedent was operating his GEICO-insured vehicle when it was struck head-on at a high rate of speed by a vehicle owned and operated by Jose Maldonado, which was insured by New York Central Mutual Ins. Co. At the time of the accident, the Maldonado vehicle was being followed by an Old Brookville police officer, who had observed him speeding. The Maldonado vehicle carried bodily injury liability coverage of $25,000/$50,000, which expanded to $50,000/$100,000 in the case of death. The decedent's vehicle carried bodily injury and SUM limits of $250,000/$500,000.

New York Central paid its entire $50,000 limit to settle the action against Maldonado. U.S. Specialty

Ins. Co., the insurer for the Village of Old Brookville and other municipal defendants, paid $425,000 from its public risk professional policy to settle the action against its insureds. Presumably, these settlements were reached with GEICO's consent.

Subsequently, the estate representative filed a claim with GEICO for $200,000 in SUM benefits (representing its $250,000 SUM limits less the $50,000 received from the tortfeasor's insurer). In response, GEICO petitioned to stay arbitration on the ground that, pursuant to *Weiss*, the $425,000 received from or on behalf of the municipal defendants must be taken into account and included in the offset or reduction in coverage, and, therefore, its SUM policy limits were reduced to zero.

In opposition to GEICO's Petition to Stay, the claimants contended that rather than permitting an offset of SUM coverage, the Non-Duplication provision ensures that the policyholder does not receive duplicative recovery, and that to the extent that Weiss holds otherwise, it should be overruled.

The Supreme Court, Nassau County (Feinman, J.), granted GEICO's Petition and issued a permanent stay on the ground that under *Weiss*, the payment by the public risk policy reduced the SUM coverage to zero. Indeed, the court stated that "the Weiss decision controls, is applicable and under the doctrine of stare decisis shall be followed."

Undaunted by the severe challenge imposed by the doctrine of stare decisis, the claimants boldly took an appeal from this decision in order to test "whether *Weiss v. Tri-State Consumers Ins. Co.*, should be overruled and whether the Non-Duplication Condition allows for an offset of coverage."

One of the major arguments made by claimants was that "the proof at the Sherlock arbitration will be that the pecuniary damages for loss of financial support, loss of household services and loss of nurture and guidance suffered by the claimants...far exceed the $425,000.00 paid by the municipal Defendants. From the Appellant's view, the total coverage here is woefully inadequate. There will be no duplication. In any event, it will be the arbitrator's role to determine the totality of the damages."

Claimants also argued that the legislative purpose of SUM coverage supports a ruling that payment from non-motor vehicle bodily injury liability insurance should not offset coverage, and that the Legislature's intent was to provide an insured with as much coverage as he or she provided to other motorists. As the court summarized the claimant's argument, "In essence, [the claimant] contends that the purpose of Condition 11(e) is to prevent insureds from receiving more in compensation than they have suffered in injury; it is not intended to prevent an insured from obtaining benefits that would bring them closer to full compensation for the injuries that they prove they have suffered. [Claimant] contends that *Weiss* was wrongly decided to the extent that it holds otherwise."

In a decision handed down on June 8, 2016, the Second Department, notwithstanding its earlier Weiss decision, reversed the order appealed from by claimants and denied GEICO's Petition to Stay Arbitration. The court noted that "The key to a proper understanding of Condition 11 is the recognition that 'shall not duplicate' is not aimed at preventing an insured from seeking full compensation by combining partial recoveries from several tortfeasors, but at preventing double recoveries for their bodily injuries."

The court further noted that the claimant alleged in her request for arbitration that the bodily injury damages were "in the millions of dollars," and that presumably, if the motor vehicle defendant's policy had contained the same $250,000 liability limit as GEICO's policy, claimant would have been able to obtain $250,000 from the motor vehicle tortfeasor's insurer, plus the $425,000 from the municipal defendant's insurer. Here, the claimant seeks only through her SUM claim "to be in the same position she would have been in had the Maldonado defendants not been underinsured relative to the GEICO policy."

Finally, the court stated that "to the extent that *Weiss* can be interpreted to require that the amount of SUM coverage be reduced without regard to the actual amount of bodily injury damages suffered, *it should no longer be followed.*" (Emphasis added.) Accordingly, since the full (actual) amount of the bodily injury damages had not yet been determined, claimant was allowed to proceed to arbitration—the clear implication being that if the damages are found to exceed $475,000, she should be allowed to recover up to $200,000 under the SUM policy.

Conclusion

As things now stand, and at least until the Court of Appeals has occasion to speak on this issue, or the Department of Financial Services amends Regulation 35-D, the answer to the question posed at the beginning of the article depends upon the jurisdiction in which it is litigated.

1. See 11 NYCRR §60-2.3 (f).
2. See 11 NYCRR §60-2.3, et seq.
3. See 11 NYCRR §60-2.2[b][1]-[4].