

INSURANCE LAW

Recent Legislative, Regulatory Amendments Pertaining to Auto Insurance: Part II

By
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In my previous article, I began a discussion of the spate of recent noteworthy changes to the statutes and regulations governing auto insurance.¹ Therein, I promised to continue that topic with a discussion of an even more recent set of amendments to the Supplementary Uninsured/Underinsured Motorists (SUM) Endorsement set forth in Regulation 35-D (11 NYCRR §60-2.3, et seq.), and an analysis and update on the proposed legislation pertaining to the required limits of SUM coverage, an earlier version of which was discussed in these pages several years ago.² Below is my attempt at keeping that promise.

Sixth Amendment To Regulation 35-D

Pursuant to the authority granted to her by §§202 and 302 of the Financial Services Law, and §§301, 307, 308 and 3420 of the Insurance Law, the Superintendent of Financial Services, Maria T. Vullo, recently promulgated the Sixth Amendment to Part 60-2 of Title 11 of the Official Computation of Codes, Rules and Regulations of the State of New York (Insurance Regulation No. 35-D), governing SUM coverage, which took effect on Aug. 1, 2017. Though less extensive and less dramatic than the changes to the Regulation 35-D SUM Endorsement enacted pursuant to the Seventh Amendment to Regulation 35-D, discussed in my prior article, which was enacted on June 29, 2017, as an emergency measure, the Sixth Amendment changes are significant in their own right. The most significant of these changes are summarized below.

New Illustration of SUM Arbitration

The Sixth Amendment adds to 11 NYCRR §60-2.2 ("Notice about

SUM coverage") a new (fifth) example illustrating the proper application of SUM coverage, which is required to be included in the written notice sent by the insurer with all new and renewal policies. That example, "Example Five," which demonstrates the applicability of SUM coverage when an accident involves persons that are both injured and killed, and the SUM coverage on a combined single limit policy provides equiva-

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lent or greater benefits than the mandatory UM coverage, provides as follows:

Insured's Bodily Injury Damages \$25,000
 Passenger's Bodily Injury Damages \$25,000
 Another Passenger's Damages that resulted in death \$50,000
 Insured's Combined Single Limit (CSL) \$75,000
 Insured's CSL SUM Limit \$75,000
 Other Motor Vehicle Liability Limit Uninsured (i.e., no coverage)

Result: Since the other motor vehicle was uninsured, the full \$75,000 CSL SUM limit is available for all insured persons from this accident under the policy. However, since the acci-

dent involves insured persons who were both injured and killed, the mandatory UM limits of \$25,000 per person and \$50,000 per accident for injured persons, and \$50,000 per person and \$100,000 per accident for persons killed in the accident are available. Therefore, the insured and first passenger each recover \$25,000 and the second passenger's estate recovers the full \$50,000 under the SUM coverage. If the insured's CSL and CSL SUM were each \$300,000 and the insured's damages amounted to \$200,000, then all insured persons would be covered under the SUM coverage as the total damages \$200,000 + \$25,000 + \$50,000 = \$275,000 are less than the \$300,000 CSL SUM Limit."

Amendments to the SUM Endorsement

Section 60-2.3(f), which contains the text of the prescribed SUM endorsement, has been amended, inter alia, by dividing Condition 2 (Notice and Proof of Claim) into subparagraphs (2)(i) and (2)(ii) for more clarity, and by clarifying references to the period of days within which the insurer is required to furnish proof of claim forms (i.e., 15), by changing the term "days" to "calendar days." Conditions 5 (SUM Limits) and 6 (Maximum Payments) have been combined, and a new §5(a)(3) has been added to clarify the applicability of the SUM coverage when an accident involves persons that are both injured and killed. New subdivision (3) now provides as follows:

If an accident results in both bodily injury to one or more persons and the death of one or more persons, then we will provide the greater of the SUM limits stated in the Declarations or the limits required by the mandatory uninsured motorist (UM) coverage as follows:

\$25,000 per injured person and, subject to this per person limit

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Amendments

«Continued from page 3

\$50,000 to two or more persons injured as the result of any one accident; and

\$50,000 per person for bodily injury resulting in death and, subject to this per person limit,

\$100,000 to two or more persons for bodily injury resulting in death as the result of any one accident.”

Conditions 7 through 16 have been renumbered 6 through 15. Condition 9, formerly Condition 10 (Release or Advance), has been amended to clarify that in the event of a settlement with any party for the available limits of that party's motor vehicle bodily injury liability coverage, release may be executed after thirty calendar days from the insurer's receipt of written notice to it.

'Designated Organization'

The SUM endorsement also has been amended in several places to change the specific terms “American Arbitration Association” or “AAA” to the more generic term “designated organization.” Thus, for example, Condition 11 (formerly Condition 12) (Arbitration) has been amended to state that if the insured/claimant and the SUM insurer do not agree that the insured is legally entitled to recover damages or the amount of such damages, then, at the option and upon written demand of the insured, the disagreement(s) “shall be settled by arbitration, administered by the [insert name of designated organization], pursuant to procedures approved by the Superintendent of Financial Services for this purpose.” Similarly, in §60-2.4 (Arbitration of SUM claims), all references to “American Arbitration Association” or “AAA” have been amended to read “designated organization,” and it is made clear that every arbitration involving SUM coverage under the endorsement “shall be administered by the organization designated by the superintendent and conducted in accordance with procedures established by the des-

ignated organization approved by the Superintendent.”

And, finally, §60-2.4(e) (Financing) has been amended to allow the designated organization and the Supplementary Uninsured Motorist Optional Arbitration Advisory Committee to augment or modify the manner and timing of assessment billing through written guidelines, and a new subdivision (e)(5) has been added to codify the recommendation and authorization of the Supplementary Uninsured Motorist Optional Arbitration Advisory Committee permitting the designated organization to impose an interest charge, at prime rate plus one percent, for all assessment charges that are unpaid for more than 90 days after the billing date, to help reduce the overall cost of the program.

I have been advised by a representative of the Department of Financial Services that the change from “American Arbitration Association” to “AAA” to “designated organization” does not indicate an intent to change the status of the AAA as the administrator for SUM arbitrations. Rather, this change was made simply to reflect the general regulatory policy that has evolved over the years of not designating administrators by name, in order to give the Superintendent the flexibility in the future to name a different administrator without having to go through an extensive regulatory process. (A similar change was made several years ago in the No-Fault regulation.) The AAA remains the designated organization for these claims, and insurers will, therefore, insert AAA in the blank space provided in Condition 11 of the SUM endorsement.

SUM Limits Bill

Prior to the enactment of Regulation 35-D (11 NYCRR §§60-2.3, et seq.) in October 1993, motor vehicle liability insurers were required to provide supplementary uninsured or underinsured motorist coverage to their insureds, at the insureds' request, “in an amount up to the bodily injury liability insurance limits of coverage” provided under their basic policy. See *Ins. L. §3420(f)(2)*; *Automobile Ins. Co. of Hartford, Ct. v. Stillway*, 165

A.D.2d 572 (1st Dept. 1991). This statutory requirement was interpreted to mean that “no insurance company will be permitted to refuse to provide supplementary uninsured motorist coverage if the insured requests it.” See *Downey v. Allstate Ins. Co.*, 638 F. Supp. 322, 324 (S.D.N.Y. 1986). However, it was also held that insurers had no duty to inform their insureds of the availability of such coverage. *Id.*

Pursuant to Regulation 35-D, motor vehicle liability insurers are required to take affirmative action

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to advise their insureds, in writing, at the time of writing or reviewing a policy, of the availability and desirability of supplementary uninsured motorist coverage, and to explain the benefits for such coverage and provide examples of its application in a variety of situations. See *GEICO v. Loevinger*, 251 A.D.2d 664 (2d Dept. 1998). Insurance Law §3420(f)(2)(B) also requires auto insurers to notify their insureds, in writing, at least once each year, of the availability of SUM coverage and to explain the nature of the coverage and the amounts in which it can be purchased—similar to the requirements of Regulation 35-D.

Effective March 9, 1998, the limits of SUM coverage required by statute to be offered were increased to a maximum \$250,000 per person and \$500,000 per accident, or a combined single limit of \$500,000 per accident. Under the current statute, the insurer can still offer only a \$100,000/\$300,000 SUM policy (the previous maximum amount) if it also offers to the insured a personal umbrella policy that covers SUM claims and has limits “up to at least \$500,000.” Insurers can, and frequently do, offer coverage with higher limits. However, the “supplementary uninsured” or “underinsured” motorist coverage available to the insured may still not exceed the third-party liability coverage purchased by that insured.

Notwithstanding the foregoing, many insureds elect underinsured motorist coverage in lesser amounts than the coverage provided for in their bodily injury liability policy. See e.g., *Mele v. General Accident Ins. Co.*, 198 A.D.2d 731 (3d Dept. 1993). Whether this is because of a lack of understanding of the importance and need for such coverage, a failure to appreciate that increases in the coverage are extremely inexpensive, or because insurance agents and/or brokers are simply not doing a good enough

job in pushing for this coverage at the highest possible levels, the fact is that no insured should protect strangers more than themselves and their families, and this failure of knowledge and understanding does create a problem for insureds.

Proposed Legislation

In an effort to ensure that drivers are fully protected by supplementary insurance equal to the bodily injury liability insurance coverage they select, in 2012 the New York State Senate and Assembly passed a bill (S7787 and A10784) that effectively would have changed the required amount of SUM coverage to be offered by the insurer from a maximum amount that is the same as the insured's bodily injury liability coverage (which the insurer must provide if the insured elects to purchase) to a required amount that is the same as the bodily injury liability limits (which the insurer must provide unless the insurer opts to decline SUM coverage or to purchase lower amounts of SUM coverage than the bodily injury liability limits). Under that proposed legislation, the insurer or agent would have been required to disclose and explain to the insured what SUM coverage is and how much SUM coverage the insured may purchase, and, indeed, to urge the insured to consider purchasing the maximum SUM coverage

available. If the insured opted to reject or take less SUM coverage than his or her bodily injury limits, he or she would be required to acknowledge such choice in a signed writing, audio recording, electronic signature, or any other means evidencing such choice.

Not surprisingly, plaintiffs' groups, such as the New York State Trial Lawyers Association, were strongly in favor of that bill, and insurance industry groups, such as the New York Insurance Association, opposed it (preferring an "opt-in" plan to an "opt-out" plan).

On Dec. 17, 2012, Gov. Andrew Cuomo vetoed that bill, 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.

More Recent Legislative Proposals

While several subsequent statutory amendments pertaining to the required limits of SUM coverage were proposed in the ensuing years, see Dachs, N. and Dachs J., "The Insurance 'Top 68' and SUM Legislation Update," N.Y.L.J., May 14, 2013, p. 3, col. 1., it was not until June 2017 that such proposed legislation again passed both Houses of the New York State Legislature. Bill Nos. A08519A, sponsored by Assemblyman Joseph Morelle, and S05644B, co-sponsored by State Senators Seward, Addabbo, Alcantara and Avella—the stated purposes of which are "to make

certain that auto insurance consumers are made aware of the benefits of supplementary uninsured/underinsured motorists (SUM) coverage and to provide these consumers with the option of declining such coverage"—provide that the amount of SUM coverage that insurance carriers must make available to consumers shall be equal to the bodily injury limits, and eliminate caps related to such coverage. In addition, these bills provide that the insured may decline SUM coverage or purchase lower amounts through a written or electronic waiver form. The form to be provided to insureds shall advise, in at least 12-point type, that SUM coverage shall be equal to the level of bodily injury coverage unless lower SUM limits are requested or rejected. The insurer would be required to provide the insured with an explanation of SUM coverage and the amounts in which it can be purchased at the time of the issuance of the policy, and to notify the insured at least annually of the availability of SUM coverage. These bills also provide that, at the insurer's option, the insured's SUM coverage may be required to equal the insured's bodily injury liability coverage limits. Finally, these bills are intended to take effect on the 180th day after becoming law, and to apply to new insurance policies and contracts issued on and after the effective date. Moreover, notably, they are intended to expire and be deemed repealed on June 30, 2020—unless, of course, further legislative action is taken to make the law permanent.

This version of the SUM Limits bill is currently awaiting Governor Cuomo's signature. It remains to be seen if he will be sufficiently satisfied by the changes made to the prior proposed SUM Limits legislation he previously vetoed to now sign this bill into law.

1. See Dachs, J., "Recent Legislative, Regulatory Amendments Pertaining to Auto Insurance: Part 1," N.Y.L.J., July 19, 2017, p. 3, col. 1.

2. See Dachs, N. and Dachs, J., "SUM Insurance Dilemma Hits the Mainstream," N.Y.L.J., September 19, 2012, p. 3, col. 1; see also Dachs, N. and Dachs, J., "SUM Legislation—Good News/Bad News," N.Y.L.J., March 12, 2013, p. 3, col. 1; Dachs, N. and Dachs, J., "The Insurance 'Top 68' and SUM Legislation Update," N.Y.L.J., May 14, 2013, p. 3, col. 1.