INSURANCE LAW

2018 REVIEW OF UM/UIM/SUM CASE LAW

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As the end of the year rapidly approaches, I take this opportunity to present this brief survey of recent developments in the area of Uninsured Motorist (UM), Underinsured Motorist (UIM), and Supplementary Uninsured/Underinsured Motorist (SUM) law. As in the past, 2018 was marked by a great deal of significant activity in this highly litigated, ever-changing and complex area of the law.

Accidents v. Intentional Conduct

In *Progressive Advanced Ins. Co. v. Widdecombe*, 157 AD3d 1047 (3d Dept. 2018), Respondent Germain left a bar after consuming a number of alcoholic beverages, and got into the driver's seat of his parked car. Concerned that Germain was not fit to drive, Respondent Widdecombe, an acquaintance of Germain's, tried to persuade Germain to return to the bar. Widdecombe attempted to stop Germain from operating the car by placing his foot inside the open driver's door and reaching to grab the keys from the ignition. However, Germain managed to start the engine and put the car in drive, causing it to move forward, trapping Widdecombe and dragging him for approximately 20 feet, causing injuries to his leg.

The critical issue before the court was whether Widdecombe's injuries were caused by an "accident" within the meaning of his policy with Progressive Advanced, which provided for payment of "all sums that the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury . . . caused by an accident arising out of such uninsured motor vehicle's ownership, maintenance or use [emphasis

added]." As the court noted, "The term 'accident' is not defined in the policy, and, thus, we must look to the definition provided by the Court of Appeals in *State Farm Mut. Auto. Ins. Co. v. Langan*, 16 N.Y.3d 349, 353 (2011)." In *Langan*, supra, the Court held that, for purposes of an uninsured motorist endorsement, an occurrence qualifies as an "accident" when -- from the insured's perspective – it is "unexpected, unusual and unforeseen." 16 NY3d at 355. The Court of Appeals further held in *Langan* that although the insured was also the victim, "the intentional assault of an innocent insured is an accident within the meaning of his or her own policy." Id., 16 NY3d at 356.

Thus, the *Widdecombe* court held that "whatever Germain's intent and criminal liability, this incident was an accident from Widdecombe's perspective." As the Court further explained, "As in *State Farm* [*Langan*], this event was clearly an accident from the insured's point of view, since having his leg trapped and being dragged was sudden and 'unexpected, unusual and unforeseen'."

However, in *Castillo v. Motor Veh. Acc. Indem. Corp*, 161 AD3d 937 (2d Dept. 2018), the court held "if the driver of the motor vehicle that injured the petitioner acted intentionally, the petitioner may not recover in an action against the MVAIC." The court rejected the petitioner's reliance upon *State Farm Mut. Auto. Ins. Co. v. Langan*, supra, because in this case the petitioner sought to recover from the state fund administered by the MVAIC, and not, as in *Langan*, from an insured under an insurance policy. [NOTE: The basis or rationale for this distinction is not clear].

Exclusions

Owned Vehicle

In *Government Employees Ins. Co. v. Williams*, 157 AD3d 953 (2d Dept. 2018), Petitioner GEICO relied upon the exclusion in its SUM endorsement for "bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of this policy." The court found that GEICO met its initial burden of demonstrating that a factual issue existed as to the applicability of this exclusion via the submission of a SUM benefits claim form, signed by the claimant and the policyholder, which disclosed that the claimant was operating his motorcycle at the time of the accident, and that the motorcycle was insured under a different GEICO policy. The court held that a hearing should have been held to determine if the exclusion applied. [NOTE: In the absence of any refutation of the fact that the claimant was operating a vehicle he owned, which was not insured under the policy pursuant to which his claim was made, it is unclear why the court concluded that a hearing was necessary or appropriate, rather than deciding the issue of the applicability of the exclusion as a matter of law].

Proceedings to Stay Arbitration

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded."

Filing and Service of Petition to Stay

In *Matter of Ameriprise Insurance Company v. Sandy*, 158 AD3d 623 (2d Dept. 2018), Respondent Oral Sandy ("Sandy") filed a claim for UM benefits claiming that he was injured in

a hit-and-run accident on May 4, 2014. On May 13, 2015, Sandy's insurer, Ameriprise, commenced an Article 75 proceeding to permanently stay arbitration, claiming that the accident was excluded under the policy.

On November 2, 2015, Sandy's attorney sent Ameriprise a certified letter, return receipt requested, requesting payment in full of the entire amount of the SUM coverage under the policy. The fourth paragraph of the letter contained a notice of intention to arbitrate, and stated that unless Ameriprise applied to stay arbitration within 20 days after receipt of the notice, Ameriprise would be precluded from objecting, *inter alia*, that a valid agreement to arbitrate was not made or complied with. On January 26, 2016, Sandy's attorney sent Ameriprise an American Arbitration Association request for arbitration form, dated January 25, 2016. On February 12, 2016, Ameriprise commenced this proceeding to stay arbitration on the grounds, *inter alia*, that the underlying incident was not covered under the insurance policy.

In denying the Petition to Stay Arbitration, the court noted that "Where an insurance policy contains an agreement to arbitrate, CPLR 7503(c) requires a party, once served with a [notice of intention to arbitrate], to move to stay such arbitration within 20 days of service of such [notice], else he or she is precluded from objecting.'" Here, the proceeding was not commenced within 20 days of the receipt of the November 2, 2015 notice of intention to arbitrate. The court further noted that in order for the 20-day limitation period to be enforceable, the notice of intention to arbitrate must comply with the requirements of CPLR 7503(c). Here, contrary to Ameriprise's contention, Sandy's November 2, 2015 notice of intention to arbitrate complied with all the statutory requirements. Ameriprise failed to establish that the Notice was deceptive and intended to prevent it from timely protesting the issue of arbitrability.

Burden of Proof

In *Government Employees Ins. Co. v. Tucci*, 157 AD3d 679 (2d Dept. 2018), the court stated "The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay," and that "Thereafter, the burden shifts to the party opposing the stay to rebut the *prima facie* showing." Moreover, "where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue." See also, *Allstate Ins. Co. v. Deleon*, 159 AD3d 895 (2d Dept. 2018); and *Government Employees Ins. Co. v. Williams*, 157 AD3d 953 (2d Dept. 2018).

In *Government Employees Ins. Co. v. Tucci*, supra, the court held that the "unsupported, conclusory assertions" of Petitioner's counsel regarding the claimant's failure to satisfy the hit-and-run reporting requirement or whether there was physical contact with a hit-and-run vehicle were insufficient to meet its *prima facie* burden on its Petition. Thus, the court reversed the Supreme Court's Order and denied the Petition.

In *Hereford Ins. Co. v. Vazquez*, 158 AD3d 470 (1st Dept. 2018), Petitioner alleged that the offending vehicle, which had left the scene of the accident, was not only identified but also insured, by State Farm. In opposition, State Farm neither admitted nor denied the allegations pertaining to coverage, but asserted that the petitioner failed to meet its initial burden on its petition because it did not submit any documents to support its claim of coverage. It was only upon reply that Petitioner was able to submit the documentary proof it had been waiting for, which established that the vehicle had been sold three days before the accident and was insured by State Farm. The lower court granted the petition to the extent of a framed issue hearing on

the issue of coverage, and the First Department affirmed, holding that "Absent any surprise or prejudice to State Farm, which was aware that [Petitioner] alleged that it had insured the [offending vehicle] under a specified policy and which did not seek to submit a sur-reply, the motion court providently exercised its discretion in considering the documents submitted by [Petitioner] in reply." The court added that the petitioner "could have sought leave to amend the petition based on the same documents, leading to the same outcome."

Arbitration Awards -- Scope of Review

In *O'Neill v. GEICO Ins. Co.*, 162 AD3d 776 (2d Dept. 2018), which involved a proceeding to vacate an SUM arbitration award, the court stated that "Judicial review of arbitration awards is extremely limited [citations omitted]. Pursuant to CPLR 7511(b)(1)(iii), a court may vacate an arbitration award if the arbitrator 'exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.' However, vacatur of an award pursuant to this provision is warranted 'only if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power' [citations omitted]. 'An award is irrational when there is no proof whatever to justify the award' [citations omitted]." Moreover, where "an arbitration award is the product of compulsory arbitration, the award 'must satisfy an additional layer of judicial scrutiny -- it must have evidentiary support and cannot be arbitrary and capricious' [citations omitted]."

In this case, the court held that the arbitrator's determination that the complained of injury was not the result of the subject motor vehicle accident, and, therefore, the SUM claim should be dismissed -- was "rational, supported by evidence, and not arbitrary and capricious" -- rejecting the claimant's contentions to the contrary. The court also rejected the claimant's

assertion that the arbitrator exceeded the scope of authority by disregarding GEICO's prior inconsistent position, taken in the no-fault context, noting that any such error "was, at most, an error of law which would not warrant vacatur of the arbitration award."

Self-Insurance

In *Contact Chiropractic v. New York City Transit Authority*, 31 NY3d 187 (2018), the Court of Appeals held that the three-year statute of limitations set forth in CPLR 214(2) applied to no-fault claims against a self-insurer. [NOTE: The six-year contract statute of limitations still applies to *UM claims* against self-insured entities and to no-fault claims against an insurer]. See Dachs, Jonathan A., "Self-Insurance and the Statute of Limitations," N.Y.L.J., May 16, 2018, p. 3, col. 1.

Mandatory Coverage

In *County of Suffolk v. Johnson*, 157 AD3d 949 (2d Dept. 2018), the court rejected the County's contention that it was exempt from providing uninsured motorist coverage on its vehicles pursuant to VTL §370. As explained by the court, "'[T]he "Legislature has specifically declared its grave concern that motorists who use the public highways be financially responsible to ensure that innocent victims of motor vehicle accidents be recompensed for their injuries and losses'" (*Matter of State Farm Mut. Auto Ins. Co. v. Amato*, 72 NY2d 288, 292 [1988], quoting *Matter of Allstate Ins. Co. v. Shaw*, 52 NY2d 818, 819 [1980]). Thus, although the Legislature authorized municipalities to be self-insured pursuant to the exception in Vehicle and Traffic Law §370(1), it did not exculpate them from the responsibility of providing uninsured motorist protection (see *Matter of Country-Wide Ins. Co. [Manning]*, 96 AD2d 471, 472 [1983], affd. 62

NY2d 748 [1984]; *Matter of State Farm Mut. Auto. Ins. Co. v. Olsen*, 22 AD3d 673, 673-674 [2005]." [NOTE: An exception to the foregoing exists for police and fire vehicles. See *Matter of State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 NY3d 799, 810 (2015)].

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. L. §3420[d][2])

Insurance Law §3420(d)(2) provides that "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as reasonably possible of such disclaimer or liability or denial of coverage to the insured and the injured person or any other claimant." As the Court of Appeals observed in *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, 23 NY3d 583 (2014), "The Legislature enacted section 3420(d)(2) to 'aid injured parties' by encouraging the expeditious resolution of liability claims [citations omitted]. To effect this goal, the statute 'establishe[s] an absolute rule that unduly delayed disclaimer of liability or denial of coverage violates the rights of the insured [or] the injured party' [citation omitted]. Compared to traditional common-law waiver and estoppel defenses, section 3420(d)(2) creates a heightened standard for disclaimer that 'depends merely on the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel [citations omitted].'"

In *Vargas v. City of New York*, 158 AD3d 523 (1st Dept. 2018), the court observed that "when a putative insured first makes a claim for coverage in a complaint, the insurer may disclaim via its answer."

In *Battisti v. Broome Coop Ins. Co.*, 163 AD3d 1091 (3d Dept. 2018), the court stated, "The insurer has an obligation not only to promptly provide notice of disclaimer once it has reached that decision, but to promptly investigate and reach a decision on whether to disclaim."

In *Hereford Ins. Co. v. McKoy*, 160 AD3d 734 (2d Dept. 2018), the Additional Respondent insurer disclaimed coverage for the alleged offending rental vehicle based upon the renter's failure to cooperate in the investigation of the subject accident. The court noted that "In order to establish a proper disclaimer based on an insured's alleged noncooperation, an insurer must demonstrate that 'it acted diligently in seeking to bring about its insured's cooperation, that its efforts were reasonably calculated to obtain its insured's cooperation, and that the attitude of its insured, after the cooperation of its insured was sought, was one of "wilful and avowed obstruction,"'" quoting *Thrasher v. United States Liab. Ins. Co.*, 19 NY2d 159 (1967). Further, the court noted that "The burden of proving lack of cooperation is a 'heavy one' and is on the insurer." In this case, the disclaimer letter and an affirmation from the attorney assigned by the insurer to represent the insured driver demonstrated that the driver had not made contact with either the insurer or the attorney as of the date of the disclaimer letter. The court held that while those submissions by the insurer did not establish that the disclaimer was valid and timely as a matter of law, they were sufficient to raise a triable issue of fact.

Hit-and-Run

UM/SUM coverage is available to victims of accidents involving a "hit-and-run," i.e., an unidentified vehicle that leaves the scene of the accident after making "physical contact" with the Claimant's vehicle or person.

In *Allstate Ins. Co. v. Deleon,*, supra, the court noted that "'Physical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle' [citation omitted]. 'The insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely, that physical contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable' [citations omitted]."

There, the court held that the petitioner, by submitting the police accident report containing the claimant's statement that his vehicle was "cut off" by an unknown vehicle with a red trailer, raised a triable issue of fact as to whether physical contact occurred between the claimant's vehicle and the alleged unidentified hit-and-run vehicle, and, thus, the court below properly directed a framed issue hearing to determine whether a hit-and-run vehicle was involved in the accident. [NOTE: It is not clear why the court did not simply grant the Petition as a matter of law insofar as it has been held consistently that proof that another vehicle "cut off," but did not come into contact with, the claimant's vehicle will not suffice to give rise to a valid hit-and-run claim. See *Hanover Ins. Co. v. Lewis*, 57 AD3d 221 (1st Dept. 20080; *Country-Wide Ins. Co. v. Colon*, 279 AD2d 427 (1st Dept. 2001)].

In *Government Employees Ins. Co. v. Tucci*, supra, the court held that the insurer failed to show the existence of evidentiary facts regarding the claimant's failure to satisfy the reporting requirement (report to police within 24 hours) or whether there was physical contact with a hit-and-run vehicle, since, as to those issues, it only provided "the unsupported, conclusory assertions of its attorney." Thus, the court denied the petition to stay arbitration as a matter of law.

MVAIC

In *Baker v. Motor Veh. Acc. Indem. Corp.*, 161 AD3d 1070 (2d Dept. 2018), the court noted that the maximum limit of MVAIC's liability under Insurance Law §5210(a)(1) is $25,000, exclusive of interest calculated from the date of the unpaid underlying judgment against the uninsured defendant, and costs. The court also noted that 'MVAIC is not obligated to pay disbursements pursuant to Ins. L. §5210."

Amount of Coverage

The New SUM Limits Law

Effective June 16, 2018, an amendment to Ins. L. §3420(f) makes a dramatic change with regard to the purchase of supplementary uninsured/underinsured motorist ("SUM") coverage by requiring the sale by insurers of SUM coverage to those who request such coverage with limits equal to the bodily injury liability limits under the policy, unless the insured affirmatively elects lower SUM coverage. See Dachs, Jonathan A., "The New SUM Limits Law," N.Y.L.J., March 21, 2018, p. 3, col. 1; and "Recent Legislative, Regulatory Amendments Pertaining to Auto Insurance, Part II," N.Y.L.J., September 21, 2017, p. 3, col. 1, for additional details about the contents of this significant law.

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