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SELF-INSURANCE AND THE STATUTE OF LIMITATIONS

A recent split decision of the Court of Appeals, in *Contact Chiropractic, P.C. v. New York City Transit Authority*, ___ NY3d ___, ___ NYS3d ___, 2018 N.Y.Slip Op. 03093, 2018 WL 2009415 (May 1, 2018), has answered an interesting question regarding whether the six-year statute of limitations under CPLR 213(2) or the three-year statute of limitations under CPLR 214(2) is applicable to a dispute with respect to the payment of no-fault (PIP) benefits by a *self-insurer*, and, in so doing, has raised several questions still to be answered. In order fully to understand and appreciate the significance of this new decision, a discussion of the issues in historical context is in order.

Self-Insurance

It is well-known that the most common method of obtaining third-party bodily injury liability protection in the event of a motor vehicle accident is through the purchase of a liability insurance policy, with limits of coverage at least equal to those required by the applicable statutes and regulations (see e.g., Veh. and Traf. L. §§311; 370; 1693[2][a], [3][a]; and 35 RCNY §§1-02[c][3]; 1-40[d]; 6-11[d]).

In lieu of such an insurance policy, an individual seeking to register a motor vehicle in the State of New York may, under appropriate circumstances, provide a financial security bond or deposit with the Commissioner of Motor Vehicles for $25,000 in cash or specified securities, as well as an additional amount, fixed by the Commissioner, to cover the individual's obligations under the No-Fault Law. See Veh. and Traf. L. §§311(3), (6), (7); 312.

Another alternative is self-insurance. Simply put, whereas insurance involves the contractual shifting of the risk of the payment of judgments of loss from the insured to the insurer, self-insurance entails the assumption of the risk by the party having the insurable interest. As the Appellate Division, First Department recently observed in *Strauss v. EAN Holdings*, 156 AD3d 571 (1st Dept. 2017) [citing *Guercio v. Hertz Corp.*, 40 NY2d 680, 684 (1976)], "Self-insurance is not insurance but an assurance - an assurance that judgments will be paid." See also *ELRAC, Inc. v. Ward*, 96 NY2d 58, 74 (2001). To qualify for self-insurance status, an individual or entity must be the registered owner of more than twenty-five (25) vehicles, or an individual firm, association or corporation engaged in the business of renting or leasing motor vehicles. Veh. and Traf. L.§316, 370(3). In addition, the Commissioner must be satisfied that the owner is and will continue to remain financially able to respond to judgments arising out of the ownership, maintenance, use or operation of its motor vehicles. Id.

Governmental entities, such as political subdivisions of the state and municipalities, may also be considered "self-insurers" inasmuch as they are presumed to be financially solvent and able to respond to judgments rendered against them. See *Nassau Ins. Co. v. Guarascio*, 82 AD2d 505 (2d Dept. 1981); see also *Metropolitan Prop. & Cas. Ins. Co. v. Singh*, 98 AD3d 580 (2d Dept. 2012) (New York City Transit Authority, owner of bus, was a self-insurer).

It has been judicially determined that self-insurers are subject to the uninsured motorist statutes, and, thus, required to provide the statutorily required uninsured motorist coverage for the operators and passengers of their vehicles -- with the noted exception of

police and fire vehicles. See *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 NY3d 799 (2015); *State Farm Mut. Auto. Ins. Co. v. Amato*, 72 NY2d 288 (1988); *New York City Transit Authority v. Thom*, 70 AD2d 158 (2d Dept. 1979), affd. 52 NY2d 1032 (1981); *Allstate Ins. Co. v. Shaw*, 52 NY2d 818 (1980); *County of Suffolk v. Johnson*, 157 AD3d 949 (2d Dept. 2018). As stated in *Country-Wide Ins. Co. v. Manning*, 96 AD2d 471, 472 (1st Dept. 1983), affd. 62 NY2d 748 (1984). "The right to obtain uninsured motorist protection from a self-insurer is no less than the corresponding right under a policy issued by an insurer [citations omitted]." Self-insurers are not required to (but may) offer the optional supplementary uninsured or underinsured motorist coverage. See *Spears v. NYCTA*, 262 AD2d 493 (2d Dept. 1999), *motion for lv. to app. denied*, 94 NY2d 761 (2000).

Statute of Limitations

As pertinent hereto, CPLR 213(2) provides that "an action upon a contractual obligation or liability, express or implied" must be commenced within six years. CPLR 214 (2) provides that "an action to recover upon a liability, penalty or forfeiture created or imposed by statute, except as provided in sections 213 and 215" must be commenced within three years.

UM/UIM/SUM Claims Against Insurers

It has, since the introduction in New York of uninsured motorist ("UM") coverage (in 1959), and of supplementary uninsured motorist ("SUM")/underinsured motorist coverage ("UIM") (in 1977), been recognized and understood that a claim for UM/SUM/UIM benefits exists solely by reason of the terms of the pertinent endorsement attached to the liability policy, and that "[a]lthough the indorsement is statutorily required, the obligation imposed

upon the insurer is contractual rather than statutory in nature." *Manhattan & Bronx Surface Transit Operating Authority v. Evans*, 95 AD2d 470, 472 (2d Dept. 1983). See also, *Motor Veh. Acc. Indem. Corp. v. National Grange Mut. Ins. Co.*, 19 NY2d 115, 118 (1967); *St. Paul Fire & Marine Ins. Co. v. Vanguard Systems Resources, Inc.*, 152 AD2d 497 (1st Dept. 1989); *State Farm Mut. Auto. Ins. Co. v. Basile*, 48 AD2d 868 (2d Dept. 1975).

Accordingly, it has repeatedly and consistently been held that claims for uninsured motorist, supplementary uninsured motorist, and underinsured motorist benefits are governed by the six-year limitations period applicable to contract actions, and not the three-year period prescribed for statutory actions. See *De Luca v. Motor Veh. Acc. Indem. Corp.*, 17 NY2d 76 (1966); *McNamara v. Motor Veh. Acc. Indem Corp.*, 22 AD2d 1017 (1st Dept. 1964), aff'g. 42 Misc.2d 923 (Sup. Ct. New York Co. 1964); *Motor Veh. Acc. Indem. Corp. v. McDonnell*, 23 AD2d 773 (2d Dept. 1965); *Allstate Ins. Co. v. Giordano*, 108 AD2d 910 (2d Dept. 1985), aff'd. 66 NY2d 810 (1985); *State Farm Mut. Auto. Ins. Co. v. Avena*, 133 AD2d 159 (2d Dept. 1987); *Allstate Ins. Co. v. Torrales*, 186 AD2d 647 (2d Dept. 1992); *Allstate Ins. Co. v. Morrison*, 267 AD2d 381 (2d Dept. 1999); *Allstate Ins. Co. v. Schelter*, 280 AD2d 910 (4th Dept. 2001); *Allstate Ins. Co. v. Venezia*, 305 AD2d 405 (2d Dept. 2003); *American Transit Ins. Co. v. Rosario*, 133 AD3d 503 (1st Dept. 2015).

UM/SUM/UIM Claims Against Self-Insurers

Notably, the Second Department has consistently held that the limitations period for filing a claim for uninsured motorist benefits against a self-insurer is also the six-year period set forth in CPLR 213(2) because while such a claim is statutorily mandated, it remains "contractual rather than statutory in nature." See *ELRAC, Inc. v. Suero*, 38 AD3d

544 (2d Dept. 2007), *motion for lv. to appeal denied*, 9 NY3d 811 (2007); *New York City Transit Authority v. Hill*, 107 AD3d 897 (2d Dept. 2013); and *New York City Transit Authority v. Powell*, 126 AD3d 705 (2d Dept. 2015). See also, *ELRAC, Inc. v. Exum*, 18 NY3d 325, 328 (2011) ("An action against a self-insurer to enforce [a UM claim] is, in our view, essentially contractual. The situation is as though the employer had written an insurance policy to itself including the statutorily-required provision for uninsured motorist coverage").

No-Fault/PIP Claims Against Insurers

With respect to claims against insurance companies liable for the payment of no-fault/PIP benefits, the courts have also consistently applied a six-year statute of limitations, on the basis that the obligation to pay such benefits is created by contractual provisions in the insurance policy, as required by law. See e.g., *Micha v. Merchants Mut. Ins. Co.*, 94 AD2d 835 (3d Dept. 1983); *Benson v. Boston Old Colony Ins. Co.*, 134 AD2d 214 (1st Dept. 1987).

In *Mandarino v. Travelers Property Casualty Ins. Co.*, 37 AD3d 775, 776 (2d Dept. 2007), the court stated: "[A]s a matter of strict statutory interpretation, where the plaintiff's action is based upon *both* a `contractual obligation or liability' *and* upon a `liability, penalty or forfeiture created or imposed by statute,' the longer, six-year statute of limitations, as provided in CPLR 213(2), is applied to the exclusion of the three-year statute of limitations provided in CPLR 214(2). See also, *Travelers Indemnity Co. of Connecticut v. Glenwood Medical, P.C.*, 48 AD3d 319 (1st Dept. 2008).

No-Fault/PIP Claims Against Self-Insurers

Prior to the Court of Appeals' recent decision in *Contact Chiropractic, P.C.*, supra, the courts were less unanimous and consistent as to whether the six-year statute of limitations applicable to no-fault/PIP claims against insurance companies should also be applied to such claims against self-insurers.

In *Richard Denise, M.D., P.C. v. New York City Transit Authority*, 25 Misc.3d 13 (App. Term, 1st Dept. 2009), *rev'd.*, 96 AD3d 561 (1st Dept. 2012), an action to recover assigned no-fault benefits, the Defendant Transit Authority argued that while it, as a self-insurer, was subject to the provisions of the No-Fault Law to the same extent as an insurer, and while actions to recover no-fault benefits are generally governed by the six-year statute of limitations set forth in CPLR 213(2), a claimant was required to assert an identical claim against a self-insurer within three years, because the liability of a self-insurer for the payment of no-fault benefits is derived strictly from statute. The Appellate Term rejected that argument, however, noting that "As in the case of an uninsured motorist claim [citation omitted], the right to obtain no-fault coverage, from an injured claimant's perspective, `is no less than the corresponding right under a policy issued by an insurer.'" The court, therefore, found "no basis in law or compelling reasons of policy to distinguish the right to uninsured motorist benefits and the right to no-fault benefits," and, therefore, held that "a claim for no-fault benefits against a self-insurer . . . is governed by a six-year statute of limitations." On appeal, however, the Appellate Division, First Department *reversed*, and held that "Because Defendant New York City Transit Authority's obligation to provide no-

fault benefits arises out of the no-fault statute, the three-year statute of limitations as set forth in CPLR 214(2) bars Plaintiff's claim."

In *M.N. Dental Diagnostics, P.C. v. New York City Transit Authority*, 82 AD3d 409 (1st Dept. 2011) -- decided after the Appellate Term decision in *Denise*, supra, but before the Appellate Division's reversal in that case, the First Department reversed an Order of the Appellate Term, First Department decided on the same day as, and on the authority of, its decision in *Denise*, supra (24 Misc. 3d 139 [A]), and held, citing the Court of Appeals' decision in *Aetna Life & Cas. Co. v. Nelson*, 67 NY2d 169, 175 (1986), that "It is well settled that `the No-Fault Law does not codify common-law principles; it creates new and independent statutory rights and obligations in order to provide a more efficient means for adjusting financial responsibilities arising out of automobile accidents.' Since it is undisputed that there existed no contract between Plaintiff's assignor and the NYCTA, the common carrier's obligation to provide no-fault benefits arises out of the no-fault statute. Therefore, the three-year statute of limitations as set forth in CPLR 214(2) is applicable here."

Contact Chiropractic, P.C.

Which brings us, finally, to the *Contact Chiropractic* case.

As in the *Denise* and *M.N. Dental* cases that preceded it, *Contact Chiropractic* involved an action by a medical provider against the same self-insured entity, the NYCTA, to recover assigned first-party no-fault benefits. As in those earlier cases, the self-insured Defendant contended that since it did not maintain an insurance policy, its obligation to provide no-fault benefits was statutorily imposed, and, therefore, governed by the three-

year statute of limitations of CPLR 214(2). As in those cases, the Appellate Term -- this time of the Second Department -- in recognition of the obligation of a self-insured to provide the same benefits as those required in an insurance policy, and the statutory construction principles applied in *Mandarino v. Travelers Prop. Cas. Ins. Co.*, supra, discussed above, held that the six-year statute of limitations of CPLR 213(2) was applicable. See 42 Misc.3d 60 (App. Term, 2d Dept. 2013). Unlike those cases, however, the Appellate Division -- this time the Second Department -- *affirmed* the Appellate Term's determination, on the basis of its conclusion that "the claim is essentially contractual, as opposed to statutory, in nature" [citing, not only *Mandarino*, supra, but also the UM cases discussed above]. See 135 AD3d 804 (2d Dept. 2016)].

The Court of Appeals Decision

On appeal by the Second Department's grant of leave to appeal, the Court of Appeals, by a 4-3 vote, *reversed*, and concluded that the three-year statute of limitations set forth in CPLR 214(2) applied to no-fault claims against a self-insurer.

As explained by the majority (in an opinion written by Judge Fahey, in which Chief Judge DiFiore and Judges Stein and Feinman concurred), "No-fault is a creature of statute [citing *Aetna Life Ins. Co. v. Nelson* 67 NY2d 169, 175 (1986)]." Indeed, the majority stated that the court's prior holding in *Aetna Life Ins. Co.*, supra, was "directly applicable here" because "As we stated in that case, `first-party benefits are a form of compensation unknown at common law, resting on predicates independent of the fault or negligence of the injured party [citation omitted]. In the absence of private law requiring the defendant to pay first party benefits (that is, in the absence of a contract for insurance), the only

requirement that defendant provide such remuneration to the assignee as a result of the accident appears in relevant parts of the Vehicle and Traffic Law and the Insurance Law. Consequently, the source of this claim is wholly statutory, meaning that the three-year period of limitations in CPLR 214(2) should control this case."

In her brief concurring opinion, Judge Stein simply pointed out that "on this appeal, we do not resolve the question of whether insurance companies who issue contractual insurance policies covering no-fault claims are subject to a three-year or six-year statute of limitations, as that question is not before us."

In his lengthy dissenting opinion, in which he was joined by Judges Rivera and Wilson, Judge Garcia argued for a uniform application of the six-year statute of limitations to actions to recover no-fault benefits "whether from insurers or self-insurers." As stated by Judge Garcia, "By electing to be self-insured, Defendant stands in the same position as any other insurer under the No-Fault Law. A different statute of limitations for self-insurers, essentially providing a shorter limitations period for those who demonstrate 'financial security' is an unfortunate result and one not required by our precedent."

Contrary to the majority's assertion, Judge Garcia concluded that "the absence of a contract does not necessarily mean that an action against a self-insurer is fundamentally statutory in nature," noting, pertinently, that "The term 'insurer' is defined in the No-Fault Law as 'the insurance company or the self-insurer, as the case may be' (Ins. L. §5102[g])," and that there is no meaningful difference between insurers and self-insurers.

Finally, Judge Garcia wrote that "Giving self-insurers, based on no substantive difference in their obligation to pay, a shorter limitations period than those who obtain

insurance policies, leads to arbitrary and inequitable outcomes in the provision of no-fault benefits" – an outcome never contemplated by the Legislature

Remaining Questions

By her concurring opinion emphasizing that the question of whether the three-year statute of limitations now found applicable to no-fault claims against self-insurers should also apply to such claims against insurance companies that issue no-fault policies was not before the Court, and, therefore, not decided by it -- something that was or should have been clear from the majority's decision -- was Judge Stein signaling that, in a proper case, in which the issue of the applicable statute of limitations for no-fault claims against insurers is directly presented to it, the court might be willing to accommodate the dissenters' concerns about consistency "across all no-fault claims" by holding that claims against no-fault insurers should also be governed by the three-year statute of limitations of CPLR 214(2)?

By essentially ignoring the substantial precedent, discussed above, that established the applicability of the six-year contact statute of limitations to *UM* claims against self-insurers, and failing to explain why, in its view, a different rule should apply to UM and no-fault cases, did the majority of the Court, perhaps more subtly, signal that in a proper case, in which the issue of the applicable statute of limitations for UM claims against self-insurers, and/or even UM claims against insurance companies, is directly before it, the Court might similarly upset venerable precedent and apply a three-year statute of limitations to *all* such claims? Of course, only time will tell.