

INSURANCE
COVERAGES &
REGULATION

Anthony J. Piazza
585.295.4420
apiazza@hblaw.com

Gary H. Abelson
David B. Cabaniss
John R. Casey
William C. Foster
Alexandra Maloney
Dennis R. McCoy
Thomas J. O'Connor
Judith M. Sayles
Mark T. Whitford
Joseph A. Wilson

Collateral Estoppel Applied in Uninsured Motorist Claim

The Appellate Division, Second Department, recently considered the issue of collateral estoppel in an uninsured motorist arbitration. *Creinis v. Hanover Ins. Co.*, 59 A.D.3d 371 (2d Dep't 2009), motion for leave to appeal to Court of Appeals denied, May 12, 2009, 2009 N.Y. LEXIS 976.

Following an automobile accident, the Plaintiff demanded uninsured motorist arbitration against her own insurer. Her insurer petitioned to stay arbitration on the ground that the offending automobile was insured by Hanover Insurance Company. Hanover was joined as a respondent in the proceeding and was served with Notice of Petition but failed to appear or answer. The court permanently stayed the arbitration finding that "based on the evidence submitted to the Court, the vehicle operated by Olatoyin M. Fashina and owned by Olatoyin Fashina, Inc., was insured by [Hanover]."

Subsequently, Hanover moved to vacate the order on the ground that it never insured Fashina. The lower court granted the motion but on appeal the Appellate Division reversed on the ground that Hanover "failed to demonstrate a reasonable excuse for its default."

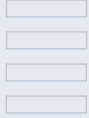
The plaintiff then commenced an action to recover damages for personal injuries against Fashina. Notwithstanding letters by the plaintiff's attorneys to the attorneys representing Hanover, Hanover did not provide a defense for Fashina who defaulted. An inquest was held with Hanover placed on notice and no one appearing on behalf of Fashina. A judgment was entered in favor of the plaintiff and against Fashina in the sum of \$800,000.

Plaintiff commenced a direct action pursuant to Insurance Law § 3420(a)(2) against Hanover to recover the amount of the unsatisfied judgment. Hanover answered and asserted as an affirmative defense that it never issued a policy of insurance to Fashina. Plaintiff and defendant both moved for summary judgment and Supreme Court granted plaintiff a judgment in the sum of \$800,000 against Hanover.

On appeal, the Appellate Division affirmed, noting that Insurance Law § 3420 permits an injured plaintiff to sue a tortfeasor's insurance company directly to satisfy a judgment obtained against the tortfeasor. The Court rejected Hanover's contention that because it never issued a policy of insurance to Fashina and never covered the vehicle which injured the plaintiff, the plaintiff was barred from any recovery because she could not demonstrate that there was a policy of insurance in force between the insurer and the judgment debtor.

(Continued on back)

Hiscock & Barclay is a full service, 210-attorney law firm, with offices throughout the major cities of New York State, as well as in Boston, Washington, D.C. and Toronto. We provide comprehensive legal and business counsel to a diverse client base in 29 specialized practice areas with statewide and regional expertise as well as with national and international capabilities.



Commercial Litigation
Construction & Surety
Corporate
Creditors' Rights
Economic & Project
Development
Energy & Utilities
Environmental
Financial Institutions &
Lending
Health Care & Human
Services
Immigration
Indian Law
Insurance Coverage &
Regulation
Intellectual Property &
Technology
Intellectual Property
Litigation
International Business
Labor & Employment
Lobbying & Election
Law Compliance
Media & First
Amendment Law
Municipal & Land Use
Professional Liability
Public Finance
Real Estate
Real Property Tax &
Condemnation
Regulatory
Sports & Entertainment
Tax
Telecommunications
Torts & Products
Liability Defense
Trusts & Estates

The Court noted that “Hanover was made a party to the proceedings to stay arbitration of the uninsured motorist claim and inexcusably failed to participate in that proceeding ***. Accordingly, under the circumstances, Hanover is collaterally estopped from litigating the issue of such coverage at this juncture, since that question was already determined adversely to it in the proceeding to stay arbitration ~ a proceeding in which it had a full and fair opportunity to appear and litigate and the application of collateral estoppel is neither unwarranted nor unfair under the facts presented ***.”

The Court further found that Hanover’s liability limit was only \$25,000, the statutory minimum coverage for personal injury liability under Vehicle and Traffic Law § 311(4)(a).

This is an example of the perils of failing to respond to a petition to stay arbitration in an uninsured motorist matter, and contradicts the general rule that one cannot create coverage where none exists. ■

If you require further information regarding the information presented in this Legal Alert and its impact on your organization, please contact any of the members of the Practice Area listed on the front of this Alert.