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Court of Appeals Interprets Scope of Coverage Under Supplementary Underinsured Motorist Endorsement Regulation 35-D

The New York Court of Appeals recently affirmed two appeals from the Appellate Division, Second Department, involving the interpretation of Regulation 35-D pertaining to the extent of coverage provided under automobile policies for underinsured motorist coverage. *Matter of Allstate Ins. Co. v. Rivera*, (June 4, 2009); *Matter of Clarendon National Ins. Co. v. Nunez*, (June 4, 2009). Members of Hiscock & Barclay's Insurance Coverage and Regulation team (John Casey, Gary Abelson, Joseph Wilson and Mark Whitford) successfully handled this appeal on behalf of Clarendon National.

In *Rivera*, Allstate Insurance Company had issued an automobile insurance policy to Petra Mercado providing bodily injury liability and SUM coverage of \$25,000 per person/\$50,000 per accident. Mercado and five passengers were injured when struck by a vehicle driven by Nilza Rodriguez and insured by GMAC Insurance Company with bodily injury liability limits of \$25,000 per person/\$50,000 per accident. GMAC tendered its policy limit of \$50,000, with \$25,000 being paid to Petra Mercado and \$5,000 to each of her five passengers. The five passengers then sought supplementary underinsured motorist benefits under Mercado's Allstate policy. Allstate denied the claims on the ground that the \$50,000 payments under the GMAC policy were an offset against the supplementary underinsured motorist coverage under the Allstate policy.

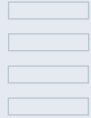
In the *Nunez* case, Clarendon National Insurance Company had issued an automobile liability insurance policy to Francisco Nunez with bodily injury liability and SUM coverage of \$25,000 per person/\$50,000 per accident. During the policy period, Nunez, his wife and their two children were injured when struck by a vehicle insured by Progressive Northwestern Insurance Company with the same liability coverage limit as the Clarendon policy. Progressive tendered its \$50,000 policy limit, paying \$15,000 each to three of the Nunez family members and \$5,000 to the fourth. The Nunez family then sought SUM benefits under the Clarendon policy. Clarendon denied the claims on the ground that the \$50,000 Progressive payment was a complete setoff to any SUM benefits.

The claimants under the Allstate and Clarendon policies demanded arbitration. Allstate and Clarendon each commenced a CPLR Article 75 proceeding to permanently stay the arbitrations. In both cases, the Appellate Division, Second Department, affirmed the lower court's permanent stays of arbitration. The Court of Appeals granted leave to appeal in each case and subsequently affirmed.

The Court of Appeals noted that Insurance Law § 3420 provides for supplementary uninsured/underinsured motorist coverage "in an amount up to the bodily injury liability insurance limits of coverage provided under such policy . . . if the limits of liability under all . . . insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by such policy . . ." The Court found that "the plain language of Insurance Law § 3420, therefore, provides that SUM coverage is only triggered where the bodily injury liability insurance limits of the policy covering the tortfeasor's

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vehicle are less than the third-party liability limits of the policy under which a party is seeking SUM benefits.”

The Court examined the provisions of Insurance Department Regulation 35-D (11 NYCRR § 60-2) adopted by the Superintendent of Insurance in 1992 and which requires that “[e]very SUM endorsement issued shall be the [SUM] Endorsement proscribed by subdivision (f) of this section. . . .”

Regulation 35-D defines the term “insured” to mean:

- (1) you, as the named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse;
- (2) any other person while occupying:
 - (i) a motor vehicle insured for SUM under this policy; or
 - (ii) any other motor vehicle while being operated by you or your spouse; and
- (3) any person, with respect to damages such person is entitled to recover, because of bodily injury to which this coverage applies sustained by an insured under paragraph (1) or (2) above.

In addition, Regulation 35-D defines an “uninsured motor vehicle” as:

a motor vehicle that, through its ownership, maintenance or use, results in bodily injury to an insured, and for which . . . (3) there is a bodily injury liability insurance coverage or bond applicable to such motor vehicle at the time of the accident, but; . . . (ii) the amount of such insurance coverage or bond has been reduced, by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of this policy.

In each of the cases, the appellants contended that they were entitled to deduct the payments made to other occupants of their vehicle by the tortfeasor’s insurer, thus reducing the tortfeasor’s bodily injury liability coverage to an amount less than the coverage limits on their vehicle, and “triggering” SUM coverage. The Court of Appeals held:

The SUM claimants therefore argue that co-occupants constitute ‘other persons’ under the endorsement, even though co-occupants are insureds under the policy. We are unpersuaded.

The ‘payments to other persons’ that may be deducted from the tortfeasor’s coverage limits for purposes of rendering the tortfeasor ‘uninsured’ under a SUM endorsement do not encompass payments made to anyone who is an insured under the endorsement.

Insureds are therefore able to reduce the coverage limits of the tortfeasor’s policy only when payments made under the tortfeasor’s policy are to individuals – such as occupants of the tortfeasor’s vehicle, injured pedestrians or those operating a third vehicle – not covered under the SUM endorsement. This guarantees that those who have purchased SUM coverage will receive the same recovery they have made available to third parties they injured - but no more.

In a vigorous dissent, two Judges argued that the SUM provisions were, at best, ambiguous regarding the rights of co-occupants/insureds to be able to reduce the tortfeasor’s liability policy limits by payments made to other co-occupants/insureds in order to qualify for SUM benefits and such ambiguity should be construed against the insurers.

The decision by the five member majority of the Court of Appeals represents the Court’s application of the “core principal underlying SUM coverage – that insureds can never use a SUM endorsement to obtain a greater recovery for themselves than is provided under the policy to third parties injured by the insureds” ■

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