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HEADLINE: The New 'Catch-22': Discovery Disputes in UM/SUM Claims

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BODY:

SINCE the enactment of Regulation 35-D, n1 the standard unified endorsement governing Supplementary Uninsured/Underinsured Motorist coverage, SUM coverage is no longer a mystery to most attorneys. Additionally, many of the pre-regulation 35-D inconsistencies in the application of the varying SUM endorsements have been resolved.

n1 Applicable to policies issued or renewed on or after October 1, 1993.

For example, before the enactment of Regulation 35-D, if the carrier withheld its consent to settle, the insured could not accept the tender of the offending vehicle's limits and, thus could not exhaust the limits of liability available to the underinsured motor vehicle, a prerequisite to receipt of underinsured benefits. This was frequently referred to as the insured's "Catch-22." n2

n2 Dachs & Dachs J, "A call for legislative action," *New York Law Journal*, August 14, 1990, P. 3, Col. 1; Lopez revisited, *NYLJ*, November 13, 1990, P. 3, Col. 1; "The Underinsured Motorist," *NYLJ*, December 11, 1990, P. 3, Col. 1; "The Catch in Underinsured Motorist Coverage," *NYLJ*, June 11, 1991, P. 3, Col. 1; *NYLJ*, September 13, 1994, P. 3, Col. 1

However, Condition 10 of Regulation 35-D imposed the requirement that the carrier provide its consent to settle within 30 days of the written request by the insured or, alternatively, front the tendered amount. Like many other disparities existing before the enactment of Regulation 35-D, the "Catch-22" was resolved.

There remains, however, an area of uninsured/undinsured motorist litigation that was not resolved by Regulation 35-D, namely, the insurance carriers' entitlement (or lack thereof) to discovery before arbitration. In many instances, courts refuse to intervene in the arbitration process and order discovery, while UM/SUM arbitrators routinely refuse to involve themselves in the discovery process, claiming it is not within their purview. As is discussed more fully below, this question of a carrier's entitlement to discovery has created a "Catch-22" for the insurance carrier seeking to obtain the discovery and investigation it needs to defend a claim.

Both the New York Accident Indemnification endorsement, which governs the terms of basic mandatory uninsured motorist coverage and Regulation 35-D, obligate the insured to provide authorizations for medical records, provide an examination under oath and submit to independent medical examinations as may be reasonably necessary. Pursuant to the contract of insurance, the insured is typically under the independent obligation to cooperate with the carrier in its investigation of the claim. Often, the insured, or his/her counsel makes a claim for uninsured or underinsured benefits and discovery and investigation proceed without objection. However, in many instances, the scenario proceeds as follows.

The insured is involved in a motor vehicle accident and retains an attorney who issues a form letter, placing the carrier on notice of a potential no-fault, uninsured or underinsured motorist claim. (A routine almost universally followed as the failure to properly advise and protect the client's SUM claim has been deemed malpractice n3). This form letter is sent despite the insured's lack of actual knowledge as to the involvement of an uninsured or underinsured vehicle and is in effect a notice of accident and not notice of an existing uninsured or underinsured claim. n4

n3 *Campagnola v. Mulholland, Minion & Roe*, 76 NY2d 38, 555 NE2d 611, 556 NYS2d 239 (1990).

n4 This practice may be alleviated somewhat by the enactment of Insurance Law @ 3420(f) (2)(A) which requires a carrier upon written request by an insured covered by SUM to disclose bodily injury liability limits within 45 days of the request and the disclosure of bodily injury and SUM limits and the failure to disclose the limits following proper request operates as a toll for the insured notice to his SUM carrier of a SUM claim.

The carrier creates a no-fault file and proceeds to administer the no-fault claim. A year after the accident, having had no additional contact from the insured regarding the status of any uninsured or underinsured motorist claim, the carrier receives another letter requesting consent to settle with an involved tortfeasor. This is the first notification advising the carrier that an underinsured vehicle was actually, rather than theoretically, involved in the accident.

The carrier offers its consent and the insured immediately files a demand for arbitration. The carrier requests authorizations, an examination under oath and an independent medical examination, since the underinsured claim has now ripened. The insured refuses and the carrier files a petition seeking a temporary stay of arbitration and an order directing the claimant to comply with the policy provisions regarding discovery.

Is the carrier entitled to the requested discovery as a condition precedent to arbitration?
The jury is still out. The outcome varies from judge to judge and county to county.

Courts that have refused to order discovery premise the refusal upon several different theories, including a reluctance to involve themselves in the arbitration forum, the purported waiver of discovery by the insurer and, superimposed upon these substantive grounds, the carrier's failure to timely file a petition to stay the demanded arbitration within 20 days from receipt of the demand. n5 The issue of whether a UM/SUM arbitrator or the courts should involve themselves in discovery disputes has resulted in conflicting case law often leaving the carrier without recourse to either the courts or the arbitrator and thus the **"New Catch-22."**

n5 CPLR 7503(c).

An example of the refusal of the court to order discovery despite the filing of the petition within twenty days from receipt of the demand for arbitration is illustrated in *State Farm v. Urdahl*.ⁿ⁶ The insured reported a Sept. 26, 1994 accident, as well as the possibility of a UM claim, on Nov. 10, 1994. State Farm thereafter promptly responded to the letter and requested authorizations, medical reports, a copy of the police report and an inspection of the insured's vehicle. Communications continued between State Farm and the insured over the next several years.

ⁿ⁶ 170 Misc. 2d 841, 652 N.Y.S.2d 197 (Nassau County 1996).

Finally, on May 3, 1996, a demand for arbitration was served and State Farm petitioned to stay the arbitration requesting a physical examination and an examination under oath. In denying the insurer's request, the court cited 11 NYCRR 216.5 (a) which provides:

Every insurer shall establish procedures to commence an investigation of any claim filed by the claimant, or by a claimant's authorized representative, within 15 business days of receipt of notice of claim. An insurer shall furnish to every claimant, or claimant's authorized representative, a notification of all items, statements and forms, if any, which the insurer reasonably believes will be required of the claimant, within 15 business days of receiving notice of claim...

The court held that the carrier failed to establish procedures to commence an investigation of the claim and that it therefore waived its rights to those items.

Compliance with 11 NYCRR 216.5(a), when given the interpretation urged by the court in *Urdahl*, means that a carrier has 15 days from receipt of a potential claim to determine and request all discovery it may need to appropriately defend the claim or waive the right to obtain the same. This result appears harsh because in most instances the initial notice by the insured is merely precautionary and is not provided at the point in time that the underinsured claim has ripened. In fact, at the time the notice is given, it is quite possible that the underinsured claim will never ripen. See also *Allstate v. Urena*; ⁿ⁷ *Allstate v. Nebedum*; ⁿ⁸ *Liberty v. DeCaro*; ⁿ⁹ *Interboro v. Noel*; ⁿ¹⁰ *Interboro v. Wiener*; ⁿ¹¹ *Allstate v. Riaz*; ⁿ¹² *State Farm Insurance Company v. Smith*; ⁿ¹³ *Allstate v. Faulk*; ⁿ¹⁴ *Allstate v. Garcia*; ⁿ¹⁵ and *Matter of Integon Insurance Co. v. Wilson* ⁿ¹⁶ (involving petitions to stay and the courts' denial of the requested discovery). But see, *Motor Vehicle Accident Indemnification Corporation v. Lucash* ⁿ¹⁷ (court found that under the circumstances of the case, MVIAC was justified in not requesting discovery until the demand for arbitration was received).

ⁿ⁷ 208 AD2d 623, 618 NYS2d 219 (2nd Dept. 1994).

ⁿ⁸ 208 AD2d 624, 618 NYS2d 220 (2nd Dept. 1994).

ⁿ⁹ 1997 NY Slip. Op. 09648 (2nd Dept. 1997).

ⁿ¹⁰ J. Bruce Alpert (Nassau County 1998) (unpublished opinion)

ⁿ¹¹ J. Bruce Alpert (Nassau County 1998) (unpublished opinion)

ⁿ¹² 678 NYS2d 507 (2nd Dept. 1998)

ⁿ¹³ 679 NYS2d 702 (2nd Dept. 1998)

ⁿ¹⁴ 671 NYS2d 689 (2nd Dept. 1998)

ⁿ¹⁵ 673 NYS2d 589 (2nd Dept. 1998)

ⁿ¹⁶ NYLJ, April 6, 1999, p. 32, col. 2. (Nassau County)

ⁿ¹⁷ 16 AD2d 975, 30 NYS2d 262 (2nd Dept. 1962).

The circumstance often arises where more than 20 days have passed from the insurer's receipt of the demand for arbitration and the claimant's attorney refuses to provide certain items of discovery, such as an examination under oath. An application is made to the

arbitrator who refuses to order discovery based upon the terms of the mandatory endorsement which extends to the arbitrator the authority to resolve disputes only as to whether the insured is -- legally entitled to recover damages from the owner or operator of an uninsured motor vehicle... or... the amount of payment that may be owing under [the] SUM coverage." n18

n18 11 NYCRR 60-2.3, Condition 12.

In *Maiello v. CNA Ins. Co.* n19 after the demand for arbitration was received, the carrier sought various items of discovery, but never sought to stay the arbitration. The insured refused to comply with discovery requests. Apparently the carrier requested that the arbitrator order the claimant to comply with discovery requests, which the arbitrator refused to do. The arbitrator thereafter awarded the claimant \$ 5,000. The carrier moved to vacate the award averring that the arbitrator's refusal to become involved in the discovery dispute constituted "misconduct."

n19 *NYLJ*, June 3, 1993, p. 26, col. 1. (Kings County Civil Court)

The court upheld the arbitrator's decision noting that the carrier had failed to timely move to stay the arbitration, and that the arbitrator had properly limited his determination to the issues of "fault and damages." Whether this interpretation of the role of the arbitrator in the UM/SUM forum prohibits an arbitrator's involvement in discovery disputes remains to be seen and does not appear to have yet been addressed by the Court of Appeals.

The Court in *Maiello* acknowledged a split in the Departments regarding the authority of an arbitrator to resolve conditions precedent to arbitration. In *Matter of State Farm Mutual Ins. v. Donath*, n20 and *USF&G v. Mitchell*, n21 the Second and Fourth Departments, respectively, held that the arbitrator's determination is limited to issues of "fault and damages" only. But see *Matter of Prudential Prop. and Casualty Insurance Co. v. Hildago*, n22 where the court held that the issue of the insured's compliance with a condition precedent to arbitration related to the question of whether a claim was payable and thus, was encompassed by the broad arbitration clause of the policy. It should be noted, however, that the cited cases did not involve an arbitrator's authority to address discovery disputes, but rather the arbitrator's authority to rule on the insured's compliance with other conditions precedent.

n20 [164 AD2d 889, 559 NYS2d 56 \(2nd Dept. 1990\)](#).

n21 [168 ADd 941, 564 NYS2d 894 \(4th Dept. 1990\)](#).

n22 [133 AD2d 87, 518 NYS2d 434 \(2nd Dept. 1987\)](#).

In *Metropolitan v. Keeney*, n23 the Second Department held the carrier was entitled to the discovery requested despite the expiration of the 20-day statute of limitations. Factors considered by the court included the engagement of the parties in good faith settlement negotiations, during which time the respondent provided the carrier with relevant medicals. A little more than a month after learning that the claimant's injuries were more serious than originally thought and that settlement negotiations had come to an end, the carrier petitioned for a stay seeking compliance with the discovery provisions of the policy.

n23 [241 A.D.2d 455, 660 N.Y.S.2d 54 \(2nd Dept. 1997\)](#).

Of particular interest in *Keeney* is the court's clarification of its decision in *Urena*. The court

stated: " In *Matter of Allstate Ins. Co. v. Urena*, supra, we did not hold that the insurer had waived its right to obtain discovery from the insured, but merely that it was not entitled to a stay of arbitration to obtain such discovery because of its unjustified delay in doing so." CPLR 3102(c)

The Civil Practice Laws and Rules contain a provision permitting an application to the court seeking discovery in aid of arbitration. In particular, CPLR 3102(c) provides: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order."

Reliance upon 3102(c), requires a showing of extraordinary circumstance, warranting judicial intrusion. As articulated by David D. Siegel in his practice commentary following that section, use of "CPLR 3102(c) is not favored by the courts. The judicial attitude is that since the parties have chosen an arbitral rather than judicial tribunal for their cases, they should ordinarily seek their disclosure before the arbitrators." n24 However, in the context of UM/SUM arbitrations, while the coverage is optional, the endorsement designating the forum is mandatory.

n24 David D. Siegel, Civil Practice Law and Rules, *Practice Commentary* C3102:5.

In *State Farm v. Wernick*, n25 which involved a SUM claim, the second department relied on CPLR 3102(c) in support of its order compelling the respondent to submit to a physical examination. The court found that the facts presented constituted extraordinary circumstances sufficient to warrant judicial intrusion into the arbitration forum, noting: The claimant has alleged physical injuries with possible permanent repercussions. If he is not compelled to submit to a physical examination, petitioner will be severely prejudiced. It will be unable to disprove any of the claimant's assertions, and will be severely limited in its ability to present a viable defense. In contradistinction, the claimant will suffer no prejudice, if compelled to submit to the examination.

n25 90 A.D.2d 519, 455 N.Y.S.2d 30 (2nd Dept. 1982).

See also *Hendler & Murray v. Lambert*; n26 *DeSapio v. Kohlmeyer*; n27 and *Mooch v. Emanuel*, n28 cases outside the SUM context where the courts found extraordinary circumstances warranting judicial intrusion.

n26 147 ADd 442, 537 NYS2d 563 (2nd Dept. 1989).

n27 35 NY2d 402, 321 NE2d 770, 362 NYS2d 843 (1974).

n28 99 AD2d 1003, 473 NYS2d 793 (1st Dept. 1984).

Interestingly, in the recent case of *Matter of Integon Insurance Co. v. Wilson*, the court denied a petition to stay arbitration which sought discovery and noted in dicta: Additionally, were the court to construe this aspect of the petition as a prayer for discovery in aid of arbitration, it would be unavailing as the petitioner failed to demonstrate the presence of extraordinary circumstances that would justify judicial intrusion into the arbitral process. (See, *DeSapio v. Kohlmeyer*, 35 NY2d 402, 406; *Matter of Goldsborough v. New York State Correctional Services*, 217 AD2d 546, 547, app. disp. 86 NY2d 834)

Conclusion

Confusion remains as to the role of the arbitrator in the UM/SUM forum and to whom an

application should be made to resolve discovery disputes. While recent decisions, particularly in the Second Department, evince the courts' hesitance to stay arbitration and order discovery, CPLR 3102(c) appears to provide a viable means for obtaining an order compelling the insured to comply with policy provisions regarding discovery upon a demonstration of extraordinary circumstances. Allowing the insurer to obtain discovery necessary to properly defend a UM/SUM claim benefits not only the insurer, but all automobile owners within the state of New York who ultimately pay the costs of claims which are inflated or unjustified, a situation which is more likely to occur where the insurer does not have the opportunity to properly prepare, investigate and defend a UM/SUM claim. It would seem that permitting these disputes to be resolved by the arbitrator would be the most cost and time effective for all sides involved and would further the objective of having UM/SUM claims expeditiously resolved via mandatory arbitration. Until this issue is resolved by either the courts or the legislature, the carrier will continue to confront the "**New Catch-22.**"