

By letter from the Liquidation Bureau dated June 27, 2005, the parties were advised that the subject claim was covered by the PMV fund; however, they were further advised that the PMV fund was financially strained at the time, and thus, unable to provide a defense or indemnification of this claim.

Following receipt of the letter from the Liquidation Bureau, by demand dated July 17, 2003, the Elias' sought arbitration of their claim for uninsured motorist (UM) benefits with Progressive pursuant to Michael Elias' policy of insurance with Progressive on the basis that the Reliance vehicle was uninsured. Michael Elias had not purchased supplemental uninsured motorist (SUM) coverage from Progressive.

Progressive timely commenced this proceeding to permanently stay the UM arbitration demanded by the Elias' contending that despite Reliance's insolvency, the adverse vehicle was not uninsured pursuant to the UM endorsement of the Progressive policy and New York Insurance Law § 3420(f)(1).

By order dated May 26, 2004, this court (Rios, J.) granted Progressive leave to add Kumar, Liquidation Bureau and Reliance as additional respondents, and set this matter down for a hearing on the issue of the availability of coverage through Reliance and all other issues raised in the petition and answering papers.

By order dated August 22, 2006, this court (Rios, J.) granted Progressive's motion for leave to join the Superintendent of the New York State Insurance Department, in his capacity as Administrator the PMV fund (Administrator) as a necessary party to this proceeding, and to serve a supplemental petition. The court directed a hearing on the issue of whether coverage for the underlying claim is available from the PMV fund and all other issues raised in the petition and answering papers.

By order dated December 12, 2006, this court (Rios, J.) granted Progressive's amended supplemental petition to add the Administrator as a necessary party to the proceeding.

At the hearing held on January 23, 2007, the parties relied on their submissions including a June 27, 2005 letter from the Liquidation Bureau; affidavit of Mark E. Daigneault of the New York State Insurance Department as Supervisor of the PMV fund, with copies of the PMV's income and disbursement reports for the months of April 1, 2006 through December 31, 2006, and memoranda of law.

Contentions

Progressive argues that the arbitration for UM benefits should be permanently stayed contending that an insurer's insolvency does not trigger a claim for UM benefits and that Reliance has not disclaimed liability or denied coverage.

The Elias' contend that the PMV fund has denied them coverage due to its lack of funds and questionable ability to pay claims.

Decision

In the recent case of Eagle Ins. Co. v Hamilton (16 AD3d 498, [2005]), the Second Department concluded that a letter from the Liquidation Bureau stating that coverage from the PMV fund was being denied "at this time" due to "financial strain", without more, was insufficient to determine whether coverage from the fund was being denied and if so, whether the denial constituted a denial of coverage within the meaning of Insurance Law § 3420(f)(1). As the only evidence proffered in that matter was a letter from the Liquidation Bureau, the court directed that the issue be determined by the Supreme Court on a more fully developed record.

The PMV fund was originally created by the Legislature in 1939 for the avowed purpose of securing benefits under policies of insurance issued to registered owners of vehicles engaged in the transportation of passengers for hire (VTL § 370). Coverage under the PMV fund is triggered when the otherwise liable insurer is insolvent. The PMV fund provides coverage for allowed claims of injured parties that remain unpaid due to the insolvency of an insurer who made payments to the fund (see Eagle Ins. Co. v Hamilton, 16 AD3d 498, supra). A claim to the PMV fund is made with the Superintendent pursuant to Article 74 of the Insurance Law (see Insurance Law Article 74; see also Insurance Law §§ 7607 and 7608).

At the time of its enactment, there was no statute which afforded protection for a claimant involved in an accident with a vehicle for which either there was no insurance in effect at the time of the accident, or the vehicle was insured, but the insurer disclaimed or denied coverage. To close this gap, in 1958 the Legislature enacted subdivision 2-a of section 167 of the Insurance Law (now known as Insurance Law section 3420), which, until 1965, mandated UM coverage under an endorsement by which the Motor Vehicle Accident Indemnification Corporation (MVAIC) became liable for payment thereunder (see State-Wide Ins. Co. v Curry, 43 NY2d 298 [1977]). In 1965, the statute was amended

insofar as the obligation to pay UM benefits was transferred from MVAIC to the insurer providing motor vehicle liability coverage.

New York Insurance Law § 3420(f)(1) requires UM coverage in all motor vehicle insurance policies issued or delivered within the State. Such compulsory UM coverage is triggered when an accident involves an uninsured motor vehicle or where an insurer of an otherwise insured vehicle disclaims liability or denies coverage. Insurance Law § 3420(f)(2) requires an insurer to provide at the option of the insured, the right to purchase SUM coverage.

The regulations promulgated by the Superintendent concerning SUM coverage known as Regulation 35-D (see 11 NYCRR 60-2.3) were enacted to provide an insured with the option of purchasing additional insurance with broader coverage than the compulsory UM coverage. Unlike basic UM coverage, the SUM definition of an uninsured motor vehicle includes an insolvent carrier. Individuals opting for SUM coverage are not required to wait for a recovery from the PMV fund. SUM coverage allows for a direct recovery from the insured's own carrier (see Metropolitan Prop. & Cas. Ins. Co. v Carpentier, 7 AD3d 627 [2004]; American Mfrs. Mut. Ins. Co. v Morgan, 296 AD2d 491 [2002]).

An insured who is injured in a collision with a motor vehicle insured by an insolvent carrier is required to seek payment from the PMV fund rather than his/her own insurer, where the insured did not purchase SUM coverage and the insolvent insurer paid into the PMV fund (see Eagle Ins. Co. v Hamilton, 16 AD3d 498, supra). Here, as the Reliance vehicle was insured at the time of the accident, it cannot be classified as an uninsured motor vehicle, since the Reliance insurance policy survives the subsequent insolvency of Reliance and the obligations to the insured under the policy are assumed by the PMV fund (see State-Wide Ins. Co. v Curry, 43 NY2d 298, supra).

It is undisputed that Michael Elias did not purchase SUM coverage from Progressive and that Reliance paid into the fund. The Elias' recourse is therefore not against Progressive for UM coverage, but against the PMV fund, unless, they can establish that the fund is denying them coverage based upon its inability to pay any allowed claims (see Eagle Ins. Co. v Hamilton, 16 AD3d 498, supra).

Notwithstanding the "financial strain" language in the letter of June 27, 2005, the letter from the Liquidation Bureau/PMV fund without more, does not demonstrate an inability of the PMV fund to pay allowed claims. To the contrary, the letter

confirms that the claim is a covered claim and advises the Reliance insured, Kumar, of a certain set of procedures to follow in the event a claim is pursued against him.

While the Administrator does not take a position regarding the intent of the "financial strain" letter, the Daigneault affidavit sets forth that all allowed claims approved for payment out of the PMV fund by the New York State Supreme Court are processed and paid by the Liquidation Bureau in order of receipt. Based upon the affidavit, it appears that as of December 31, 2006, the PMV fund had a balance of \$113,352.82, unpaid claim obligations of \$3,464,353.34, and the claims next in line to be paid from the PMV fund were received by the Bureau on February 1, 2006.

Pursuant to Insurance Law § 7606, insurers issuing insurance policies or surety bonds described in VTL § 370 shall continue to make payments of three percent of all net direct written premiums of such policies to the PMV fund on a quarterly basis until the net value of the PMV fund equals fifteen percent of the outstanding claim reserves of all authorized insurers contributing to the PMV fund.

Clearly as of December 31, 2006, the PMV fund did not have sufficient funds to pay all pending claims at once; however, the Daigneault affidavit and annexed financial documents demonstrate that despite some delay, allowed claims are being paid.

As the evidence fails to demonstrate that the Elias' have been denied compensation from the PMV fund due to its inability to pay, they are unable to establish that the Reliance vehicle was an uninsured motor vehicle pursuant to Insurance Law § 3420(f)(1) and, thus, are precluded from seeking UM arbitration from Progressive.

Accordingly, Progressive's petition for a permanent stay of UM arbitration demanded by the Elias' is granted.

Settle judgment.

Dated: March 28, 2007

J.S.C.