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FIRST PARTY BENEFITS and CONFLICT OF LAWS

The current state of our nation's economy, gasoline prices and the high cost of air travel have forced people who wish to vacation or engage in recreational activities to look closer to home. Jaunts across state lines to experience the change in foliage, the quaint "Bed and Breakfast" or the bright lights of Times Square are more common place than ever.

Unfortunately, accidents happen and when they occur with an out of state person and/or vehicle, issues involving First Party Benefits and Conflict of Laws arise. Parties involved in accidents can pursue Third Party claims and First Party Benefits. First Party Benefits are defined by statute, regulation and the policy of insurance. In cross border accidents the nature of the claim and the parties involved will determine which state law applies.

In understanding no-fault First Party Benefits and the applicable law, one must look to the legislative enactment in 1973 that changed the system for compensating automobile accident victims. No-fault reform limited the common law rights of persons who are automobile accident victims to sue for damages in tort (unless there is "serious injury" or economic loss in excess of "basic economic loss") in exchange for timely statutorily assured payment of "first party benefits for basic economic loss, without the need of court intervention." The law applies generally to all automobile accidents that occur throughout New York State and in some instances those that occur outside the state involving New York citizens. It was the legislature's intention that First Party Benefits under no-fault reform be made widely and promptly available to all injured persons within New York's legislative jurisdiction *Medical Society of the State of New York, Inc.*, 185 Misc.2d 536 (Sup. Ct. N.Y. County 2000*); Montgomery v. Daniels*, 38 N.Y.2d 41 (1975); *Walton v. Lumbermens Mut. Casualty Co.*, 88 N.Y.2d 211 (1996).

No-fault First Party Benefits are defined as "payment to reimburse a person for basic economic loss or personal injury arising out of the use or operation of a motor vehicle." McKinney's Insurance Law § 5102(b). Insurance Department Regulation 68, codified at 11 N.Y.C.R.R. part 65, implements the no-fault law. *Medical Society of the State of New York v. Serio*, 100 N.Y.2d 854 (2003) Regulation 68 provides, in relevant part, "Every owner's policy of liability insurance issued in satisfaction of the minimum requirements of Article 6 or 8 of the Vehicle and Traffic Law and Article 51 of the Insurance Law shall contain provisions providing minimum first-party benefits...." 11 N.Y.C.R.R. § 65-1.1(a)

Additional First Party Benefits are provided by Uninsured/Underinsured Motorist coverage (UM/SUM). This type of coverage is also defined by statue, regulation and the

policy of insurance. Pursuant to Regulation 35-D (11 NYCRR §60-2.3 *et seq*.), there is a standard, mandatory unified endorsement which affords both uninsured and underinsured motorist coverage under the label of supplementary uninsured motorist (SUM) insurance coverage to all policyholders in New York State. The SUM endorsement is a standard form in each and every insurance policy issued to policyholders in New York State.

Consider the following scenario regarding an out of state resident and vehicle: A Connecticut resident was injured in an automobile accident in Queens, New York, when his vehicle was struck in the rear. The Connecticut resident registered his vehicle in Connecticut and obtained an automobile insurance policy with an insurance company in Connecticut which did not provide for no-fault benefits. However, the policy did provide uninsured/underinsured benefits. As a result of this accident there is a lawsuit and the plaintiff settles with the tortfeasor for the underlying bodily injury limits of $25,000. Plaintiff thereafter filed a demand for Supplementary Underinsured Motorist (SUM) arbitration.

Based on this type of situation, insurers have to consider the following questions when determining First Party benefits: 1) Which state's law applies to contract interpretation and contract based disputes? ; 2) Does New York no-fault apply? ; 3) If New York no-fault applies, can it be a set-off to a UM/SUM claim? ; 4) Must a UM/SUM claim go to arbitration?

In answering question one, where there is a conflict of law relating to an insurance policy the conflict must be resolved by the application of the conflict of law principles relevant to contracts, although arising out of a motor vehicle accident. It is well settled, that in resolving conflict of laws relating to contracts, New York Courts apply the "center of gravity" approach or "grouping contacts" inquiry, considering such significant contacts as: 1) the place of contracting; 2) the place of negotiation and performance; 3) the location of the subject matter of the contract; and 4) the domicile or place of business of the contracting parties. *Integon Insurance Company v. Garcia*, 721 N.Y.S.2d 669 (2d Dep't 2001); *Zurich Insurance Company v. Shearson Lehman Hutton*, 84 N.Y.2d 309 (1994).

Applying this analysis to the above fact pattern it is apparent that Connecticut law would apply to contract interpretation and contract based disputes for the following reasons: 1) Plaintiff contracted for coverage with a Connecticut insurance company in the State of Connecticut; 2) Connecticut was the place of negotiation and is the place of performance. Plaintiff is a Connecticut resident seeking benefits pursuant to a Connecticut policy of insurance; 3) The subject matter of the contract are the endorsements which were contracted to apply to a Connecticut resident interpreted by Connecticut principles of law; and 4) The domicile of plaintiff is Connecticut and the insurance company is also in Connecticut.

In addition to the conflict analysis which determines the law used in contract interpretation and contract based disputes, we must consider the next question of whether New York's no-fault laws apply. Consistent with New York public policy to protect

victims of traffic accidents, personal protection insurance liability coverage underwritten in a neighboring state by insurers authorized to do business in New York is required to conform to New York minimum financial requirements and, if not, is deemed to do so. *Allstate Ins. Co. v. Lopez*, 697 N.Y.S.2d 684 (2d Dep't 1999); 11 NYCRR 65-1.8; McKinney's Insurance Law § 5107(a).

McKinney's Insurance Law § 5107(a) states as follows:

> **§ 5107. Coverage for non-resident motorists**
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> (a) Every insurer authorized to transact or transacting business in this state, or controlling or controlled by or under common control by or with such an insurer, which sells a policy providing motor vehicle liability insurance coverage or any similar coverage in any state or Canadian province, shall include in each such policy coverage to satisfy the financial security requirements of article six or eight of the vehicle and traffic law and to provide for the payment of first party benefits pursuant to subsection (a) of section five thousand one hundred three of this article when a motor vehicle covered by such policy is used or operated in this state.

Title 11 NYCRR § 65-1.8 states as follows:

> **Section 65-1.8. Coverage for nonresident motorists driving in this State**
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> (a) The automobile liability insurance policies of every authorized insurer which are sold in any other state or Canadian province shall be deemed to satisfy the financial security requirements of article 6 or 8 of the New York Vehicle and Traffic Law, and shall be deemed to provide for the payment of first-party benefits pursuant to section 5103 of the New York Insurance Law when the insured motor vehicle is used or operated in this State.
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> (b) The automobile liability insurance policies which are sold in any other state or Canadian province by an unauthorized insurer which is controlled by, or controlling, or under common control of, an authorized insurer shall be deemed to satisfy the financial security requirements of article 6 or 8 of the New York Vehicle and Traffic Law, and shall be deemed to provide for the payment of first-party benefits pursuant to section 5103 of the New York Insurance Law when the insured motor vehicle is used or operated in this State.
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> (c) Any other unauthorized insurer may file with the Superintendent of Insurance a statement that its automobile insurance policies sold in any

> other state or Canadian province will be deemed to satisfy the financial security requirements of article 6 or 8 of the New York Vehicle and Traffic Law, and will be deemed to provide for the payment of first-party benefits pursuant to section 5103 of the New York Insurance Law when the insured motor vehicle is used or operated in this State.

As such, no-fault benefits will be available depending on the out of state insurance company's status within the State of New York. For the purposes of the above fact pattern, the out of state insurance company is deemed to be authorized to conduct business in the state of New York.

Based on the above conflict analysis Connecticut law applies to the contract interpretation regarding whether an insurer is entitled to set-off of no-fault payments and whether a SUM claim must proceed to arbitration. Many out of state policies allow for set-offs to SUM coverage for all amounts payable under any "automobile medical payments coverage". Although no-fault First-Party Benefits are defined by New York law, using them as a set-off would be governed by Connecticut law. As such, when seeking a set-off of no-fault payments, one must remember that First-Party Benefits generally refer to medical expenses and lost earnings. McKinney's Insurance Law § 5102(a)(b). Therefore, any claimed set-off in the above fact pattern would have to be identified as one that was made to reimburse for medical payments.

Finishing the analysis, Connecticut law applies to whether the SUM claim proceeds to arbitration because the policy of insurance contained a UM/SUM provision. There is no requirement under the New York uninsured/underinsured statutes and regulations that mandates arbitration where a policy issued out of state meets the minimum financial security requirements of McKinney's Insurance Law § 5107; *Matter of State Farm Mutual Automobile Ins. Co. v. Torcivia*, 715 N.Y.S.2d 75 (2d Dep't 2000). As such, the demand for arbitration in the above fact pattern may be subject to a stay of arbitration if the out of state policy has either a consent to arbitrate provision or requires that the uninsured/underinsured claim be brought by a lawsuit.

In conclusion, when evaluating a claim or handling litigation that involves an out of state resident and vehicle, it will be necessary to assess the status of the foreign insurance company, the facts surrounding the issuance of the insurance policy and to obtain a copy of the insurance policy in order to interpret the language of the policy to determine the applicable First Party Benefits.

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