

Assessment of Public Comments for the Sixth Amendment to 11 NYCRR 60-2 (Insurance Regulation 35-D).

The Department of Financial Services (“DFS”) received comments from three insurance trade organizations (“organizations”). The comments focused on two aspects of the amendment.

1. Offer of the supplementary uninsured/underinsured motorist (“SUM”) insurance waiver.

Sections 60-2.2(a)(1)(i)(b)(1) and 60-2.2(a)(2)(i)(b)(2)(i) of the regulation specifically provide that, in the initial notice to the insured, the insurer shall include:

. . . a statement that the insurer shall provide SUM limits in an amount equal to the bodily injury liability insurance limits of coverage provided under the motor vehicle liability policy unless a first named insured declines the SUM coverage or selects a lower amount of coverage through a written waiver signed by the first named insured, subject to the requirements of Insurance Law section 3420(f)(2-a)(B), provided, however, if the insurer requires that the SUM coverage limit be equal to the policy’s bodily injury liability insurance limit, then the written waiver shall only provide for the first named insured’s option to decline SUM coverage under the policy

Comment: All three organizations take issue with DFS’s reading of the amendment to the law that the insurer must offer the SUM waiver in the circumstances where it is offering SUM coverage only at the limits of the policy. They assert that the law permits the insurer to forego the written waiver process entirely and require SUM coverage limits that equal bodily injury liability insurance limits for all insureds with no option to purchase lower SUM coverage limits or decline SUM coverage.

Response: At issue is the proper interpretation of Insurance Law section 3420(f)(2-a)(D), which reads: “[n]otwithstanding the provisions of subparagraph (A) of this paragraph, at the insurer’s option, the insured’s supplementary uninsured/underinsured motorists coverage limit may be required to equal the insured’s bodily injury liability insurance limit under the motor vehicle liability insurance policy.”

DFS understood Chapter 490 of the Laws of 2017, which enacted section 3420(f)(2-a), as intending to provide for a mandatory inclusion of SUM coverage on new insurance policies with an affirmative option for the insured to select lower amounts or reject it. As stated in the introducer’s memorandum of support (“memorandum”) for Chapter 490:

Section 1 of this bill would establish that the amount of supplementary uninsured/underinsured motorist (SUM) coverage to be included in any new auto insurance policy will be the same as the amount of bodily injury coverage selected by the insured. The insured, [*stet.*] may have the opportunity to decline SUM coverage or to purchase lower amounts through a written waiver. The insurer or agent would be required to inform the insured what SUM coverage is and how much coverage the insured may purchase. At the insurer’s option, the insured’s SUM coverage may be required to equal the insured’s bodily injury liability insurance.

Chapter 15 of the Laws of 2018 amended Chapter 490, but the amendment did not affect the SUM waiver requirement. The memorandum for Chapter 15 states that “[t]he original bill would have further provided, that the insured, may have the opportunity to decline SUM coverage or to purchase lower amounts through a written waiver.” Neither memorandum states that the intent of either Chapter 490 or Chapter 15 was to allow the insurer to force the insured to purchase SUM coverage.

While DFS strongly believes that SUM coverage is important and beneficial to most consumers, the Legislature did not mandate the coverage and has continued to make it an optional coverage. There is obviously an additional cost to the insured. It is thus incongruent to construe the statute as permitting an insurer to force an insured to purchase SUM coverage against his or her will. Accordingly, DFS has not amended the regulation as the organizations requested.

2. First-named insured.

Comment: The proposed amendment defined “first-named insured” to mean “the individual specified first on the declarations page of a motor vehicle liability insurance policy, and the individual’s spouse, if the spouse is a resident of the same household and specified on the declarations page.” One of the organizations said that the Department should clarify that either spouse could waive SUM coverage. However, another organization objected to both spouses being able to waive SUM coverage, alleging that it would result in confusion and litigation.

Response: DFS had intended that either spouse would be able to waive SUM coverage, which is consistent with the coverage requirements under 11 NYCRR 60-1 (Insurance Regulation 35-A). However, DFS recognizes that “and” could be read to mean that both spouses had to waive the coverage, not one or the other.

With respect to whether the spouse should be able to waive the SUM coverage for both spouses, a resident spouse is equally the insured under a motor vehicle policy of financial responsibility. For example, Section 60-1.1(c)(1) of 11 NYCRR 60-1 (Insurance Regulation 35A) affords a special status to a spouse by defining an insured to mean “the named insured and, if an individual, his or her spouse if a resident of the same household with respect to the motor vehicle or vehicles; . . .” Under section 60-1.1(c)(2), every other person who drives the vehicle is covered provided that the insured or his or her spouse has consented to the use of the vehicle by such person. Also, DFS believes that most insurers would regularly make changes to policies requested by either spouse provided that both spouses are named as insureds in the policy. Moreover, DFS believes that whether one spouse is listed first or second will generally be arbitrary and often the husband will be listed first because of prevailing societal norms. Thus, not accepting the second-named spouse’s waiver may result in de facto sexual discrimination.

DFS fails to see how allowing either spouse to waive SUM coverage under the policy would be confusing or result in increased litigation so long as the insurer clearly disclosed the rights of the insureds to waive the coverage in the required notice.

Accordingly, section 60-2.0(d)(3) of the regulation is amended to change the first “and” to “or” to clarify that either spouse may waive the SUM coverage.