

BY NORMAN H. DACHS AND JONATHAN A. DACHS

## Rulings on Declaratory Judgment Actions: The "Top 10"

In our last two columns, we addressed two interesting and important issues dealing with declaratory judgment (DJ) actions, which were, at the time, pending decisions by the Court of Appeals.

In our September column,<sup>1</sup> we discussed the issue of whether an insured is entitled to recover attorney's fees in cases where the insurer, who has provided its insured with a defense to the underlying action, commences an unsuccessful declaratory judgment action seeking a declaration that it has no obligation to defend or indemnify the insured.

In our November column,<sup>2</sup> we discussed the issue of whether an injured claimant, who is not a party to the insurance contract, has standing to commence a declaratory judgment action to determine the insurer's obligation to defend and indemnify its insured in the absence of a judgment against the tortfeasor. The Court of Appeals has now spoken on those two issues.



Norman H. Dachs



Jonathan A. Dachs

### Attorney's Fees

In *U.S. Underwriters Insurance Company v. City Club Hotel LLC, et al.* — NY3d — — NYS2d — 2004 WL 2902402 (decided Dec. 16, 2004), the Court of Appeals held that an insured who prevails in an action brought by an insurer seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorney's fees expended in defending against the declaratory judgment action regardless of whether the insurer provided a defense to the insured.

Noting that it held in *Mighty Midgets, Inc. v. Centennial Insurance Co.* 47 NY2d 12, 21-22 (1979) that an insured who is "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" and who prevails on the merits, may recover attorney's fees incurred in defending against the insurer's action, the Court explained that "[t]he reasoning behind *Mighty Midgets* is that an insurer's duty to defend an insured extends to the defense of any action arising out of the occurrence, including a defense against an insurer's declaratory judgment action."

As applied to the case before it, the Court held that the insured, which was named as a defendant in the declaratory judgment action, was entitled to recover from the insurer the expenses it incurred in defending against that action, which arose as a direct consequence of the insurer's unsuccessful attempt to free itself of its policy obligations. As stated by the Court, the insured's "recovery of attorney's fees is incidental to the insurer's contractual duty to defend."

### Standing

In *Lang v. Hanover Insurance Company*, 3 NY3d 350 (decided Nov. 18, 2004), the Court of Appeals held that a judgment against the tortfeasor is a statutory con-

dition precedent to a direct suit against the tortfeasor's insurer, including a declaratory judgment action.

After setting forth the history of Insurance Law §3420, which codified the right of injured parties to sue the tortfeasor's insurer directly, under limited circumstances, the Court held that "the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days."

In the words of the Court, "Compliance with these requirements is a condition precedent to a direct action against the insurance company . . . . Once the statutory prerequisites are met, the injured party steps into the shoes of the tortfeasor and can assert any right of the tortfeasor-insured against the insurance company."

Perhaps the most interesting aspect of the *Lang* decision is its final paragraph, in which the Court advises that

an insurance company that disclaims in a situation where coverage may be arguable

is well-advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law §3420. Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment.

*Query:* Can an injured party pursue a declaratory judgment action prior to obtaining a judgment against the tortfeasor/insured if he or she obtains an assignment of the right to challenge the insurer's disclaimer or denial of coverage from the tortfeasor/insured?

### The "Top 10"

It is once again that time of year when we have the privilege of reporting on the Insurance Department's "Annual Ranking of Automobile Insurance Complaints." The 2004 Annual Ranking, which is based upon data for the calendar year 2003, ranks 49 automobile insurance companies or groups of companies by the number of private passenger automobile insurance complaints upheld against them and closed by the Insurance Department in 2003, divided by their 2002-2003 average private passenger automobile premium volume in New York State.

Thousands of complaints are handled by the Insurance Department's Consumer Services Bureau each year. In 2003, the department closed a total of 16,194 private passenger auto insurance complaints, of which 2,813 were upheld (a substantial decrease in upheld complaints from the prior year, when 4,614 complaints were upheld). The department also handles commercial auto complaints, which are not included in deter-

Norman H. Dachs and Jonathan A. Dachs are with the firm of Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola.

## Rulings on Declaratory Judgment Actions: The "Top 10"

Continued from page 3

mining the complaint ratios. In addition, complaints made directly to the insurer are not counted in the ratios.

An upheld complaint occurs when the department agrees with a consumer that an auto insurer made an inappropriate decision. Typical complaints are those involving monetary disputes, such as the value of a total loss. Complaints about policy terminations and failures to pay claims are also common.

The 2003 ranking also includes complaints regarding late payment of no-fault arbitration awards. The number of upheld no-fault arbitration late payment complaints was 121, a 36 percent reduction from the 2002 total. Most auto insurers posted two or fewer upheld no-fault arbitration late payment complaints in 2003. However, two insurers — GEICO and Interboro — each posted 10 or more such complaints.

The 2003 average complaint ratio for all companies or groups, including those with less than \$10 million in premiums, was 0.27 per \$1 million in premiums (down from 0.49 in 2002). This equates to one upheld complaint for every \$3.7 million in premiums. This average ratio was derived by dividing the number of complaints upheld against all companies in 2003 (2,813) by the average premium for 2002-2003 for all companies (\$10,237.1 million, or \$10.23 billion).

Most of the "Top 10" (best) ranked insurers were relatively small companies. Only one of these insurers, USAA, wrote more than \$100 million in average premium. With only one upheld complaint, Amica Mutual, a perennial "Top 10" finisher, ranked first in 2003. Amica also only had one upheld complaint in 2002 and 2001.

Of the three largest New York State auto insurers, both Allstate and State Farm showed significant year-to-year improvement and registered complaint ratios better than the overall average. GEICO, which became New York's second-largest private passenger auto insurer in 2003 (moving just ahead of State Farm and second only to Allstate), had a complaint ratio worse than the overall average. Indeed, GEICO registered the largest increase in upheld complaints among the "big three," going from 323 upheld complaints in 2002 to 502 in 2003. State Farm posted the largest decline in upheld complaints, falling from 228 in 2002 to 112 in 2003. State Farm improved from 20th in 2002 to 15th in 2003, while GEICO slipped from 29th in 2002 to 38th in 2003. Allstate, New York's largest writer, jumped from 40th in 2002 to 32nd in 2003.

Also of note is the performance of several other companies that demonstrated great improvement performance over the prior year. The largest improvement was by Credit Suisse, which ranked 45th in 2001 and 42nd in 2002, but rose in 2003 to 5th place. Harleysville improved from 36th in 2002 to 10th in 2003. Country-Wide also showed significant improvement, jumping from 37th in 2002 to 25th in 2003.

Most of the insurers on the 2003 "Bottom 10" list are relatively small companies (i.e., less than \$50 million in average premium). AIG was by far the largest writer on that list, with \$417.4 million in an average premium. Two of the "Bottom 10" insurers — Mercury and Fairfax — were not previously ranked due to low premium volume.

### Tables

Table 1 at right lists the "Top 10," i.e., the 10 companies with the fewest complaints against them, or the 10 best performers of 2003. This list contains six repeat performers from last year — Amica, USAA, Erie,

Preferred Mutual, Atlantic and Electric. For purposes of comparison, these companies' rankings in 2002 and 2001 are also shown. Companies listed in italics are notable for having finished among the top 25 auto insurers in each of the past three years.

Table 2 reveals the opposite side of the spectrum; it lists the 10 auto insurers with the worst performance record for the calendar year 2003, i.e., the "Bottom 10." In this table, the company with the highest ratio is ranked first; the company with the lowest ratio is ranked last. Thus, those ranked near the top of this list had the worst performance.

These companies' rankings in 2002 and 2001 are also shown. Companies listed in italics are notable for having ranked among the 10 lowest in each of the past three years. Four of the insurers with the highest complaint ratios — Great American, Clarendon, Interboro and Leucadia — were carryovers from the previous year's "Bottom 10."

Table 3 lists the performance records of the 10-largest auto insurers in New York State. As can be seen, 75.1 percent of auto insur-

ance consumers purchase their insurance from one of these 10 companies.

The Insurance Department notes that its rankings should not be the only factor considered when selecting an auto insurer. Price is also a major factor, as are recommendations from family, friends, coworkers, and neighbors. The department's annual Consumers Guide to Automobile Insurance contains representative price information for 25 New York auto insurers in addition to the Assigned Risk Plan. Copies of the guide and the ranking may be obtained free of charge by calling the department's toll-free telephone number 800-342-3736. In addition, both publications are accessible on the Internet at the department's Web-site address: [www.ins.state.ny.us](http://www.ins.state.ny.us).

1. See Dachs, N. and Dachs, J., "Participation in Arbitration, Recovery of Attorney's Fees," NYLJ, Sept. 14, 2004, p. 3, col. 1.

2. See Dachs, N. and Dachs, J., "Declaratory Judgment Actions: A Question of Standing," NYLJ, Nov. 9, 2004, p. 3, col. 1.

3. In 2003, some companies that were in the Great American Group in 2001 and 2002 became part of the Infinity Group, while others remained with the Great American Group. As a result, the 2001 and 2002 rankings (noted below) for the Great American and Infinity Groups are identical.

**Table 1**

The "Top 10" The 10 Best Performers of 2003				
Company or Group	2003 Complaint Ratio	2003 Ranking	2002 Ranking	2001 Ranking
1. <i>Amica</i>	0.01	1/49	3/50	6/51
2. <i>USAA</i>	0.04	2/49	4/50	9/51
3. <i>Erie</i>	0.04	3/49	5/50	1/51
4. <i>Preferred Mutual</i>	0.04	4/49	7/50	21/51
5. <i>Credit Suisse</i>	0.05	5/49	42/50	45/51
6. <i>Atlantic</i>	0.05	6/49	1/50	4/51
7. <i>American Modern</i>	0.05	7/49	18/50	—
8. <i>Electric</i>	0.06	8/49	2/50	25/51
9. <i>Royal &amp; Sunalliance</i>	0.07	9/49	24/50	19/51
10. <i>Harleysville</i>	0.07	10/49	36/50	35/51

**Table 2**

The "Bottom 10" The 10 Worst Performers of 2003				
Company or Group	2003 Complaint Ratio	2003 Ranking	2002 Ranking	2001 Ranking
1. <i>Leucadia</i>	18.78	49/49	49/50	50/51
2. <i>Interboro</i>	2.19	48/49	47/50	10/51
3. <i>Infinity</i>	1.46	47/49	46/50	48/51
4. <i>Clarendon</i>	1.02	46/49	50/50	49/51
5. <i>Great American</i>	0.70	45/49	46/50	48/51
6. <i>Safeco</i>	0.64	44/49	38/50	47/51
7. <i>Fairfax Financial</i>	0.52	43/49	—	—
8. <i>Mercury Casualty</i>	0.47	42/49	—	—
9. <i>Lumbermens</i>	0.46	41/49	27/50	18/51
10. <i>AIG</i>	0.38	40/49	41/50	46/51

**Table 3**

The "Big 10" The Largest Auto Insurers in New York				
Company or Group	2003 Ranking	2003 Complaint Ratio	2002-2003 Average Premium (In Millions)	Market Share
1. <i>Allstate</i>	32/49	0.22	\$1,698.80	16.60%
2. <i>Berkshire-Hathaway (GEICO)</i>	38/49	0.35	\$1,422.60	13.90%
3. <i>State Farm</i>	15/49	0.08	\$1,329.00	13.00%
4. <i>Progressive</i>	19/49	0.14	\$660.20	6.40%
5. <i>Travelers</i>	27/49	0.19	\$611.60	6.00%
6. <i>Liberty Mutual</i>	20/49	0.15	\$458.00	4.50%
7. <i>AIG</i>	40/49	0.38	\$447.40	4.10%
8. <i>White Mountains</i>	36/49	0.33	\$375.70	3.70%
9. <i>New York Central</i>	12/49	0.08	\$366.00	3.30%
10. <i>Nationwide</i>	26/49	0.18	\$335.00	3.30%
The "Big Ten"			\$7,674.30	75.10%
Total (all companies, including those with less than \$10 million premiums)			\$10,237.10	100.00%