INSURANCE LAW

Ranking the Auto Companies, And Loss of Fetus as a 'Serious Injury'

By **Norman H. Dachs**

And **Jonathan A. Dachs**

We are privileged once again to report (albeit somewhat belatedly) upon the State of New York Insurance Department's "Annual Ranking of Automobile Insurance Complaints." In addition, this article discusses an interesting and significant lower court decision on the rarely litigated issue of the "loss of a fetus" category of a "serious injury" under the no-fault law.

2008 Annual Ranking

The 2008 "Annual Ranking of Automobile Insurance Complaints," which is based upon data for the calendar year 2007, ranks 40 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 2007, divided by their average 2006-2007 private passenger automobile premium volume in New York State.

In 2007, the insurance department's Consumer Services Bureau received a total of 6,301 private passenger auto insurance complaints (down from 7,914 the year before), of which 993 (down from 1,629) were upheld. Neither commercial auto complaints nor complaints made directly to the insurer are included in determining the complaint 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. Other common complaints involve insurers that do not renew policies. Complaints about policy terminations and the promptness of insurance payments are also common.

The 2007 average complaint ratio for all companies or groups, including those with less than $10 million in premiums, was 0.10 per $1 million in premiums (down from 0.16 in 2006.) This equates to approximately one upheld complaint for every $9.8 million in premiums paid to insurance companies. This average ratio was derived by dividing the number of complaints upheld against all companies in 2007 (993) by the average premium for 2006-2007 for all companies ($9,811.621 million, or $9.8 billion).

> As originally enacted in 1973, the no-fault statute did not include 'loss of a fetus' as a 'serious injury' for which non-economic loss recovery could be sought.

Of the top 10 finishers in 2007, six—American Express Group, Electric, Amica, Preferred Mutual, USAA and Chubb—were in the top 10 in 2006 as well. Electric, Amica and Preferred Mutual finished in the top 10 in each of the previous four annual rankings. Most notable is the improved performance of Mercury General Group, which went all the way from the "Bottom 10" (No. 39) in 2006 to the top of the "Top 10" (No. 1) in 2007.

All three of the largest New York state auto insurers, Berkshire-Hathaway (GEICO), Allstate and State Farm, showed some improvement in their rankings. GEICO moved from a rank of 23rd in 2006 to 22nd in 2007; Allstate moved from a ranking of 30th in 2006 to 23rd in 2007; and State Farm cracked into the "Top 10" by improving from 17th in 2006 to 10th in 2007. State Farm, which ranked the best among the state's biggest three insurers, has finished in the top 25 in each of the past six annual rankings.

Charting the Numbers

Of the three charts below (see p. 8), the first lists the "Top 10," i.e., the 10 companies with the fewest complaints against them, or, the 10 best performers of 2007. For purposes of comparison, companies' rankings in 2006 are also shown.

The second chart reveals the opposite side of the spectrum: It lists the 10 auto insurers with the worst performance record for the calendar year 2007, i.e., the "Bottom 10." In this chart, the company with the highest ratio is ranked first; the company with the lowest ratio is ranked last. Thus, those ranked at the top of this list had the worst performance. These companies' rankings in 2006 are also shown. Five of the insurers with the highest complaint ratios—Long Island Ins. Co., Infinity, Tri-State Consumer, American International and Safeco—were carryovers from the previous year's "Bottom 10."

Copies of the insurance department's annual Consumers Guide to Automobile Insurance and the annual 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 online at the department's Web site: www.ins.state.ny.us.

Loss of Fetus

As originally enacted in 1973, the no-fault statute did not include "loss of a fetus" as one of the categories of injuries that qualified as a "serious injury" for which recovery could be sought for non-economic loss.

Then, in 1981, in *Raymond v. Bartsch*, 84 AD2d 60 (3d Dept. 1981), lv. denied, 56 NY2d 508 (1982), the plaintiff, who was nine months pregnant, was involved in a motor vehicle accident while driving her vehicle. Examination of the plaintiff at the » Page 8

NORMAN H. DACHS *and* JONATHAN A. DACHS *are with Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola.*

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hospital emergency room revealed that the fetus had a heartbeat and the plaintiff was released. The next day, which happened to be the delivery due date, she went into labor and, unfortunately, the baby was delivered stillborn. The automobile accident was listed as a probable cause of death.

The plaintiff brought an action against the defendant on behalf of herself and the deceased infant. As pertinent hereto, the first cause of action sought damages for the plaintiff's "serious injury" within the meaning of the no-fault law (then Ins. L. §671(4), now §5102[d]) due to the loss of the fetus.

Concluding that this injury was not encompassed by the definition of "serious injury" in the statute ("the statute specifically enumerates the types of injuries considered to be serious and the loss of plaintiff's fetus does not fall within any of the enumerated injuries"), the court precluded the plaintiff from recovering for her own suffering in connection with the loss of her fetus. The court went on to reject her argument that a death (an injury specifically listed in the statute) occurred within the meaning of the statute because, in its view, "the death must be that of a person born alive."

The court also rejected the suggestion that the plaintiff's loss of the fetus constituted "the permanent loss of use of a body organ, member, function or system," stating: "While unborn children have never been recognized as persons in the law in the whole sense [citation omitted], it does not follow that a fetus is a body organ or member of its mother."

Statutory Amendment

In 1984, as a direct result of the *Raymond* decision, and with the expressed intent of overruling that holding, the Legislature amended the "serious injury" statute by adding "loss of a fetus" to the list of "serious injury" categories. See Sponsor's Mem., Bill Jacket, L. 1984, ch. 143; *Gastwirth*

The 10 Best Performers of 2007

	Company or Group	2007 Complaint Ratio	2007 Ranking	2006 Ranking
1.	Mercury General	0.00	1/40	39/44
2.	American Express/Amex	0.00	2/40	9/44
3.	Eveready	0.00	3/40	28/44
4.	Electric	0.00	4/40	3/44
5.	Amica Mutual	0.01	5/40	5/44
6.	Preferred Mutual	0.02	6/40	8/44
7.	USAA	0.03	7/40	7/44
8.	Chubb	0.03	8/40	4/44
9.	Utica National	0.03	9/40	20/44
10.	State Farm	0.04	10/40	17/44

The 10 Worst Performers of 2007

	Company or Group	2007 Complaint Ratio	2007 Ranking	2006 Ranking
1.	Long Island Ins. Co.	11.15	40/40	44/44
2.	Infinity	1.97	39/40	43/44
3.	Interboro	0.79	38/40	31/44
4.	Tri-State Consumer	0.70	37/40	41/44
5.	American International	0.50	36/40	42/44
6.	Safeco	0.39	35/40	37/44
7.	Countrywide	0.35	34/40	11/44
8.	White Mountains Group	0.31	33/40	34/44
9.	State-Wide	0.26	32/40	33/44
10.	Hannover RE Group	0.21	31/40	36/44

The Largest Auto Insurers in New York State

	Company or Group	2007 Ranking	2007 Complaint Ratio	2006-2007 Average Premium (in millions)
1.	Berkshire-Hathaway (GEICO)	22/40	0.08	$2,114.174
2.	Allstate	23/40	0.08	$1,846.029
3.	State Farm	10/40	0.04	$1,000.716
4.	Progressive	13/40	0.05	$790.886
5.	St. Paul Travelers	19/40	0.07	$557.701
6.	Liberty Mutual	14/40	0.05	$511.589
7.	Nationwide	17/40	0.06	$294.111
8.	Central Services	11/40	0.04	$272.652
9.	Metropolitan	26/40	0.09	$257.963
10.	White Mountains Group	33/40	0.31	$222.581

SOURCE: State of New York Insurance Department, "Annual Ranking of Automobile Insurance Complaints," 2008 and 2007 editions.

v. Rosenberg, 117 AD2d 706 (3d Dept. 1986); *Doyle v. Van Pelt*, 189 Misc.2d 67 (Sup. Ct. Madison Co. 2001). Thus, the Legislature expressed an intention to signify that the loss of a fetus should in and of itself be viewed as an injury to the plaintiff.

While there has been a great deal of litigation and discussion regarding the meaning, scope and applicability of several of the statutory "serious injury" categories, almost nothing was written or said about the "loss of fetus" category in the ensuing 20 years.

In 2005, the Fourth Department decided the curious case of *Brannan v. Brownsell*, 23 AD3d 1106 (4th Dept. 2005), in which the "loss of fetus" category was invoked by the plaintiff. While the decision noted that in moving for summary judgment, the defendants met their initial burden of proof with respect to that statutory category by submitting the affidavit of their expert obstetrician/gynecologist, the court provided no information as to the nature and content and/or basis of that expert's opinion.

Although the court noted that in response, the plaintiff submitted an affidavit from her treating obstetrician/gynecologist, again, the decision was silent with respect to the expert's statement. The court found that the plaintiff's expert's affidavit raised a triable issue of fact as to whether the plaintiff suffered the loss of a fetus, and, thus, denied the defendant's motion. It is not at all clear why there would have been any question as to whether or not the plaintiff suffered a loss of her fetus. More likely, the question of fact had to do with the issue of causation.

Recent Decision

The Supreme Court, Rensselaer County recently addressed the "loss of fetus" category in a very interesting opinion in *McKendry v. Thornberry*, __Misc.3d__, __NYS2d__, 2009 WL 214567, N.Y. Slip Op. 29037 (Sup. Ct. Rensselaer Co. 2009). In that case, the plaintiff sued the defendant for the "loss of her unborn child" as a result of an automobile accident.

In moving for summary judgment on the basis that the plaintiff failed to sustain a "serious injury" as defined by Ins. L. §5102(d), the defendant submitted an affirmed report from a doctor who averred that in his opinion the accident was not the cause of "this early pregnancy loss," and further opined that "from conception to 6 weeks gestation, the pregnancy is in the embryonic stage and the product of conception is an embryo and not a fetus" and that the plaintiff was "no more than 1 week pregnant."

In opposition to the motion, the plaintiff argued that, as a matter of law, a pregnancy of any duration constitutes a "fetus" under the statute. The plaintiff also submitted an affidavit by her treating doctor, who averred that the accident was the cause of the plaintiff's miscarriage.

In reply, the defendant noted that there was no dispute that the plaintiff was only approximately one week pregnant at the time of the accident and argued that medical and dictionary definitions of the term "fetus" do not include a pregnancy of such brief duration. A medical dictionary defines "fetus" as "from the third month to birth; Webster's Dictionary defines that term as "usually two months after conception to birth;" and the defendant also quoted from an "Expectant Mother's Guide," which stated that "by the 10th week, the embryo is known as a fetus."

In surreply, the plaintiff argued that the rules of statutory construction require that the intent of the Legislature be given priority over medical definitions and dictionary definitions because the term "fetus" is a word of technical or special meaning.

In its decision, the court first noted that the plaintiff had raised a triable question of fact on the issue of causation via the affidavit of her medical expert, which conflicted with the defendant's medical expert. The court then went on to address the issue of statutory construction raised by the parties and held that the loss of a one week pregnancy constitutes a "loss of a fetus" within the meaning of the insurance law's "serious injury" definition.

The court found that "the legislative intent appears to indicate an intent to include a pregnancy of any duration. The Memorandum in support of the legislation discusses a court opinion which dismissed the case of a woman who was nine months pregnant when she was in a motor vehicle accident and delivered a stillborn baby due to the accident. However, the Legislature does not engage in any discussion of the definition of the term 'fetus,' and there is also a reference to the phrase 'loss of pregnancy.'

"This court has weighed heavily the fact that the Legislature referred to 'loss of pregnancy' and also the fact that the Legislature did not make any clear reference that indicated an intent to limit the statute's application to pregnancies of a certain duration. The Memorandum in support of the legislation states in relevant part as follows:

> A major objective of New York's no fault insurance law was to alleviate litigation by limiting recovery for damages for non-economic loss to instances of serious injury. Since the courts have interpreted the loss of a fetus not to be a serious injury, this legislation is necessary to clarify the statute.
>
> A woman who is involved in an automobile accident that results in the termination of her pregnancy has suffered a serious injury and should have the right to recovery from a negligent operator for her non-economic loss. She should not be subjected to an inequitable law that is inconsistent with the original intent of the no-fault insurance law.

The court also noted that the term "fetus" "does not have a clear common meaning or a clear definition within the medical community. This further supports a finding that the Legislature did not intend to limit the term to a pregnancy of a certain duration."

Thus, it may be argued that the term "loss of fetus" is to be equated with termination of pregnancy. And, the *McKendry* court has reconfirmed what many have long believed: There is no such thing as being "a little bit pregnant."