

The Insurance 'Top 50'; Review of Arbitrators' Awards

We are privileged once again to report upon the State of New York Insurance Department's "Annual Ranking of Automobile Insurance Complaints." In addition, following that report, we will discuss an interesting and significant decision of the Court of Appeals on the issue of the standard of review of an arbitration award.

2010 Annual Ranking

The 2010 "Annual Ranking of Automobile Insurance Complaints," which is based upon data for the calendar year 2009, ranks all 167 automobile insurance companies doing business in New York State. Unlike previous years, this year's report ranks the individual companies themselves, rather than just the corporate groups of which those companies may be members. This change is intended to give consumers a more accurate picture of their insurers' performance.

As in the past, insurers are ranked based upon a complaint ratio, which is determined by the number of private passenger automobile insurance complaints upheld against them and closed by the Insurance Department in 2009, divided by their average 2008-2009 private passenger automobile premium volume in New York State. All companies with at least \$10 million in average premiums in 2008-2009 are included in the ranking. Insurers with less than \$10 million in premiums are included only if they had 10 or more complaints.

In 2009, the Insurance Department's Consumer Services Bureau received a total of 7,600 private passenger auto insurance complaints (up from 7,238 the year before), of which 966 (up from 948) were upheld. Neither commercial auto complaints nor complaints made directly to the insurer are included in determining the complaint ratios. Complaints not upheld by



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the Insurance Department or withdrawn by the consumer are also not included in the ratio. An upheld complaint occurs when the department agrees with a consumer that an auto insurer made an inappropriate decision.

Typical complaints are those involving such issues as delays in the payment of no-fault claims. This includes no-fault arbitration complaints that are ruled in favor of

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the consumer and are not appealed or paid by the insurance company within 30 days. Other common complaints involve insurers that do not renew policies.

The 2009 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 (the same as the two previous years). This equates to approximately one upheld complaint for every \$9.7 million in premiums paid to insurance companies. This average ratio was derived by dividing the number of complaints upheld against all companies in 2009 (966) by the average premium for 2008-2009 for all companies (\$9.65 billion). The average number of upheld complaints per company was 5.8.

Charts

The first chart, on page 9, lists the "Top 50," i.e., the 50 companies

with the fewest upheld complaints against them, or, the 50 best performers of 2009. Indeed, because there were actually 51 companies that achieved a complaint ratio of 0.00, we have listed all of them below. Although these companies all have the same complaint ratio, they are ranked differently because of the differences in their average annual premiums.

The second chart, on page 9, reveals the opposite side of the spectrum; it lists the 25 auto insurers with the worst performance record for the calendar year 2009, i.e., the "Bottom 25." In this chart, the company with the highest (worst) ratio is ranked first; the company with the lowest ratio is ranked last.

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 at the Department's Web site address: www.ins.state.ny.us.

Arbitration Review

A most interesting recent decision by the Court of Appeals in *Falzone v. New York Central Mutual Fire Insurance Company*, 15 NY3d 530 (2010), is instructive on several fronts—legal and tactical. It involves a claimant who arbitrated her claim for no-fault benefits for her shoulder injury and won, and who thereafter arbitrated her SUM claim against the same insurer for compensation for the same shoulder injury and lost.

In the no-fault arbitration, the arbitrator ruled that the claimant's shoulder injury was causally related to an auto accident in which she was involved and awarded her \$4,355 in no-fault benefits. After she settled her lawsuit against the underinsured tortfeasor for his \$25,000 policy limit, the claimant sought SUM benefits in the amount of \$75,000 under her \$100,000 SUM coverage limit against the same insurer.

Although that insurer had once been defeated with » Page 9

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respect to its claim that the claimant's shoulder injury was not related to the accident, it advanced the same argument once again. "Wait a minute," cried the claimant to the SUM arbitrator, who was listening intently to the insurer's argument. "How many times do I have to beat them on the same issue? Haven't you ever heard of the doctrine of collateral estoppel?" Turning a deaf ear to this plea, the SUM arbitrator proceeded, nevertheless, to find that the claimant's shoulder injury was unrelated to the accident.

The Supreme Court vacated the SUM arbitration award and ordered a new arbitration before a different arbitrator, concluding that "although it is within an arbitrator's discretion to determine the preclusive effect of a prior arbitration award, here, there was nothing in the SUM arbitrator's decision to indicate whether petitioner's collateral estoppel argument was even considered."

By a 3-2 vote, the Appellate Division reversed the Supreme Court's order and confirmed the SUM arbitration award (64 AD3d 1149 [4th Dept. 2009]), the majority concluding that (1) "[t]he fact that a prior arbitration award is inconsistent with a subsequent award" is not a ground, pursuant to CPLR 7511, for vacating an arbitration award, (2) it is within the arbitrator's sole discretion to determine the preclusive effect of a prior award, and (3) "the SUM arbitrator was not required to state that he had considered" the collateral estoppel argument raised before him.

The dissenting justices countered that the SUM arbitrator exceeded his power by disregarding the preclusive effect of the prior no-fault arbitration award, which involved the same parties and was based on the same facts. Six of the seven judges of the Court of Appeals have now agreed that the SUM arbitrator was not bound to follow the no-

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fault arbitrator's determination, and, thus, affirmed the Appellate Division's order.

Explaining that a court has no authority to vacate an arbitration award unless "it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power," and that "[e]ven where an arbitrator has made an error of law or fact, courts generally may not disturb an arbitrator's decision," the Court of Appeals opined that if the SUM arbitrator erred in failing to apply collateral estoppel to preclude litigation of the causation issue in the SUM arbitration, that "falls squarely within the category of claims of legal error courts generally cannot review."

The majority did recognize that a different result would be obtained if the second proceeding was not another arbitration, but a court action. In that event, the court would be bound to apply the doctrine of collateral estoppel to give preclusive effect to the arbitrator's prior determination (citing to *Matter of American Ins. Co. [Messinger-Aetna Cas. Sur. Co.]* 43 NY2d 184, 191 [1977]).

Complaining that "apparently, what is sauce for the goose is no longer sauce for the gander" and referring to articles written by us 15 and 20 years ago, respectively, (i.e., Dachs, Norman H. and Dachs, Jonathan A., "Time to Reconsider 'Clemens v. Apple'?" NYLJ, Nov. 14, 1995, quoting Rep of the Joint Legislative Comm on Ins. Rates, Regulation and Recodification of Ins. Law, NY Leg Doc 1973, No 18, at 7; Dachs, Norman H. and Dachs, Jonathan A., "Collateral Estoppel and Res Judicata in Arbitration," NYLJ, Feb. 13, 1990), Judge Eugene F. Pigott, in a highly insightful and practical dissenting opinion argued that: "These results, however, contradict the primary legislative purpose behind the no-fault law, namely, to ensure that every auto accident victim will be compensated for substantially all of his economic loss promptly and without regard to fault," such that the insurer has nothing to lose and everything to gain from denying no-fault claims... Simply put, under the majority holding there is a great deal of incentive for a no-fault carrier to deny claims because even if it loses at arbitration, it can revisit the issue in a later SUM proceeding."

Pointing out that the dichotomy of allowing arbitrators the discretion to disregard the findings of an arbitrator on an identical issue between the same parties while the courts may not similarly do so, Judge Pigott lamented that an insured will be "forced by a sophisticated insurer to choose between arbitration and engaging, at her own expense, in the costly litigation that is itself discouraged by the statute. Having done so, she finds herself in a hall of mirrors where winning in arbitration is only the beginning, not the end of her travail."

Thus, unless the Legislature enacts legislation requiring SUM and no-fault arbitrators to apply the doctrine of collateral estoppel to each other's awards, or, in the alternative, eliminating the collateral estoppel effects of no-fault arbitration decisions entirely, many claimants who have obtained favorable no-fault awards may shun the arbitration process for fear that the SUM arbitrator may refuse to abide by the result obtained therein. Insurers should not object to such legislation for the reason that, as the situation now stands, a claimant who lost on a particular issue in a no-fault arbitration may still try his or her luck on the same issue before a SUM arbitrator.

The 50 Best Performers of 2009

| | Company or Group | 2009 Complaint Ratio | 2009 Complaint Total | 2009 Upheld | 2008-9 Avg. Premium (Millions) |
|-----|----------------------------|----------------------------|----------------------------|----------------|---|
| 1. | Nationwide Mut. Ins. Co. | 0.00 | 55 | 0 | 140.47 |
| 2. | Adirondack Ins. Exchange | 0.00 | 41 | 0 | 94.60 |
| 3. | Amica Mutual | 0.00 | 11 | 0 | 85.45 |
| 4. | Phoenix | 0.00 | 4 | 0 | 42.50 |
| 5. | Great Northern | 0.00 | 8 | 0 | 40.09 |
| 6. | TravCo | 0.00 | 4 | 0 | 28.07 |
| 7. | Chubb Indemnity | 0.00 | 5 | 0 | 25.05 |
| 8. | Commerce & Industry | 0.00 | 4 | 0 | 23.81 |
| 9. | 21st Century National | 0.00 | 40 | 0 | 22.72 |
| 10. | Economy Premier | 0.00 | 5 | 0 | 21.35 |
| 11. | American Commerce | 0.00 | 1 | 0 | 18.63 |
| 12. | Progressive Advanced | 0.00 | 8 | 0 | 18.12 |
| 13. | Charter Oak Fire | 0.00 | 2 | 0 | 16.53 |
| 14. | Merchants Preferred | 0.00 | 2 | 0 | 14.46 |
| 15. | Republic-Franklin | 0.00 | 4 | 0 | 13.66 |
| 16. | Citizens | 0.00 | 4 | 0 | 12.41 |
| 17. | Liberty | 0.00 | 11 | 0 | 12.30 |
| 18. | USAA General Indem. | 0.00 | 12 | 0 | 12.07 |
| 19. | 21st Century North America | 0.00 | 3 | 0 | 11.95 |
| 20. | Foremost | 0.00 | 4 | 0 | 10.94 |
| 21. | Travelers Commercial | 0.00 | 2 | 0 | 9.96 |
| 22. | Massachusetts Bay | 0.00 | 3 | 0 | 9.24 |
| 23. | National General | 0.00 | 4 | 0 | 7.20 |
| 24. | Response Worldwide | 0.00 | 7 | 0 | 7.13 |
| 25. | Encompass Home & Auto | 0.00 | 8 | 0 | 6.71 |
| 26. | 21st Century Premier | 0.00 | 2 | 0 | 6.68 |
| 27. | Travelers Casualty of Ct. | 0.00 | 2 | 0 | 6.28 |
| 28. | Nationwide Prop. & Cas. | 0.00 | 8 | 0 | 5.70 |
| 29. | National General Assurance | 0.00 | 3 | 0 | 5.47 |
| 30. | MIC Prop & Cas. | 0.00 | 2 | 0 | 5.29 |
| 31. | Cim | 0.00 | 1 | 0 | 5.20 |
| 32. | Central Mutual | 0.00 | 2 | 0 | 4.68 |
| 33. | National Merit | 0.00 | 1 | 0 | 4.50 |
| 34. | SAFECO | 0.00 | 8 | 0 | 4.43 |
| 35. | American Bankers | 0.00 | 2 | 0 | 4.26 |
| 36. | Countryway | 0.00 | 4 | 0 | 3.77 |
| 37. | Harleysville | 0.00 | 4 | 0 | 3.68 |
| 38. | American Family | 0.00 | 2 | 0 | 3.55 |
| 39. | Twin City Fire | 0.00 | 4 | 0 | 3.28 |
| 40. | Travelers Indemnity | 0.00 | 6 | 0 | 3.20 |
| 41. | Hartford Underwriters | 0.00 | 1 | 0 | 2.78 |
| 42. | Unitrin Direct Prop & Cas. | 0.00 | 2 | 0 | 2.70 |
| 43. | Utica National Assurance | 0.00 | 4 | 0 | 2.54 |
| 44. | 21st Century Preferred | 0.00 | 1 | 0 | 2.38 |
| 45. | Philadelphia Indemnity | 0.00 | 2 | 0 | 2.09 |
| 46. | Sterling | 0.00 | 3 | 0 | 1.77 |
| 47. | Merchants Mutual | 0.00 | 11 | 0 | 1.77 |
| 48. | Nationwide Assurance | 0.00 | 2 | 0 | 1.72 |
| 49. | Metropolitan General | 0.00 | 1 | 0 | 1.16 |
| 50. | Chubb National | 0.00 | 1 | 0 | 1.15 |
| 51. | Hermitage | 0.00 | 3 | 0 | 1.15 |

The 25 Worst Performers of 2009

| | Company or Group | 2009 Complaint Ratio | 2009 Complaint Total | 2009 Upheld | 2008-9 Avg. Premium (Millions) |
|-----|--------------------------|----------------------------|----------------------------|----------------|---|
| 1. | Victoria Fire & Cas. | 142.85 | 3 | 1 | 0.007 |
| 2. | Zurich American | 37.03 | 2 | 1 | 0.02 |
| 3. | Long Island | 25.88 | 355 | 265 | 10.23 |
| 4. | Granite State | 14.24 | 1 | 1 | 0.07 |
| 5. | ACE American | 12.58 | 4 | 1 | 0.07 |
| 6. | Hudson | 8.91 | 5 | 3 | 0.33 |
| 7. | National Continental | 6.94 | 7 | 1 | 0.14 |
| 8. | Chartis Prop. Cas. | 3.36 | 10 | 2 | 0.59 |
| 9. | Trumbull | 2.72 | 5 | 1 | 0.36 |
| 10. | Infinity Standard | 2.30 | 4 | 2 | 0.86 |
| 11. | Infinity | 2.11 | 12 | 5 | 2.36 |
| 12. | AIU | 1.70 | 11 | 3 | 1.75 |
| 13. | Safeco National | 1.69 | 2 | 1 | 0.58 |
| 14. | Hanover | 1.69 | 21 | 4 | 2.35 |
| 15. | Utica Mutual | 1.66 | 25 | 7 | 4.20 |
| 16. | Travelers Prop. Cas. | 1.52 | 27 | 5 | 3.27 |
| 17. | Permanent General Assur. | 1.26 | 9 | 3 | 2.37 |
| 18. | Merastar | 1.21 | 2 | 1 | 0.82 |
| 19. | Allstate Indemnity | 1.17 | 43 | 12 | 10.23 |
| 20. | Meritplan | 1.15 | 3 | 1 | 0.86 |
| 21. | 21st Century | 1.15 | 19 | 2 | 1.72 |
| 22. | Hartford Casualty | 0.90 | 12 | 2 | 2.20 |
| 23. | New Hampshire | 0.83 | 13 | 7 | 8.41 |
| 24. | Unitrin Direct | 0.77 | 33 | 8 | 10.36 |
| 25. | GEICO Casualty | 0.62 | 29 | 1 | 1.60 |