

**SUPREME COURT - STATE OF NEW YORK
IAS TERM, PART 28 SUFFOLK COUNTY**

PRESENT:

Honorable Mark D. Cohen

**IN THE MATTER OF THE APPLICATION OF
AMERICAN ALTERNATIVE INSURANCE
CORP.**

Petitioner

- against -

**TO STAY THE UNINSURED MOTORIST
ARBITRATION OF CHRISTOPHER R.
PELSZYNSKI**

Respondent

x

**Motion Nos: 01/02/CDISP
Submit Date: 01/26/10**

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Upon the papers submitted (Order to Show Cause with supporting papers including Petition, Notice of Cross Motion, Affirmation in Opposition/Reply Affirmation and reply plus a conference and further letter submission), it is hereby

ORDERED that the motion seeking to stay arbitration is denied; and it is further

ORDERED that the cross motion seeking to compel arbitration is granted; and it is further

ORDERED AND ADJUDICATED that the Petition is denied and the proceeding is dismissed.

The Petitioner issued policies to the North Babylon Volunteer Fire Company, Inc. The Respondent is a volunteer firemen. On July 30, 2006, the Respondent, while responding to an emergency call and driving his own vehicle, was in an accident. Thereafter he settled the action against the driver of the other vehicle. On June 19, 2009, the Respondent filed a request for arbitration based upon underinsured coverage under the petitioner's policy. The Petitioner has moved to stay arbitration claiming that the policies do not cover a personal vehicle owned by a volunteer firemen involved in an accident. The Respondent has cross moved to compel arbitration

claiming that the Petitioner has failed to establish there is no coverage under the policies.¹

At the conference, the parties assisted the Court in clearly indicating that the Petitioner's vehicle would not be a covered auto.² The focus is on the New York Supplementary Uninsured/Underinsured Motorists Endorsement, which defines insured:

1. Definitions

For purposes of this SUM endorsement, the following terms have the following meaning:

a. Insured

The unqualified term "insured" means:

(1) You, as the named insured and, while residents of the same household, your spouse and relatives of either you or your spouse;

(2) Any other person while occupying:

(a) A Motor Vehicle insured for SUM under this policy; or

(b) Any other motor vehicle while being operated by you or your spouse

The Respondent notes, and the Petitioner concedes, that the New York State Insurance Department issued an informal opinion, dated February 8, 2002, which interpreted the SUM language. The opinion found that an employee of the business operating their own vehicle during the course of employment and while acting within the scope of their duty would be covered under the SUM endorsement. Although the informal opinion does not demand stare decisis adherence, courts may defer to the government agency charged with the responsibility for administration of the particular statute, "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom ..." *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459. The analysis seems to be the reasonable construction of the policy language. Moreover, as the Respondent notes, SUM coverage was to apply to individuals, herein volunteers, of the named insured, since only individuals can have a spouse or a relative. Alternatively, an "insured" is "a person occupying ...any other motor vehicle while being operated by you." The phrase "other motor vehicle," would have to mean a non-covered vehicle and for a volunteer, would be his or her own vehicle while acting within the scope of his or her employment.³

1

The Respondent's argument that the Petitioner failed to make the required initial showing cannot be accepted in light of the submission of the policies and adequate analysis of the provisions on establishing who was "insured" under the policies.

2

It was noted that the Petitioner waived an exclusion since it was not raised as a basis for disclaimer coverage.

3

There is some precedent that indicates that such an accident would be covered under a policy, although the language and the issue of coverage was not specifically raised. See *Guidant Mut. Ins. Co. v. Indemnity Ins. Co. of North America*, 13 So.3d 1270(Miss. 2009)

Based upon said analysis, the Petition must be denied and the motion granted.⁴

The foregoing constitutes the Order of this Court.

Dated: January 27, 2010
Riverhead, NY


HON. MARK D. COHEN, J.S.C.

4

The Respondent notes a type of estoppel argument, in that the Petitioner has paid for property damage to his vehicle. The Respondent also notes that any floodgate specter raised by the Petitioner and this Court, is defeated by other provisions of the policy that, if raised, would negate the expansion of claims. Therefore, the claim that the premium did not account for this type of coverage is correct. However, the waiver by the Petitioner of this disclaimer provision negates the argument.