DWI

Lapse of Insurance

By David A. Mansfield

Driver license and registration suspensions for lapse of insurance pursuant to Vehicle & Traffic Law §318 have become exceedingly common due to the worsening economy. Defense attorneys frequently receive calls from distressed clients seeking relief.

Lapse of insurance suspensions are generated when your client's insurance carrier electronically notifies the Department of Motor Vehicles that the client's insurance has been cancelled or not renewed and the vehicle registration has yet to expire.

The advent of two-year registrations has only exacerbated the problem because suspension for lapse of insurance is calculated from the date of the end of the coverage until the expiration of the registration.

There are several frequent situations, which result in vehicle registration or driver license suspension that will be discussed in this article.

Frequently the client will take a vehicle "off the road" without surrendering the unexpired registration plates. The vehicle may have become in-operable, or too expensive to repair, and been stored for months at a repair shop. The Department of Motor Vehicles will most likely not waive the vehicle or driver license suspension under these circumstances.

If the client's vehicle has been repossessed, impounded, stolen or sold, they must present satisfactory proof to have any vehicle registration or driver license suspension modified or rescinded by presenting the documentation to a Department of Motor Vehicles examiner at a local DMV office or, in some instances by correspondence to Albany. The answers can be found on the website at http://nysdmv.custhelp.com/cgi-bin/nysdmv.cfg/php/enduser /std_adp.php?p_faqid=112 and similar links.

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If the client is involved in an arrangement for a third party to insure the vehicle, and that vehicle is not insured in the name of the registrant, this will trigger a lapse of insurance for the vehicle or a license suspension even though the vehicle was "insured." Therefore, the insurance company is not obligated to defend in the event of a claim against the liability portion of the policy.

Your client may keep operating the vehicle with the suspended registration plates until confiscated by the police during a Vehicle and Traffic Law stop. The lapse of insurance is only for the mandatory coverage required (first party benefits, no-fault and for lapse of liability insurance).

Should your client's insurance coverage lapse for comprehensive (usually physical damage in case a tree were to fall on the vehicle, theft or collision) the Department of Motor Vehicles will not suspend the license or registration. The failure to maintain continuous liability, comprehensive or collision coverage for a leased or financed vehicle will constitute a breach of contract.

The Department of Motor Vehicles does provide a safe harbor for lapses of insurance that are less than 90 days. Your client may be eligible to pay a civil penalty option only once within three years as per VTL §318 1-a (b). The key factor is that your client would have to appear at the DMV office and surrender the plates or pay the civil penalty before the expiration of the 90 days. A driver license suspension will result under VTL §318 1-a (e) upon the lapse of insurance coverage exceeding 90 days.

The Department of Motor Vehicles has a graduated civil penalty where it is $8 per day for a lapse of insurance coverage on days 1-30 and $10 per day for days 31-60 and $12 per day for days 61-90.

Should your client appear at the Department of Motor Vehicles on the 92nd day they will be informed that the plates must be surrendered and that the driver license is suspended for 92 days as well, which may involve eligibility and application for a restricted use license under VTL §530(6).

The requirements for motor vehicle insurance must be New York State coverage by a company authorized to do business. Should your vehicle be registered in New York State you cannot have out of state insurance coverage.

The minimum policy requirements for New York State are $25,000/$50,000 for an injury, $50,000/$100,000 for a death and $10,000 for property damage.

Should your client wish to seek relief from an unjustly imposed vehicle registration or driver license suspension, counsel can rely upon §318(13) (a)(b). These provisions allow a person who is the subject of a vehicle registration or driver license suspension order as a result of a lapse of insurance coverage to file affidavits with the department seeking relief from the suspension or revocation. Your client must establish by clear and convincing evidence their lack of knowledge and the reason financial security was not in effect solely from the negligence or malfeasance of a third party. The department will only grant relief in very limited circumstances.

The statutory relief is usually applied in those very rare instances where your client can prove they paid for insurance coverage with a broker and the coverage was not put into place because the broker defalcated or stole the money. It can help your client, who has less than satisfactory proof of payment, if the broker is currently under investigation by the State Insurance Department.

Defense attorneys will find that in the vast majority of factual patterns the client

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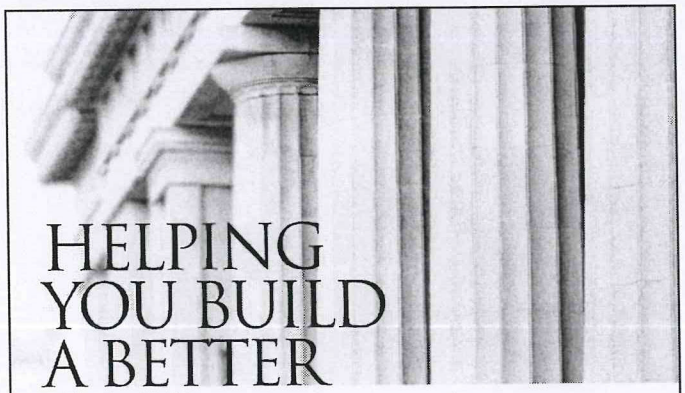

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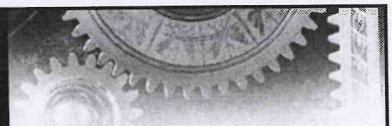

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To Modify Or Not To Modify? That Is The Question (Continued from page 24)

den of demonstrating a change in his circumstances that would warrant a hearing on his application. Husband based his 2007 application on the same theory on which he bases the current application, a reduction in the mortgage market, and voluntarily entered into the 2008 Stipulation in lieu of proceeding with a hearing. The changes that Husband refers to in his instant motion were anticipated, as demonstrated by Husband's discussion of them when he entered into the 2008 Stipulation. Moreover, the housing and related mortgage markets are, by their nature, fluctuating and some variation is to be expected.

The Court feels constrained to add that it does not share Husband's view of what constitutes an "extreme hardship." While the Court appreciates that Husband will necessarily incur living expenses by virtue of his residence outside of the parties' marital residence, the deposition of Girlfriend reflects that Husband is living very well and paying for expenses that many people would view as a luxury. The Court senses a certain entitlement on the part of Husband and his Girlfriend, who do not appreciate that Husband's financial obligations to his Children are paramount. To be clear, if Husband has to choose between paying for Girlfriend's pool, tennis court and housekeeper, and meeting his financial obligations to his Children, he must choose the latter."

Although the majority of petitions for downward modification are denied due to the failure of the payor spouse to prove his/her entitlement to the modification, the court will grant the request when the petitioner presents the proof required by the existing statutes and case law.

In the Matter of Ketcham v Crawford, 1 AD3d 359, 767 NYS2d 47 (App. Div. 2d, 2003), the court stated the following:

"Loss of employment may constitute a change of circumstances warranting a downward modification of child support where a parent has diligently sought re-employment (*see Reynolds v Reynolds,* 300 A.D.2d 645, 753 N.Y.S.2d 106 [2002]; *Matter of Meyer v Meyer,* 205 A.D.2d 784, 614 N.Y.S.2d 42 [1994]). The evidence at the hearing demonstrated that the father's employment was terminated through no fault of his own and that he diligently made a good-faith effort to obtain employment in his field. Consequently, the Hearing Examiner should have granted his petition for downward modification (*see Matter of Morena v Morena,* 267 A.D.2d 388, 700 N.Y.S.2d 214 [1999]; *Matter of Meyer v Meyer, supra*; *Matter of Glinski v Glinski,* 199 A.D.2d 994, 606 N.Y.S.2d 468 [1993]). Accordingly, we remit the matter to the Family Court, Suffolk County, for a further hearing regarding the parties' financial circumstances and a determination of the father's reduced obligation for child support.

However, the evidence supports the Hearing Examiner's finding that the father's failure to pay child support was willful. He received severance pay of approximately $21,000 and yet made no child support payments and did not seek downward modification until the mother commenced an enforcement proceeding. Under the circumstances, the Hearing Examiner properly concluded that the father's violation of the support order was willful and directed the entry of a money judgment (*see Matter of Feliciano v Nielsen,* 282 A.D.2d 783, 722 N.Y.S.2d 825 [2001]; *Matter of Modica v Thompson,* 258 A.D.2d 653, 685 N.Y.S.2d 783 [1999]; Family Ct Act § 454 [2] [a]). However, in light of our determination that the father was entitled to downward modification as of the date he made his application for such relief, we also remit the matter for a recalculation of arrears."

As to the original question presented herein, "To modify or not to modify", although it may be difficult to accomplish, it is not impossible. Because of the current economic downturn, many payor spouses or payor parents will actually experience or claim to experience an undue burden in continuing to make payments pursuant to existing orders or judgments, so it is likely many more proceedings will be brought for downward modification in our already overburdened court system.

Thus there is no simple answer to the "$64,000 question" and as in all adversarial situations, whichever way the court rules, one party will feel exonerated and the other will feel short-changed.

Note: As of June 1, 2009, Arthur E. Shulman will be Second Vice President of the SCBA. Art has been practicing law since 1974 with an emphasis in matrimonial and family law out of his offices in Islandia. Art is a member of both the New York State Bar and the Suffolk County Matrimonial Bar Associations. He has been a delegate to the New York State Bar Association House of Delegates and is a member of the State Bar's Mandatory Continuing Education Committee. He is currently the Assistant Managing Director of the Suffolk County Pro Bono Foundation, a past Dean of the Suffolk Academy of Law and a member of its Advisory Committee. Art has coordinated and served as faculty on approximately seventy continuing legal education seminars for the Suffolk Academy of Law and is a past contributor to the Suffolk Lawyer.

Trusts and Estates Update (Cooper) (Continued from page 9)

Inter vivos Transfers Found Valid

In a contested accounting proceeding, the fiduciaries of the estate of the decedent's post-deceased spouse (who had been the estate fiduciary and had accounted prior to her death), moved for summary judgment dismissing the objections with respect to certain inter vivos transfers made to her. The objectant maintained that the transfers in issue were the result of undue influence. The movants alleged that the transfers were consistent with the decedent's pattern of gift-giving to his wife. The record revealed that the objectant was aware of the subject transfers within months after they were made but raised no objection to them at the time. Moreover, during the course of his deposition, objectant admitted that at the time of the transfers the decedent's mental condition was "pretty good," and that he had not been privy to any conversations between the decedent and his spouse regarding the transactions. Further, while the transfers took place soon after the decedent executed his will, the objectant did not file objections to probate.

In opposition to the motion, the objectant referred to his own conversations with the decedent (inadmissible under CPLR 4519), in which the decedent had purportedly stated that he had not made the transfers willingly, but rather had been pestered and nagged by the decedent. Objectant further relied on the fact that the decedent had not filed gift tax returns with respect to the transfers, although the court noted that he was not obligated to file such returns in connection with transfers to his spouse.

Additionally, the objectant relied on reports he allegedly received from the decedent's stockbroker and trusted secretary that the decedent was being harassed and berated by his wife to transfers the assets to her account. Further, the stockbroker allegedly stated that the transfers were unusual and inconsistent with the decedent's usual handling of his account. While not commenting upon the veracity of these statements, the court opined that the objectant had failed to provide affidavits from either witness, or an excuse for his failure to do so. Inasmuch as the statements were inadmissible hearsay, the court held that they could not be considered in opposition to the motion for summary judgment. Further, the court held that even if the statements could be considered, they lacked the specificity and detail necessary to raise a triable issue of fact.

Finally, the objectant alleged that the decedent's health was failing in the latter years of his life, that he had been caused to stop work, and had withdrawn from social and business activities, and was forced to rely upon and become dependent upon his wife. The court held that even if this were true, these allegations did not amount to or create a question of fact regarding objectant's claim of undue influence.

Accordingly, summary judgment regarding the propriety of the inter vivos transfers was granted and the objections as to this issue were dismissed. On the other hand, the court denied the motion with respect to the omission of a certain coin collection from the accounting, finding that there was a question of fact as to whether the coins were estate property.

***In re* Faggen, N.Y.L.J., Mar. 2, 2009, at 30 (Sur. Ct. New York County).**

Note: Ilene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C., where she concentrates in the field of trusts and estates. In addition, she is President-Elect of the Suffolk County Bar Association and a member of the Advisory Committee of the Suffolk Academy of Law.

Contract Law, Taxation and the U.S. Constitution (Continued from page 19)

$1 annually. Furthermore Mr. Liddy also tried to explain, but to no avail, to individuals seemingly intent on promulgating a message regardless of the facts that the vast majority of those responsible for the AIG all left the firm. Those that currently remained were trying their best to correct what was still correctable as they had been requested to do by the government itself under the guise that they were too big to fail. The net result has been that bonus and non-bonus recipients at AIG received threats including death threats and generally feared for their safety and that of their loved ones. For instance this was one of the multitudes of messages left on the AIG web site: "We will hunt you down, every last penny. We will hunt your children and we will hunt your conscience. We will do whatever we can to get those people getting the bonuses. Give back the money or kill yourselves." Bruce Marks, a self proclaimed "bank terrorist," a leading member of the leftist group Neighborhood Assistance Corporation of America, has long been threatening bankers and their children over the years for not lending a sufficient level (according to him and his group) to low income applicants for mortgages, which ironically has been the exact opposite practice, i.e. lending to non-qualified applicants, which greatly contributed to the rise in foreclosures and bank problems. The George Soros backed group, a radical leftist organization known as ANSWER, also chimed in with protests making their intentions and aims amply clear as they waive signs which read "Capitalism is Organized Crime, Stop AIG."

There are dangers that inevitably lurk around the corner when for political expediency, cynical opportunism or calculated chicanery is employed to achieve ends that are for all intents and purposes antithetical to American pragmatism and its core values as embodied in its constitutionally framed system of laws, core among it is the imperative respect for contract law and rational taxation.

Note: Justin Giordano is a Professor of Business & Law at the State University of New York—Empire State College and an attorney based in Huntington. He welcomes commentary and feedback. Jagiordano44@hotmail.com

Lapse of Insurance (Continued from page 16)

will be unable to obtain relief from vehicle registration or driver license suspension for lapse of insurance coverage. The best advice would be to surrender the vehicle registration plates to DMV and make application for a restricted use license if eligible. Should client have charges pending in the First District Court that include an alleged violation of 19-1, operating without insurance, some thought should be given to saving the restricted use license, if eligible, to cover a prospective one-year evocation rather than a shorter period of suspension.

Note: David A. Mansfield practices in Islandia and is a frequent contributor to this publication