2002 Report to the Legislature: Proposed Reforms to the Insurance Law

Submitted by: New York State Law Revision Commission

I. THE OPERATION OF INSURANCE LAW § 3420(g)

Insurance Law § 3420(g) provides:

> No policy or contract shall be deemed to insure against any liability of an insured because of death or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating thereto is included in the policy. This exclusion shall apply only where the injured spouse, to be entitled to recover, must prove the culpable conduct of the injured spouse.[1]

The operation and effect of this provision was recently highlighted in Black v. Allstate Ins. Co..[2] In that case, Mrs. Powell was driving the family car, her husband was riding in the passenger seat and her young son was in the back seat. The Powells' car collided with another car that was being pursued by the police. Mr. Powell was killed, Mrs. Powell suffered severe and permanent brain damage rendering her incompetent, and their son was seriously injured. Mr. Powell's estate sought coverage under his wife's automobile liability policy with Allstate Insurance Company. Allstate denied coverage, claiming that it was not required to provide coverage pursuant to Insurance Law § 3420(g). In the estate's declaratory judgment action against Allstate, the First Department reluctantly ruled in favor of Allstate, citing Insurance Law § 3420(g). However, the court emphasized the "unlikelihood of collusion between decedent husband and his widow, who was rendered incompetent as a result of injuries incurred in the same accident, and the anachronistic nature of 3420(g)."[3] The court explicitly called upon the Legislature to reconsider the merits of the provision, noting that:

> As a result of the now 61-year old statute, literally millions of married New Yorkers are unaware that their automobile liability insurance policy, while providing coverage for every other passenger or person injured in an accident caused by the driver's negligence, does not provide any coverage when the injured passenger is their spouse.

II. BACKGROUND OF INSURANCE LAW § 3420(g)

In 1937, the Legislature abolished interspousal tort immunity through the enactment of

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[1] An identical provision is found in Vehicle and Traffic Law § 388(4).

[2] 274 AD2d 346 (1st Dept. 2000).

[3] Id., at 346.

Domestic Relations Law § 57[4]. That statute, now found at General Obligations Law § 3-313, gives one spouse a right of action against the other for his or her wrongful or tortious acts resulting in injury to person or property. However, despite the abolition of interspousal tort immunity, tort actions between spouses has been substantially limited as a result of Insurance Law § 3420(g).

The statute, originally enacted as Insurance Law § 109(3a), then renamed Insurance Law § 167(3) and now Insurance Law § 3420(g), was simultaneously enacted with (former) Domestic Relations Law § 57 (now General Obligations Law § 3-313). "These simultaneous enactments disclose a considered legislative intent to create a right of action theretofore denied, and at the same time to protect insurance carriers against loss through collusive actions between husband and wife."[5] Significantly, however, as demonstrated by the Black case, Insurance Law § 3420(g) will serve as a bar to recovery even where no collusion exists. "The absence of fraud or the possibility of fraud is not sufficient to negate the plain intendment of the statutory exclusion provision."[6]

The impact of Insurance Law § 3420(g) is most noticeable in the context of automobile liability insurance. New York automobile liability policies are required to provide coverage to the named insured against injury to any person and property arising out of the ownership, use or operation of a specific motor vehicle.[7] By virtue of Insurance Law § 3420(g), however, a culpable insured will be denied coverage against injury to his or her spouse. The operation of the statute is demonstrated in the following examples. In each, the husband ("H")/insured is driving and his wife ("W") is a passenger:

1. Car strikes tree causing serious injury to W. In W's negligence action against H, H's insurer is statutorily protected from defending or indemnifying H.

2. Same scenario except wife is killed. In W's estate's wrongful death action against H, H's insurer is statutorily protected from defending or indemnifying H.[8]

3. W is injured in car driven by H and owned by O. W sues owner based on vicarious liability. O, in turn, sues H for indemnification. H's insurer is

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[4] (L. 1937, c. 669, § 1).

[5] Fuchs v. London & Lancanshire Ind. Co., 258 App Div 603, 605 (2d Dept. 1940); see also, New Amsterdam Cas. Co. v. Stecker, 3 NY2d 1, 5-6 (1957).

[6] Employers Liab. Assur. Corp. v. Aresty, 11 AD2d 331, 335, affd 11 NY2d 696.

[7] See, Vehicle & Traffic Law § 311(4)(a); 11 NYCRR 60-1.1.

[8] See, e.g., Black v. Allstate Ins. Co., supra; Government Employees Ins. Co. v. Pagano, 251 AD2d 452 (2d Dept. 1998).

statutorily protected from defending or indemnifying H in any action by O or W.[9]

4. Car collides with a vehicle driven by a third party. W is injured. In W's suit against third party *only*, H's insurer is obligated to defend and indemnify H in any third party or impleader action against H as W need not prove H's negligence.[10]

These examples demonstrate that, despite New York's clear rejection of interspousal tort immunity, Insurance Law § 3420(g) effectively precludes direct actions between spouses and vicarious liability actions against owners where the culpable conduct of a spouse is a cause of the injury. If one spouse is responsible, in whole or in part, for injuries to his or her spouse, the injured spouse's recovery will be limited to benefits under the No-Fault law. In contrast, every other person who suffers injury by the insured or the insured's permissive driver is entitled to recover under the insured's liability policy.[11]

Also significant is the fact that New York appears to be alone in statutorily protecting

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[9] See, e.g., Firemen's Ins. Co. v. Allstate Ins. Co., 171 AD2d 186 (3d Dept. 1991), lv denied 79 NY2d 756; Schwartz v. S. Lipkin & Son, 76 AD2d 141 (1st Dept. 1980) Note, however, that where an owner is otherwise liable (e.g., negligent entrustment), H's insurer must defend and indemnify H (see, Empire Ins. Co. v. Siblowitz, 243 AD2d 251 [1st Dept. 1997]). In contrast, where W is injured as a passenger in a car owned by H, but driven by son-in-law with H's permission, H's insurer is obligated to defend and indemnify H because W's claim against H is based on vicarious liability only; H's negligence is not at issue (see, Empire Ins. Co. v. Siblowitz, supra [1st Dept. 1997]).

[10] Coverage in a third-party claim is largely a result of a 1976 amendment proposed by the Law Revision Commission which statutorily overturned the Court of Appeals' decision in Westlake v. Westlake (35 NY2d 587). In Westlake, a car driven by Mr. Westlake collided with a third party car causing injury to Mrs. Westlake. Mrs. Westlake sued the third party who, in turn, brought a third-party action against Mr. Westlake. The Court rejected the Westlakes' argument that the apportionment required by Dole v. Dow Chem. Co. (30 NY2d 143) obligated the insurance company to defend or indemnify Mr. Westlake in a third-party action against him and concluded that Insurance Law (former) § 167(e) (now Insurance Law § 3420[g]) superceded the requirements of Dole. The effect of Westlake, therefore, was to diminish the amount of any judgment recovered by the injured spouse because the cost of defending the third-party action as well as any judgment against the driver spouse would be paid out of marital assets. Opining that the Westlake decision interpreted the statute too broadly, the Commission recommended that the statute be amended to limit its applicability to those cases where the injured spouse is required to prove the culpable conduct of the driver spouse (see, Recommendation of the Law Revision Commission, 1976 McKinney's Session Laws of NY, at 2247-2248).

[11] See, Vehicle & Traffic Law §§ 311(4)(a), 388; 11 NYCRR 60-1.1.

insurers in liability claims between spouses.[12] A survey of other state statutes reveals no similar spousal exclusion.[13] Nevertheless, if an accident occurs outside of New York and coverage is sought under a policy issued in this State, Insurance Law § 3420(g) will often apply.[14]

III. INSURANCE LAW § 3420(g) AND OTHER NEW YORK INSURANCE PROVISIONS

A. **No-Fault Insurance**

The Comprehensive Automobile Insurance Reparations Act, commonly known as the "No-Fault Law" provides first party benefits to insureds and members of their households for basic economic loss up to $50,000 regardless of fault.[15] The statute provides, in relevant part:

> Every policy of liability insurance issued on a motor vehicle in satisfaction for the requirements of article six or eight of the vehicle and traffic law shall also provide for . . . the payment of first party benefits to: . . . (2) The named insured and members of his household . . . for loss arising out of the use or operation of . . . an uninsured motor vehicle . . . within the United States . . . and an insured motor vehicle . . . outside of this state and within the United States . . .[16]

Significantly, the term "member of his household" is defined as "a spouse, child or relative of the named insured who regularly resides in his household."[17]

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[12] Note, however, that Georgia and Louisiana continue to bar interspousal torts, with limited exceptions not applicable here. See, GA ST 19-3-8; LSA-RS 9:291.

[13] Many states, however, permit insurers to include "household" or "family" exclusions in general liability policies. Other states do not recognize household exclusions on the basis that family exclusions violate mandatory liability coverage requirements. See, McMahon, *Validity, Under Insurance Statutes, of Coverage Exclusion for Injury to or Death of Insured's Family or Household Members*, 52 ALR4th 18 (1987) (2000 Supplement).

[14] See, New Amsterdam Cas. Co. v. Stecker, 3 NY2d 1 (1957), but see, Hamilton v. Government Empl. Ins. Co., 662 A2d 568 (NJ Super. Ct. App. Div. 1995), appeal dismissed 672 A2d 1164 (NJ statute requiring coverage for insured's spouse supercedes NY Insurance Law § 3420(g) in regard to accident occurring in NJ).

[15] See, Insurance Law § 5102(a).

[16] Insurance Law § 5103(a)(2).

[17] Insurance Law § 5102(h).

Case law further bears out that Insurance Law § 3420(g) is inapplicable in no-fault claims. The issue was squarely addressed by the Court of Claims in Liberty Mut. Ins. Co. v. State of New York.[18] There, the court found that a spouse/accident victim was entitled to payments under the No-Fault law. Rejecting the applicability of Insurance Law § 3420(g), the court noted that "negligence and an insured's liability are irrelevant" under the No-Fault law.[19] Rather, the insurer's obligation to pay the claim "arose directly by reason of the law's provisions and their legislatively mandated incorporation into its policy with the insured."[20]

Moreover, No-Fault is not limited by exclusions in the liability portion of a policy.[21] Indeed, Insurance Law § 5103(b) sets forth the specific exclusions which will be permitted; notably, spousal coverage is not among them. Thus, even if an insurer is able to disclaim coverage by way of a household or other exclusion, the insurer is statutorily required to pay on claims by spouses under No-Fault. Accordingly, any change to Insurance Law § 3420(g) would have no effect on the State's No-Fault provisions.

B. **Uninsured and Underinsured Motorist Coverage**

In contrast to the No-Fault Law, Insurance Law § 3420(g) directly affects the availability of coverage under uninsured and underinsured motorist policy provisions. These endorsements are a product of the "Motor Vehicle Accident Indemnification Corporation Act" which was enacted to protect innocent victims from irresponsible motorists by providing for uninsured motorist benefits.[22] Accordingly, all liability policies must include a "NY Auto Accident Indemnification Endorsement."[23] The endorsement provides coverage for bodily injury sustained by the insured and caused by an accident arising out of the ownership, maintenance or

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[18] 94 Misc 2d 676 (1978).

[19] Id., at 678. It is noted that New York Jurisprudence (second) suggests that spouses may be excluded from No-Fault benefits by virtue of Insurance Law § 3420(g) (see, 70A NY Jur.2d Insurance § 1781). However, there are no citations to authority to substantiate this assertion.

[20] Id.; see, Empire Ins. Co./Allcity Ins. Co. v. Hilliard, 184 Misc.2d 821 (Sup. Ct. Westchester Co. 2000) (implying, in *dicta*, that No-Fault coverage is available where the driver spouse was not negligent or where coverage under standard policy is prohibited by virtue of Insurance Law § 3420(g)).

[21] See, Eveready Ins. Co. v. Asante, 153 AD2d 874 (2d Dept., 1989).

[22] See, Insurance Law § 5201.

[23] See, Insurance Law § 3420(f)(1).

use of an uninsured motor vehicle.[24] Significantly, an "insured" is defined as a relative of the named insured *or spouse*, while a resident of the same household as the insured spouse.[25]

In addition, supplemental uninsured and underinsured coverage (collectively referred to as "SUM") is available for a premium.[26] Like the mandatory endorsement, the prescribed SUM endorsement also defines an "insured" as the named insured and the insured's spouse and relatives who live in the insured's household.[27] Of some significance is the fact that an insurer is *required* to affirmatively offer SUM to each insured.[28]

Despite the plain language of the regulation which defines a spouse as an "insured", Insurance Law § 3420(g) will prohibit, in certain circumstances, entitlement to coverage under both the mandatory uninsured and SUM endorsements. For example, the Second Department indicated that Insurance Law § 3420(g) would serve as a bar to uninsured or underinsured motorist benefits where it is necessary for one spouse to prove the negligence of another. In Matter of General Accident Ins. Co. v. Elbaum,[29] a wife was injured in a single-vehicle accident when her husband fell asleep at the wheel. The wife sued the owner of the car for negligent entrustment and settled at the owner's policy limit. She then filed a claim for underinsured motorist benefits with her and her husband's insurer. The insurer denied the claim, asserting that because the wife had to prove the negligence of her husband to be entitled to benefits, Insurance Law § 3420(g) barred the claim. The court agreed with the insurer that Insurance Law § 3420(g) would bar recovery if the wife's claim against the owner was based solely on vicarious liability because such a claim would necessarily require proof of the husband's negligence.[30]

However, Insurance Law § 3420(g) will not hinder uninsured or SUM coverage where the negligence of a spouse is not at issue. For example, the Second Department held that an insurer may not avoid coverage of a spouse who is otherwise qualified to claim uninsured

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[24] See, 11 NYCRR 60-2.3.

[25] 11 NYCRR 60.1(c); see, Insurance Law § 5202 (i); 72 Aug NYSTBJ 18, Dachs, *Summing Up 1999 'SUM' Decisions: Courts Provide New Guidance on Coverage Issues for Motorists*.

[26] See, Insurance Law § 3420(f)(2); 11 NYCRR 60-2.3.

[27] See, 11 NYCRR 60-2.3.

[28] See, 11 NYCRR 60-2.2(a).

[29] 236 AD2d 472 (1997).

[30] Id.; see also, Byrne v. Nationwide Mut. Fire Ins. Co., 2001 WL 99892 (EDNY).

benefits under his or her spouse's policy.[31] There, the court permitted a wife, who had been injured in a hit and run accident in Florida, to proceed to arbitration under her husband's uninsured motorist endorsement reasoning that 11 NYCRR 60.1(c) mandated coverage for a spouse if a resident in the same household, regardless of any exclusions which might be written into the policy. [32]

C. **Homeowners Insurance Policies**

Because Insurance Law § 3420(g) applies to all liability insurance policies, the statute effectively prohibits recovery under a homeowner's policy wherever the injury of one spouse is caused by the culpable conduct of the other.[33] However, the rule has not been litigated to any significant extent because it is both common and permissible for New York insurers to exclude coverage under a homeowner's policy for liability for injuries to members of the insured's household.[34]

IV. CRITICISMS OF INSURANCE LAW § 3420(g)

A. **No Mandatory Disclosure**

One of the strongest criticisms of Insurance Law § 3420(g) is that it is a hidden exclusion. New York requires every policy exclusion to be stated in the policy in "clear and unmistakable language".[35] However, because the spousal exclusion is statutory, there is no disclosure requirement.[36] In fact, the Court of Appeals has held that an insurer need not set forth the exclusion "*since the insured has ample notice of the terms of the exclusion by virtue of the statutory provision itself, which is deemed included as a policy provision*."[37]

The Court of Appeals's conclusion that married insureds are aware of Insurance Law §

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[31] See, Matter of Insurance Co. of N. Am. v. Lyman, 148 AD2d 456 (2d Dept. 1989).

[32] Id., at 456-457. The relevance of Insurance Law § 3420(g) was not considered by the Court.

[33] See, Longworth v. Great Am. Ins. Co., 80 Misc 2d 114 (Nassau Cty., 1974).

[34] See, Suba v. State Farm Fire & Cas. Co., 114 AD2d 280 (4th Dept. 1986), lv denied 67 NY2d 610, appeal dismissed 68 NY2d 665; 9 Couch on Ins. § 128:2).

[35] See, Seaboard Sur. v. Gilette Co., 64 NY2d 304, 311; see also, Insurance Law § 3204.

[36] See, Yankelevitz v. Royal Globe Ins. Co., 59 NY2d 928 (1983).

[37] Id., (emphasis supplied).

3420(g) is unrealistic. For example, in American Motorist Ins. Co. v. Salvatore,[38] the insured was denied coverage on the basis of Insurance Law § 3420(g) although her insurance agent had indicated her policy provided coverage against every conceivable claim. Relying on the opinion of the Court of Appeals in Yankelevitz v. Royal Globe Ins.,[39] the First Department reasoned that the insured's failure to familiarize herself with the policy - - including the *unwritten* exclusion posed by Insurance Law § 3420(g) - - relieved the agent of any liability for misrepresentation. Indeed, the Court of Appeals has made clear that an insurance agent has "no continuing duty to advise, guide or direct a client to obtain additional coverage."[40]

Thus, as recently noted by the First Department, "literally millions of married New Yorkers are unaware that their automobile liability insurance policy, while providing coverage for every other passenger or person injured in an accident caused by the driver's negligence, does not provide any coverage when the injured person is their spouse."[41]

B. **Unavailability of Spousal Coverage**

Another major issue posed by Insurance Law § 3420(g) is the unavailability of spousal coverage for those who wish to contract for this protection. Insurance Law § 3420(g) provides:

> No policy or contract shall be deemed to insure against any liability of an insured because of death or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse *unless express provision relating thereto is included in the policy* (emphasis supplied).

This language makes plain that the Legislature intended for spousal coverage to be available to those who desire to avoid the operation of the statute. However, as noted by the New York Insurance Department, "no statute or regulation . . . requires an insurer to make such additional coverage available."[42] Indeed, the Insurance Department was unable to identify any insurer who offered an interspousal endorsement.[43]

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[38] 102 AD2d 342 (1st Dept. 1984).

[39] Supra, at n. 34.

[40] See, Murphy v. Kuhn, 90 NY2d 266 (1997).

[41] Black v. Allstate Ins. Co., supra.

[42] NY General Counsel Opinion 8-11-95 #2.

[43] See also, American Motorist Ins. Co. v. Salvatore, 102 AD2d 342 (1st Dept. 1984) (Court notes that plaintiff insurance company's underwriting supervisor asserted that the company "did not issue any policies providing such (spousal) coverage, [and that] *no insurance company writing automobile policies in the State of New York has such a provision in an*

Significantly, many courts, including the Court of Appeals, have premised their decisions upholding Insurance Law § 3420(g) on the assumption that spousal coverage is, in fact, obtainable. Courts have repeatedly pointed to the absence of an endorsement for spousal coverage to justify the harsh operation of the statutory spousal exclusion.[44] Had these courts been aware of the unavailability of spousal coverage, their decisions may have not been so clear-cut in light of the fact that the language of Insurance Law § 3420(g) presupposes the ability to obtain additional protection.[45]

C. **Collusion Argument is Weak and Arbitrary**

A third criticism of Insurance Law § 3420(g) is that it lacks sound justification in today's world. The statute was originally passed in 1937[46] as an apparent compromise to the simultaneous enactment of (former) Domestic Relations Law § 57, now General Obligations Law § 3-313, which abrogates the common-law doctrine of interspousal immunity.[47] The insurance statute was intended to protect insurers from collusive actions between spouses.[48] For several reasons, the Commission concludes that the danger of collusion is an arbitrary and weak justification for undermining a spouse's right to sue his or her spouse for injuries caused by that spouse.

First, courts have consistently rejected the conclusion that married couples or other

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automobile policy providing coverage for inter-spousal suits" [emphasis supplied]); Shirani B. Ponnambalam, "The Uninsurable Motorist in NY: An Anachronism in Need of Reform," 66 NYSTBJ 26 (Jan. 1994); Kooper, *Letter to the Editor*, NYLJ, Aug. 6, 1980, at 2, col. 6.

[44] See, e.g., State Farm Mut. Ins. Co. v. Westlake, 35 NY2d 587 (1974); Government Employees Ins. Co. v. Pagano, 251 AD2d 452 (2d Dept. 1998); Phillips v. General Acc. Ins. Co., 230 AD2d 897 (2d Dept. 1996); American Motorists Ins. Co. v. Salvatore, 102 AD2d 342 [1st Dept. 1984]; Schwartz v. Lipkin & Son, 76 AD2d 141 (2d Dept. 1980); Employers' Liab. Assur. Co. v. Aresty, 11 AD2d 331, affd, 11 NY2d 696.

[45] It is noted, however, that the Supreme Court of North Dakota has held that the abolition of spousal immunity does not require insurers to offer coverage in interspousal suits. RLI Ins. Co. v. Heling, 520 NW2d 849.

[46] Insurance Law (former) § 109(3-a) (L.1937, ch. 669, § 2).

[47] L.1937, ch. 669, §1.

[48] See, Recommendation of Law Revision Commission, supra, at 2246; Yankelevitz v. Royal Globe Ins. Co., 59 NY2d 928, supra; Black v. Allstate Ins. Co., 274 AD2d 246, supra; Firemen's Ins. Co. v. Allstate Ins. Co., 171 AD2d 186, supra; Schwartz v. S. Lipkin & Son, supra.

family members are somehow more likely to engage in collusive conduct than non-relatives.[49] Indeed, the Court of Appeals specifically rejected an intra-family collusion argument in Gelbman v. Gelbman,[50] where the Court abolished the defense of parent-child tort immunity. The Court's reasoning is worth reviewing:

> The argument has been advanced that, by permitting suits between parent and child for nonwillful negligent acts, we will be encouraging fraudulent lawsuits. The argument fails to explain how the possibility of fraud would be magically removed merely by the child's attainment of legal majority. Nor does the argument pretend to present the first instance in which there is the possibility of a collusive and fraudulent suit.

Based on this reasoning, there is no sound basis to assert that a marriage license somehow increases the possibility of fraud. Indeed, the irrationality of the distinction is highlighted in Stonborough v. Preferred Acc. Ins. Co. of NY,[51] wherein Insurance Law § 3420(g) was found inapplicable where the parties married *subsequent* to the accident underlying the claim. Similarly, the spousal exclusion was inapplicable where a woman who had lived open and notoriously with the insured, bore children with the insured and described the relationship as permanent.[52] Indeed, given these outcomes, it could be argued that Insurance Law § 3420(g) unfairly burdens married New Yorkers.

Moreover, although the danger of fraud and collusion clearly exists, there are mechanisms in place which are specifically designed to weed out such cases. For example, in addition to the investigatory resources of insurance companies, insurers routinely include "cooperation" clauses and "concealment of fraud" clauses in their policies. The purpose of these clauses is to "enable the insurer to obtain all knowledge and facts concerning the cause of the [event giving rise to the claim] and the loss involved while the information is fresh in order to protect itself from fraudulent and false claims."[53] An insured's willful failure to provide material and relevant documents, or to submit to an examination under oath, constitutes a

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[49] See, e.g., Meyer v. State Farm Mut. Auto. Ins. Co., 689 P2d 585 (Colo. 1984); Nocktonick v. Nocktonick, 611 P2d 135 [Kan. 1980] [danger of collusion exists in any case]; Sorensensen v. Sorensen, 339 NE 907 (Mass Sup J. Ct. 1975) [same];

[50] 23 NY2d 434 (1969).

[51] 292 NY 154 [1944).

[52] See, US Fire Ins. Co. v. Cruz, 35 Misc 2d 272 [1962], affd 18 AD2d 1137.

[53] Weissberg v. Royal Ins. Co., 240 AD2d 733 (2d Dept. 1997); see also, 2423 Mermaid Realty Corp. v. New York Prop. Ins. Underwriting Assn., 142 AD2d 124 (2d Dept. 1988), lv denied 74 NY2d 607, quoting Hudson Tire Mart v. Aetna Cas. & Sur. Co., 518 F2d 671, 674; Davis v. Allstate Ins. Co., 204 AD2d 592 (2d Dept. 1994).

material breach of the clause which, in turn, bars recovery under the policy.[54]

Additionally, courts have consistently pointed to the ability of the judicial system to expose fraudulent and collusive claims.[55] Thus, in rejecting the common-law interspousal immunity doctrine, the Supreme Court of Florida rejected the collusion argument, noting that:

> When testifying, the claimants are subject to impeachment and discrediting because of their own financial stake in the outcome. They are subject to the court's contempt power, to the criminal laws for perjury and various forms of fraud, to civil lawsuit, and even to the racketeering and forfeiture statutes authorizing (among other things) the seizure of property used to further their crimes. If these and other devices are adequate for unmarried couples, then we believe they must also be equally adequate for those with a marriage license.[56]

Finally, the danger of collusion argument has been widely criticized as heavy handed. This is particularly so in cases where the danger of collusion is clearly absent. The facts of Black v. Allstate Ins. Co.[57] illustrate the issue. Mrs. Powell was driving the family car in which Mr. Black and her son were passengers. The car collided with another car being pursued by the police. Mr. Powell was killed, Mrs. Powell sustained serious brain damage and their son was also injured. In Mr. Powell's estate's action against Mrs. Powell for negligence and wrongful death, the First Department found itself constrained to grant judgment against the estate. The court noted that "plaintiff's complaints about alleged unfairness in this case are well taken because of the unlikelihood of collusion between the decedent husband and his widow, who was rendered incompetent as a result of injuries incurred in the same accident, and the anachronistic nature of Insurance Law § 3420(g)."[58] Significantly, the court called upon the legislature to consider the issue.

Such cases have led several courts in other jurisdictions to conclude that a claimant otherwise deserving of relief should not be barred solely because some cases might involve

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[54] See, id.; see also, Yerushalmi v. Hartford Acc. & Indem. Co., 158 AD2d 407 (1st Dept. 1990); Averbuch v. Home Ins. Co., 114 AD2d 827 (2d Dept. 1985).

[55] See, Gelbman v. Gelbman, 23 NY2d 434, supra; see also, Nocktonick v. Nocktonick, 611 P2d 135, supra; Sorensen v. Sorensen, 339 NE 907, supra.

[56] Waite v. Waite, 618 So2d 1360, supra.

[57] Supra, at n.1.

[58] Id..

possible collusion.[59] The New York Court of Appeals, in rejecting a collusion argument as to parent-child immunity, determined that "[t]he definite and vital interest of society in protecting people from losses resulting from accidents should remain paramount."[60]

An additional policy justification addressed in several other jurisdictions is that interspousal tort actions threaten marital harmony. However, the marital harmony argument has no weight in New York as it was implicitly rejected by the Legislature in 1937 when interspousal tort immunity was abolished. Moreover, it has been widely argued that the nearly universal use of liability insurance has eliminated the threat to marital and/or family harmony per se because the real defendant is the insurance company.[61] In rejecting the preservation of family harmony as a justification for intra-family tort immunity, the New York Court of Appeals noted:

> The parties recognize, as we must, that there is compulsory automobile insurance in New York. Such insurance effectively removes the argument favoring continued family harmony as a basis for prohibiting this suit. The present litigation is, in reality, between the parent passenger and her insurance carrier. Viewing the case in this light, we are unable to comprehend how the family harmony will be enhanced by prohibiting this suit.[62]

D. **The Statute is Contrary to State Policy regarding Protection of Injured Persons**

As a final criticism, Insurance Law § 3420(g) is contrary to the State's policy of ensuring that innocent victims will be compensated for injuries caused by the culpable conduct of another. Stripped of the collusion justification, Insurance Law § 3420(g) bars coverage that is otherwise available. "The whole object of compulsory automobile insurance is to assure the protection of members of the public, who are innocent victims of motor vehicle accidents, by providing compensation for and protection from tortious wrongs committed against them . . . [i]t is the public policy of New York to protect the innocent victims of traffic accidents."[63] Where, however, the "innocent victim" is the spouse of the culpable party, innocence is irrelevant

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[59] See, e.g., Waite v. Waite, supra; Sorensen v. Sorensen, supra; Meyer v. State Farm Mut. Auto. Ins. Co., supra;

[60] Gelbman v. Gelbman, supra.

[61] See, "The Legislative Abrogation of Interspousal Immunity in Virginia", 15 U. Rich. L. Rev. 939;

[62] Gelbman v. Gelbman, supra.

[63] Rosado v. Eveready Ins. Co., 34 NY2d 43, 48 (1974); see Vehicle & Traffic Law § 310(2).

pursuant to Insurance Law § 3420(g).[64]

Notably, in its enactment of the Motor Vehicle Financial Security Act, the Legislature ensured that every motor vehicle accident victim would be recompensed for injury and financial loss inflicted by a motorist's negligence through a compulsory insurance program.[65] That spouses are excluded from this initiative by virtue of Insurance Law § 3420(g) is, arguably, inconsistent with the Motor Vehicle Financial Security Act. This is particularly so given that the policy considerations which once supported Insurance Law § 3420 (g) have been flatly rejected by the Court of Appeals in the parent-child tort immunity context and by many other jurisdictions in their abrogation of spousal and intra-family tort immunity doctrines.

V. THE COMMISSION'S RECOMMENDATION: **Require disclosure of the exclusion and require insurers to offer coverage.**

Insurance Law § 3420(g) is an apparent anomaly in insurance statutes nationwide. Its continued survival is at odds with the Legislature's clear intent to protect all other persons from losses resulting from accidents, regardless of their relationship. Moreover, Insurance Law § 3420(g) is the only exclusion which need not be disclosed in the insurance contract. These distinctions, coupled with the fact that optional spousal coverage is universally unavailable in New York, bring into doubt the propriety of the statute. The policy justification underlying the statute - - the danger of collusion - - has been consistently rejected by many courts and jurisdictions, including the Court of Appeals.

The Commission recommends that Insurance Law § 3420 be amended to include two mutually dependent requirements. The recommendation is loosely based on the current scheme for supplemental underinsured and uninsured motorist coverage whereby every insurer is required to provide notice to its insured of the benefits of SUM coverage and the cost of a SUM endorsement.[66]

Thus, in the context of Insurance Law § 3420(g), the recommended amendment requires insurers, first, to disclose the existence and operation of Insurance Law § 3420(g) each time a liability policy is issued. The public's ignorance of the effect of Insurance Law § 3420(g) on coverage for injuries caused by an insured to his or her spouse is a serious defect, particularly when every other type of policy exclusion must be brought to the insured's attention "in clear and unmistakable language."[67] Thus, providing notice is a critical part of any reform effort.

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[64] See, Employers' Liab. Assur. Co. v. Aresty, 11 AD2d 331, supra.

[65] See, Vehicle & Traffic Law § 310.

[66] See, Insurance Law § 3420(f)(2)(A), (B); 11 NYCRR 60-2.1, 60-2.2.

[67] See, section IV(A), supra.

Secondly, coverage for injuries to spouses must be available. As noted in this report,[68] the language of Insurance Law § 3420(g) reflects an intent by the Legislature to allow an insured to contract for spousal coverage, but such coverage is unavailable in New York. Thus, to ensure compliance with the intent of the statute, the Commission determined that insurers should be compelled to offer such coverage upon request. The Commission recommends, therefore, that the Insurance Law be amended to include a provision requiring licensed insurers to provide supplemental liability coverage for injuries to spouses when it is (1) requested by the insured and (2) a premium is paid for such coverage.

This recommendation benefits both consumers and insurance companies. Although insurers would have to make the coverage available and provide notice, a premium will be received to offset the associated cost and exposure.[69] At the same time, married persons will benefit as they will be able to choose whether the additional coverage and cost is appropriate to their individual circumstances. Moreover, this approach is completely consistent with the Legislature's clear intention to permit spouses to contract for coverage.

However, the Commission recommends limiting the notice and optional coverage requirements to automobile liability insurance. The bar to recovery created by Insurance Law § 3420(g) has had little effect on a spouse's right to recover under homeowners policies in light of the willingness of the Legislature and courts to permit household exclusions in homeowners' policies. It appears that a household exclusion is permissible because homeowners' insurance is not mandatory.[70] In contrast, an insurer is not permitted to exclude household members (other than spouses) in an automobile liability policy or an uninsured policy because such coverage is mandatory and its provisions prescribed by law.[71] Accordingly, the need for reform lies in the automobile liability insurance context.

VI. PROPOSALS CONSIDERED, BUT REJECTED, BY THE COMMISSION

A. **Require disclosure (only) of the statutory consequences of Insurance Law § 3420(g).**

While providing notice of the operation of Insurance Law § 3420(g) is an important step in addressing the problems posed by the provision, merely requiring insurers to disclose the spousal immunity created by the statute is not in itself enough to guarantee coverage for injuries

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[68] See, IV(B), supra.

[69] Insurers are already providing spousal coverage in other states.

[70] See, Suba v. State Farm Fire & Cas. Co., 114 AD2d 280, supra; 9 Couch on Ins. § 128:2, supra.

[71] See, Insurance Law 3420; Vehicle and Traffic Law § 311(4)(a), § 388; 11 NYCRR 60-1.1; 11 NYCRR 60-2.1.

to innocent spouses. Not a single insurer operating in New York offers such coverage. Therefore, in addition to compelling insurers to provide notice of the effect of Insurance Law § 3420 (g), insurers must also be forced to offer such coverage for a premium. The Commission determined that both requirements must be met to ensure that the provision is consistent with the Legislature's intention that "motorists shall be financially able to respond in damages for their negligent acts, so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them."[72]

B. **Mandate Supplemental Spousal Liability Insurance Coverage**

Another option considered but rejected by the Commission was a mandatory spousal coverage endorsement. This would entail repealing Insurance Law § 3420(g) and thereby require insurers to provide liability coverage in direct actions between spouses or in traditional indemnification actions by owners against an insured where the owner has been found vicariously liable for damages to the insured's spouse. However, the Commission ultimately concluded that forced coverage may not benefit some consumers and may be cost prohibitive to others. For these reasons, the Commission determined that the notice and optional endorsement model offered by the existing supplemental underinsured motorist insurance was preferable as it allows each insured to determine whether or not supplemental spousal liability insurance coverage is appropriate to the needs and situation of the particular insured.

VII. CONCLUSION

As a matter of public policy, New York requires liability insurance coverage against injury to every person who suffers injury as a result of the insured's culpable conduct. However, Insurance Law § 3420(g) creates a largely unknown, but substantial exclusion to this mandate. Subsection (g) precludes both direct actions between spouses and vicarious liability actions against owners where the culpable conduct of a spouse is a cause of the injury. The lone purpose of the provision, which was enacted in 1937, is to protect insurers from collusive and fraudulent actions between spouses. No similar exclusion exists for any other family relationship.

There are several significant criticisms of the continued vitality of Insurance Law § 3420(g):[73]

1. Because the exclusion is statutory, insurers are not required to disclose it. Thus, the vast majority of insureds are unaware that their spouse will not be afforded coverage for injuries caused by the insured's negligence.

2. Although the section provides that an insured may contract for spousal coverage to

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[72] See, Vehicle & Traffic Law § 310.

[73] For a full discussion, see pages 7 - 12, *infra*.

avoid the operation of the exclusion, no New York insurer offers this endorsement.

3. The exclusion will operate even where it is evident that no fraud or collusion exists.

4. The danger of collusion argument has been specifically rejected by the Court of Appeals in regard to the former common-law rule barring suits between other family members. All but two other states, Louisiana and Georgia, have rejected the collusion argument with regard to interspousal torts.

5. New York is the only state that wholly insulates insurers against claims by spouses of negligent insureds without notice or a written exclusion in the policy.[74]

Given the validity of these criticisms, and the aberrant purpose and effect of Insurance Law § 3420(g), the Commission recommends the following bill:

AN ACT to amend the insurance law, in relation to requiring insurers to provide notice to married insureds of certain limitations on liability coverage for injuries caused by an insured to his or her spouse, and making available, at the request of the insured, coverage for injuries to an insured's spouse caused by the insured.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subsection (a) of section 3420 of the insurance law is amended to read as follows:

(a) No policy or contract insuring against liability for injury to person, except as ~~stated~~ provided in subsection (g) hereof, or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions which are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:

Section 2. Subsection (g) of section 3420 of the insurance law is amended to read as follows:

[74] See, n. 13, supra.

(g) No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy as provided in subdivisions one and two of this subsection. This exclusion shall apply only where the injured spouse, to be entitled to recover, must prove the culpable conduct of the insured spouse.

(1) Upon written request of an insured, and upon payment of a reasonable premium established in accordance with article 23 of the insurance law, an insurer issuing or delivering any policy that satisfies the requirements of article 6 of the vehicle and traffic law shall provide coverage against liability of an insured because of death of or injuries to his or her spouse up to the liability insurance limits provided under such policy even where the injured spouse, to be entitled to recover, must prove the culpable conduct of the insured spouse. Such insurance coverage shall be known as "supplemental spousal liability insurance".

(2) Upon issuance of a motor vehicle liability policy that satisfies the requirements of article 6 of the vehicle and traffic law and that becomes effective on and after January 1, 2003, pursuant to regulations promulgated by the superintendent, the insurer shall notify the insured, in writing, of the availability of supplemental spousal liability insurance. Such notification shall be contained on the front of the premium notice in boldface type and include a concise statement that supplementary spousal coverage is available, an explanation of such coverage, and the insurer's premium for such coverage. Subsequently, a notification of the availability of supplementary spousal liability coverage shall be provided at least once a year in motor vehicle liability policies issued pursuant to article six of the vehicle and traffic law, including those

originally issued prior to January 1, 2003. Such notice must include a concise statement that supplementary spousal coverage is available, an explanation of such coverage, and the insurer's premium for such coverage.

Section 3 . Subsection (e) of section 345 of the Motor Vehicle and Traffic Law is amended to read as follows:

(e) Such motor vehicle liability policy shall not insure any liability on account of bodily injury to or death of an employee of the insured for which benefits are payable under any workmen's compensation law. Nor is any such policy required to insure any liability on account of (1) damage to property of others in charge of the insured or of his agents or employees, ~~or~~ (2) bodily injury to or death of the insured ~~or bodily injury to or death of the spouse of the insured~~ , or (3) except as provided in subdivisions one and two of subsection (g) of section 3420 of the insurance law, bodily injury to or death of the spouse of the insured, or for injury to property of the spouse of the insured.

Section 4. Subsection 4 of section 388 of the vehicle and traffic law is amended to read as follows:

4. All bonds executed by or policies of insurance issued to the owner of any vehicle subject to the provisions of this section shall contain a provision for indemnity or security against the liability and responsibility provided in this section; but, except as provided in subdivisions one and two of subsection (g) of section 3420 of the insurance law, this provision shall not be construed as requiring that such a policy include insurance against any liability of

the insured, being an individual, for death of or injuries to his or her spouse or for injury to property of his or her spouse, where the injured spouse, to be entitled to recover, must prove the culpable conduct of the insured spouse.