No. 230
In the Matter of Elrac, Inc., &c.,
Appellant,
v.
Birtis Exum,
Respondent.

Michael F. Ingham, for appellant.
Robin Grumet, for respondent.

SMITH, J.:

We hold that a self-insured employer whose employee is involved in an automobile accident may be liable to that employee for uninsured motorist benefits, notwithstanding the exclusivity provision of the Workers' Compensation Law.

Birtis Exum was an employee of Elrac, Inc. (a subsidiary of Enterprise Rent-A-Car Company). While driving, in the course of his employment, a car owned by Elrac, Exum was in an accident with another car, driven by a person without liability insurance. Elrac was self-insured, as allowed by Vehicle and Traffic Law § 370 (3), and thus had not obtained an insurance policy to cover the car Exum was driving.

Exum served a notice of intention to arbitrate on Elrac, seeking uninsured motorist benefits. Elrac petitioned to stay the arbitration. Supreme Court granted the petition, but the Appellate Division reversed, permitting the arbitration to proceed (Matter of ELRAC, Inc. v Exum, 73 AD3d 431 [1st Dept 2010]). The Appellate Division granted leave to appeal to this Court, and we now affirm.

Insurance Law § 3420 (f) (1) requires every policy of motor vehicle liability insurance to contain a provision requiring payment to the insured of all sums, up to $25,000 in the case of injury and $50,000 in the case of death, that the insured is entitled to recover as damages from the owner or operator of an uninsured motor vehicle. In Matter of Allstate Ins. Co. v Shaw (52 NY2d 818 [1980]), we considered the application of this requirement to self-insurers, and held that a self-insurer had the same liability for uninsured motorist coverage that an insurance company would have. We said that, by authorizing self-insurance, the Legislature "in no way intended

to decrease the insurance protection presently available" (id. at 820).

The rationale of Shaw applies here. There is no policy reason why Exum's uninsured motorist protection should decrease because he happened to be driving the car of a self-insurer.

But there is a difference between this case and Shaw: here the person claiming uninsured motorist coverage was an employee of the self-insurer. It is undisputed that Exum was entitled to workers' compensation benefits from Elrac, and Elrac claims that he is therefore barred from recovering uninsured motorist benefits. Exum points out that we permitted an employee of a self-insurer to recover in Matter of Country-Wide Ins. Co. (Manning) (62 NY2d 748 [1984]), which involved essentially indistinguishable facts. Because we did not discuss the workers' compensation issue in Manning, however, we assume that the issue is open.

Workers' Compensation Law § 11 says:

> "The liability of an employer [for workers' compensation benefits] . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom."

Although the words "any other liability whatsoever" seem all-inclusive, there are cases -- of which this is one -- in which they cannot be taken literally (see Billy v Consolidated

Mach. Tool Corp., 51 NY2d 152 [1980]). Specifically, the statute cannot be read to bar all suits to enforce contractual liabilities. If an employer agrees, as part of a contract with an employee, to provide life insurance or medical insurance, and breaches that contract, an action to recover damages for the breach would not be barred, though the action might literally be "on account of . . . injury or death."

An action against a self-insurer to enforce the liability recognized in Shaw is, in our view, essentially contractual. The situation is as though the employer had written an insurance policy to itself, including the statutorily-required provision for uninsured motorist coverage. This action is therefore not barred by Workers' Compensation Law § 11.

Accordingly, the order of the Appellate Division should be affirmed with costs. The certified question is unnecessary and should not be answered.

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Order affirmed, with costs, and certified question not answered as unnecessary. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided December 13, 2011