

THE COURT OF APPEALS ADDRESSES UNDERINSURED MOTORIST NOTICE OF CLAIM

One of the most well-established principles of New York law is that an insurer's obligation to provide coverage under its policy of insurance is not triggered unless the insured or someone on his or her behalf, including the injured party (or someone on his or her behalf)¹ gives timely notice of the loss or claim in accordance with the terms of the policy.² In the absence of such notice, "an insurer may be deprived of the opportunity to investigate a claim and is rendered vulnerable to fraud."³ Moreover, late "notification may . . . prevent the insurer from providing a sufficient reserve fund."⁴ Indeed, the insurer's right to receive timely notice has been held to be so fundamental that a primary or excess insurer [as opposed to a reinsurer] need not show prejudice to be able to disclaim liability or deny coverage on the basis of late notice.⁵

The Applicable Standard

Most, if not all insurance policies contain notice provisions which require that notice be given either "within 90 days or as soon as practicable" or, simply, "as soon as practicable." For example, the mandatory uninsured motorist endorsement contains the former provision, and the "SUM" endorsement under Regulation 35-D,⁶ contains the latter. It has frequently been held that a provision that notice be given "as soon as practicable" mandates that notice be given "within a reasonable time under all of the circumstances."⁷ The question of what is a reasonable time under the circumstances is one which has occupied many courts in many different contexts.

Generally speaking, the courts recognize that for purposes of determining what constitutes a reasonable time within which to give notice of claim to an insurer, the mere passage of time does not in and of itself make the delay unreasonable. Thus, it has been

held that “[p]romptness is relative and measured by the circumstances.”⁸ Similarly, it has been held that reasonableness must be measured by the efforts undertaken by the person obligated to give notice in the circumstances confronting him.⁹ The phrase “as soon as practicable” is deemed “an elastic one, not to be defined in a vacuum,” “there is no inflexible test of reasonableness.”¹⁰ Where there has been a delay in giving notice to an insurer, the burden is upon the insured to show lack of knowledge or other such circumstances that will explain or excuse the delay and demonstrate that it was reasonable.¹¹

UM Coverage

One of the most interesting contexts in which the question of whether notice has been timely given to an insurer is in the area of uninsured (“UM”)/supplementary uninsured (“SUM”)/underinsured motorist (“UIM”) coverage. It has long been the rule that in order to determine whether notice was given in conformity with the UM endorsement requirement, it is necessary to consider (a) whether the claimant/insured gave notice within a reasonable time after learning that the offending vehicle was uninsured; (b) whether the claimant/insured used diligence to ascertain if the offending vehicle was uninsured; and (c) whether notice was given within a reasonable time thereafter.¹²

In the UM context, it is, in most cases, relatively easy to determine the uninsured status of the offending vehicle and thus to put the insurer on notice of such a claim. At issue is whether or not insurance coverage existed at all, rather than what the amounts of coverage are and/or whether such coverage equaled or exceeded the amount of the claimant’s coverage. The non-existence of insurance can be garnered from Police Accident Reports, which may show no insurance code for the offending vehicle, and DMV

registration record expansion reports, which may show the pre-accident termination of a policy. When the claim involves a hit-and-run, presumably the claimant is aware of all of the facts necessary to support a claim, including the fact that there was physical contact with a vehicle whose owner and operator were unidentified. It has been held that if the offending vehicle was uninsured on the date of the accident, the measuring period for purposes of uninsured motorist notice begins to run on the date of the accident.¹³ In the case of a disclaimer of coverage by the offending vehicle's insurer, a fact that might not make itself known until much later, the time to give notice has been held to run from the date of the disclaimer, not the date of the accident.¹⁴

In the absence of a valid excuse or explanation, a delay in giving notice of an uninsured motorist claim may be held to be unreasonable and, therefore, may vitiate the coverage. For example, in Eveready Ins. Co. v. Saunders,¹⁵ the "insured person" retained an attorney promptly after being struck by a "hit-and-run" vehicle, but neither he nor his attorney informed his insurer of the accident until nearly four months later. Noting that there was "no logical reason" for the attorney's failure to notify the insurer of the accident, the court held that the "failure to satisfy the notice requirement vitiates coverage." And, in Country-Wide Ins. Co. v. Aubry,¹⁶ the court held that the claimant failed to diligently attempt to determine whether the driver of the other vehicle was insured, and also failed to serve the insurer with a notice of intention to make claim as soon as he "should have been aware" that the other vehicle was alleged to have been stolen.¹⁷ On the other hand, in Allstate Ins. Co. v. Shakhais,¹⁸ it was held that notice of a UM claim was reasonable under the circumstances where the claimant could not have ascertained the existence of a claim

until his counsel finally received the Police Accident Report three months after requesting it.

UIM/SUM Coverage

In the context of SUM/UIM coverage, the issue of timely notice is substantially more complex. In its recent decision in two companion cases, *Metropolitan Prop. & Cas. Ins. Co. v. Mancuso* and *Nationwide Ins. Co. v. DiGiacchino*,¹⁹ the Court of Appeals addressed the issue in that context and offered guidance on how the issue of timely notice of a UIM claim is to be governed.

In a well-reasoned and well-written opinion authored by Judge Albert Rosenblatt, the Court of Appeals recognized that “[i]n cases of underinsurance coverage . . . questions as to timeliness of notice and compliance with notice provisions have proven particularly troublesome.” That is because unlike insurance coverage for risks such as fire, theft and death, wherein liability “typically materializes instantly and unambiguously upon the occurrence of a single event,” a claim for underinsurance benefits “has a number of conditions along the way.” As further explained by Judge Rosenblatt: “The accident is obviously the first event, considering that if there is no accident, there can be no underinsurance claim. Nevertheless, an accident and a tortfeasor, without more, does not give rise to an underinsurance claim. There may be no such claim unless and until other conditions exist, including not only the injuries but also the insufficiency of the relevant tortfeasor coverage to compensate for them Even then, however, a claim for underinsurance need not be paid unless and until another ‘condition precedent’ is met, notably that ‘the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or

settlements' [citations omitted]. Although in theory most automobile accidents carry a potential claim for underinsurance benefits, it takes time, investigation and analysis to determine whether one will actually result. In this analysis a number of factors come into play, including the seriousness and nature of the insured's injuries [citations omitted]; the potential liability of multiple parties [citations omitted]; and of course the extent of a tortfeasor's coverage [citations omitted]. Because these factors will vary from case to case, so too will the time at which an underinsurance claim becomes reasonably ascertainable. Thus, although coverage is 'triggered' when the limit of the insured's bodily injury coverage is greater than the same coverage in the tortfeasor's policy, the acquisition of this information, the existence of other conditions and the occurrence of other developments do not always take place at a fixed time."

DiGioacchino/Nationwide

It was against this background that the Court examined the timeliness of the two UIM claims before it. In the DiGioacchino/Nationwide case, the policy required that notice be given "as soon as practicable." After noting that although "[a] good deal of litigation" surrounding that phrase involved claims by third persons against policyholders, which cases are "useful to the extent that they deal with the reasonableness of excuses in general" but "are not directly controlling . . . because underinsurance has unique conditions and features for the ripening of claims that do not exist in primary insurance cases," the Court held that in the UIM context, "the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured" [emphasis added]. The Court added that an "objective standard" would be applied as to what constituted "reasonable ascertainment." Then, explaining further,

Judge Rosenblatt added: “The test, however, does not lend itself to mathematic precision. What may be swiftly ascertained in one case may prove difficult and protracted in another. In some instances injuries may manifest themselves immediately; in others, there may be latency. There are also variables in connection with the parties. Sometimes they may be easily identified, located and counted; sometimes not. An underinsurance claim will also turn on the respective levels of policy coverage and degrees of fault of the parties. This assessment may be straightforward and predictable, or it may be elusive or even surprising. Courts will determine whether notice was given as soon as practicable based on circumstances and factors they consider relevant to that determination.”

Finally, Judge Rosenblatt aptly took note of the recent amendment to Insurance Law §3420(f)(2)(A), which requires insurers to disclose insurance policy coverage limits within forty-five days after a written request by any person seeking damages who is covered by his or her own underinsurance policy, and tolls the time to make a claim for underinsured motorist benefits “during the period the insurer of any other owner or operator of another motor vehicle that may be liable for damages to the insured, fails to so disclose its coverage.”²⁰ Judge Rosenblatt properly warned for the future that “The availability of this remedy may be taken as a relevant factor in evaluating the timeliness of an insured’s notice of claim.”

Under the particular facts of the DiGioacchino/Nationwide case, wherein the accident took place in December 1994, the insured commenced a personal injury action in January 1996, and first learned of the tortfeasor’s policy limits in October 1996 after receiving a settlement offer, and filed a claim for UIM benefits the next day, the Court

affirmed the determinations of the courts below that such notice was not provided “as soon as practicable.”

It should be noted that this result was consistent with several recent lower court decisions on this subject and, perhaps, inconsistent with others. For example, in Schiebel v. Nationwide Mut. Ins. Co.,²¹ the attorney for a minor notified the UIM carrier of a potential claim more than seven months after the accident and only one month after he learned of the tortfeasor’s limits. In dismissing the claim, the Second Department held that where no excuse is offered for a more than seven month delay in asserting a claim for coverage, notice is untimely as a matter of law, and, therefore, vitiated the policy. More recently, in Owen v. Allstate Ins. Co.,²² where the insured’s condition was deteriorating and he was aware of the identify of the tortfeasor’s insurer, but did not seek information about the policy limits until fifteen months after the accident, and did not give notice of a UIM underinsurance claim until eighteen months after the accident, the Third Department held that the insured exercised a “lack of due diligence” and that notice was not given as soon as possible and was “unreasonable as a matter of law.”²³ On the other hand, in Allstate Ins. Co. v. Zenaty,²⁴ a UIM claim made more than 2½ years after an accident was held to have been made “within a reasonable time after discovering that (claimant) had a claim.” There, the claimant’s injuries were not thought to be severe at first, he did not commence an action against the tortfeasor until two years after the accident, and he did not learn of the underinsured status of the tortfeasor until seven months later, but gave notice of his claim promptly thereafter. In Allstate Ins. Co. v. Haroian,²⁵ the accident occurred on March 27, 1994; the claimant inquired of the tortfeasor’s insurer as to its policy limits on June 8,

1994, but the insurer failed to disclose its limits until November 29, 1995. Within five days of learning the tortfeasor's limits, the claimant filed a notice of claim. That notice was nineteen months after the accident. Insofar as the SUM insurer failed to demonstrate that the claimant had "any other means at her disposal to learn the tortfeasor's insurance limits," and was thus "unable to determine whether she possessed a claim pursuant to the SUM provisions of her policy," the Supreme Court held the notice to have been timely.²⁶

Mancuso/Metropolitan

In the Mancuso/Metropolitan case, the policy required written notice of a UIM claim "[w]ithin 90 days or as soon as practicable." It did not, however, as most such policies do not, indicate from what date or event the ninety days was to be measured. Thus, this provision was deemed by Judge Rosenblatt to be "a model of ambiguity" in the UIM context. After noting that "sophisticated Judges have varied widely in their interpretation of this 90-day language", with some courts holding that the 90-day notice period should be marked not from the accident date but from the date the insured "knew or should have known that [the tortfeasor] was underinsured with respect to his claim,"²⁷ and others holding the relevant starting point to be when the insured "was apprised" of the tortfeasor's underinsured status,²⁸ or when the claimant had a "founded suspicion" of an underinsurance situation,²⁹ Judge Rosenblatt found the policy language to be susceptible to several interpretations. He, therefore, in accordance with the rule of contra preferentem, construed the ambiguous policy provision to allow the insured/claimant to file a claim "90 days or as soon as practicable (whichever is longer) from the date he knew or should reasonably have known" that the tortfeasor was underinsured.

Under the particular facts of the Mancuso/Metropolitan case, wherein the accident took place in May 1993, the insured commenced a personal injury action in March 1995 and first learned of the tortfeasor's policy limits in May 1996 after securing a settlement offer, and filed a notice of claim for UIM benefits six days later, the Court affirmed the determinations of the courts below that such notice, given fourteen months after the personal injury action was commenced and three years after the accident, "no matter how calculated," was untimely as a matter of law. Because the delay was so extensive, no hearing was necessary to calculate when the claim was "reasonably ascertainable."

No-Fault Notice

One final point bears mention. We have previously noted an apparent divergence of opinion among various Departments as to whether a claimant for UM, UIM or SUM benefits who has failed to provide the insurer with written notice of the claim in a timely fashion, may successfully contend that the earlier notice of the accident and of a claim that the insurer received via the submission of No-Fault forms is sufficient to meet the notice requirements of the policy.³⁰ Indeed, in our prior column on that topic, we concluded that "It seems that this is yet another issue in the complex area of uninsured/underinsured motorist/SUM coverage that requires resolution by the Court of Appeals." It now appears that the Court of Appeals has, in fact, albeit sub silentio, resolved that issue in favor of a determination that notice of a No-Fault claim is not a valid substitute for notice of a UM, UIM or SUM claim.

In its statement of the facts of the DiGioacchino/Nationwide claim and the Mancuso/Metropolitan claim, the Court noted in both cases that "[i]mmediately after the accident," the insureds notified their respective insurers of their claims for "first-party no-

fault benefits.” Clearly, had such notice been deemed sufficient to establish an underinsured motorist claim, the results in those cases would have been different and there would have been no reason for the Court to expound as it did upon the standard of timeliness in the underinsured motorist context.

ENDNOTES

1. See Ins. L. §3420(a)(3).
2. When the notice provision specifies that the notice be in writing, other forms of notice will not suffice. See *Travelers Ins. Co. v. Littleton*, 218 AD2d 661 (2d Dept. 1995); *Collins v. Isaksen*, 221 AD2d 403 (2d Dept. 1995).
3. *Power Authority v. Westinghouse Electric Corp.*, 117 AD2d 336, 339 (1st Dept. 1996).
4. Id.; see also *Unigard Sec. Ins. Co., Inc. v. North River Ins. Co.*, 79 NY2d 576, 581-582 (1992).
5. Id.; *White v. City of New York*, 81 AD2d 955 (1993); *Security Mut. Ins. Co. v. Acker-Fitzsimons*, 31 NY2d 436 (1972). See also, *White v. City of New York*, 81 AD2d 955 (1993); *State Farm Ins. Co. v. Archer*, ___ AD2d ___, 681 NYS2d 338 (2d Dept. 1998); *United Talmudical Academy of Kiryas Joel v. Cigna Prop. & Cas. Co.*, 253 AD2d 423 (2d Dept. 1998); *Travelers Ins. Co. v. Delosh*, 249 AD2d 924 (4th Dept. 1998).
6. 11 NYCRR §60-2.3(e).
7. *Security Mut. Ins. Co. v. Acker-Fitzsimons*, supra; *Owen v. Allstate Ins. Co.*, 250 AD2d 1018 (3d Dept. 1998); *Matan v. Nationwide Mut. Ins. Co.*, 243 AD2d 978 (3d Dept. 1997); *Merchants Mut. Ins. Co. v. Hudson*, 160 AD2d 873 (2d Dept. 1990).
8. *Launtano v. American Fidelity Fire Ins. Co.*, 3 AD2d 564 (1st Dept. 1957), affd. 4 NY2d 1028 (1958).
9. *Nationwide Mut. Ins. Co. v. Edgerson*, 195 AD2d 560 (2d Dept. 1993); *State Farm Mut. Ins. Co. v. Pizzonia*, 147 AD2d 70 (2d Dept. 1989).
10. *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 NY2d 12 (1979); *Travelers Ins. Co. v. Delosh*, 249 AD2d 924 (4th Dept. 1998).
11. *Security Mut. Ins. Co. v. Acker-Fitzsimons*, supra; *State Farm Ins. Co. v. Archer*, supra. For a discussion of numerous potential excuses for delayed notice, see Dachs, N. and Dachs, J., "Excuses for Delayed Notice to Insurers," NYLJ, September 10, 1991, p. 3, col. 1.
12. See *Lloyd v. MVAIC*, 27 NY2d 396 (1st Dept. 1967), affd. 23 NY2d 478 (1967); *American Home Assurance Co. v. Wong*, 249 AD2d 301 (2d Dept. 1998).
13. *State Farm Mut. Ins. Co. v. Pizzonia*, 147 AD2d 703, 538 NYS2d 312 (2d Dept. 1989).
14. *State Farm Mut. Auto. Ins. Co. v. Pantina*, ___ AD2d ___, 681 NYS2d 82 (2d Dept. 1998); *Colonial Penn Ins. Co. v. Morin*, 206 AD2d 531 (2d Dept. 1994); *Allstate Ins. Co. v. Giordano*, 108 AD2d 910 (2d Dept. 1985), affd. 66 NY2d 810 (1985).
15. 149 AD2d 456 (2d Dept. 1989).
16. 233 AD2d 189 (1st Dept. 1996).
17. See also *Eveready Ins. Co. v. Younger*, 198 AD2d 276, 603 NYS2d 591 (2d Dept. 1993) (11-month delay in placing insurer on notice of an uninsured motorist claim was unreasonable).
18. 244 AD2d 254 (1st Dept. 1997), mot. for lv. to appeal denied, 91 NY2d 810 (1998).

19. 93 NY2d 487 (1999).
20. L. 1997, Ch. 547, eff. January 8, 1998. See also Dachs, Norman and Dachs, Jonathan, "Four New Laws for Motorists," NYLJ, November 10, 1997, p. 3, col. 1.
21. 166 AD2d 520 (2d Dept. 1990).
22. 250 AD2d 1018 (3d Dept. 1998).
23. See also, *Paz v. Aetna Cas. & Sur. Co.*, 250 AD2d 660 (2d Dept. 1998) (written notice of underinsured motorist claim given more than one year after claimant learned of the policy limits of the offending vehicle was untimely as a matter of law); *National Union Fire Ins. Co. v. Pittsburgh, Pa v. Leong*, 250 AD2d 687 (2d Dept. 1998) (notice of an underinsured motorist claim given sixteen months after the accident was untimely where the claimant "failed to demonstrate that he had diligently sought to determine the limits of the offending vehicle's policy").
24. 174 AD2d 832 (3d Dept. 1991).
25. N.O.R., NYLJ, August 2, 1996, p. 26, col. 4 (Sup. Ct. Rockland Co. 1996).
26. See also *Travelers Ins. Co. v. Torres*, 245 AD2d 82 (1st Dept. 1997); *Allstate Ins. Co. v. White*, 231 AD2d 950 (4th Dept. 1996) (delay excused by due diligence in ascertaining tortfeasor's limits); *Interboro Mut. Indemn. Ins. Co. v. Uvari*, 220 AD2d 422 (2d Dept. 1995) (delay given "as soon as could reasonably be expected"); *Matan v. Nationwide Mut. Ins. Co.*, *supra* (delay excused due to subsequent discovery of injuries more serious than originally known); *Travelers Ins. Co. v. Delosh*, 249 AD2d 924 (4th Dept. 1998) (same); *Nationwide Mut. Ins. Co. v. Fennimore*, 201 AD2d 979 (2d Dept. 1996) (delay excused upon showing of "reasonable excuse" and "due diligence"); *Allstate Ins. Co. v. Sala*, 226 AD2d 172 (1st Dept. 1996) (delay excused due to time spent at trial to apposition culpability).
27. *Travelers Ins. Co. v. Morzello*, 221 AD2d 291, 292 (1st Dept. 1995); see also *Owen v. Allstate Ins. Co.*, 250 AD2d 105 (3d Dept. 1998).
28. *Travelers Ins. Co. v. Dauria*, 224 AD2d 259 (1st Dept. 1996).
29. *Matan v. Nationwide Mut. Ins. Co.*, 243 AD2d 978 (3d Dept. 1997).
30. See Dachs, Norman and Dachs, Jonathan, "The Interrelationship of the No-Fault and SUM," NYLJ, March 12, 1996, p. 3, col. 1 and cases cited therein.