

## **RECENT UM AND SUM DECISIONS**

In this month's column we review some recent decisions on various topics in uninsured and supplementary uninsured motorist coverage.

### **Uninsured Motorist Coverage ("UM")**

One of the definitions of an uninsured motor vehicle is one which was, covered by a policy of insurance at the time of the accident, but the insurer subsequently disclaims or denies coverage. In *Firemen's Fund Ins. Co. of Newark v. Hopkins*, 88 NY2d 836, 644 NYS2d 481 (1996), the Court of Appeals reaffirmed the basic rule that "An insurer must give written notice of disclaimer on the ground of late notice `as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability.' Recognizing that an unexplained delay of two months in disclaiming liability has been held unreasonable as a matter of law (see *Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028, 416 NYS2d 539 (1979)) [in fact, in *Nationwide Mut. Ins. Co. v. Steiner*, 199 AD2d 507, 605 NYS2d 391 (2d Dept. 1994), an unexplained delay of forty-one days was held unreasonable as a matter of law], the Court had no problem holding that the disclaimer in this case, which was four months after the insurer received the complete record in this case, and nearly eight months after it first received notice of the accident, was untimely as a matter of law. See also, *Nationwide Ins. Co. v. Freehill*, 224 AD2d 532, 637 NYS2d 800 (2d Dept. 1996) (unexplained delay of more than two years unreasonable as a matter of law).

By contrast, in *Stabules v. Aetna Life & Cas. Co.*, \_\_AD2d\_\_, 639 NYS2d 824 (1st Dept. 1996), a delay of 72 days, which was "satisfactorily explained and justified" by the failure of the homeowners insurer's computer tracking system to discover notice of claim and by the "reasonable time required to complete the carrier's investigation of the claim," was held not to be untimely.

In *Allstate Ins. Co. v. Ferrone*, \_\_ AD2d \_\_, 648 NYS2d 936 (2d Dept. 1996) the Court noted that "[t]he reasonableness of any delay in disclaiming coverage must be judged from the time that the carrier is aware of insufficient facts to issue a disclaimer."

In Aetna Life & Cas. Co. v. Ocasio, \_\_ AD2d \_\_, 648 NYS2d 159 (2d Dept. 1996), the court reiterated the well-known rule that distinguishes between the denial of a claim based upon non-coverage and a denial based upon an exclusion from coverage. In the former situation, the claim is not within the policy, and, therefore, no notice of disclaimer is required, because mandatory coverage on the basis of an insurer's failure to serve a timely notice of disclaimer would be to create coverage where non previously existed. In the latter situation, the policy covers the claim but for the applicability of the exclusion and, therefore, a notice of disclaimer is required. In Ocasio, the court held that no disclaimer was required because the claimant's failure to file a statement under oath as to her "hit and run" claim within 90-days "resulted in non-coverage as opposed to rendering her claim excluded from coverage."

Another type of uninsured motor vehicle is where the policy of insurance had been cancelled prior to the accident. It is well-established that in order for a notice of cancellation to be effective, strict compliance with the statutes and the rules and regulations of the Commissioner of Motor Vehicles is required and the statutes, rules and regulations are strictly construed. Among the requirements for a notice of cancellation is a specification that suspension of the automobile registration for non-maintenance of insurance coverage can be avoided by the payment of a civil penalty of \$6.00 per day for each day the coverage is no in effect. See 15 NYCRR §34.6(b). This penalty amount was increased from \$4.00 per day in 1991. Even this provision is so strictly construed that in several cases where the notice incorrectly stated that the civil penalty was \$4.00 per day, rather than \$6.00 per day, the cancellation was held to be invalid. See Dunn v. Passmore, \_\_ AD2d \_\_, 644 NYS2d 283 (2d Dept. 1996); Allstate Ins. Co. v. Satchell, \_\_ AD2d \_\_, 639 NYS2d 339 (1st Dept. 1996); Wilson v. MVAIC, \_\_ AD2d \_\_, 649 NYS2d 184 (2d Dept. 1996). But see Foster v. Abrams, 167 Misc.2d 909, 640 NYS2d 417 (Sup. Ct. Erie Co. 1996) (holding error in amount of civil penalty "inconsequential").

Accidents caused by hit-and-run vehicles are also covered by uninsured motorist policies. In Federal Ins. Co. v. Luhmann, \_\_ AD2d \_\_, 645 NYS2d 86 (2d Dept. 1996), the court reiterated the rule that "physical contact is a condition precedent to an arbitration that is based on a so-called hit-and-run accident" and that although direct contact with the unidentified vehicle is not necessary to satisfy the term "physical contact," the accident

must nevertheless originate "in collision with an unidentified vehicle or an integral part of an unidentified vehicle." See *Matter of Allstate Ins. Co. v. Killakey*, 78 NY2d 325, 574 NYS2d 927 (1991). Where, as here, an unidentified vehicle allegedly cut off a police car, causing the police car to strike the claimant's car and propelling it into an unoccupied, parked car, there was no "physical contact" and, thus, no valid uninsured motorist claim.

In *Aetna Life & Cas. Co. v. Ocasio*, \_\_ AD2d \_\_, 648 NYS2d 159 (2d Dept. 1996), the court noted that "the requirement that a claimant file a sworn statement with the insurer within 90 days after the accident is a condition precedent to coverage under the uninsured 'hit and run' motorist endorsement of the . . . policy." In *Lumbermens Mut. Cas. Co. v. Schrem*, \_\_ AD2d \_\_, 642 NYS2d 666 (1st Dept. 1996), however, the court noted that because the standard policy contained a requirement that a sworn statement be provided within 90 days, but the uninsured motorist section of the supplemental policy contained no such requirement, an ambiguity existed which eliminated the necessity for claimant to submit a sworn statement concerning the accident.

In *Interboro Mutual Indem. Ins. Co. v. Napolitano*, \_\_ AD2d \_\_, 648 NYS2d 978 (2d Dept. 1996), the court held that the unexcused failure by the insured to comply with the policy requirements of a report to a police, peace or judicial officer or the Commission of Motor Vehicles" within 24 hours or as soon as reasonably possible, and to file with the insurer within 90 days a statement under oath indicating the existence of a cause of action arising out of the accident vitiated coverage.

In *Eagle Ins. Co. v. Galloza*, NYLJ, 2/13/96, p. 33, col. 6 (Sup. Ct. Nassau Co.), the court held that "an insured injured through the negligent operation of an unregistered motor vehicle may proceed against his or her own carrier, and seek expeditious recovery through arbitration even if the unregistered vehicle was insured on the date of loss." The court further noted that "The anomaly which results in this context, if it is to be resolved, must be resolved by the Legislature, not the judiciary."

### **Supplementary Uninsured/Underinsured Motorist ("SUM")**

Numerous recent decisions have been rendered in the area of supplementary uninsured (or "underinsured") motorist coverage as well.

In State Farm Mut. Ins. Co. v. Hollis, \_\_ AD2d \_\_, 646 NYS2d 29 (2d Dept. 1996), the court reiterated the rule that "Underinsured motorists benefits are available when the bodily injury liability limits of the offending vehicle are less than the bodily injury liability limits of the insured's policy." Where, as here, the tortfeasor's bodily injury liability limits were equal to the claimant's, the tortfeasor was not underinsured and the underinsured motorist coverage was not triggered. This same trigger is clearly specified in Regulation 35-D's SUM endorsement.

Most pre-Regulation 35-D UIM endorsements contain a "reduction-in-coverage clause" that permits the insurer to reduce the limits of its policy by "all sums paid by or on behalf of persons or organizations who may be legally responsible."

In Paolilli v. Aetna Ins. Co., \_\_ AD2d \_\_, 645 NYS2d 815 (2d Dept. 1996), the court noted that "A reduction in coverage clause is only enforceable when a policy contains a single combined limit of uninsured and underinsured motorists coverage (see, Matter of Allstate Ins. Co. [v. Stolarz - N.J. Mfrs. Ins. Co.], 81 NY2d 219, 597 NYS2d 904; United Community Ins. Co. v. Mucatel, 127 Misc.2d 1045, 487 NYS2d 959, affd. 119 AD2d 1017, 501 NYS2d 761, affd. 69 NY2d 777, 513 NYS2d 114). Where, as here, the policy did not contain a single combined endorsement for UM and UIM coverage, the reduction-in-coverage clause was held unenforceable. See also Herrington v. Aetna Ins. Co., \_\_ AD2d \_\_, 644 NYS2d 492 (2d Dept. 1996); Cf. Commercial Union Ins. Co. v. Mandel, \_\_ AD2d \_\_, 651 NYS2d 174 (2d Dept. 1996); American Manufacturers Mut. Ins. Co. v. Lucenti, \_\_ AD2d \_\_, 644 NYS2d 294 (2d Dept. 1996); Bauso v. Allstate Ins. Co., \_\_ AD2d \_\_, 643 NYS2d 190 (2d Dept. 1996); Lotito v. Metropolitan Prop. & Cas. Co., \_\_ AD2d \_\_, 643 NYS2d 227 (2d Dept. 1996); Metropolitan Prop. & Cas. Ins. Co. v. Markland, \_\_ AD2d \_\_, 642 NYS2d 508 (1st Dept. 1996); Ward v. Corbally, Gartland & Rappleyea, \_\_ AD2d \_\_, 639 NYS2d 460 (2d Dept. 1996) (finding offset provision valid and enforceable in accordance with Stolarz.)

In Lotito v. Metropolitan Prop. & Cas. Ins. Co., supra, the court noted that the payment of \$10,000 from a liability insurer, which was offset from the underinsured motorist coverage of \$10,000, exhausted the underinsured motorist coverage and claimant could not recover any additional monies.

Under Regulation 35-D's SUM endorsement, the reduction-in-coverage clause is valid and enforceable, and its existence must be highlighted on the declaration sheet to avoid any ambiguity.

The typical pre-Regulation 35-D SUM endorsement contains an offset or reduction in coverage for "all sums paid or payable because of bodily injury under . . . [the] workers' compensation law disability benefits law, or other similar law." This provision was upheld by the Court of Appeals in Valente v. Prudential Prop. & Cas. Ins. Co., 72 NY2d 894, 568 NYS2d 901 (1991).

In City of Newburgh v. Travis, \_\_ AD2d \_\_, 644 NYS2d 281 (2d Dept. 1996), the court held that a statute entitling a municipality to reimbursement from a third party for salary or wages, medical treatment and hospital care (General Municipal Law §207-C(6)) entitled self-insured municipal employer to an offset reducing its liability to a police officer for underinsured motorist benefits because the benefits paid to the officer/employee were analogous to "sums paid or payable under any workers' compensation, disability benefits or similar law." See also Exchange Ins. Co. v. Skomski, 224 AD2d 948, 637 NYS2d 561 (4th Dept. 1996) (offset applied for monies received by claimant pursuant to GML §207-c, Retirement and Social Security Law §307 and Federal social security disability benefits laws.) In Cummings v. Prudential Ins. Co., \_\_ AD2d \_\_, NYS2d \_\_, 1996 WL 631454 (2d Dept. 1996), the court upheld a reduction of a \$100,000 arbitration award by the amount of an award made by the United States Social Security Administration based upon the claimant's disability as a result of the accident [citing Valente, supra].

Under Regulation 35-D's SUM endorsement, this offset has been eliminated, effectively overruling Valente, supra.

Pursuant to the governing statute and all applicable endorsements, no obligation exists under a UIM or SUM policy unless and until the underlying limits of the tortfeasor's coverage have been exhausted by the payment of judgment or settlement. In Garcia v. State Farm Ins. Co., \_\_ AD2d \_\_, 648 NYS2d 340 (2d Dept. 1996), claimant's application to compel underinsured motorist arbitration was denied because she "failed to establish that she exhausted all insurance policies covering the offending vehicle."

In Sutorius v. Hanover Ins. Co., \_\_ AD2d \_\_, 649 NYS2d 183 (2d Dept. 1996), an underinsured motorist arbitration award of \$250,000 in favor of the insured was vacated

in its entirety because, contrary to the information originally presented to the arbitrator, the insured had not actually received any payment in settlement of his claim against the tortfeasor because he refused to sign a release. As stated by the court, "Because the petitioner failed to exhaust by payment the limits of an applicable bodily injury insurance policy, he was not entitled to arbitration of his underinsured motorist claim under the respondent Hanover's policy."

In General Accident Ins. Co. v. Gobetz, \_\_ AD2d \_\_, 651 NY2d 623 (2d Dept. 1996), the court reaffirmed the rule that the coverage of only one vehicle need be exhausted in order to proceed with an underinsured motorist claim. See, S'Dao v. National Grange Mut. Ins. Co., 87 NY2d 853 (1995). Thus, where the coverage of the other vehicle was exhausted, but the coverage of the host vehicle was not, the claimant passenger was allowed to proceed to arbitration based upon the underinsured status of the other driver.

The exhaustion requirement referred to above, together with the standard requirements of obtaining the UIM or SUM carrier's consent to any settlement with the tortfeasor and the prohibition against prejudicing the UIM or SUM carrier's right to subrogation against the tortfeasor, often placed pre-Regulation 35-D claimants in a "Catch-22" wherein they were stymied in their efforts to proceed with their claims. Several recent cases dealt with the pitfalls of this difficult area of practice, as well as some potential ways around the problem.

In State Farm Mut. Auto. Ins. Co. v. Hardina, \_\_ AD2d \_\_, 639 NYS2d 374 (1st Dept. 1996), the claimant failed to advise the underinsured motorist carrier of the tortfeasor's offer to settle and failed to seek, no less obtain, the carrier's consent to such settlement. Such failures were held to constitute a breach of the conditions precedent to arbitration, thereby precluding underinsured motorist arbitration. See also Allstate Ins. Co. v. Palermo, \_\_ AD2d \_\_, 641 NYS2d 51 (2d Dept. 1996).

In Hanover Ins. Co. v. Finnerty, \_\_ AD2d \_\_, 639 NYS2d 433 (4th Dept. 1996), the court noted that the settlement with a tortfeasor via a general release which contained an unambiguous reservation of the insured's claim for underinsured motorist benefits, did not prejudice the underinsured motorist carrier's subrogation rights and thus allowed the claim to proceed to arbitration.

However, in Prudential Prop. & Cas. Ins. Co. v. Bacchus, \_\_ AD2d \_\_, 640 NYS2d 237 (2d Dept. 1996), the insured was held to have violated the underinsured motorist carrier's subrogation rights and thus vitiated his UIM coverage, notwithstanding his settlement of the underlying case with a restricted or conditional release, because he settled with the tortfeasor more than three years after the cause of action had accrued and simultaneous with the issuance of the release, he issued a stipulation of discontinuance. Because more than three years had passed, the subrogation claim was time-barred. See Nationwide Mut. Ins. Co. v. MVAIC, 190 AD2d 798, 593 NYS2d 561 (2d Dept. 1993). Because of the discontinuance, the prior action was concluded and the carrier would have had to start a new action, which it was prevented from doing by virtue of the expiration of the statute of limitations. See Dachs, N. and Dachs, J., "Caveat Settlor," NYLJ, 9/10/96, p. 3, col. 1).

In Allstate Ins. Co. v. Sullivan, \_\_ AD2d \_\_, 646 NYS2d 359 (2d Dept. 1996), the underinsured motorist carrier's contention that arbitration should be stayed because the claimant settled his claim against the tortfeasor (for the maximum available limits) without first obtaining the underinsured carrier's consent was rejected by the court because the claimant had, in fact, made several efforts to obtain such consent but the carrier never responded. Indeed, the claimant went so far as to notify the carrier, in writing, that the tortfeasor had tendered its entire policy, that written consent was requested and that if the carrier did not respond within 30 days, the settlement would be effectuated. The carrier failed to respond to this letter as well. Under the circumstances, the court held that the carrier was estopped from denying coverage. (See also Tri-State Consumer Ins. Co. v. Hundley, 208 AD2d 754, 618 NYS2d 41 (2d Dept. 1994)).

In Dwyer v. GA Ins. Co. of New York, NYLJ, 6/3/96, p. 29, col. 3, (Sup. Ct., N.Y. Co.) the underinsured motorist carrier refused to consent to the insured's settlement with the tortfeasor for their full available limits. Several requests for such consent were ignored by the carrier. In declaring and directing that the insurer either consent to the settlement within 20 days "and thereby lose the right of subrogation," or "pay its insured the amount of the settlement upon execution of an assignment of the claim, the court held that "While defendant's right of subrogation against the wrongdoing tortfeasor must be protected [citing Ins. L. §3420(f)(2)], [the insurer] cannot arbitrarily withhold consent if its rights are

preserved. *Prudential Property & Casualty Co. v. King*, 198 AD2d 421." The court also referred to and relied upon the "Release or Advance" provision of Regulation 35-D.

Regulation 35-D's SUM endorsement effectively eliminates the "Catch-22" problem by establishing the "Release or Advance" procedure under which the claimant may advise the carrier in writing that he or she desires to accept a full policy limits offer from the tortfeasor, and then the SUM carrier has three options that it must exercise within 30 days thereafter: (a) consent to the settlement (via a general release), thereby waiving its subrogation right; (b) take no action, which after 30 days, will be deemed consent to the settlement; or (c) accept an assignment of the claim by paying the claimant the policy limits offered by the tortfeasor's insurer in return for the right to assume control over the claim against the tortfeasor (with the continued cooperation of the claimant).

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