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## REVISED UNINSURED MOTORIST ENDORSEMENT

In our previous column ("The New Revised Mandatory UM Endorsement and Recent Amendment to Regulation 35-D," New York Law Journal, December 9, 1996, p. 3, col. 1) we discussed the new revised mandatory uninsured motorist endorsement that is required to be attached to all, new and renewal policies effective September 1, 1996, which do not provide supplementary uninsured motorist (SUM) coverage. Because of space limitations, we were unable, after setting forth the full text of the new endorsement, to analyze its contents. In this column, we specifically examine the provisions of the new endorsement and call attention to those revisions, amendments and/or additions to this formerly well-settled area of automobile insurance that we feel are most significant.

On our initial review of the "Uninsured Motorist Endorsement -- New York," we were immediately struck by how much more closely it appeared to follow the Regulation 35-D "SUM" endorsement, rather than its own predecessor, the "Automobile Accident Indemnification Coverage -- New York" Endorsement. It appears to us that the drafters took the new SUM endorsement and attempted to convert it to a UM endorsement by omitting references to SUM and replacing them with UM - appropriate references. It remains to be seen whether or not that approach was a wise one.

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### "Motor Vehicle"

The first noticeable change in the mandatory UM endorsement brought about by the new revision thereof (albeit a relatively minor one) involves the use of the term "motor vehicle" throughout the endorsement, instead of "automobile." Insurance Law §3420(f)(1), by its specific terms, refers to an "uninsured motorist vehicle." Notwithstanding that fact, the former mandatory UM endorsement referred throughout to an "uninsured automobile." The typical pre-Regulation 35-D underinsured motorist endorsement and the Regulation 35-D SUM endorsement also use the term "motor vehicle."

The ambiguity (or potential ambiguity) caused by the former mandatory UM endorsement's reference to "automobile" was effectively eliminated by the fact that the statute further provides that if a policy does not contain the required statutory provisions, it shall be construed as though it does, and thus, policy or endorsement provisions that conflict or are inconsistent with the statute are automatically replaced by the relevant statutory provision (see Insurance Law §3420 (f)(1); *Early v. MVAIC*, 32 AD 1042, 305 NYS2d 709 (2d Dept. 1969)), it seems that amending the new endorsement in this way is

certainly a much neater and more effective way of ensuring a consistent application of the statute's intent.

The next noticeable (and more significant) changes in the endorsement appear in the definition of an "uninsured motor vehicle". Specifically, several aspects of the definition of a "hit-and-run" motor vehicle have -- or may have-- been changed.

We have previously noted that in drafting Regulation 35-D's SUM endorsement, which also contains a definition of a hit-and-run vehicle, the Insurance Department essentially incorporated the hit-and-run provisions of the prior mandatory UM endorsement, but with two noticeable exceptions. First, under the former mandatory UM endorsement, it was the identity of either the operator or the owner of the offending vehicle that must be ascertained or unascertainable in order for it to qualify as an "uninsured" motorist vehicle. The specific language of the endorsement was, "there cannot be ascertained the identity of either the operator or the owner of such hit-and run automobile (emphasis added)."

By contrast, the language of both the MVAIC Act and Regulation 35-D's SUM endorsement was more restrictive. Pursuant to Insurance Law §5218(a), the appropriate test is "when the identity of the motor vehicle and of the operator and owner cannot be ascertained (emphasis added)." Under Regulation 35-D's SUM endorsement, a vehicle is a hit-and-run when "neither owner nor driver can be ascertained (emphasis added)."

Secondly, the former mandatory UM endorsement required the claimant to file a statement under oath with the insurer stating that he or she had a cause of action arising out of an accident with a person or person whose identity is unascertainable "within 90 days" after the accident. By contrast, in Regulation 35-D's SUM endorsement, the Insurance Department omitted the 90-day time limit and, instead, set forth no time period for providing the statement under oath.

Although these discrepancies were brought to the Department's attention prior to the final effective date of Regulation 35-D (see Dachs, N. and Dachs, J., "SUM Regulation Redux", NYLJ, June 9, 1992, p.3, col. 1), no changes were made in the SUM endorsement.

#### Two Definitions

For some reason, when drafting the new, revised mandatory UM endorsement -- perhaps because as we noted earlier, it appears that the drafters were attempting to

combine the SUM endorsement with UM - related provisions -- the endorsement contains two separate definitions of a hit-and-run vehicle. The first definition, which appears at section 2 (b)(2)(i), (ii), within the definition of a "uninsured motor vehicle," appears to be an exact duplication of Regulation 35-D's SUM endorsement's section (c)(2)(i), (ii). Thus, under this first definition, the insured must prove that "neither the owner nor the driver can be identified," but need not file the statement under oath within 90 days. However, the second definition, which appears at section 2(c), under the heading "Hit-and-Run Motor Vehicle" appears to be an exact duplication of the prior mandatory UM endorsement's section II (c). Thus, under this second definition, the insured must prove that "there cannot be ascertained the identity of either the operator or the owner of "such `hit-and-run motor vehicle", but must file the statement under oath within 90 days.

Obviously, the existence of two contradictory definitions within the four corners of a single endorsement creates an ambiguity which will be construed against the insurer. What makes this even more interesting is that each of the definitions contains one aspect that is pro-claimant and one that is pro-insurer. Will the claimant be able to construe both provisions against the insurer by picking and choosing the portions that are most beneficial to him or her? Will the insurer be able to argue that the second definition is obviously superfluous and that the only one that really counts is the one that defines an "uninsured motor vehicle"? More importantly, shouldn't the Insurance Department step in to clarify this obviously inadvertent ambiguity?

#### "Uninsured Motor Vehicle"

Also within the definition of an "uninsured motor vehicle", the new revised mandatory endorsement contains a new provision that includes a vehicle for which "There is a bodily injury liability insurance coverage or bond applicable to such motor vehicle at the time of the accident, but: (1) "The amount of such insurance coverage or bond is less than the UM limits of this policy." See section 2 (b)(3)(i).

Because the UM limits of a policy governed by the new mandatory UM endorsement are, by definition, the minimum limits allowed by law, i.e., "25/50", this provision in effect means that a motor vehicle will be deemed uninsured when its coverage limits are less than New York's minimum limits. This will, presumably, only occur when the offending

vehicle is an out-of-state vehicle from a state with coverage limits less than New York's and where the insurer writing such coverage is not authorized to do business in New York. See Insurance Law §5107.

It is significant to note that the original version of the new mandatory UM endorsement also included within the definition of an "uninsured motor vehicle" a vehicle where a policy or bond was applicable at the time of the accident, but "The amount of such insurance coverage or bond has been reduced, by payments to other persons, insured in the accident to an amount less than the UM limits of this policy."

However, by "Supplement No. 2 to Circular Letter No. 1995-15, dated June 25, 1996, the endorsement was "corrected" by deleting the aforementioned provision in its entirety "because the language, as originally filed and approved, would have broadened uninsured motorist coverage in certain instances beyond that contemplated by §3420 (f)(1) of the Insurance Law and beyond the requirements of Article 52 of the Insurance Law."

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#### Coverage Denied

Finally, within the endorsement's definition of an "uninsured motor vehicle", a further change has been made which may have a substantial impact on future claims, depending upon how the courts interpret this change. Whereas the former mandatory UM endorsement includes a vehicle for which there was an applicable policy or bond "but the company writing the same disclaims liability or denies coverage thereunder," and the Regulation 35-D's SUM endorsement, by contrast, refers only to an insurer who "denies coverage," but adds reference to an insurer who "is or becomes insolvent," the new revised UM endorsement simply refers to an insurer who "denies coverage."

Is there a significant difference between disclaimer of liability and denial of coverage? Did the Insurance Department intend to create such a distinction by omitting reference to one non-coverage event and not the other?

As to insolvency, prior to Regulation 35-D, a distinction arose between insurance insolvencies covered or not covered by the New York Property & Liability Insurance Security Fund. An insolvency of a domestic insurer covered by The Fund would not be deemed uninsured; an insolvency by an insurer not licensed to do business in New York and, therefore, not covered by The Fund, would be deemed uninsured. Compare *State-Wide Ins. Co. v. Curry*, 43 NY2d 298, 401 NYS2d 196 (1977) with *Taub v. MVAIC*, 31

AD2d 378, 298 NYS2d 212 (1st Dept. 1969); *Travis v. General Accident Group*, 31 AD2d 20, 294 NYS2d 914 (3d Dept. 1968).

Because Regulation 35-D's SUM endorsement did not make any distinction between covered and non-covered insolvencies, it was generally assumed that in either event, an insolvency would lead to the conclusion of uninsurance. Does the Department's latest omission of all reference to insolvency, signal that it no longer deems insolvency to constitute uninsurance? Or, is this a signal that the interpretation should revert back to the way it was under the former mandatory UM endorsement, *i.e.*, dependent upon coverage or non-coverage by the Security Fund?

#### Definitional Exclusions

The new revised mandatory UM endorsement adds a new exclusion to the definition of an "uninsured motor vehicle", in section 2(b)(4)(i), as follows: "The term 'uninsured motor vehicle' does not include a motor vehicle that is: (1) insured under the liability coverage of this policy." In addition, the exclusion in the former endorsement for "an automobile owned by the named insured or spouse" is also expanded upon in the new endorsement, in section 2(b)(4)(ii), as follows: "owned by you, as the named insured and, while residents of the same household, your spouse and relatives of either you or your spouse (emphasis added)."

The new endorsement makes a subtle change in the definition of "occupying," similar to the change that was made in Regulation 35-D's SUM endorsement. Whereas the former mandatory UM endorsement included one "alighting from" a vehicle, the new endorsement refers instead to "exiting from" a vehicle. It is unclear at best whether this is a distinction with a difference.

The former mandatory UM endorsement had three specific exclusions from coverage; the new endorsement has five. The new exclusions include for:

"bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for at least the minimum bodily injury liability limits and UM limits required by law by the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of this policy," and for "non-economic loss, resulting from bodily injury to an insured and arising from an accident in New York State, unless the

insured has sustained serious injury as defined in Section 5102(d) of the New York Insurance Law."

In Condition 1, entitled "Policy Provisions", the former mandatory UM endorsement stated that "none of the Insuring Agreements; Exclusions or Conditions of the policy shall apply to the insurance afforded by this coverage except `Duties after an Accident or Loss'." The new endorsement adds as provisions of the policy that shall apply, "Fraud" and "Termination", if applicable.

Condition 5 of the former endorsement entitled "UM limit of liability", has been renumbered Condition 6 and amended by increasing the coverage limit amounts from \$10,000 per person to \$25,000 per person, and from \$50,000 for two or more persons to \$100,000 for two or more persons. As before, the per accident limit is made subject to the per person limit. In addition, a new subdivision (b) has been added, which specifically provides for the increase in the limits in the case of death to \$50,000 per person and \$100,000 for two or more persons, which was enacted by amendment to Ins. L. §3420(f)(1) in 1979, but which was not previously made a part of the endorsement.

#### "Offsets"

Significantly, under the former mandatory UM endorsement's Limits of Liability section, the amount payable was to be reduced by three separate offsets:

(1) "all sums paid to one or more insureds on account of such bodily injury by or on behalf of (a) the owner or operator of the uninsured automobile and (b) any other person or persons jointly or severally liable together with such owner or operator for such bodily injury;

(2) all sums paid to one or more insureds on account of bodily injury sustained in the same accident under any insurance or statutory benefit similar to that provided by this coverage; and

(3) the amount paid and the present value of all amounts payable on account of such bodily injury under any Workers' Compensation Law, exclusive of non-occupational disability benefits."

While the new endorsement maintains or repeats the first two offsets, it completely omits the third, which deals with Worker's Compensation benefits. This is akin to the approach taken in Regulation 35-D's SUM endorsement, which also eliminated the

reduction-in-coverage for Workers' Compensation benefits, effectively overruling Valente v. Prudential Prop. & Cas. Ins. Co., 77 NY2d 894, 56 NYS2d 901 (1991).

Also clearly taking its cue from Regulation 35-D's SUM endorsement, the drafters of the new mandatory UM endorsement have made applicable to the basic UM coverage, for the first time, a condition known as "Release or Advance" (Condition 8).

Recognizing that even in the uninsured motorist situation, where there are or may be additional tortfeasors involved, the UM carrier could create a "Catch-22" for the claimant by failing to give the required consent to a settlement, this provision allows the insured to settle with the other tortfeasor with a general release after thirty days written notice to the UM carrier unless the UM carrier instead agrees to advance the settlement sum to the claimant in return for cooperation in a subrogation action against the uninsured tortfeasor.

The new endorsement also adds a new Condition 9, "Non-Duplication," which expressly provides that the UM coverage "shall not duplicate" Workers' Compensation benefits, non-occupational disability benefits under Article 9 of the Workers' Compensation Law; any valid or collectible motor vehicle medical payments insurance; or amounts recovered from sources other than motor vehicle bodily injury insurance policies or bonds.

Finally, the "Trust Agreement" in the former mandatory UM endorsement, set forth the insurer's right, in the event of a payment of UM benefits, settlement or judgment against "any person or organization legally responsible for the injury" to the extent of the payment, requested the insured to hold such rights of recovery in trust, do nothing to prejudice such rights and cooperate in any subrogation action against such person or organization.

In its stead, the new endorsement contains a "subrogation" provision. This similarly provides for the right of recovery of the amount of the UM payment against "any person legally responsible for the bodily injury or loss", requires the insured to "do whatever is necessary to transfer this right" to the insurer and "except as permitted by Condition 8" ("Release or Advance"), requires the insured to "do nothing to prejudice this right."

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#### Conclusion

Winston Churchill once wrote that "There is nothing wrong in change . . . if it is in the right direction. To improve is to change, so to be perfect is to have changed often."

There is no question that the mandatory uninsured motorist endorsement, which had remained intact since its creation in 1959, was ready for some change and improvement, if for no other reason than that the minimum required limits had, after so many years, finally been increased. Nor can it be doubted that some of the improvements originally developed in the context of the Regulation 35-D's SUM endorsement could also have beneficial application and effect in the context of the mandatory UM coverage.

It appears that the Insurance Department's recent effort at amending and revising the mandatory UM endorsement is a well-meaning and well-considered approach to once again making it easier to collect benefits, reduce confusion and resolve disputes in a complicated area of the law. Once some of the apparently inadvertent kinks are worked out, such as the elimination of the hit-and-run ambiguity referred to above, this new endorsement will certainly be a source of pride for the Department.