

## **UNINSURED/UNDERINSURED MOTORIST POTPOURRI**

As readers of this column are certainly aware, the area of uninsured/underinsured motorist coverage is one of the busiest and most constantly changing areas of insurance law. In this month's column, we discuss two of these issues and their recent treatment by the courts.

### **COMBINED SINGLE LIMIT SUM TRIGGER**

One of the more interesting underinsured motorist cases to pass through the courts in recent years is *Prudential Prop. & Cas. Ins. Co. v. Szeli*.<sup>1</sup> Indeed, we have tracked the progress of that case, which deals with the issue of whether the tortfeasor in a multiple-victim automobile accident should be deemed underinsured where he has a "single limit" policy providing a \$300,000 limit per accident for both bodily injury and property damage liability, while the insured has a "split limit" policy containing a bodily injury limit of \$100,000 per person and \$300,000 per accident and a separate limit for property damage liability, in two prior columns in this space.<sup>2</sup> The most recent column was written after the Appellate Division, Second Department reversed the order of the Supreme Court, Westchester County, which had denied Prudential's petition to stay arbitration, and held that the trial court "improperly reduced the single limit liability (\$300,000) of the tortfeasor's policy by an unspecified amount for property damage, and concluded that something less than that amount was available for bodily injury under his policy. Rather, the full \$300,000 should have been the comparable amount."<sup>3</sup> The Second Department's resolution of this issue, and the insurer's victory in that case was short-lived, however, because the Court of Appeals, which granted leave to appeal, has now reversed the Second Department and agreed with the trial court, finally resolving the issue in favor of the claimant.<sup>4</sup> As will be seen, however, the individual claimant's victory in *Prudential v. Szeli* may not be the great victory for claimants generally that it may at first blush appear to be.

### **Facts**

Briefly stated, the facts in *Prudential v. Szeli* are, as follows: Szeli and his two teenage companions were struck and injured by a car as they walked along the road. The car that struck them contained a single liability limit of \$300,000 per accident, for both personal injury and property damage. Szeli was insured under a policy issued by

Prudential to his father, with split limits of \$100,000 per person and \$300,000 per accident. That policy also provided the same limits for underinsured motorist coverage. Asserting that his bodily injury coverage, which, he argued, was the \$300,000 per accident limit, not merely the \$100,000 per person limit, was greater than the tortfeasor's bodily injury coverage (\$300,000, less some amount for property damage coverage), and, therefore, the tortfeasor was underinsured as to him, Szeli demanded arbitration under the Prudential underinsured motorist policy.

### **Issues Presented**

In an Opinion dated June 9, 1994, written by Justice Simons for a unanimous bench, the Court of Appeals once again reaffirmed that the proper comparison for purposes of determining whether a vehicle is underinsured, in accordance with the statute (Ins. L. §3420(f)(2)) is between the insured's bodily injury coverage and the tortfeasor's bodily injury coverage.<sup>5</sup> The Court noted, however, that this seemingly "straightforward" comparison "becomes less clear and is not addressed directly by the statute, when the two policies to be compared employ different limit structures." Accordingly, as viewed by the Court, the *Szeli* case presented two related issues: (1) when there are multiple victims in an accident but a single claimant under a policy providing SUM coverage, should the insured's bodily injury limit for purposes of the comparison be the per person amount or the per accident amount?; and (2) for purposes of the trigger comparison, should the tortfeasor's entire single limit be considered his bodily injury limit even though property damage coverage is also contained in the limit?

### **Arguments**

Among the findings by the Court was that Insurance Law §3420(f)(2) was enacted to allow an insured "to obtain the same level of protection for himself and his passengers which he purchased to protect himself against liability to others" (State Executive Dept. Memorandum, 1977 McKinney's Session Laws of NY, at 2446). Thus, "by its terms, the statute calls for a facial comparison of the policy limits without reduction from the judgment of other claims arising out of the accident."

Prudential argued that the facial comparison in this case was clear: The tortfeasor had \$300,000 available; Szeli had, at most, the \$300,000 limit allowed per accident. Because Szeli's policy did not provide greater coverage, the tortfeasor was not

underinsured. In any event, Prudential argued, it was Szeli's limit of \$100,000 per person -- not the \$300,000 per accident -- that should have been used in the comparison. Though three persons were injured in the accident, only one claimed under the Prudential policy. Thus, Prudential reasoned, the logical comparison was the per person limit in each policy (\$300,000 in the tortfeasor's versus \$100,000 in the insured's).

On the other hand, Szeli responded that Prudential's facial comparison was flawed by its failure to take into account the fact that property damage liability was also covered by the tortfeasor's \$300,000 single limit. Under Vehicle and Traffic Law §311, a New York motorist is required to have at least \$5,000 in property damage liability coverage. Because the tortfeasor's policy met the statutory requirements only if it was construed as providing the property liability minimum, Szeli contended that, at most, the tortfeasor had \$295,000 available for bodily injury coverage. Second, Szeli argued that in an accident involving more than one victim, it is the per accident limit, not the per person limit, that is relevant. Thus, Szeli concluded, his policy provided \$300,000 in bodily injury coverage, the tortfeasor's policy contains no more than \$295,000 in coverage, and SUM coverage was properly invoked.

### **Court of Appeals Decision**

In responding to the questions presented to it, the Court of Appeals noted that the statute itself did not clearly resolve the issue, and therefore, it referred back to the essential purpose of the underinsured motorist statute, as stated above, *i.e.*, to provide the insured with the same level of protection he or she would provide to others were the insured a tortfeasor in a bodily injury accident. According to the Court, "[t]he necessary analytical step, then, is to place the insured in the shoes of the tortfeasor and ask whether the insured would have greater bodily injury coverage under the circumstances than the tortfeasor actually has." Under the facts and circumstances of the *Szeli* case, a multiple-victim accident, the Court concluded that "Szeli's policy with Prudential would provide \$300,000 in coverage for bodily injuries plus an additional amount for any property damage. The tortfeasor's policy, by contrast, provides \$300,000 for bodily injuries less any amount payable for property damage." Viewed in this light, the Court agreed with Szeli and the Supreme Court below that the tortfeasor was underinsured for purposes of Insurance Law §3420(f)(2).

Interestingly, the Court conceded that "in circumstances where there is no property damage, as here, the tortfeasor's single limit policy provides coverage equivalent to that of the Szeli policy with Prudential." However, the Court explained that "the determination of underinsurance coverage under Insurance Law §3420(f)(2) is to be made facially from the policies and not by reference to the particular claims actually arising from any given accident." Because the tortfeasor's policy "is facially valid under New York law only if it is construed to contain the required minimum amount of property damage coverage," the Court did not need to, and, therefore, did not, decide "precisely how much of the tortfeasor's coverage is properly assignable to property damage liability" insofar as "there can be no question that a policy facially offering \$300,000 exclusively for bodily injury coverage than one facially offering \$300,000 divided between bodily injury and property damage."

The Court further rejected Prudential's assertion that the per person limit (\$100,000) in its policy rather than the per accident limit (\$300,000) should be employed in the underinsurance comparison when there is a multiple-victim accident but only one underinsured claimant. As stated by the Court, "under Prudential's view, the bodily injury limit to be employed in the comparison would turn on the number of insureds making SUM claims irrespective of the number of persons insured in the accident, even though it is the number of injured persons that is relevant to determining the applicable limit under the insured's liability coverage (\$100,000 per person and \$300,000 per accident). Prudential's approach appears to confuse two separate operations: the determination of whether underinsurance is available in the first instance, on the one hand, and, on the other, the determination of the limit to be applied under the underinsurance endorsement once SUM coverage has in fact been triggered. While the number of insureds making claims will of course be relevant (in a split limit SUM endorsement) to the latter determination -- i.e., the limit of liability once SUM coverage is triggered -- the determination of whether SUM coverage is available at all is made without reference to the terms of the SUM endorsement. Instead, that determination requires a comparison of each policy's bodily injury liability coverage as it in fact operates under the policy terms applicable to that particular coverage. Only by doing that comparison is it possible to make the required

determination: whether the tortfeasor has less bodily injury liability coverage than the insured."

Accordingly, the Court reversed the Order of the Appellate Division and denied Prudential's petition to stay arbitration.

### **Unanswered Questions**

While the Court of Appeals' decision in *Prudential v. Szeli* certainly answers a lot of questions, it leaves many other questions unanswered. For example, although the Court noted that Insurance Law §3420, by its terms, "calls for a facial comparison of the policy limits without reduction from the judgment of other claims arising from the accident," it specifically and intentionally did not address the effect, if any, that Regulation 35-D (not applicable to this case) would have on "the availability of underinsurance coverage where other claims have been paid." In point of fact, under Regulation 35-D, 11 NYCRR §60-2.3(e)(1)(c)(3)(ii), a vehicle will be deemed "uninsured" (underinsured) if "there is a bodily injury liability insurance coverage or bond applicable to such motor vehicle at the time of the accident but . . . the amount of such insurance coverage or bond has been reduced, by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of this [the new SUM] policy . . . ."

In addition, the Court's failure to decide how much of the tortfeasor's coverage is properly assignable to property damage liability will likely result in litigation over that issue in an appropriate pre-Regulation 35-D case, if such exists. For example, it having been determined that the single limit policy must be reduced by at least the required minimum amount of property damage coverage, i.e., \$5,000, but it not having been determined how much more of the coverage should be assigned to property damage, where, unlike the *Szeli* case, the amount of the claimant's coverage does not precisely match the tortfeasor's coverage, e.g., the claimant's coverage is \$250,000 and the tortfeasor's single limit coverage is \$300,000, how will it be determined whether the tortfeasor's bodily injury coverage is less than the claimants? Indeed (as argued by Prudential), the Court's decision raises the possibility, if not actuality, because of the reduction of a single limit policy by some undefined, hypothetical amount for property damage, that underinsured motorist coverage would be triggered in every case where the tortfeasor's "single limit" policy is measured against the claimant's per person/per accident limits of greater than the

statutory minimum. (In point of fact, Szeli argued before the Court of Appeals that "any vehicle insured under a single limit policy should be deemed underinsured as to a vehicle having separate bodily injury and property damage limits.")

### **Good News/Bad News**

It must also be noted that the court's decision in Szeli is not necessarily good news for claimants; while it certainly was an exciting victory for Mr. Szeli, and those similarly situated, we believe that there is no cause for claimants' attorneys to be dancing in the streets. The day may come when the Szeli decision comes back to haunt a claimant and actually serve to destroy his or her case, for it must be remembered that it is not only tortfeasors that carry single limit policies. The holder of such a policy can just as easily be the claimant. Indeed, Regulation 35-D recognizes that post October 1, 1993 SUM endorsements may be issued with a combined single limit (see Condition 6(b), f.n. 1). In such a situation, applying the same logic as above, underinsured motorist coverage might never be triggered because the underinsured motorist or SUM carrier would argue that the claimant's single limit should be reduced by a real or potential large property damage amount to a level at or below the limits of the tortfeasor's policy.

Indeed, it would appear that the only time it would be clear that underinsured motorist coverage was triggered in cases involving combined single limit policies would be either where, as in Szeli, the policy limits of the tortfeasor's single limit and the claimant's split limits are equal, or where both the tortfeasor and the claimant had combined single limits policies and the tortfeasor's single limit was less than the claimant's.

### **MULTIPLE TORTFEASORS**

As we have written many times<sup>6</sup> once it is determined that underinsured motorist or SUM coverage is triggered, i.e., is definitionally available, among the conditions that must be satisfied before such coverage becomes applicable and an underinsured motorist claim can be made is the requirement that the claimant exhaust "the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident." Ins. L. §3420(f)(2). As the Court of Appeals stated in Federal Ins. Co. v. Watnick,<sup>7</sup> "the statutory scheme requires primary insurers to pay every last dollar, and requires plaintiffs to accept no less, prior to the initiation of an underinsurance claim." The question that naturally arises is how this exhaustion requirement applies when there are multiple tortfeasors

(defendants) involved in the accident -- do all of the tortfeasors have to pay their policy limits before the claimant can demand underinsured motorist arbitration? This interesting question has been dealt with recently by the courts, with interesting results.

### **Uninsured Context**

At the outset, it should be noted that in the context of uninsured, as opposed to underinsured, motorist coverage, it has been held universally that a claimant's right to recover uninsured motorist benefits for injuries sustained in an accident with an uninsured tortfeasor is in no way altered or diminished by the fact that the accident may also have involved a joint tortfeasor that was not uninsured. Thus, for example, a claimant involved in a three-car collision would not be barred from obtaining uninsured motorist benefits under his or her own policy as long as one of the vehicles involved in the accident was uninsured.<sup>8</sup>

### **Underinsured Context**

In the context of underinsured motorist coverage, the law appears to be less settled as a result of some recent decisions. As usual, discussion of this issue must begin with an examination of the statute.

Insurance Law §3420(f)(2) provides, inter alia, that supplementary uninsured (underinsured) motorist coverage is triggered "if the limits of liability under all bodily injury liability bonds and insurance policy of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by the claimant's policy. This singular reference to "another" vehicle would appear to be a clear indication that a claimant can pursue an underinsured motorist claim as long as at least one of the offending insured motor vehicles has paid its policy limits (assuming they are less than claimant's own limits).

### **First Department Case**

In Colonial Penn Ins. Co. v Salti,<sup>9</sup> the claimants, the Saltis, were passengers in a motor vehicle owned and operated by Max and Ellen Rayner, which was struck head-on by a crossover vehicle owned by Michael Petryszyn and operated by Eugene Petryszyn, who was cited for driving while intoxicated. The host vehicle was covered by a liability policy with limits of \$100,000/\$300,000; the crossover vehicle was covered by a liability policy with limits of \$10,000/\$20,000. After settling their actions against the Rayners and

the Petryszyns for an aggregate of \$145,000, consisting of the full \$20,000 of the Petryszyn policy and \$125,000 of the full \$300,000 of the Rayner's policy, the Saltis demanded underinsured motorist coverage under their own policy. The policy at issue, written by Colonial, provided, as follows:

"The Company shall not be obligated to make any payment because of bodily injury to which this insurance applies and which arises out of the use of an underinsured highway vehicle until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgment or settlements."

The policy further defined an "underinsured highway vehicle" as :

"A highway vehicle with respect to the use of which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under this insurance."

Colonial moved to stay arbitration on the ground that the Saltis, by settling within the Rayner's \$300,000 policy limits, had not exhausted "the limits of liability under all . . . policies applicable at the time of the accident," as required under its policy. The trial court and the First Department disagreed and denied the stay.

According to the court, the clause "the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident" must be read in the context of the entire endorsement, and, as such, so as to relate to the underinsured highway vehicle only, and not to the total number of vehicles involved in the accident. Ruling on a Florida policy, but enunciating the interpretation likely to be given to the same provision in New York policies, the First Department stated that "To interpret the insuring agreement so that the insurer's obligation to pay becomes operative only after all insurance applicable to all vehicles involved in the accident is exhausted, as Colonial contends, would emasculate the endorsements's intended effect . . . , to provide coverage over and above the limits of the tortfeasor's coverage . . . . If Colonial's interpretation were accepted, the endorsement would be inoperative except in the instances of a single car accident involving an underinsured vehicle or the multiple car accident where the aggregate applicable insurance is less than the limits of Colonial's policy. The endorsement would be inapplicable as long as any vehicle involved in the accident was covered with liability limits in excess of the Salti's coverage. It would not matter that the party responsible for

the operation of such vehicle might not be liable for the accident. Obviously, such a result was never intended, and this case illustrates the point."

### **Second Department Case**

Three years later, in *Passaro v. Metropolitan Prop. & Cas. Ins. Co.*,<sup>10</sup> where two plaintiffs were injured as passengers in one car involved in a two-car accident, the underinsured motorist carrier's argument, that the statute clearly conveys the intent that the "exhaustion by payment" provision extends to the total number of vehicles involved in the accident, was rejected by the trial court and the Second Department. Finding, again, that the exhaustion clause must be read in conjunction with the previously quoted obligation to pay clause, which triggers coverage when the limits of "another motor vehicle" are less than the claimants,'

the court held that "the claimant is not barred from obtaining underinsured motorist benefits as long as any tortfeasor's liability policy limits are less than the uninsured/underinsured motorist coverage [sic] and are fully exhausted by the injured party. Thus, by the use of the term `another motor vehicle,' the Legislature is presumed to have intended that the limits of the underinsured motorist coverage [sic] be compared only to the vehicle or vehicles which the claimant has turned into underinsureds by exhausting the applicable policy limits, regardless of the available coverage from the other offending vehicle of vehicles."<sup>11</sup> Furthermore, the court noted that this conclusion is consistent with the legislative intent, as set forth in the memorandum of the State Executive Department in its summary of the provisions of the bill, which stated that "'supplementary uninsured motorists insurance . . . would be excess to the liability coverage of the other automobile in the accident" and that, "Thus by purchasing this option, the insured would obtain the same level of protection for himself, and his passenger which he purchased to protect himself against liability to others and would not be limited to the coverage of the other automobile," (Emphasis in original.) Finally, the court noted that this result was consistent with the well-established rule, set forth above, with respect to uninsured motorist coverage.

It is clear that, although the *Passaro* court applied the incorrect comparison, i.e., as noted above, it should have compared the tortfeasor's bodily injury coverage to the claimant's bodily injury coverage, rather than the claimant's underinsured motorist coverage, it held, consistent with *Salti, supra*, that only one and not all of the tortfeasor's

coverages had to be exhausted in order to allow the underinsured motorist claim to proceed.

The *Passaro* holding was more recently cited and followed in the Nassau County Supreme Court case of *Matter of Valley Forge Ins. Co. v. O'Brien*.<sup>12</sup>

### **First Department Again**

The law appeared to be well-settled on this question until the First Department handed down its decision several months later in *Garcia v. Mercado*.<sup>13</sup> The plaintiff in that case, a passenger, was injured in a two-car accident. The car in which he was riding had liability limits of \$100,000/\$300,000 and \$100,000 underinsured motorist coverage. The other vehicle had \$10,000/\$20,000 liability coverage, which coverage was offered in full in settlement of plaintiff's claim against the owner and operator of that vehicle. Without a disposition of plaintiff's liability claim against the host driver and owner, plaintiff attempted to proceed to arbitration of an underinsured motorist claim. The trial court granted plaintiff leave to proceed to arbitration. On appeal, however, the First Department reversed and sent the case back to the trial court for a trial against the hosts, on the ground that the plaintiff's request for arbitration was "premature."

Although, interestingly, neither party produced a copy of the underinsured motorist policy involved, and the court, therefore, proceeded on the parties' agreement that Insurance Law §3420(f)(2) was dispositive, the court did not construe the statute as a whole, as the *Salti* and *Passaro* courts had previously mandated, but instead, found on the basis of the exhaustion clause alone, that plaintiff was obligated to exhaust "the limits of liability of all bodily injury . . . insurance policies applicable at the time of the accident," but did not do so. Specifically, the court held that "only 10,000, at most, of available insurance has been exhausted" and that "plaintiff's underinsured motorist claim must await the disposition, by settlement or judgment, of her claims against both [the host and the other tortfeasors]. As stated by the court, "according to this record, there is, as a result of the accident, \$110,000 of insurance available, which must be exhausted, by settlement or judgment, before the underinsured motorist provision is triggered."

### **Lower Court Case**

It is interesting to note that nowhere in the Garcia decision did the First Department cite, no less attempt to distinguish, its own prior decision in Salti and/or the Second Department's decision in Passaro. Eight months later, in Hanover Insurance Co. v. Gaeta,<sup>14</sup> Justice Edward Lehner was presented with yet another multi-defendant underinsured motorist case, and, by that time, a conflict among the cases and the Departments. In Gaeta, the claimant was injured as a passenger in a vehicle owned by Raymond Morgan, which was involved in a three-car accident. The Morgan vehicle was insured by Liberty with limits of \$350,000/\$1,000,000. The third vehicle was insured by Selective Ins. Co. with liability limits of \$100,000. At the time of the accident, Gaeta as living with her parents and therefore covered by their auto policy issued by Hanover, with liability and supplementary uninsured motorist limits of \$300,000/\$500,000.

Gaeta's personal injury action against the drivers and owners of all three vehicles was settled in open court for a total of \$50,000, consisting of \$10,000 from Liberty -- which, after payment to other individuals injured in the accident, constituted exhaustion of that policy -- \$15,000 from Selective -- the balance of its \$100,000 policy being paid out to others -- and only \$25,000 from Kemper. In response to Gaeta's subsequent demand for underinsured motorist arbitration serve upon Hanover, Hanover moved to stay arbitration on the ground that the Kemper policy had not been exhausted.

In its petition to stay arbitration, Hanover relied upon the provision in its policy that provided that "we will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payments or judgment or settlements." Justice Lehner noted that this language tracked the statute's exhaustion clause, cited above, but also noted that the preceding clause of the statute, *i.e.*, the obligation to make payment clause, referred to the coverage of "another motor vehicle." Justice Lehner took note of the fact that "it has been held in the Second Department that when these two clauses are read together they demonstrate a legislative intent that `the claimant is not barred from obtaining underinsured motorist benefits so long as any tortfeasor's liability policy limits are less than the uninsured/underinsured motorist coverage and are fully exhausted by the injured party'" -- citing Passaro, *supra*, and even Valley Forge Ins. Co. v. O'Brien, *supra*. He did not, however, take note of the First Department's earlier decision in Salti, and, instead, only referred to the subsequent decision in Garcia,

supra, which "came to a contrary result." Because he felt bound and constrained by the recent decision in his own Department, Justice Lehner held that, following Garcia, because Gaeta had settled for "significantly less than the available liability coverage provided by the Kemper policy," her demand for arbitration would be stayed that is, if Hanover had timely moved to stay arbitration. Only because, in fact, Hanover's petition was filed beyond the statutory 20-day period, Justice Lehner denied the Petition to stay.

#### **Regulation 35-D**

Once again, into this morass has stepped Regulation 35-D to clarify the state of the law. The new SUM endorsement prescribed by the Regulation provides that the SUM carrier will pay "only after the limits of liability have been used up under all motor vehicle bodily injury liability insurance policies or bonds applicable at the time of the accident to any one person who may be legally liable for the bodily injury sustained by the insured." (Emphasis added.)<sup>15</sup> Under this endorsement provision, applicable to policies issued on or after October 1, 1993, it is clearly the coverage of only a single vehicle and not the total number of vehicles involved, that must be exhausted as a condition precedent to arbitration.

## Footnotes

1. 150 Misc.2d 72, 568 NYS2d 284 (Sup. Ct. Westchester County 1991), revd. 193 AD2d 748, 598 NYS2d 55 (2d Dept. 1993), revd. \_\_NY2d\_\_, \_\_NY2d\_\_ (1994) (NYLJ June 10, 1994, p. 25, col. 1).
2. See Dachs and Dachs, "Combined Single Limit Policies and SUM Trigger," NYLJ May 12, 1992, p. 3, col 1; "Combined Single-Limit Trigger, Resolved," NYLJ July 13, 1993, p. 3, col. 1.
3. See *Prudential Prop. & Cas. Ins. Co. v. Szeli*, 193 AD2d 748 598 NYS2d 55 (2d Dept. 1993).
4. \_\_NY2d\_\_, \_\_NYS2d\_\_ (1994) (NYLJ June 10, 1994), p. 25, col. 1).
5. See also, *Maurizzio v. Lumbermens Mutual Ins. Co.*, 73 NY2d 951 (1989); *Automobile Ins. Co. of Hartford, Conn. v. Stillway*, 165 AD2d 572, 575 (1st Dept. 1991); *Fireman's Fund Ins. Co. v. Freda*, 156 AD2d 364, 365 (2d Dept. 1989); *Nationwide Ins. Co. v. Figliomeni*, 147 AD2d 942, 942-943 (4th Dept. 1989); *DiStasi v. Nationwide Ins. Co.*, 132 AD2d 305, 310 (3d Dept. 1987).
6. See e.g., Dachs and Dachs, "A Call for Legislative Action," NYLJ August 14, 1990, p. 3, col. 1; "The Catch in Underinsured Motorist Coverage," NYLJ June 11, 1991, p. 3., col. 1.
7. 80 NY2d 539, 592 NYS2d 624 (1992).
8. See *Sovic v. Aetna Life & Casualty Co.*, 127 AD2d 995, 513 NYS2d 44 (4th Dept. 1987); *Electric Ins. Co. v. Woods*, 101 AD2d 840, 475 NYS2d 296 (2d Dept. 1984); *O'Brien v. Aetna Casualty & Surety Co.*, 33 AD2d 1085, 307 NYS2d 689 (3d Dept. 1970); *State-Wide Ins. Co. v. Lang*, 30 AD2d 974, 294 NYS2d 661 (2d Dept. 1968); *Powers v. Continental Ins. Co.*, 29 AD2d 1041, 289 NYS2d 467 (3d Dept. 1968).
9. 84 AD2d 350, 446 NYS2d 77 (1st Dept. 1982).
10. 128 Misc.2d 21, 487 NYS2d 1009 (Sup. Ct. Queens Co. 1985), affd. on opn. below, 124 AD2d 647, 507 NYS2d 836 (2d Dept. 1986).
11. 128 Misc.2d at 25.
12. N.O.R., NYLJ April 22, 1993, p. 28, col. 6 (Sup. Ct. Nassau County [Winick, J.]).
13. 194 AD2d 334, 598 NYS2d 259 (1st Dept. 1993).
14. N.O.R., NYLJ February 17, 1994, p. 24, col. 5 (Sup. Ct. N.Y. County).
15. See 11 NYCRR §60-2.3(e), Condition 9.

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