

THE NEW REVISED MANDATORY UM ENDORSEMENT AND
RECENT AMENDMENT TO REGULATION 35-D

Much time and effort has been devoted in this column in the past several years to keeping our readers abreast of the numerous recent developments in the seemingly ever-changing area of supplementary uninsured motorist or underinsured motorist coverage, governed by Insurance Law §3420 (f)(2). Of course, the critical impetus for the sea of change in this area was the promulgation by the State of New York Insurance Department of Regulation 35-D, 11 NYCRR §60-2, et seq., which, effective October 1, 1993, created a new standard supplementary uninsured motorist endorsement "in order to reduce confusion regarding the coverage, make it easier to collect benefits and, when disputes arise, make it simple to resolve those disputes."

As befitting such a monumental and significant change in the law, Regulation 35-D was introduced to the public and the bar with a full degree of hoopla -- lectures were given and articles were written analyzing its provisions, it was published as a "Proposed Regulation" in the Public Register and underwent several public comment periods and resultant amendments prior to its enactment. Indeed, Regulation 35-D even went through and survived a judicial challenge to its viability. See *National Ass'n of Independent Insurers v. Curiale*, 190 AD2d 597, 593 NYS2d 812 (1st Dept. 1993). Significantly, Regulation 35-D did not address or affect the coverage prescribed by Insurance Law §3420 (f)(1), which was known as the basic, mandatory uninsured motorist coverage. That coverage had already been based upon a mandatory uniform uninsured motorist endorsement that was required to be attached to every automobile policy. Indeed, the "New York Automobile Accident Indemnification Endorsement," the terms and conditions of which were prescribed by the Board of Directors of the then newly-created MVAIC and approved by the Superintendent of Insurance remained completely unchanged since 1959 -- that is, until now.

Without any of the hoopla surrounding the enactment of Regulation 35-D and its new "SUM" endorsement -- and, indeed, it seems, almost under the cover of darkness -- the Insurance Department has, for the first time in 37 years, amended the mandatory uninsured motorist ("UM") endorsement. Without so much as a public announcement or

notice to the bar, but, instead, by way of a series of Departmental Circular Letters sent, presumably, only to the limited number of subscribers to same, the Department has taken the drastic step of completely revising the endorsement.

Circular Letter 1995-15

It began innocently enough. Following the signing by Governor Pataki, in June, 1995, of Chapter 305 of the Laws of 1995, which increased the required minimum limits of liability for motor vehicle insurance coverages pursuant to the financial security laws, effective January 1, 1996 (and applicable to all accidents occurring on or after that date) from \$10,000/\$20,000/\$5,000 to \$25,000/\$50,000/\$10,000, it was obvious that the mandatory UM endorsement would similarly have to be amended to reflect those increases. Thus by Circular Letter 1995-15, dated October 3, 1995, the Insurance Department advised all insurers, *inter alia*, to review their current policies in force that would be affected by the change in minimum limits and to issue to all affected insureds "a revised change of limits endorsement and an amended declarations page by January 1, 1996." Insurers were also advised that if their policy forms contained language regarding policy minimum limits, "these forms should be reviewed and amended, if necessary, to comply with the new minimum limits." The Circular letter noted that a revised "Automobile Accident Indemnification Coverage New York" Endorsement was being developed by the MVAIC, which would have to be used by each company when MVAIC filed and obtained approval for it.

Supplement No. 1

Then, by "Supplement 1 to Circular Letter 1995-15", dated April 4, 1996, the Department announced that the Superintendent had approved a revised UM endorsement form, which was prescribed in accordance with §5206(b) of the Insurance Law by the MVAIC, and attached a copy of the new endorsement. The Supplement modified the earlier form filing requirement by extending the implementation date. All insurers licensed to write motor vehicle insurance were required to file a form, for approval no later than July 15, 1996, containing the prescribed language and to use the revised form "for all new and renewed motor vehicle insurance policies effective September 1, 1996 and subsequent which do not provide Supplementary Uninsured Motorist Coverage." Of course, insurers were also notified that they could choose an earlier implementation date if they so desired.

As a service to our readers, many, if not most, of whom do not subscribe to the Insurance Department's Circular Letters and may, therefore, have no other access to this obviously important document, we have annexed to this article a full copy of the new "Uninsured Motorist Endorsement -- New York." Because of the limited space available to us, extensive critical analysis of the new provisions will have to await a future article, or judicial review, or both.

Amendment to Regulation 35-D

While all of this activity was occurring with regard to the mandatory UM endorsement, there was also an amendment to Regulation 35-D's SUM endorsement, which should not be overlooked.

In our column in July of this year, in discussing the interesting and significant Court of Appeals decision in *Mostow v. State Farm Ins. Co.*, 88 NY2d 321, 645 NYS2d 421 (1996), on the issue of the ambiguity in the "Limits of Liability" section of some policies wherein the "per accident" limits were not expressly made "subject to" the "per person" limits, we noted that the "Maximum Sum Limits" section of Regulation 35-D's SUM endorsement suffered from precisely the same defect as had been found in *Mostow*. We also noted that this ambiguity "creates a problem that can only be remedied by amending the provision," and commented that "There is, of course, no way to tell just how long it will take the Insurance Department and the insurers to make the appropriate changes" to the Regulation. See, Dachs, N. and Dachs, J., "Policy Limits: Taking Nothing For Granted:", NYLJ, July 29, 1996, p. 3, col. 1. We are pleased to announce that, in fact, the Insurance Department has acted both aggressively and promptly in amending the Regulation in response to *Mostow*.

By "Second Amendment to Regulation 35-D", promulgated by the Superintendent of Insurance as an emergency measure effective August 15, 1996, sections 60-2.1(e), and 60-2.3(e), Condition 6 of the Regulation were amended specifically to state that the "per accident" limits of the SUM coverage are "subject to" the limit for one person. Section 60-2.2(b) of the Regulation -- the section that sets forth the four examples illustrating the proper application of SUM coverage -- was amended to reflect the statutorily increased minimum limits from "10/20" to "25/50". Finally, sections 60-2.3(a) and (b) of the

Regulation were amended by providing that although these changes were effective August 15, 1996, insurers were given until January 1, 1997 to actually amend their original SUM endorsements accordingly. Personal experience indicates to us that several insurers have not yet amended their SUM endorsements.

The new, revised mandatory uninsured motorist endorsement, which is applicable to all new and renewal policies effective September 1, 1996 and subsequent, which do not provide SUM coverage, is set forth, in full, below:

UNINSURED MOTORISTS ENDORSEMENT—NEW YORK

We, the Company, agree with you, as the named insured, in return for the payment of the premium for this coverage to provide you with Uninsured Motorist (UM) Coverage, subject to the following terms and conditions:

INSURING AGREEMENTS

1. Damages for Bodily Injury Caused by Uninsured Motor Vehicles. We will pay all sums which the insured, as defined herein, or the insured's legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, and caused by accident arising out of such uninsured motor vehicle's ownership, maintenance or use, subject to the Exclusions, Conditions, Limits and other provisions of this UM endorsement; provided, for the purposes of this coverage, determination as to whether the insured or the insured's representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or the insured's representative and us or, if they fail to agree, by arbitration.

2. Definitions. For purposes of this UM endorsement, the following terms shall have the following meanings:

(a) Insured. The unqualified term "insured" means:

(1) You, as the named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse;

(2) Any other person while occupying:

(i) A motor vehicle owned by the named insured or, if the named insured is an individual, such spouse and used by or with the permission of either, or

(ii) Any other motor vehicle while being operated by the named insured or such spouse, except a person occupying a motor vehicle not registered in the State of New York, while used as a public or livery conveyance; and

(3) Any person, with respect to damages such person is entitled to recover because of bodily injury to which this coverage applies sustained by an insured under subparagraphs (1) or (2) above.

(b) Uninsured Motor Vehicle. The term "uninsured motor vehicle" means a motor vehicle that through its ownership, maintenance or use, results in bodily injury to an insured, and for which:

(1) No bodily injury liability insurance policy or bond applies to such vehicle (including a vehicle that was stolen, operated without the owner's permission, or unregistered) at the time of the accident; or

(2) Neither the owner nor driver can be identified, including a hit-and-run vehicle, and which causes bodily injury to an insured by physical contact with the insured or with a motor vehicle occupied by the insured at the time of the accident, provided that:

(i) The insured or someone on the insured's behalf shall have reported the accident within 24 hours or as soon as reasonably possible to a police, peace or judicial officer or to the Commissioner of Motor Vehicles and shall have filed with us a statement under oath that the insured or the insured's legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and

(ii) At our request, the insured or the insured's legal representative makes available for inspection the motor vehicle the insured was occupying at the time of the accident, or

(3) There is a bodily injury liability insurance coverage or bond applicable to such motor vehicle at the time of the accident, but:

(i) The amount of such insurance coverage or bond is less than the UM limits of this policy; or

(ii) The insurer writing such insurance coverage or bond denies coverage.

(4) The term "uninsured motor vehicle" does not include a motor vehicle that is:

(i) Insured under the liability coverage of this policy; or

(ii) Owned by you, as the named insured and, while residents of the same household, your spouse and relatives of either you or your spouse; or

(iii) Self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered, or any similar state or federal law, to the extent that the required amount of such coverage is equal to, or greater than, the UM limits of this policy; or

(iv) Owned by the United States of America, Canada, a state, a political subdivision of any such government, or an agency of any of the foregoing; or

(v) A land motor vehicle or trailer, while located for use as a residence or premises and not as a vehicle, or while operated on rails or crawler-treads; or

(vi) A farm type vehicle or equipment designed for use principally off public roads, except while actually upon public roads.

(c) Hit-and-Run Motor Vehicle. The term "hit-and-run motor vehicle" means a motor vehicle which causes bodily injury to an insured arising out of physical contact of such motor vehicle with the insured or with a motor vehicle which the insured is occupying at the time of the accident, provided:

(1) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run motor vehicle";

(2) the insured or someone on his behalf shall have reported the accident within 24 hours or as soon as reasonably possible to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 90 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and

(3) at our request, the insured or his legal representative makes available for inspection the motor vehicle which the insured was occupying at the time of the accident.

(d) Bodily Injury. The term "bodily injury" means bodily harm, including sickness, disease or death resulting therefrom.

(e) Occupying. The term "occupying" means in, upon, entering into, or exiting from a motor vehicle.

(f) State. The term "state" includes the District of Columbia, a territory or possession of the United States, and a province of Canada.

3. Territory. The coverage provided by this UM endorsement applies only to accidents which occur within the State of New York.

EXCLUSIONS

This UM coverage does not apply:

1. To bodily injury to an insured while operating a motor vehicle in violation of an order of suspension or revocation; or to care or loss of services recoverable by an insured because of such bodily injury so sustained.

2. To bodily injury to an insured, or care or loss or service recoverable by an insured, with respect to which such insured, the insured's legal representatives or any person entitled to payment under this UM coverage shall, without our written consent, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefor, but this provision shall be subject to Condition 8 of this UM endorsement.

3. To 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.

4. So as to inure directly or indirectly to the benefit of any workers' compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workers' compensation or disability benefits law or any similar law.

5. 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.

CONDITIONS

1. Policy Provisions. None of the Insuring Agreements, Exclusions or Conditions of the policy shall apply to this UM coverage except "Duties After an Accident or Loss"; "Fraud," and "Termination" if applicable.

2. Premium. If during the policy period the number of motor vehicles owned by the named insured or spouse and registered in New York or the number of New York dealer's license plates or transporter plates issued to the named insured changes, the named insured shall notify us during the policy period of any change and the premium shall be adjusted as of the date of such change in accordance with the manuals in use by us. If the earned premium thus computed exceeds the advance premium paid, the named insured shall pay the excess to us; if less, we shall return to the named insured the unearned portion paid by such insured.

3. Notice and Proof of Claim. Within 90 days or as soon as practicable, the insured or other person making claim shall give us written notice of claim under this UM endorsement.

As soon as practicable after our written request, the insured or other person making any claim shall give us written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details we need to determine the UM amount payable hereunder.

The insured and every other person making claim hereunder shall, as may reasonably be required, submit to examinations under oath by any person named by us and subscribe the same. Proof of claim shall be made upon forms we furnish unless we fail to furnish such forms within 15 days after receiving notice of claim.

4. Medical Reports. The injured person shall submit to physical examinations by physicians we select when and as often as we may reasonably require. The insured, or in the event of the insured's incapacity, such insured's legal representative, or in the event of the insured's death, the insured's legal representative or the person or persons entitled to sue therefor, shall upon our request authorize us, when and as often as we may reasonably require, to obtain relevant medical reports and copies of records.

5. Notice of Legal Action. If the insured or such insured's legal representative brings any lawsuit against any persons or organizations legally responsible for the use of a motor vehicle involved in the accident, a copy of the summons and complaint or other process served in connection with the lawsuit shall be forwarded immediately to us by the insured or the insured's legal representative.

6. UM Limit of Liability. The UM limit payable under this UM endorsement shall be:

(a) The limit of our liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident is \$25,000 per person and, subject to this per person limit, the total limit of our liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons, as the result of any one accident is \$50,000.

(b) If the bodily injury results in death, the limit of our liability shall be \$50,000 for such bodily injury resulting in death sustained by one person as the result of any one

accident and, subject to this limit for each person, \$100,000 for such bodily injury resulting in death sustained by two or more persons as the result of any one accident.

(c) Any amount payable under the terms of this UM endorsement, including amounts payable for care or loss of services, because of bodily injury sustained by one person, shall be reduced by (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 motor vehicle and (b) any other person or persons jointly or severally liable together with such owner or operator for such bodily injury, and (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 UM endorsement.

7. Other Insurance. With respect to bodily injury to an insured while occupying a motor vehicle not owned by the named insured, the coverage under this UM endorsement shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such motor vehicle as primary insurance, and this UM endorsement shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if there is other similar insurance available to the insured and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this coverage and such other insurance, and we shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this UM endorsement and such other insurance.

8. Release or Advance. In accidents involving the insured and one or more negligent parties, if such insured settles with any such party for the available limit of the motor vehicle bodily injury liability coverage of such party, release may be executed with such party after thirty calendar days actual written notice to us, unless within this time period we agree to advance such settlement amounts to the insured in return for the cooperation of the insured in our lawsuit on behalf of the insured.

We shall have a right to the proceeds of any such lawsuit equal to the amount advanced to the insured and any additional amounts paid under this UM coverage. Any excess above those amounts shall be paid to the insured.

An insured shall not otherwise settle with any negligent party, without our written consent, such that our rights would be impaired.

9. Non-Duplication. This UM coverage shall not duplicate any of the following:

- (a) Benefits payable under workers' compensation or other similar laws;
- (b) Non-occupational disability benefits under article nine of the Workers' Compensation Law or other similar law;
- (c) Any amounts recovered or recoverable pursuant to article fifty-one of the New York Insurance Law or any similar motor vehicle insurance payable without regard to fault;
- (d) Any valid or collectible motor vehicle medical payments insurance; or

(e) Any amounts recovered as bodily injury damages from sources other than motor vehicle bodily injury insurance policies or bonds.

10. Arbitration. If we do not agree with the insured or the insured's representative making claim hereunder that the insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this UM endorsement then, upon written demand of either the claimant or us, the matter or matters upon which we do not agree with such person shall be settled by arbitration in accordance with the rules and procedures of the American Arbitration Association prescribed or approved by the Superintendent of Insurance for this purpose. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and we each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this UM endorsement.

11. Subrogation. If we make a payment under this UM coverage, we have the right to recover the amount of this payment from any person legally responsible for the bodily injury or loss of the person to whom, or for whose benefit such payment was made to the extent of the payment. The insured or any person acting on behalf of the insured must do whatever is necessary to transfer this right of recovery to us. Except as permitted by Condition 8, such person shall do nothing to prejudice this right.

12. Payment of Loss by Company. We shall pay any amount due under this UM endorsement to the insured or, at our option, to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents.

13. Action Against Company. No lawsuit shall lie against us unless, as a condition precedent thereto, the insured or the insured's legal representative has first fully complied with all the terms of this UM endorsement.

14. Assignment. Assignment of interest under this UM endorsement shall not bind us until our consent is endorsed hereon.

15. Survivor Rights. If you or your spouse, if a resident of the same household; dies, this UM coverage shall cover:

(a) The survivor as named insured;

(b) The decedent's legal representative as named insured, but only while acting within the scope of such representative's duties as such; and

(c) Any relative who was an insured at the time of such death.

16. Policy Period—Termination. This UM coverage applies only to accidents which occur on and after the effective date hereof and during the policy period and shall terminate upon (1) termination of the policy of which it forms a part or (2) termination of New York registration on all motor vehicles owned by the named insured or spouse.

This UM endorsement must be attached to the Change Endorsement when issued after the policy is written.

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