

**THE WHOLE OF THE SUM: AN UPDATE ON
SUPPLEMENTARY UNINSURED/UNDERINSURED
MOTORIST LAW – 1998**

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As reported in these pages for the last five years¹, the areas of uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured/underinsured motorist (SUM) insurance coverage continue to be among the most actively litigated of all substantive areas of law and, certainly, among the most active areas of insurance law. As in prior years, 1998 saw a large number of reported cases in this complex and seemingly ever-changing topic. Although space does not permit me to summarize or refer to all the uninsured/underinsured/supplementary uninsured motorist cases decided during the past year, I will endeavor herein to highlight the most significant of those decisions.

I. GENERAL ISSUES

A. LIMITS OF LIABILITY - SUM COVERAGE

Pursuant to an amendment to Insurance Law §3420(2)(A) effective March 9, 1998, the limits of SUM coverage required to be offered, in an amount to match the bodily injury limits of the claimant's policy, were increased to \$250,000 per person and, subject to the limit for one person, \$500,000 per accident, or a combined single limit of \$500,000 per accident. The amended statute further provides that the insurer can still offer only a \$100,000/\$300,000 policy if it also offers to the insured a personal umbrella policy that covers supplementary uninsured motorist coverage and has limits up to at least \$500,000."

By emergency measure effective September 3, 1998, Regulation 35-D was also amended to reflect this statutory amendment.² An insurer may offer SUM limits that

exceed the above-stated amendments as long as those limits do not exceed the bodily injury liability limits purchased by the insured . Id. Nothing in the Regulation, however, should be construed to require an insurer to offer any particular minimum or maximum amount of third-party bodily injury liability limits.

B. “INSURED PERSONS”

1. Residency

A relative of the named insured or spouse, while a resident of the same household as the insured or spouse, is included in the definition of an “insured” under the UM and SUM endorsements.

In Commercial Mut. Ins. Co. v. Wagshall,³ the court noted that “residency requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain.” Thus, where the defendants had been living with the insured for a period of two years, had no separate residence and used the insured’s address as their own in school, police, and medical records, and they had no “concrete plans of moving to any other specific residence,” they were deemed to be residents of the insured’s household, and, therefore, entitled to coverage under the policy.

On the other hand, in GEICO v. Troisi,⁴ the court held that a high school graduate did not become a “resident” of her divorced father’s household by irregularly visiting his apartment, occasionally sleeping there overnight, and keeping a few items of clothing there, especially considering that she had been in her mother’s custody and had lived with her mother before graduation; thus, she was not an “insured” entitled to liability coverage under her father’s homeowners and excess policies.

In *Metropolitan Prop. & Cas. Ins. Co. v. Wu-Tsang*,⁵ the court held that the infant claimant resided with her brother in Malone, New York rather than with her parents in Staten Island, where the evidence established that her clothing and personal belongings were all transferred to Malone, she was enrolled in school in Malone, and Malone was where she was intended by her family to remain.⁶

C. NOTICE OF CLAIM

Timely written notice of a claim by the claimant is a condition precedent to the right to apply for UM, UIM and SUM benefits. Although most endorsements, including a new mandatory UM endorsement, require such notice to be given “within ninety days or as soon as practicable,” Regulation 35-D’s SUM endorsement requires simply that notice be given “as soon as practicable.” Under either approach, a claimant may forfeit coverage by failing promptly to notify the insurer of a potential claim.

In *Travelers Ins. Co. v. Delosh*,⁷ the court noted that “The requirement that an insured notify its liability carrier of a potential claim ‘as soon as practicable’ operates as a condition precedent to coverage.” See also *Owen v. Allstate Ins. Co.*⁸; *Nationwide Ins. Co. v. DiGiacchino*⁹ (“Failure to comply with notice provisions contained in an insurance policy within the time limit provided or within a reasonable time under the circumstances is grounds for denial of a claim.”)

The *Delosh* court added that “The meaning of the phrase ‘as soon as practicable’ is an elastic one and calls for a determination of what was within a reasonable time in the light of the facts and circumstances of the case at hand.” See also *Owen v. Allstate Ins.*

Co., supra (“The reasonableness of the notice must be determined on a case by case basis.”)

Several courts in 1998 recognized that a delay in providing notice may be excused; the insured, however, bears the burden of demonstrating the reasonableness of such excuse. See State Farm v. Archer¹⁰; United Talmudical Academy of Kiryas Joel, Inc. v. Cigna Prop. & Cas. Co.¹¹; Witriol v. Travelers Ins. Co.¹²; Owen v. Allstate, supra; Travelers v. Delosh, supra.

In State Farm Mut. Auto. Ins. Co. v. Pantina,¹³ the court held that in the case of a disclaimer of coverage by the offending vehicle’s insurer, the time to provide notice of claim to the uninsured motorist carrier does not begin to run until the date of the disclaimer (rather than the date of the accident).

In previous years, I have noted a discrepancy in the decisions of the various Departments on the issue of whether an insurer’s actual knowledge of the accident (and of the claimant’s injuries) as a result of receipt of a No-Fault claim may constitute sufficient notice to satisfy the UM or SUM notice requirement. In Travelers Ins. Co. v. Lianides,¹⁴ the First Department noted that although the insureds did not notify the insurer of their intention to make a UM claim until 5½ years after their hit and run accident, the insurer had been informed of the accident the day after it occurred and of the injuries ten (10) months later, but only three (3) months after the claimants themselves learned of the causal connection between the accident and the injuries. At the same time, the claimants’ insurance broker notified the insurer of their intention to claim No-Fault benefits, which they did shortly thereafter. Under these circumstances, the court held that the insurer received

notice of the claim “as soon as practicable, in compliance with the notice of claim provision in the uninsured motorist endorsement.” [The rule in the Second and Third Departments is contrary -- see most recently, Nationwide Ins. Co. v. DiGiacchino, *supra* (“the fact that petitioner may have had knowledge of the claim since it insured both respondent and Jerome did not vitiate the contractual notice requirement”).

In American Home Assurance Co. v. Wong,¹⁵ the court expressed the rule that it is incumbent upon the insured/claimant to show that he was diligent in trying to ascertain the insurance status of the offending vehicle.

In National Union v. Leong,¹⁶ the court held that notice to the insurer given more than sixteen (16) months after the accident was untimely and the insured/claimant “failed to demonstrate that he had diligently sought to determine the limits of the offending vehicle’s policy.” In Owen v. Allstate Ins. Co.,¹⁷ the court held that a delay in ascertaining the tortfeasor’s policy limits for upwards of fifteen (15) months after the accident constituted a lack of due diligence. In Paz v. Aetna Cas. & Sur. Co.,¹⁸ the court held that notice of an underinsured motorist claim given more than one (1) year after the insureds/claimants learned of the policy limits of the offending vehicle was untimely as a matter of law. In State Farm Ins. Co. v. Archer,¹⁹ the court held that an unexcused one-year delay between the date of the accident and the date of notice of an uninsured motorist claim was untimely as a matter of law. And, in Nationwide Ins. Co. v. DiGiacchino,²⁰ the court held that notice approximately twenty-two months from the time of the accident and more than ten months following the commencement of the personal injury action was untimely as a matter of law.

On the other hand, in *Nationwide Ins. Co. v. Satriana*,²¹ a case involving the death of the insured's 26-year-old child, the court excused a delay of nine (9) months in providing notice of intention to make an uninsured motorist claim and held such notice to be timely as a matter of law. In the words of the court, "A delay of nine months from one paralyzed by grief from the premature loss of a child should need no further explanation."

D. NOTICE OF LEGAL ACTION

In addition to the basic notice requirement, the UM and SUM endorsements also require, as a condition to coverage, that the insured or his/her legal representative "immediately" forward to the insurer a copy of the summons and complaint and other legal papers served in connection with the underlying lawsuit against the tortfeasor.

In *Lumbermens Mut. Cas. Co. v. Material Damage Adjustment Corp.*,²² -- not a UM/SUM case -- the court upheld a disclaimer of coverage based upon the failure to comply with the notice of legal action requirement.

E. ARBITRATION

1. Demand for Arbitration

In *Albert Bialek Associates, Inc. v. Northwest Atlantic Partners, Inc.*,²³ the court held that the failure to serve a proper notice of intention or demand to arbitrate in full compliance with CPLR 7503(c) renders such notice ineffective. Thus, where the demand for arbitration failed to include any mention of the insurer's right to seek a stay within twenty days of [receipt of] the notice, the insurer was entitled to vacatur of the award rendered against it because the insurer was not properly served. See *Blamowski v. Munson Transp., Inc.*²⁴

In Northern Assurance Co. of America v. Bollinger,²⁵ the demand for arbitration incorrectly identified the applicable insurance policy. Under that circumstance, the court held that the insurer “did not receive notice of ‘the agreement pursuant to which arbitration is sought’ as required by CPLR 7503(c).” As noted by the court, “In this computerized age, failure to include proper identifying numbers makes it impossible to determine if there is any basis to move to stay arbitration within the 20-day period. Since ‘[t]he expiration of this 20-day period terminates a party’s right to contest the obligation to arbitrate . . . the validity of the 20-day limitation period depends on the sufficiency of the notice.’” Thus, since “[n]o proper demand for arbitration was served,” the insurer was not bound by the 20-day limitation period for moving to stay arbitration. (See discussion below).

2. Petitions to Stay Arbitration

CPLR 7503(c) provides, in pertinent part, that “[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or she shall be so precluded.” It is, of course, well-established that the failure to make a timely application for a stay of arbitration will result in the denial of the application as untimely and constitutes a bar to judicial intrusion into the arbitration proceeding. One exception to the 20-day rule is that where the application for a stay is made on the ground that no agreement to arbitrate exists, it may be entertained even if made after the 20-day period had expired. See Matarasso v. Continental Casualty Co.²⁶; see also Allstate Ins. Co. v. Roseboro²⁷ (“The only insurance policy included in the record does not contain an agreement to arbitrate uninsured motorist claims. Because the

appellant sought to stay arbitration permanently on the ground, among other things, that no arbitration agreement existed, the proceeding was not untimely.”)

In Hartford Ins. Co. v. Buonocore,²⁸ the court held that Hartford’s contention that there was no uninsured motorist coverage because the other vehicle was insured “relates to whether certain conditions of the contract have been complied with and not whether the parties have agreed to arbitrate,” and, thus, was outside the scope of the Matarasso exception to the 20-day rule.

Similarly, in Nationwide Ins. Co. v. McDonnell,²⁹ and CNA Ins. Co. v. Rosa,³⁰ the courts held that the issue of whether there was physical contact with the uninsured vehicle related to whether certain conditions of coverage had been satisfied and, therefore, was subject to the 20-day limitations period.

(a) Burden of Proof

In American Home Assur. Co. v. Wong,³¹ and Transportation Ins. Co. v. Phillips,³² the Second Department reiterated that an insurer seeking to stay the arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a prima facie case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary. See also Travelers Property Cas. Co. v. Schoenheimer³³ (“An insurance company seeking to stay an underinsured motorist arbitration must establish its entitlement to such relief [citation omitted]. In order to do so, the petitioner must demonstrate its entitlement to a stay, or a hearing on its request for a stay, by more than mere unsubstantiated conjecture that there was something amiss.”)

In Brogan v. New Hampshire Ins. Co.,³⁴ the court held that a prima facie case of insurance coverage could be made out by the submission of a police report and/or DMV records. See also Lumbermens Mut. Cas. Co. v. Beliard³⁵.

In Brogan, supra, once the petitioner insurer made out a prima facie case of coverage, the burden of proof shifted to the claimant and/or alleged other insurer to prove that the vehicle at issue was never insured or that such insurance had been canceled. There, the court held that “The defendant’s evidence, consisting of the deposition testimony of the claims representative for the defendant, was insufficient to rebut the plaintiff’s prima facie case as the defendant only conducted a name search and failed to cross-reference the name of the purported insured with other information available to the defendant at the time the searches were conducted.”

3. Arbitration Awards

In D’Addario v. Weinstein,³⁶ the court noted that “an arbitration award may not be vacated unless it is totally irrational, violative of a strong public policy, or clearly exceeds a specifically-enumerated limitation of the arbitrator’s power.” See also Interboro Mutual Indem. Ins. Co. v. MVAIC³⁷.

In Gambino v. Makowski,³⁸ the court stated, “CPLR 7511 fails to mention inadequacy of the evidence as a ground for vacating the award, no doubt for good reason that assessment of the evidence presented at an arbitration proceeding is the arbitrator’s function rather than that of the court. Therefore, unless there is no proof whatever to justify the award so as to render it entirely irrational . . . the arbitrator’s finding is not subject to judicial oversight Indeed, an arbitrator is not bound by principles of substantive law

or by rules of evidence. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be His award will not be vacated even though the court concludes that his interpretation of the agreement misconstrues or misapplies substantive rules of law, unless it is violative of a strong public policy or is totally irrational or exceeds a specifically enumerated limitation on his power.” In State Farm Ins. Co. v. McManus,³⁹ the court noted that pursuant to the AAA rules, the arbitrator selects the location of the hearing and that “courts are generally without power to void the determination of an arbitrator in the selection of the venue of an arbitration proceeding.

In Gambino v. Makowski, *supra*, the court stated, “[T]he fact that the arbitrator failed to state the legal or factual basis for the award [is] insufficient to vacate or modify it since the grounds set forth in CPLR 7511 for vacating an arbitrator’s award are exclusive and do not include a failure to state the legal or factual basis for the award.”

CPLR 7502(a) provides that, “A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action All subsequent applications shall be made by motion in the pending action or the special proceeding.” Although several cases and commentators had held that the statutory language manifests an intent on the part of the Legislature that parties should bring all applications related to an arbitral controversy -- including post-arbitration application to confirm or vacate -- before the same court, captioned as one integrated proceeding (see e.g., Matter of Local 435 Arbitration, 521 F.Supp. 418, 420-21 (W.D.N.Y.); Siegel, *New York Practice*, §601, at 969-970 [2d ed.]; Alexander, *Supp. Practice Commentaries*, McKinney’s Cons. Laws of NY, Book 7B, CPLR 7502:1, 1998 Cumulative Pocket Part, at 104), the Court of Appeals, in Matter of Solkav Solartechnik,

Ges. m.b.H. v. Besicorp Group, Inc.,⁴⁰ held that because prior special proceedings to compel or stay arbitration are no longer pending after a judgment is entered directing arbitration and the arbitration has been held pursuant thereto, all subsequent applications must be brought in a new special proceeding. As stated by the Court, “. . . when a stay application ends in a final judgment, a new proceeding must be brought to confirm an arbitration award.”

An arbitrator exceeds his or her authority when he or she renders an award in excess of the policy limits. In Brijmohan v. State Farm Ins. Co.,⁴¹ the court held that “a claimed limitation on the arbitrator’s power will not be waived if the party relying on it asserts it at Special Term in opposition to an application for confirmation. Thus, even where the insurer failed to controvert a statement made at the arbitration hearing that its policy limits were \$100,000 when they actually were only \$10,000, an award for \$75,000 was vacated.

NOTE: The American Arbitration Association’s Rules for the arbitration of UM and SUM claims were amended effective October 1, 1998. Copies of these rules are available from the AAA’s Garden City office, 666 Old Country Road, Garden City, New York 11530-2004, and should be consulted before proceeding with any UM/SUM claim.

F. STATUTE OF LIMITATIONS

A claim asserted against an insurer exists solely by reason of the terms of the insurance contract. Although the specific UM/SUM endorsement is statutorily required, the obligation imposed upon the insurer is contractual rather than statutory in nature. Accordingly, such claims are governed by a six-year statute of limitations.

In *Continental Ins. Co. v. Richt*,⁴² the court noted that “a claimant’s cause of action does not accrue until it possesses the legal right to be paid and to enforce its right to payment in court,” and, therefore, held that an insured’s right to payment under his underinsured motorist policy did not accrue until the tortfeasor’s liability coverage was exhausted by payment.

II. UNINSURED MOTORIST ISSUES

A. “INNOCENT VICTIMS”

It is well-established that the purpose of the uninsured motorist endorsement is to compensate innocent victims of motor vehicle accidents where compensation is not otherwise available.

In *Graphic Arts Mutual Ins. Co. v. Leno*,⁴³ the court noted that “the public policy of this State generally denies judicial relief to those injured in the course of committing a serious criminal act’ (*Barker v. Kallash*, 63 NY2d 19, 24, 479 NYS2d 201, 468 NE2d 39). Thus, where the claimants knowingly and actively participated in the unauthorized use of the motor vehicle, they were precluded from recovery for injuries resultant from that conduct (see, *Manning v. Brown*, 91 NY2d 116, 667 NYS2d 336, 689 NE2d 1382).”

B. STOLEN MOTOR VEHICLES

One of the statutory categories of an “uninsured motor vehicle” is a vehicle that has been stolen and/or operated without the permission of its owner.

In *Rosenberg v. Mazzone*,⁴⁴ the court noted that the presumption of permissive use created by Vehicle & Traffic Law §388 can be rebutted by evidence to the contrary. In *Tumminello v. Morris*,⁴⁵ the court observed that “although not dispositive on the issue of permissive use, the filing of a police report for a stolen vehicle is useful in rebutting the presumption of consent created by VTL §388(1).”

In *Empire Ins. Co. v. Callender*,⁴⁶ the court held that where at the time of the accident the operator of the vehicle was being robbed at gunpoint by a passenger in the vehicle, the vehicle was being operated without the permission of the owner and was, therefore, an “uninsured” motor vehicle.⁴⁷

C. INSOLVENCY

In *GEICO v. Silber*,⁴⁸ the court held that notwithstanding the fact that the SUM endorsement refers in its definition of an “uninsured” motor vehicle to “insolvency,” without distinguishing between different types of insolvencies, UM coverage is not available for an accident with a tortfeasor whose domestic auto insurer becomes insolvent because the claimant has an available remedy through the New York Motor Vehicle Liability Security Fund, which stands in the shoes of such an insolvent insurer. The contrary rule applies to insolvencies not covered by the Security Fund, *i.e.*, insolvencies of non-domestic insurers.⁴⁹

D. INSURER’S DUTY TO PROVIDE PROMPT WRITTEN NOTICE OF DENIAL OR DISCLAIMER

A denial or disclaimer of coverage may render a vehicle “uninsured.” The law requires all liability insurers to “give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.” See Ins. L. §3420(d). Failure by the insurer to give such reasonably timely and specific notice may result in the insurer being precluded from relying upon a breach of policy condition or an exclusionary provision in the policy.

Several cases decided in 1998 addressed the issue of whether a particular delay in formally denying or disclaiming was unreasonable as a matter of law.

See e.g., Waskiewicz v. New York Central Mutual Fire Ins. Co.⁵⁰ (unexplained delay of fifteen (15) months was untimely as a matter of law); Prudential Prop. & Cas. Ins. Co. v. Persaud⁵¹ (unexplained delay of “over two months” was unreasonable as a matter of law); Hanover Ins. Co. v. Kiesecker⁵² (unexplained delay of forty-three (43) days was unreasonable as a matter of law).

In State Farm Mut. Auto. Ins. Co. v. Clift,⁵³ the court noted that “[t]he reasonableness of any delay must be judged from the point in time when the insurer is possessed of sufficient facts upon which to base a denial or disclaimer,” and held that a question of fact existed as to the reasonableness of the insurer’s delay in disclaiming, whether that delay was measured as forty-two (42) days, thirty-two (32) days or twenty-five (25) days (depending upon the appropriate starting point under the particular facts of that case). See also Mohawk Minden Ins. Co. v. Ferry⁵⁴. In Meilutis v. Commercial Union Ins. Co.,⁵⁵ the court held that a triable issue of fact existed as to whether the insurer’s delay of one month

in disclaiming coverage was reasonable. And, in Crowningshield v. Nationwide Mutual Ins. Co.,⁵⁶ the court refused to adopt a “bright-line rule” that “any delay of 30 days or less is reasonable as a matter of law,” and held that the particular circumstances of the 30-day delay at issue raised a question of fact as to the reasonableness of the delay in disclaiming.

In Eagle Ins. Co. v. Ortega,⁵⁷ the court noted that the notice of disclaimer must also promptly apprise the claimant/injured party, who has a separate and distinct right to provide notice of a claim, with a high degree of specificity of the ground or grounds upon which the disclaimer is predicated. Thus, a disclaimer based solely upon the insured’s failure to notify the insurer of the claim was not effective against the injured party. See also Prudential Prop. & Cas. Ins. Co. v. Persaud, supra.

In GEICO v. Pagano,⁵⁸ the court observed that “While an insurer will be estopped from disclaiming coverage where it unreasonably delays in giving notice of disclaimer . . . , such notice is not required where the policy never afforded the subject coverage in the first instance (see generally, Zappone v. Home Ins. Co., 55 NY2d 131, 447 NYS2d 911).” Thus, in Waskiewicz v. New York Central Mutual Ins. Co., supra, the court held that “the failure to disclaim timely does not preclude defendant insurer from raising the defense of noncoverage ‘where, as here, [the] insurer has paid the full monetary limits set forth in the policy’ [P]recluding defendant from raising the defense of noncoverage would impermissibly impose on the insurer ‘an added source of indemnification which had never been contracted for and of which no premium had ever been paid.’” See also Gewirtz v. State Farm Mut. Auto. Ins. Co.⁵⁹; State Farm Mut. Ins. Co. v. Vazquez⁶⁰.

E. CANCELLATION

Another type of “uninsured” motor vehicle is where the policy of insurance had been canceled prior to the accident. It is well-established that proof that a policy has been canceled prior to the date of the accident requires strict, literal compliance with the statutes governing notices of cancellation or terminations of insurance.

In *Nationwide Mut. Ins. Co. v. Bates*,⁶¹ the court held that Banking Law §576, the statute governing premium finance company cancellations, which provides for thirteen days’ notice of intent to cancel (ten days notice and three days for mailing) must be strictly construed and that, therefore, a notice of intent to cancel dated May 15, 1996, which listed May 28, 1996 as the cancellation date was invalid and ineffective where the cancellation was to be effective on May 28, 1996 at 12:01 a.m., because such constituted notice of only twelve days and one minute, and not a full thirteen days.

In *Lumbermens Mut. Cas. Co. v. Gamble*,⁶² the court held that the insurer failed to show that it properly canceled its policy where its witness had no first-hand knowledge of its having actually mailed either the final bill or a notice of cancellation to the owner of the offending vehicle, or of its regular procedures in mailing such bills and notices.

In order effectively to cancel an owner’s policy of liability insurance as to third parties, the insurer must file the notice of termination with the New York State Department of Motor Vehicles no later than thirty days after the effective date of the cancellation. In *General Accident Ins. Co. v. Andada*,⁶³ and *Badagliacca v. GEICO General Ins. Co.*,⁶⁴ the courts held that the insurers were not required to file their terminations with the DMV, applying the portion of VTL §313 that provides that no filing is required for “the non-renewal of a policy

which as been in force for at least six months” and the provision in the Commissioner’s regulations, 15 NYCRR §34.2(5), that “a non-renewal of a motor vehicle . . . policy shall include . . . a failure of the insured to make the first premium payment due upon a superceding policy or a renewal of such policy offered by an insurer.”

F. TERMINATION OF COVERAGE

In *Allstate Ins. Co. v. Santos*,⁶⁵ the court noted that “an insurer’s coverage of an insured automobile terminates upon the transfer of title by its insured to another, unless the insurer is notified and consents to continued coverage.”

In addition, VTL §313 provides that an insurer’s coverage will be terminated upon the subsequent retention by the insured of coverage by another insurer. And this is so even if the first insurer’s cancellation was invalid -- once a new insurer appears on the scene, the first insurer will be “off the risk.”

In *Mumuni v. Eagle Ins. Co.*,⁶⁶ the accident occurred on December 31, 1998 at 9:00 a.m.. One insurer’s policy expired as of 12:01 a.m. on December 31, 1998; another insurer’s policy was effective “from December 31, 1998 midnight to December 31, 1989 midnight.” The court held that the word “midnight” was ambiguous, and that the ambiguity should be construed against the second insurer so as to provide coverage as of the termination of the first policy at 12:01 a.m..

G. HIT AND RUN

Another of the definitions of an “uninsured” motor vehicle is a hit-and-run vehicle. One of the essential elements of a hit and run claim is a timely report to the police. Pursuant to the applicable endorsements, such a report must be made within twenty-four

hours of the accident and must indicate that an accident occurred. The specific details of the accident, including the very fact of a hit and run, need not be reported. Another critical element of a hit and run claim is “physical contact” with a hit and run vehicle.

In *ITT Hartford Insurance Co. v. Churchward*,⁶⁷ the court held that the conditions precedent to arbitration of respondent’s uninsured motorist (hit and run) claim were sufficiently satisfied by his submission of a sworn statement to petitioner when his memory returned, five months after the accident, and by the submission of medical records and police report which, taken together with his sworn statement, established that respondent’s injuries did, in fact, result from “physical contact” between petitioner and a hit and run vehicle. The failure of the police report to note that there had been “physical contact” was “entirely understandable” in light of the respondent’s well-documented condition immediately following the accident.

III. SUM/UNDERINSURED MOTORIST ISSUES

A. TRIGGER OF UNDERINSURED MOTORIST COVERAGE

In *Wilson v. Hartford Acc. & Indem. Co.*,⁶⁸ the court repeated the by now well-known rule that underinsured motorist coverage is implicated upon a finding that the tortfeasor’s bodily injury liability limits are less than the bodily injury liability limits of the claimant’s policy, and that underinsured motorist coverage is definitionally not available when the limits of the tortfeasor’s bodily injury liability coverage are the same as the claimant’s bodily injury liability coverage limits. See also *State Farm Mut. Auto. Ins. Co. v. Callisto*⁶⁹.

B. CONSENT TO SETTLE

In Hartford Ins. Co. v. Rickett,⁷⁰ the court noted that “It is well established that an insured may not, in contravention of the policy provisions governing underinsured motorist claims, settle a claim against a third party tortfeasor, without the insurer’s consent, in a manner which prejudices the insurer’s subrogation rights. See also, Aetna Cas. & Sur. Co. v. Longo Production, Inc.⁷¹.

In Hartford Ins. Co. v. Buonocore,⁷² the court reiterated that where the policy does not contain any provision requiring consent to settle, an insured is not required to obtain the consent of the underinsured motorist carrier to the settlement with the tortfeasor.

In State Farm Mut. Auto. Ins. Co. v. Callisto,⁷³ the court held that an underinsured motorist carrier could be held to waive its right to insist upon prior written notice of the insured’s settlement with the tortfeasor where it repudiated liability on the claim prior thereto.

1. “Release or Advance”

In Atlantic Mutual Ins. Co. v. Cooper,⁷⁴ the insurer’s contention that the UM claimant released the tortfeasors without its consent and thereby failed to comply with a condition precedent to arbitration, was refuted by a certified letter from the insured’s attorney informing the insurer of a settlement offer, together with the absence of any evidence that the insurer responded to that letter. Under Condition 10 of the Regulation 35-D endorsement (“Release or Advance”), the failure to respond constituted consent to settle.

In Hartford Ins. Co. v. Rickett, supra, the court stated, “The language of the Release or Advance Condition of the [Regulation 35-D] endorsement “clearly makes the insured’s

duty of cooperation contingent upon, and in return for, the insurer's advancement of settlement amounts within thirty calendar days after actual written notice to it. Although the insured may not otherwise settle with any negligent party, without the insurers written consent, such that the insurer's right would be impaired, nothing in the policy provision at issue prevents an insured from so settling after thirty days from proper written notice to the insurer. The court further noted that an insurer could not arbitrarily fail to consent to the settlement solely on the ground of respondent's failure to procure affidavits of no assets and no excess insurance. "While the statutory framework requires a third party insurer to respond to a written request for its own bodily injury liability limits [see Insurance Law §3420[f][2][A], there is no reciprocal provision for requiring the execution of an insurer's request for affidavits of no assets and no excess insurance. Notwithstanding any duty of cooperation imposed upon the insured, the primary responsibility of reasonable investigation rests with the insurer." See also State Farm Mut. Auto. Ins. Co. v. Callisto, supra ("An insurer has an obligation to deal in good faith with its insured . . . and may not arbitrarily withhold consent and at the same time argue that its insured has not complied with a condition precedent.")

C. EXHAUSTION OF UNDERLYING LIMITS

In GEICO v. Gambuzza,⁷⁵ the court reiterated the rule that no obligation exists under an underinsured motorists policy unless and until the underlying limits of the tortfeasor's insurance coverage are exhausted by the payment of judgments or settlements.

D. REDUCTION - IN - COVERAGE CLAUSE

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.” Regulation 35-D contains a similar provision, which has been held valid and enforceable, as long as its existence is highlighted on the declarations page so as to avoid any claimed ambiguity in the policy.

In *Metropolitan Prop. & Cas. Ins. Co. v. Hollingsworth*,⁷⁶ the court held that the insurer was entitled to offset the amount recovered by the claimant in settlement of the underlying personal injury action where the policy expressly incorporated the underinsured motorist coverage endorsement into the uninsured motorist coverage section. As the court noted, “the dispositive issue is whether there is a single combined limit of uninsured/underinsured motorist coverage, not whether there is a single endorsement.”

In *GEICO v. O’Haire*,⁷⁷ the court held that the offset provision was enforceable because the policy contained a “single, combined . . . limit of ‘uninsurance/underinsurance’ covered by one premium and a ‘combined’ endorsement for uninsured and underinsured coverage.” Significantly, the court also stated that, “That the offset provision was not contained in the declaration page of the policy does not warrant a contrary conclusion (compare, 11 NYCRR 60-2.3 [a][2] [Regulation 35-D] [requiring offset provision to be on declaration page of policies effective after October 1, 1993.]”

CONCLUSION

Given the pattern of the previous five years, there is no reason to predict any let-up in the number and variety of UM/UIM/SUM cases to be decided in the year to come. I hope to once again report on 1999's significant developments in a future article.

ENDNOTES

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1. See Dachs, Jonathan A., "Uninsured and Underinsured...But Not Underlitigated: 1993: An Important Year for UM/UIM Coverage; 66 NYS Bar Journal 13 (September/October, 1994); "Uninsured and Underinsured Motorist Cases in 1994", 67 NYS Bar Journal 24 (November, 1995); "The Parts of the SUM: Uninsured and Underinsured Motorist Coverage in 1995", 68 NYS Bar Journal 42 (July/August, 1996); "Developments in Uninsured and Underinsured Motorist Coverage", 69 NYS Bar Journal 18 (September/October, 1997); "Legislative and Case Law Developments in UM/UIM/SUM Law - 1997", 70 NYS Bar Journal 46 (September/October 1998).

2. See 11 NYCRR §§60-2.1(e)(1),(2).

3. __ AD2d __, 681 NYS2d 317 (2d Dept. 1998).

4. 249 AD2d 363, 671 NYS2d 111 (2d Dept. 1998).

5. NYLJ, January 7, 1999, p. 33, col. 3 (Sup. Ct. Richmond Co.).

6. See also Dachs, Norman and Dachs, Jonathan, "Residency Issues: Is Home Where the Heart Is?" NYLJ, September 8, 1998, p. 3, col. 1; "More 'Residence' Issues and New Coverage Rules for Taxis," NYLJ, November 10, 1998, p. 3, col. 1.

7. 249 AD2d 924, 672 NYS2d 219 (4th Dept. 1998).

8. 250 AD2d 1018, 673 NYS2d 477 (3d Dept. 1998).

9. __ AD2d __, 680 NYS2d 275 (3d Dept. 1998).

10. __ AD2d __, 681 NYS2d 338 (2d Dept. 1998).

11. __ AD2d __, 676 NYS2d 645 (2d Dept. 1998).

12. __ AD2d __, 674 NYS2d 429 (2d Dept. 1998).

13. __ AD2d __, 681 NYS2d 82 (2d Dept. 1998).
14. 246 AD2d 490, 668 NYS2d 200 (2d Dept. 1998).
15. 249 AD2d 301, 671 NYS2d 288 (2d Dept. 1998).
16. 250 AD2d 687, 672 NYS2d 903 (2d Dept. 1998).
17. 250 AD2d 1018, 673 NYS2d 477 (3d Dept. 1998).
18. 250 AD2d 660, 671 NYS2d 701(2d Dept. 1998).
19. __ AD2d __, 681 NYS2d 338 (2d Dept. 1998).
20. __ AD2d __, 680 NYS2d 215 (3d Dept. 1998).
21. NYLJ, September 14, 1998, p. 33, col. 2 (Sup. Ct. Nassau County 1998).
22. 248 AD2d 444, 668 NYS2d 939 (2d Dept. 1998).
23. __ AD2d __, 674 NYS2d 352 (1st Dept. 1998).
24. 91 NY2d 190, 668 NYS2d 148 (1997).
25. __ AD2d __, 683 NYS2d 101 (2d Dept. 1998).
26. 56 NY2d 264, 451 NYS2d 703 (1982).
27. 247 AD2d 379, 667 NYS2d 914 (2d Dept. 1998).
28. __ AD2d __, 675 NYS2d 129 (2d Dept. 1998).
29. 248 AD2d 476, 668 NYS2d 920 (2d Dept. 1998).
30. __ AD2d __, 676 NYS2d 500 (2d Dept. 1998).
31. 249 AD2d 301, 671 NYS2d 288 (2d Dept. 1998).
32. 248 AD2d 392, 669 NYS2d 860 (2d Dept. 1998).
33. __ Misc.2d __, 676 NYS2d 902 (Sup. Ct. N.Y. Co. 1998).
34. 250 AD2d 562, 673 NYS2d 156 (2d Dept. 1998), lv. to appeal denied, 92 NY2d 810, 680 NYS2d 54 (1998).
35. __ AD2d __, 682 NYS2d 430 (2d Dept. 1998).

36. 250 AD2d 847, 672 NYS2d 790 (2d Dept. 1998), lv. to appeal denied, 92 NY2d 809, 680 NYS2d 54 (1998).
37. __ AD2d __, 673 NYS2d 933 (2d Dept. 1998).
38. NYLJ, September 10, 1998, p. 22, col. 3 (Sup. Ct. N.Y. Co. 1998).
39. 249 AD2d 311, 670 NYS2d 599 (2d Dept. 1998).
40. 91 NY2d 482, 672 NYS2d 838 (1998).
41. 239 AD2d 496, 658 NYS2d 52 (2d Dept. 1997), affd. 92 NY2d 821, 677 NYS2d 55 (1998).
42. __ AD2d __, 677 NYS2d 634 (2d Dept. 1998).
43. __ AD2d __, 674 NYS2d 535 (4th Dept. 1998), lv. to appeal denied, 92 NY2d 814, 681 NYS2d 474 (1998).
44. __ AD2d __, 673 NYS2d 943 (2d Dept. 1998).
45. NYLJ, August 11, 1998, p. 25, col. 2 (Dist. Ct. Nassau Co. 1998).
46. NYLJ, January 7, 1999, p. 28, col. 2 (Sup. Ct. N.Y. Co.).
47. See also Dachs, Norman and Dachs, Jonathan, "Stolen Vehicles and the 'Key in the Ignition' Law," NYLJ, July 14, 1998, p. 3, col. 1.
48. __ Misc.2d __, 679 NYS2d 552 (Sup. Ct. Nassau Co. 1998).
49. See Dachs, Norman and Dachs, Jonathan, "Insolvency & UM Law," NYLJ, January 12, 1999, p. 3, col. 1. But see, American Home Assurance Co. v. Cardus, Index No. 014652/98 (Sup. Ct. Nassau Co. 1998); GEICO v. Barrett & Hudson, Index No. 3126/98 (Sup. Ct. Nassau Co. 1998).
50. __ AD2d __, 675 NYS2d 733 (4th Dept. 1998).
51. __ AD2d __, 682 NYS2d 412 (2d Dept. 1998).
52. NYLJ, June 25, 1998, p. 37, col. 3 (Sup. Ct. Suffolk Co. 1998).
53. 249 AD2d 800, 671 NYS2d 843 (3d Dept. 1998).
54. __ AD2d __, 674 NYS2d 512 (3d Dept. 1998).
55. __ AD2d __, 674 NYS2d 234 (4th Dept. 1998).

56. __ AD2d __, 680 NYS2d 302 (3d Dept. 1998).
57. __ AD2d __, 674 NYS2d 56 (2d Dept. 1998).
58. __ AD2d __, 674 NYS2d 719 (2d Dept. 1998).
59. __ AD2d __, 672 NYS2d 807 (2d Dept. 1998).
60. 249 AD2d 312, 670 NYS2d 901 (2d Dept. 1998).
61. NYLJ, December 29, 1998, p. 32, col. 1 (Sup. Ct. Nassau County 1998).
62. 250 AD2d 540, 671 NYS2d 979 (1st Dept. 1998).
63. NYLJ, April 23, 1998, p. 37, col. 3 (App. Term, 2d Dept. 1998).
64. __ AD2d __, 680 NYS2d 661 (2d Dept. 1998).
65. 250 AD2d 634, 673 NYS2d 694 (2d Dept. 1998).
66. 247 AD2d 315, 668 NYS2d 464 (1st Dept. 1998).
67. 249 AD2d 86, 671 NYS2d 240 (1st Dept. 1998).
68. 246 AD2d 593, 668 NYS2d 49 (2d Dept. 1998).
69. __ AD2d __, 680 NYS2d 39 (4th Dept. 1998).
70. NYLJ, November 13, 1998, p. 33, col. 3 (Sup. Ct. Orange Co. 1998).
71. 247 AD2d 497, 669 NYS2d 336 (2d Dept. 1998).
72. __ AD2d __, 675 NYS2d 129 (2d Dept. 1998).
73. __ AD2d __, 680 NYS2d 39 (4th Dept. 1998).
74. 247 AD2d 209, 668 NYS2d 588 (1st Dept. 1998).
75. 248 AD2d 536, 669 NYS2d 875 (2d Dept. 1998).
76. 247 AD2d 921, 668 NYS2d 785 (4th Dept. 1998).
77. 247 AD2d 387, 667 NYS2d 917 (2d Dept. 1998).