UNINSURED AND UNDERINSURED . . . BUT NOT UNDERLITIGATED

1993: An Important Year for UM/UIM Coverage

by: Jonathan A. Dachs, Esq.[*]

For practitioners in the fields of automobile insurance, 1993 will be a year that will live in infamy for some and in glory for others, depending on their client base. All will agree, however, that 1993 was a landmark year for uninsured and underinsured motorist insurance in New York, for that was the year when the State of New York Insurance Department's long awaited Regulation 35-D (11 NYCRR §60-2, et. seq.) finally became effective.

There is little doubt that, in time, once the new system, which was designed by the Insurance Department, inter alia: (1) to provide uniformity in coverage, by eliminating the confusion and ambiguity that gave rise to conflicting court decisions in uninsured and underinsured motorist coverage as a result of the absence of a uniform SUM or underinsured motorist coverage endorsement; (2) to clarify the nature of SUM coverage and the maximum amounts payable under SUM coverage that, up until then, had been unclear because insurers' interpretations of the maximum payouts under SUM coverage varied greatly; (3) to eliminate provisions that made it difficult to collect damages under SUM coverage; (4) to provide SUM policyholders with a fair method of resolving disputes through an arbitration option,[1] has been in place long enough to generate its own body of interpretive case law, and to be applicable to all insureds, there will be few who remember,

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or pay attention to, any developments in the law prior to October 1, 1993, the Regulation's effective date.[2] Still, until that time, and as long as pre-October, 1993 policies remain valid, and pre-Regulation 35-D cases continue to wend their way through the courts, practitioners must maintain a firm grasp of the "old law" to bring their cases to a successful conclusion.

The purpose of this article is to note and discuss the newest of the "old law" cases -- those that were decided during the calendar year 1993.[3] As can be seen, litigation of uninsured and underinsured motorist coverage disputes did not slow down in anticipation of the new Regulation. In fact, uninsured and underinsured motorist disputes were among the most actively litigated areas of the law in the past year.

VALIDITY OF REGULATION 35-D

In *National Association of Independent Insurers v. Curiale*, 190 AD2d 597, 593 NYS2d 812 (1st Dept. 1993), the validity of Regulation 35-D was upheld. The court rejected the petitioner's challenge to two specific provisions of the Regulation -- the reduction-in-coverage clause and the anti-stacking clause (discussed below) -- holding that those provisions were neither "arbitrary, capricious, nor irrational as violative of public policy." When leave to appeal was denied by the Court of Appeals in June 1993, the final hurdle to enactment and applicability of Regulation 35-D was cleared. The Regulation, which sets forth a new, prescribed SUM endorsement, finally became effective and applicable to all new and/or renewal policies issued on or after October 1, 1993.

AVAILABILITY OF SUM OR UNDERINSURED MOTORIST COVERAGE

In *Country Wide Ins. Co. v. Dumawal*, __ AD2d __, __ NYS2d __ (1st Dept. 1993) (N.Y.L.J. 1/6/94, p. 21, col. 4), claimant purchased a policy of automobile insurance with liability limits of 100/300 and uninsured motorist coverage of 10/20. After an accident with an underinsured vehicle, and after settling with the tortfeasor for $10,000, claimant made

a claim for 100,000 in underinsured motorist benefits. This claim was rejected because claimant never purchased SUM or underinsured motorist coverage. In the words of the First Department, "Where the insured fails to purchase ... optional (SUM) coverage, the coverage is not available (*Matter of Liberty Mut. Ins. Co. v. Annunziato*, 187 AD2d 429). The declaration page of respondent's policy indicates the statutory minimum uninsured motorist coverage ($10,000/$20,000), with no indication of a supplementary endorsement for additional underinsured motorist coverage. That omission is conclusive (*Matter of Liberty Mut. Ins. Co. v. Alberto*, 186 AD2d 658), except where proof is adduced that the insured paid for such additional coverage, or that it was mistakenly omitted from the policy (*Matter of Empire Ins. Co. v. Vitucci*, 192 AD2d 484)."

In *Empire Ins. Co. v. Vitucci*, 192 AD2d 484, 597 NYS2d 31 (1st Dept. 1993), the court found no ambiguity allowing it to find SUM or underinsured motorist coverage where, although the body of the policy made reference to underinsurance coverage "[i]f the Underinsured Motorists Coverage Endorsement is attached to this policy," no such endorsement was attached, and claimant offered no proof that she paid for such coverage or that it was mistakenly omitted from the policy.

However, in *Aetna Cas. & Sur. Co. v. Cinisomo*, __ AD2d __, 602 NYS2d 902 (2d Dept. 1993), the Second Department held that a declaration page which showed, in the coverage section, a space for "Part C, Uninsured/Underinsured Motorists, $10,000 each person/$20,000 each accident," was "arguably ambiguous," and, therefore, to be construed against the insurer and in favor of finding underinsured motorist coverage of 10/20.

[Under Regulation 35-D, the purchase of any uninsured motorist coverage in excess of the statutory minimum $10,000/$20,000 limits will result in SUM coverage.]

TRIGGER OF SUM COVERAGE - GENERALLY

In _Prudential Prop. & Cas. Ins. Co. v. Cooper_, _ AD2d _, 597 NYS2d 205 (3d Dept. 1993), the court held that the determination of whether an automobile is underinsured is based upon a comparison between the tortfeasor's bodily injury liability limits and the claimant's bodily injury liability limits (not the claimant's SUM or underinsured motorist limits).

In _Mele v. General Accident Ins. Co._, _ AD2d _, _ NYS2d _, 1993 WL 485903 (3d Dept. 1993), the court clarified that the claimant's bodily injury limits determine whether a SUM claim is triggered. If the coverage is triggered, the SUM limits are then looked to for a determination of the amount of coverage available for such a claim. Even where the claimant's bodily injury liability limits are greater than his or her SUM limits, claimant is limited to the maximum specified for SUM coverage.

See also _Wu v. Twin City Fire Ins. Co._, N.O.R., NYLJ 12/23/93, p. 35, col. 1 (Sup. Ct. Queens Co.); _Allstate Ins. Co. v. Gerber_, N.O.R., NYLJ 11/8/93, p. 34, col. 5 (Sup. Ct. Nassau Co.)

[Regulation 35-D follows the majority trend by providing that SUM coverage is triggered when the claimant's bodily injury limits exceed the tortfeasor's bodily injury limits.]

TRIGGER OF SUM COVERAGE - COMBINED SINGLE LIMIT POLICIES

In _Prudential Prop. & Cas. Ins. Co. v. Szeli_, __ AD2d __, 598 NYS2d 55 (2d Dept. 1993), mot. for lv. to app. granted __ NY2d __, __ NYS2d __ (December 16, 1993), the Second Department reaffirmed that whether an automobile is underinsured is determined by comparison of the bodily injury liability limits of the tortfeasor's policy with the bodily injury liability limits of the claimant's policy. Moreover, the court reversed the determination of the Supreme Court, Westchester County and held that for purposes of such a comparison, in the case of a combined single limit policy, which includes both bodily injury and property damage coverage within its limit, the full amount stated on the declarations

page is to be considered available for bodily injury; no deduction is made for an amount required to cover property damage. Thus, where the tortfeasor's coverage was $300,000 combined single limit and the claimant's was $100,000/$300,000 bodily injury, the SUM coverage was not triggered because the tortfeasor's coverage ($300,000) was either greater than or equal to the claimant's coverage (depending on whether the "per person" or "per accident" limits were compared.)

Szeli will be heard by the Court of Appeals on April 28, 1994.

In *Allstate Ins. Co. v. Hager*, __ AD2d __, __ NYS2d __ (2d Dept. 1993) (N.Y.L.J. 12/28/93, p. 25, col. 3), the court once again reaffirmed that the proper comparison for purposes of the SUM trigger is between the parties' respective bodily injury liability limits. The court then went on to affirm the Supreme Court, Orange County's conclusion that, at least in a case where more than one person was hurt, and notwithstanding that only one person was making a SUM claim on the subject policy, it is the "per accident" limits, not the "per person" limits, that must be compared. Thus, where the tortfeasor's coverage was $300,000 combined single limit and the claimant's was $250,000/$500,000, SUM coverage was triggered because the $300,000 was less than $500,000.

TRIGGER OF SUM COVERAGE - MULTIPLE VEHICLE ACCIDENTS

In *Valley Forge Ins. Co. v. O'Brien*, N.O.R., N.Y.L.J. 4/22/93, p. 28, col. 6 (Sup. Ct. Nassau Co.), the court held, consistent with prior precedents (see *Passaro v. Metropolitan Property & Liability Ins. Co.*, 128 Misc.2d 21, 487 NYS2d 1009 (Sup. Ct. Queens Co. 1985), affd. 124 AD2d 641, 507 NYS2d 836 (2d Dept. 1986)); *Colonial Penn Ins. Co. v. Salti*, 84 AD2d 35 (1st Dept. 1982), that SUM protection is triggered in a multiple vehicle accident scenario when the insurance policy limits of one of the tortfeasors involved in the accident are less than the claimant's and that policy is fully exhausted by the claimant.

However, in _Garcia v. Mercado_, _AD2d_, 598 NYS2d 259 (1st Dept. 1993), plaintiff was injured in a two-car accident. The car in which she was a passenger had liability limits of 100/300 and $100,000 underinsured motorist coverage. The other vehicle had 10/20 liability coverage, which was offered in settlement. 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 court held, contrary to prior precedent, that the plaintiff's demand for arbitration was "premature" because "At this point only $10,000 at most of available insurance has been exhausted" and plaintiff's underinsured motorist claim must await disposition, by settlement or judgment, of her claims against the hosts. 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."

[Regulation 35-D follows the majority rule by permitting a SUM claim as long as at least one insured motor vehicle offers its policy limits and those limits are lower than the plaintiff's limits, and by requiring exhaustion of the limits available "for any one person who may be legally liable for the bodily injury sustained by the insured."]

THE "EXHAUSTION" REQUIREMENT

In _Andriaccio v. Borg & Borg, Inc._, __ AD2d __, 603 NYS2d 528 (2d Dept. 1993), plaintiff settled his claim against the tortfeasor for $500 less than the amount of the tortfeasor's insurance policy. Discussing the "exhaustion" requirement of underinsured motorist coverage, the court noted that, the statutory scheme (Ins. L. §3420(f)(2)) requires "`primary insurers to pay every last dollar and requires plaintiffs to accept no less, prior to the initiation of an underinsurance claim' (_Matter of Federal Ins. Co. v. Watnick_, 80 NY2d 539, 546, 592 NYS2d 624, 607 NE2d 771)."

REQUIREMENT OF SUM CARRIER'S CONSENT TO SETTLEMENT

Continental Ins. Co. v. Canni, 192 AD2d 651, 596 NYS2d 471 (2d Dept. 1993) and *Devereaux v. Agway Ins. Co.*, 190 AD2d 1050, 594 NYS2d 1009 (4th Dept. 1993), were two recent examples of the fate that may befall a SUM claimant who fails to obtain the insurer's consent prior to settling his or her claim against the tortfeasor and releasing the tortfeasor from all liability -- the grant of the insurer's application to stay arbitration and the denial of SUM benefits.

In *Federal Ins. Co. v. Stechman*, 192 AD2d 531, 595 NYS2d 815 (2d Dept. 1993), the claimant was not required to obtain the underinsured motorist carrier's consent to settle because there was no provision in the policy requiring such consent.

THE SUM "CATCH-22"

In *Tri-State Consumer Ins. Co. v. Hundley*, N.O.R., N.Y.L.J. 3/2/93, p. 33, col. 2 (Sup. Ct. Nassau Co.), Justice Joseph Goldstein referred to the "Catch-22" as a "conundrum" and described it as follows:

> "Initially there is a requirement that the underlying policy limits of the tortfeasor(s) be exhausted (the `exhaustion' clause), and the typical policy includes a `consent to settle' and/or `subrogation' clause. The former requires the claimant to obtain the underinsured carrier's consent to any proposed settlement with the tortfeasor, even though the carrier for the adverse driver offers the entire policy in settlement. The `subrogation clause' requires the claimant to preserve the subrogation rights of the underinsured carrier against the adverse driver. If this were followed the claimant would only be able to offer a conditional release to the tortfeasor's carrier (i.e., only the claimant's rights are forfeited while his or her carrier may still proceed against the adverse driver.) As we all know, such a conditional release is generally unacceptable to a tortfeasor and his insurer.
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> "Thus we find ourselves with this conundrum. The claimant and the tortfeasor are unable to consummate a settlement, and the claimant is unable to timely obtain the underinsurance benefits for which a premium has been paid."

Dissatisfied with this state of affairs, the court adopted and applied the "Release or Advance" procedure for overcoming the "Catch-22" that is contained in Regulation 35-D -- this, despite the fact that the Regulation had not as of that time become effective. Thus, the underinsured motorist carrier was ordered to decide within 30 days whether to consent to the settlement with the tortfeasor without demanding that its subrogation right be preserved, or withhold its consent, in which case it would have to pay claimant the amount of the settlement offer and be subrogated to the claimant's claims against the tortfeasor and his insurer.

[This decision contains an excellent discussion of the history of the "Release or Advance" procedure, including citations to cases in other jurisdictions.]

In *Prudential Property & Cas. Ins. Co. v. King*, __ AD2d __, __ NYS2d __ (2d Dept. 1993) (N.Y.L.J. 11/29/93, p. 28, col. 4), the court overcame the "Catch-22" by concluding that the claimant satisfied the conditions precedent to arbitration by advising the insurer

of the settlement offer, by requiring the insurer's right of subrogation to be preserved, and by requesting the insurer's consent to settle the underlying claim on numerous occasion. In the words of the court, "[The insurer] cannot arbitrarily withhold consent and at the same time argue that a condition precedent has not been complied with [citations omitted]. Under principles of equity, [the insurer] is estopped from asserting failure to meet conditions precedent as a defense."

In _Sentry Ins. Co. v. Kolb_, 190 AD2d 804, 594 NYS2d 639 (2d Dept. 1993), the court affirmed the denial of the insurer's application to stay arbitration of an underinsured motorist claim and the allowance of the claimant's settlement of the underlying personal injury action. Although the decision is silent on this point, the Record on Appeal establishes that the basis for this affirmance was the fact that it was undisputed that a representative of the insurer responded to the claimant's attorney's request for consent to settle by stating, "We are not going to give consent because the defendant has no assets and we will not get our money back." Under those circumstances, the court obviously determined that the insurer's failure to consent was arbitrary and unreasonable.

[Regulation 35-D effectively eliminates the "Catch-22" problem by providing that once the claimant advises the SUM carrier in writing that he desires to accept a policy limits offer from the tortfeasor, the SUM carrier has three options that must be exercised within 30 days:

1. Consent to the settlement, thereby extinguishing the SUM insurer's subrogation rights;

2. Take no action, which after thirty days constitutes implied consent to the settlement, thereby extinguishing all subrogation rights; or

3. Accept an assignment of the claim by paying the claimant the policy limits offered by the tortfeasor's carrier in return for the right to assume control over the claimant's claim against the tortfeasor. The SUM carrier then assumes the risk that the

jury will at least award as damages the tortfeasor's policy limits previously paid the SUM carrier to the claimant.]

LIMITS OF LIABILITY

In *Wu v. Twin City Fire Ins. Co.*, N.O.R., NYLJ 12/23/93, p. 35, col. 1 (Sup. Ct. Queens Co.), the court held, inter alia, that when an insured purchases SUM coverage at the minimum 10/20 limits, coverage of 50/100 for death must also be included.

REDUCTION-IN-COVERAGE CLAUSE

In *Allstate Ins. Co. v. Stolarz*, 81 NY2d 219, 597 NYS2d 904 (1993), the Court of Appeals held, inter alia, that "there is nothing inherently objectionable about offsets against the limits of an insurance policy." The Court distinguished its prior decision in *United Community Ins. Co. v. Mucatel*, 69 NY2d 777, 513 NYS2d 114, 505 NE2d 624 (1987), affg. 121 AD2d 357, 509 NYS2d 772 (1st Dept. 1986), affg. 127 Misc.2d 1045, 487 NYS2d 959 (Sup. Ct. N.Y. Co. 1985), which had held that such reduction-in-coverage clauses were inherently ambiguous and, therefore, invalid, by limiting that holding to cases wherein separate coverage limits were written for uninsured motorists and underinsured motorist coverage. See *CNA Insurance Co. v. Grandstaff*, 188 AD2d 965, 591 NYS2d 900 (3rd Dept. Dec. 31, 1992), mot. lv. to app. denied N.Y.L.J. 6/10/93, p. 21, col. 6 (reduction-in-coverage clause in policy of underinsurance (only) was identical to that found invalid in *Mucatel*); see also *Nationwide Mutual Ins. Co. v. Davis*, __ AD2d __, 600 NYS2d 482 (2d Dept. 1993) ("a carrier may not offset the amounts that its policyholder has recovered from others against the full amount of the underinsurance endorsement limits." Thus, where the UIM coverage was only 10/20, the reduction-in-coverage clause "would render the underinsurance coverage illusory by stripping the policyholder of underinsurance benefits which were paid for as part of the policy"); *Brentnall v. Nationwide Mutual Ins. Co.*, _ AD2d

_, 598 NYS2d 315 (2d Dept. 1993). Where, as in *Stolarz*, the declaration sheet indicated a single limit amount for "un/underinsurance," the reduction-in-coverage clause would not be ambiguous in at least the uninsurance context and would, therefore, be valid.

[Regulation 35-D avoids the *Mucatel* and *Stolarz* problem by specifically approving and including a reduction-in-coverage provision for amounts received from the tortfeasor in its new standard SUM endorsement. The Regulation further cures and eliminates the ambiguity problem by requiring the declaration sheet of each SUM policy to set forth and explain the reduction-in-coverage provision.]

STACKING / "OTHER INSURANCE" CLAUSES

In *Rifkin v. State Farm Mut. Auto. Ins. Co.*, 157 Misc.2d 141, 595 NYS2d 846 (Sup. Ct. Orange Co. 1993), the court noted that "There is no statutory proscription against stacking SUM coverage in New York State, although the Insurance Department enacted a no-stacking regulation effective October 1, 1992 [sic]." Still, the court held that a claimant who was covered under two separate policies issued to her mother-in-law, with whom she resided, each of which provided a maximum limit of underinsured motorist coverage of $100,000, and each of which contained an "Other Insurance" clause that provided for proportionate share liability, could not stack the two coverages. As stated by the court, "In this case, there has been but one occurrence and Insurance Law §3420(f)(2) imposes a ceiling on the recovery of an insured of a maximum of $100,000 `in any one accident'. The fact that a separate premium was paid for coverage under two policies was deemed irrelevant.

The "Other Insurance" clauses of two uninsured motorist policies were applied in *Crum & Forster Organization v. Morgan*, 192 AD2d 652, 596 NYS2d 472 (2d Dept. 1993). In *Allstate Ins. Co. v. Gerber*, N.O.R., N.Y.L.J. 11/8/93, p. 34, col. 5 (Sup. Ct. Nassau

County), the court noted and quoted the "Other Insurance" clauses in two underinsured motorist policies, but, nevertheless, held that the two policies could be stacked.

[Regulation 35-D, in three separate sections of the new SUM endorsement, prohibits stacking. See Condition "6", "Maximum SUM Payment"; Condition "7", "Non-Stacking"; and Condition "8", "Priority of Coverage".]

INSURER'S DUTY TO PROVIDE PROMPT WRITTEN NOTICE OF DENIAL OR DISCLAIMER / ESTOPPEL

In *Nationwide Mutual Ins. Co. v. Steiner*, _AD2d_, _NYS2d_ (2d Dept. 1993) (NYLJ 1/5/94, p. 25, co.. 5), the court stated that "It is well settled that an insurance carrier may not disclaim liability if it fails to give the insured timely notice of disclaimer "as soon as is reasonably possible after it first learns of the accident or grounds for disclaimer of liability." See Ins. L. §3420(d). Where the insurer failed to justify its 41-day delay in notifying the insured that it was disclaiming coverage, such delay was held to be unreasonable as a matter of law given the fact that the primary reason for disclaiming coverage was readily apparent upon receipt of notice of the accident.

(Justice Balletta, in dissent, refused to hold that a mere six week delay was unreasonable, the Court of Appeals never previously having found anything less than two months to be unreasonable.)

In *Bernstein v. Allstate Ins. Co.*, __ AD2d __, __ NYS2d __ (2d Dept. 1993) (N.Y.L.J. 12/28/93, p. 24, col. 5), the court held that assuming, arguendo, that the insurer's motion to stay arbitration constituted a written notice of disclaimer (see *Aetna Cas. & Sur. Co. v. Scirica*, 170 AD2d 448), a delay of "nearly four months" was unreasonable as a matter of law.

See also, *Allcity Ins. Co. v. Pioneer Ins. Co.*, __ AD2d __, 599 NYS2d 245 (1st Dept. 1993) (delay of four years unreasonable as a matter of law; a written reservation of rights is not a substitute for required notice of disclaimer); *National Casualty Co. v. Levittown*

Events, 191 AD2d 543, 595 NYS2d 93 (2d Dept. 1993) (delay of over two months unreasonable); *Allstate Ins. Co. v. Nolan*, N.O.R., N.Y.L.J. 8/12/93, p. 23, col. 1 (Sup. Ct. Queens Co.) (delay of nine months); *Westchester Fire Ins. Co. v. Imperiale*, 157 Misc.2d 721, 598 NYS2d 685 (Sup. Ct. N.Y. Co. 1993) (ten months).

See generally *State Farm Mutual Ins. Co. v. Merrill*, 192 AD2d 824, 596 NYS2d 554 (3d Dept. 1993) (no written disclaimer ever sent).

In *Aetna Cas. & Sur. Co. v. Aimetti*, N.O.R., N.Y.L.J. 11/3/93, p. 25, col. 2 (Sup. Ct. Nassau Co.), the UIM carrier was put on notice of a potential UIM claim in March 1992. At the same time, the insurer received claimant's request for consent to settle with the tortfeasor, and a request as to the necessary documentation for the claim. This inquiry was repeated again in February 1993 and April 1993. In May 1993 claimant forwarded certain information and advised of his intention to file a demand for arbitration. At no time during this extensive period of correspondence did the UIM insurer request an examination under oath or a physical examination, as it was permitted to request under the policy. Only in response to claimant's demand for arbitration -- over one year after receiving notice of the claim -- did the insurer finally request a deposition and a physical.

Justice John S. Lockman denied the insurer's belated requests, noting that it "was under a duty to make reasonable requests for information." In the words of the court, "Having had a period of over one year to act, respondent's demand for arbitration was an unacceptable trigger for the petitioner carrier to assert its rights. Petitioner has offered no excuse for the extended delay in seeking the deposition and physical of the respondent. The absence of any explanation for the petitioner's delay renders its conduct unreasonable as a matter of law ... Having failed to issue a timely denial and having failed to offer any explanation for its delay, the petitioner may not skirt the dictates of Insurance Law 3420(d) and assert the respondent's purported failure to comply with specified policy conditions as a bar to arbitration."

INSURED'S DUTY TO PROVIDE PROMPT NOTICE OF CLAIM TO INSURER

In Nationwide Mutual Ins. Co. v. Edgerson, __ AD2d __, 600 NYS2d 483 (2d Dept. 1993), the claimant was struck by an automobile on February 6, 1990. He promptly engaged an attorney and attempted to ascertain the tortfeasor's insurance coverage. The tortfeasor's carrier refused, however, to reveal its policy limits until a lawsuit was commenced against its insured. Such a lawsuit was commenced and claimant was notified orally of the tortfeasor's limited, and inadequate, coverage in May 1990. This information was confirmed in writing on June 18, 1990. Claimant made a claim for underinsured motorist benefits on June 28, 1990.

Noting that the claimant was required to give notice of a claim for underinsured motorist benefits within 90 days of the accident or as soon as practicable, and that the inquiry is whether claimant acted with "due diligence" in ascertaining the insurance status of the tortfeasor, the court held that the claimant's notice in this case, given almost five months after the accident, was timely.

In Eveready Ins. Co. v. Younger, __ AD2d __, 603 NYS2d 541 (2d Dept. 1993), the claimant was injured on November 17, 1987 when a taxicab in which he was a passenger collided with another vehicle. The insurer for the taxicab disclaimed coverage as to both the driver of the cab and the claimant on the ground that it had not been afforded timely notice of the accident as required under the policy. Approximately 11 months after this disclaimer, the claimant served a demand for arbitration upon the insurer, which then promptly moved for a stay of arbitration. The court reversed the denial of the petition for a stay on the ground that even assuming, arguendo, that the period within which notice was required to be given was measured from the date of the disclaimer, as opposed to the date of the accident (and assuming that the demand for arbitration could be considered written notice of the claim), the claimant's eleven-month delay in notifying the insurer of the claim was "unreasonable under the circumstances." The court specifically rejected the

claimant's contention that he was required to await the outcome of the litigation regarding the validity of the disclaimer before he could provide notice of the claim.

[Regulation 35-D requires the claimant to give the insurer written notice of the claim "as soon as practicable."]

DUTY TO ADVISE INSUREDS TO OBTAIN COVERAGE

In *Rogers v. Urbanke*, _ AD2d _, 599 NYS2d 697 (3d Dept. 1993), plaintiff alleged that the defendant insurance company was negligent in failing to advise her of the importance of obtaining greater than "minimal" no-fault and underinsured motorist coverage. The court affirmed the grant of summary judgment to the defendant because the evidence established that the insurer complied with plaintiff's request for a policy "comparable" to their existing policy, the underinsured motorist coverage actually exceeded the prior policy, and the new policy was renewed without change for an additional year. "[D]efendant had no duty to `advise, guide [or] direct' plaintiffs to obtain coverage other than that requested [citations omitted[."

But Cf. *Andriaccio v. Borg & Borg, Inc.*, _ AD2d _, 603 NYS2d 528 (2d Dept. 1993) ("It is well settled that `an agent or broker may be held liable for neglect in failing to procure insurance, with liability limited to that which would have been borne by the insurer had the policy been in force' [citations omitted]. A broker who negligently fails to procure a policy stands in the shoes of the insurer, and is liable to indemnify the plaintiff for any judgment which would have been covered by the policy [citation omitted].")

PROOF OF POLICY CANCELLATION

In *Empire Ins. Co. v. Narain*, _ AD2d _, 597 NYS2d 680 (1st Dept. 1993), the court held that a copy of a notice informing the insured that his coverage had been cancelled was not sufficient, in and of itself, to comply with the strict requirements for cancellations set forth in Vehicle and Traffic Law §313; the insurer had to present the certificate of mailing obtained from the postal service as proof of termination.

In *Public Service Mutual Ins. Co v. Foley*, 190 AD2d 800, 593 NYS2d 847 (2d Dept. 1993), the court held that a notice of cancellation was ineffective to cancel a policy because it did not state that the insured had a continuous obligation to maintain insurance.

In *State Farm Mut. Auto. Ins. Co. v. Fisher*, N.O.R., N.Y.L.J. 7/15/93, p. 31, col. 5 (Sup. Ct. Queens Co.), the court held that a notice of cancellation was not in compliance with VTL §313 and, therefore, ineffective because it erroneously stated that the penalty for lack of insurance was $4.00 per day instead of $6.00 per day, as provided by a recent amendment to 15 NYCRR §34.6(b).

In *GEICO v. Barthold*, __ AD2d __, 599 NYS2d 610 (2d Dept. 1993), the court held that competent proof of filing a notice of cancellation was lacking because it was impossible to interpret the meaning of certain official documents without the testimony of a witness familiar therewith. Thus, the matter was set down for a further hearing.

HIT-AND-RUN -- PHYSICAL CONTACT

In *Bajrami v. General Accident Ins. Co.*, 156 Misc.2d 435, 593 NYS2d 405 (Sup. Ct. Richmond Co. 1993), the court held that the fact that the insured's vehicle did not make direct contact with an unidentified truck was not dispositive of whether the insured's damages were covered by the uninsured motorist provisions of his policy because the "physical contact" requirement could be satisfied if the insured's vehicle was struck by an intervening vehicle which in turn made contact with the offending, hit-and-run vehicle. A load of sand carried by a dump truck was held to be an integral part of the truck, so that when part of the load of sand fell from the truck onto another vehicle, which then swerved and struck the insured's vehicle, that constituted sufficient "physical contact" under the endorsement. In so holding, the court distinguished *Smith v. Great American Ins. Co.*, 29 NY2d 116, 324 NYS2d 15, 277 NE2d 528 (1971), which involved snow and ice falling from a truck, on the ground that the sand and dirt in *Bajrami* was placed on the truck "purposefully, as part of its use or operation."

[This case contains an excellent review of prior "physical contact" cases.]

HIT-AND-RUN -- ASCERTAINMENT OF IDENTITY

In *Liberty Mutual Ins. Co. v. Pettis*, N.O.R., N.Y.L.J. 7/26/93, p. 27, col. 6 (Sup. Ct. Nassau Co.), the operator of the offending vehicle was known, but the owner was not, because of a mistake by the insured in taking down the correct license plate number. The endorsement at issue provided uninsured motorist benefits if "there cannot be ascertained the identity of either the operator or the owner of such `hit-and-run' automobile." The court held that the words "cannot be ascertained" are not synonymous with "have not been ascertained." "Cannot be ascertained" means "incapable of being ascertained" -- some reasonable effort must be made to ascertain the identity. Here, all the insured did was send two letters to the driver to verify that the vehicle was insured. When the driver failed to respond to those letters, the insured did not subpoena him or join him as an additional party. This "minimal effort" did not suffice to establish that the owner's identity could not be established and thus, the insurer's petition to stay arbitration was granted.

INSURED PERSONS -- "RESIDENT RELATIVES"

In *Sekulow v. Nationwide Mut. Ins. Co.*, _ AD2d _, 597 NYS2d 60 (1st Dept. 1993), the court reversed a summary judgment finding that a 28-year-old who resided with his girlfriend in a three-room apartment in a separate structure on his parents' property, for which he paid his parents rent, prepared his own meals and had his own keys, but shared a mailbox and telephone line with his parents, was a resident of his parents' property and thus an insured under their policy. The court found that questions of fact existed whether "taking into account the reasonable expectations of the average person purchasing such insurance, as well as the particular circumstances of the individual case, an insured could reasonably ascribe to the word "household" a meaning which would include a person in (the son's) situation."

In _New York Central Mutual Ins. Co. v. Kowalski_, __ AD2d __, 600 NYS2d 977 (3d Dept. 1993), the undisputed proof established that claimant was 17 years old at the time of the accident and was "staying" with his parents. However, some time after he turned 16, he dropped out of high school and moved into a trailer with his girlfriend, where he resided for the next 1 - 1 1/2 years. Claimant contended that he reestablished residency with his parents shortly before the accident. Since the evidence was inconclusive, summary judgment was denied.

"OCCUPYING" A MOTOR VEHICLE

In _Colonial Penn Ins. Co. v. Curry_, 157 Misc.2d 282, 596 NYS2d 317 (Sup. Ct. Nassau Co. 1993), the claimant was injured when, after exiting his own vehicle, while he was standing with one foot on the ground and one foot on the running board of his friend's parked pick-up truck and leaning into the driver's door, talking to the person occupying the driver's seat (but who was not the driver), the truck was struck by a second vehicle. Under these circumstances, the court held that claimant was not "passenger-oriented" with respect to the truck and, therefore, not occupying the truck, insofar as he had no intention of entering the truck, nor had he just left it. Thus, he was not "upon" the truck within the meaning of the truck's policy and was required to make claim against his own insurer.

[This case contains an excellent review of prior cases on the subject of "occupancy" under uninsured motorist policies.]

COVERED EVENTS -- "USE OR OPERATION"

In _Wrenn v. Park_, 156 Misc.2d 358, 593 NYS2d 408 (Sup. Ct. N.Y. Co. 1993), the court held that injuries sustained by plaintiff when he caught his leg on a twisted and jagged edge of the bumper of defendant's uninsured legally parked car did not result from

an accident involving "use or operation" of a motor vehicle so as to enable him to make a claim against the MVAIC.

[This case contains an excellent discussion of prior cases on "use or operation"]

EXCLUSIONS -- LIVERY EXCLUSION

In *Liberty Mutual Ins. Co. v. Hogan*, 82 NY2d 57, 603 NYS2d 404, 623 NYS2d 536 (1993), the Court of Appeals held that an exclusion in an uninsured motorist policy for vehicles used "to carry persons or property for a fee" was invalid insofar as it was not based upon any statute or regulation and was inconsistent with the public policy of the State "to insure that innocent victims of motor vehicle accidents be recompensed for their injuries and losses."

PETITIONS TO STAY ARBITRATION – CALCULATING THE 20-DAY LIMITATION PERIOD

In *Allstate Ins. Co. v. Horne*, N.O.R., N.Y.L.J. 12/23/93, p. 35, col. 5 (Sup. Ct. Nassau Co.); Justice Alpert noted that,

> "The date upon which the twenty day period of CPLR 7503(c) begins to run is dependent upon the method of service utilized by the claimant to initiate the process.
>
> If, for example, an arbitration demand is served upon an insurer pursuant to CPLR 311(1), that is by delivery to an officer, director, managing or general agent, cashier or assistant cashier, or upon any other agent authorized to receive same, the twenty-day statutory period is computed from the date of service.
>
> If, however, the method of service employed is either by certified or registered mail, return receipt requested, the twenty-day period within which the insurer must apply for the issuance of a stay, is computed not form the date of service, that is the posting of the demand, but rather from the date of its receipt. (see, *Matter of Knickerbocker Insurance Company [Gilbert]*, 28 NY2d 57, 64-65).
>
> Presumably, an insurer served with an arbitration demand through the office of the Superintendent of Insurance has a full twenty-day period in which to commence an Article 75 special proceeding, measured from the date the demand after retransmittal, is received by the insurer (see *Matter of*

Nationwide Mutual Insurance Company [Messa], 111 Misc.2d 957, but see, Deepdale General Hospital v. Colonial Insurance Company, 144 Misc.2d 917)."

-- THE COMMENCEMENT BY FILING STATUTE

In *Horne*, supra, where the petition to stay arbitration was served 21 days after the demand for arbitration was received, the petition was nevertheless held timely because, under the new commencement by filing statute, the petition had been filed on the 20th day and served within the 15 day grace period contained in CPLR 306-b(a). See also *Moskowitz v. Lieberman*, N.O.R., NYLJ 4/27/93, p. 26, col. 4 (Sup. Ct. N.Y. Co.); *Newkirk Pub. Inc. v. L & D Music Co., Inc.*, N.O.R., NYLJ 1/7/93, p. 24, col. 1.

In *American Transit Ins. Co. v. Lewis*, 157 Misc.2d 730, 602 NYS2d 1022 (Sup. Ct. N.Y. Co.), Justice Lehner held that purchasing an index number and filing a notice of petition within 20 days does not constitute timely filing where the petition itself was not yet in existence on the date the notice of petition was filed.

-- OVERCOMING THE 20-DAY LIMITATION PERIOD

In *Allcity Ins. Co. v. Russo*, _AD2d_, _NYS2d_ (1st Dept. 1993) (NYLJ 12/16/93, p. 22, col. 2), the court allowed the insurer to amend a timely filed petition to stay arbitration to add an entirely new claim long after the 20-day period for seeking a stay had expired. Because the Demand for Arbitration was served "almost immediately after the written claim for benefits", requiring petitioner to respond swiftly, before it could have been aware of the hospital records tending to disprove a hit and run, lest it forfeit its right to seek a stay, the insurer was allowed to amend the petition to add a claim that no hit and run had occurred. As noted by the court, leave to amend is freely given and "little, if any" prejudice resulted to the insured, who would have had to prove the hit and run in the arbitration in any event.

TRIAL DE NOVO

In *Lassiter v. CNA Ins. Co.*, _AD2d_, 600 NYS2d 59 (1st Dept. 1993), the First Department held, inter alia, that a provision in an underinsured motorist policy that either party could demand a trial de novo if the amount of damages awarded by the arbitrator exceeded the state's statutory minimum bodily injury liability limits provided that parties with a right to review damages only, not liability.

In *Hanover Ins. Co. v. Losquadro*, 157 Misc.2d 1014, 600 NYS2d 419 (Sup. Ct. N.Y. Co. 1993), Justice Lehner held that the de novo provision in SUM or underinsured motorist policies is violative of public policy favoring arbitration, unfairly discriminates against insureds, is "so unfair as to be unconscionable" and, is therefore, unenforceable.

But see *Allstate Ins. Co. v. Purdy*, N.O.R., NYLJ 1/7/94, p. 35, col. 5 (Sup. Ct. Orange Co.) (At the time the parties entered into the insurance agreement, a de novo provision was "not prohibited by the regulations of the Insurance Department", "the right to demand a trial was recognized in case law" and "was a fairly standard provision in policies issued throughout the country" and no appellate New York court has yet found such a provision against public policy.)

In *General Accident Ins. Co. v. Giacomazzo*, N.O.R., NYLJ 2/16/93, p. 26 col. 2 (Sup. Ct. N.Y. Co.), Justice Lehner held that the right to trial de novo was waived by both parties by appointing only a single arbitrator and proceeding in the matter under AAA rules and procedures, rather than the procedures set forth in the policy. Under the AAA rules the parties were "deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof", i.e., the award would be binding.

In *Commercial Union Ins. Co. v. Bratt*, N.O.R., NYLJ 5/6/93, p. 35, col. 2 (Sup. Ct. Nassau Co.), Justice McCaffrey congratulated the State Insurance Department for amending the applicable regulations to prospectively eliminate the de novo provisions (and for resolving the "Catch-22" (see infra.))

[Regulation 35-D has eliminated the de novo provision entirely.]

STATUTE OF LIMITATIONS

In *Westchester Fire Ins. Co. v. Imperiale*, 157 AD2d 721, 598 NYS2d 685 (Sup. Ct. N.Y. Co. 1993), Justice Schlesinger held, inter alia, that a demand for arbitration is governed by the six year limitations period associated with matters emanating from a contractual duty (CPLR 213[2]); see also, *Allstate Ins. Co. v. Home*, supra.

CONCLUSION

It remains to be seen, of course, what 1994 will bring for UM/UIM litigation. One good bet, however, is that the title of next year's article will be "The Sum of SUM Cases Decided in 1994."