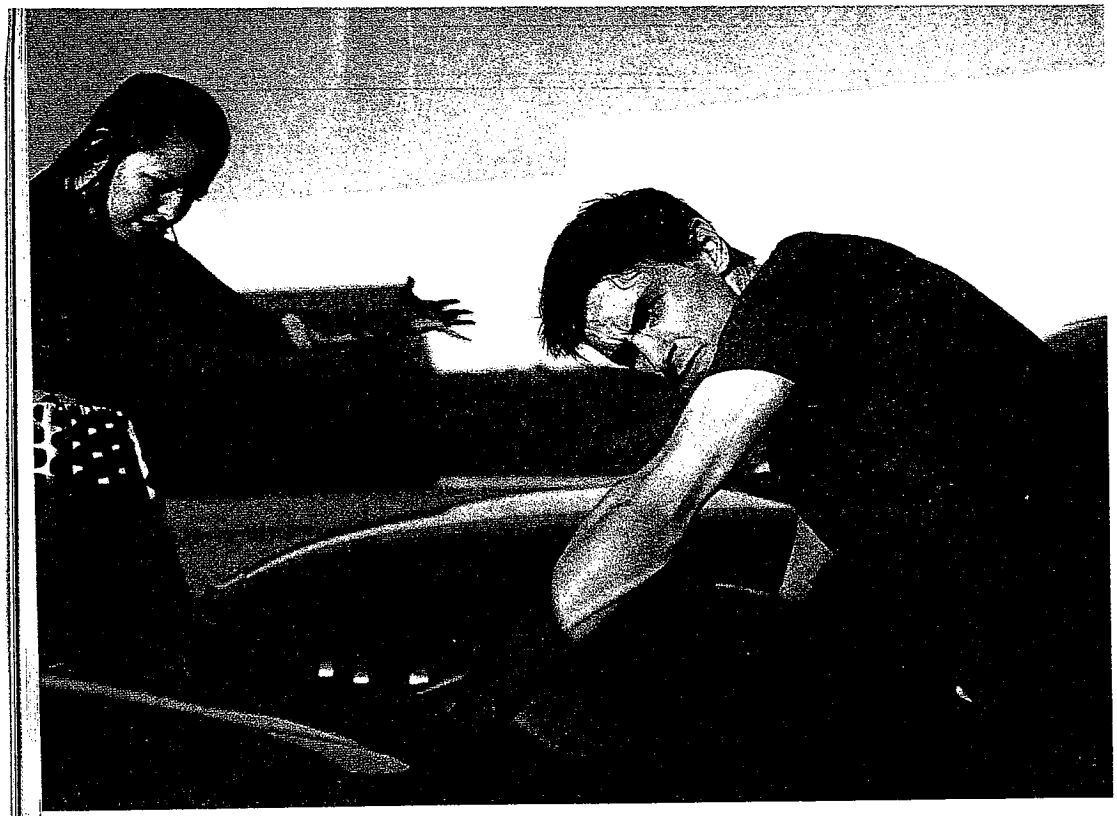

JONATHAN A. DACHS (jdachs@shaynedachs.com) is a member of the firm of Shayne, Dachs, Corker, Sauer & Dachs, LLP, in Mineola, New York. Mr. Dachs is a graduate of Columbia College of Columbia University, and received his law degree from New York University School of Law. He is the author of "Uninsured and Underinsured Motorist Protection," 2 *New Appleman New York Insurance Law*, Chapter 28 (LexisNexis), and of a chapter on UM/UIM and SUM (Pre-and Post-Regulation 35-D) in *Weitz on Automobile Litigation: The No-Fault Handbook* (New York State Trial Lawyers Institute). This article marks the 17th consecutive year in which Mr. Dachs has presented his annual survey of UM/UIM/SUM Law in the *Journal*.

2009 Review of Uninsured, Underinsured and Supplementary Uninsured Motorist Insurance Law

By Jonathan A. Dachs

In 2009, significant developments took place in the constantly changing and highly complex areas of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law of which practitioners in those areas should be aware.

Insured Persons

The definition of an "insured" under the SUM endorsement (and many liability policies) includes the "named insured" or spouse, as well as the relatives of the "named insured" or spouse while residents of the same household.

The "Named Insured"

In *Siragusa v. Granite State Ins. Co.*,[1] the appellate court held that the claimant, a pedestrian struck by a car, was not an "insured" under a policy issued to the Guild for Exceptional Children, the sponsor of the apartment in which the claimant lived. The definition of "insured" in the SUM endorsement stated: "You, or the named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse." Because the reference to "You" referred to the Guild, a corporation, which cannot have a spouse or relative, the claimant was not considered a "named insured."

Occupants

Also included within the category of "insureds" are individuals "occupying" the insured vehicle, or any other vehicle being operated by the named insured or spouse.

In *Continental Casualty Co. v. Lecei*,[2] the court upheld a Special Referee's determination that the claimant was "occupying" a truck within the meaning of the truck's policy, insofar as he was "alighting from the truck when

he was struck by a passing motorist," and, thus, was "still 'vehicle-oriented' at the time he was injured."

Insured Events

The UM/SUM endorsements provide for benefits to "insured persons" who sustain an injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured or underinsured motor vehicle.

"Use or Operation"

In *American Protection Ins. Co. v. DeFalco*,[3] an SUM claim was brought by a police officer, who alleged that the offending motorist put her vehicle in reverse and collided with the officer's patrol car after she had pulled over and stopped her vehicle upon being pursued by the officer. In addition to the issue of whether the officer's alleged injuries were the result of an "accident" or an intentional act, an issue was raised as to whether the injuries arose from the "use or operation" of an underinsured motor vehicle, rather than from a post-collision scuffle or altercation in the course of the officer's arrest of the motorist. In contrast to his affidavit submitted in opposition to the SUM carrier's petition to stay arbitration, in which he claimed that he was injured while exiting his vehicle as it was struck by the offending motorist, the claimant officer stated in an internal police department report that he was injured "while attempting to subdue and place a violent struggling suspect under arrest." These two explanations of how the officer was injured raised questions of fact and of credibility, which required a hearing to resolve.

"Accidents"

In *American Manufacturers Mutual Ins. Co. v. Burke*,[4] the court addressed a situation where a police officer was injured when a vehicle he stopped in the course of an investigation accelerated while he was partially inside it. The driver of that vehicle pleaded guilty to assault in the second degree, admitting that she intentionally drove even though the officer was struggling with her. The court held that "given that the [officer's] injuries were not the result of an accident, he was not entitled to uninsured motorist benefits under the subject insurance policy."[5]

The Claimant and Insured's Duty to Provide Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires 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." A failure to satisfy the notice requirement vitiates the policy.[6]

In *Liberty Mutual Ins. Co. v. Gallagher*,[7] the court explained, "Where, as here, an insured is required to provide notice of a claim as soon as practicable, such notice must be given within a reasonable time under all of the circumstances." The court pointed out that "it is the claimant's burden to prove timeliness of notice, which is measured by the date the claimant knew or should have known that the tortfeasor was underinsured." However, the problem with measuring timeliness is that it "is an elastic concept, the resolution of which is highly dependent on the particular circumstances." The court highlighted several factors that would help in determining whether notice is timely, including "whether the claimant has offered a reasonable excuse for any delay, such as latency of his/her injuries, and evidence of the claimant's due diligence in attempting to establish the insurance status of the other vehicles involved in the accident."[8]

In *Bhatt v. Nationwide Mutual Ins. Co.*,[9] the court reinforced the rule that, in the context of an SUM claim (as opposed to a liability claim), the carrier must establish that it was prejudiced by a late notice of an SUM claim in which the insured had previously provided timely notice of the accident.[10]

There is also a requirement to give notice of a legal action, that is, to immediately forward to the UM/SUM insurer a copy of the summons and complaint or other type of process in a lawsuit commenced by the insured or the insured's legal representative against "any person or organization legally responsible for the use of a motor vehicle involved in the accident."

In *American Transit Ins. Co. v. Hashim*,[11] the court held that "[h]aving received timely notice of claim, plaintiff insurer was not entitled to disclaim coverage based on untimely notice of the claimant's commencement of litigation unless it was prejudiced by the late notice." The court further added that the insurer did not demonstrate prejudice in the case because it was notified of the legal action after the motion for a default judgment was made but before the order granting the motion and scheduling an inquest was rendered. The dissenting justice contended that "[i]nasmuch as counsel for Hashim did not advise the insurer of the pendency of the litigation until after he had moved for a default judgment, and then refused the common and professional courtesy of permitting it to file an answer, the prejudice is self-evident."

Effective January 17, 2009, the New York State Insurance Law was amended in connection with the timing required for giving notice of a claim under insurance contracts, effectively eliminating the "no-prejudice" rule. The new law added § 3420(a)(5), which requires that every policy or contract insuring against liability for injury to person, issued or delivered by the state, contain a provision in which the "failure to give any notice required to be given by such policy within the time period prescribed therein

shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer."

In addition, under § 3420(c)(2)(C), another new provision, "[t]he insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim." Section 3420(c)(2)(A) creates a shifting burden of proof on the issue of "prejudice," which works in the following way:

> In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy.

Moreover, pursuant to § 3420(c)(2)(B), there will be an irrebuttable presumption of prejudice "if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise." This amendment to the "no-prejudice" rule may not be applied to cases involving policies issued before January 17, 2009. In such cases, the old common law rules apply.[12]

In *Malik v. Charter Oak Fire Ins. Co.*,[13] the court held that the injured party has an independent right to give notice, which is judged by a different, less stringent, standard than notice by the insured. As the court explained, "[t]he injured person's rights must be judged by the prospects for giving notice that were afforded him, not by those available to the insured." In other words, "[t]he passage of time does not of itself make delay unreasonable." Moreover, "[i]n determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insureds."[14]

The interpretation of the phrase "as soon as practicable" continued to receive significant attention in 2009.

In *Juvenex Ltd. v. Burlington Ins. Co.*,[15] the court held that the plaintiff's delay of two months in giving notice of claim was unreasonable as a matter of law, and that notice to the plaintiff's broker did not constitute notice to the insurer. Moreover, the court held that a failure to satisfy an insurance policy's notice requirement will not vitiate coverage when there is a valid excuse for late notice.

In *Progressive Northeastern Ins. Co. v. McBride*,[16] the court held that the claimant established a reasonable excuse for his nearly one-year delay in notifying the insurer of the claim, when his counsel sent several written requests to the tortfeasor's vehicle's insurers, but in the ensuing 12 months those letters were either ignored or the insurers provided erroneous information about the SUM limits of their policies.

In *American Transit Ins. Co. v. Brown*,[17] the court also held that the injured party was reasonably excused from his late notice of the lawsuit to the tortfeasor's insurer, which was sent to an old and incorrect address of the insurer because he was never advised of the insurer's change of address. The fact that the new address was contained on a check previously sent to the claimant's counsel during the settlement of a property damage claim did not suffice to put the injured party on notice of the new address to which the notice of claim or lawsuit should be sent. The dissenting justices, however, noted that there is no obligation on the part of a liability insurer to advise of a change of address, arguing that "to put forth the lack of such notice as a valid excuse for the failure to notify the insurer of pending litigation ignores the reality that (the insurer's) address could have been verified on the internet in approximately three-tenths of a second." On April 1, 2010, the New York Court of Appeals reversed the Appellate Division, First Department holding that the defendant had "failed to provide a valid excuse for his failure to use reasonable diligence in providing Plaintiff insurer with notice of the underlying personal injury action."[18]

Discovery

Effective January 17, 2009, with respect to liability policies that afford coverage for bodily injury or wrongful death claims where the policy is a personal lines policy other than an excess or umbrella policy, § 3420(d)(1) requires that within 60 days of receipt of a written request by an injured party or other claimant who has filed a claim, an insurer must confirm in writing whether the insured had a liability insurance policy in effect with that insurer on the date of the occurrence, and specify the limits of coverage provided under that policy. If the injured person or other claimant fails to provide sufficient identifying information to allow the insurer, in the exercise of reasonable diligence, to identify a liability policy that

may be relevant to the claim, the insurer has 45 days from the initial request to ask for more information, and then another 45 days after such information is provided to furnish the requested insurance information. Pursuant to an amendment to § 2601(a) of the Insurance Law ("Unfair Claim Settlement Practices"), the failure to comply with these disclosure requirements may result in departmental sanctions, including financial penalties.

Petitions to Stay Arbitration

Filing and Service

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 [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.[19] The 20-day rule does not apply when the basis for the petition is that the parties never agreed to arbitrate.[20]

In *MetLife Auto & Home v. Zampino*,[21] the court allowed the insurer to make a second application to stay arbitration long after the 20-day period from receipt of the demand for arbitration had expired.

> Under the particular circumstances of this matter . . . where Zampino failed to disclose the fact that she reached a settlement with [one of the tortfeasors] without MetLife's knowledge or consent allegedly in violation of the SUM endorsement, where MetLife did not discover these facts until after the expiration of the 20-day period set forth in CPLR 7503(c), and where MetLife filed its petition promptly upon learning these facts, we find that MetLife's failure to file its petition within that 20-day period does not bar this proceeding.[22]

Uninsured Motorist Issues

Self-Insurance

In *Richard Denise, M.D., P.C. v. New York City Transit Authority*,[23] the court observed that, as a self-insurer, the NYCTA is subject to the provisions of the no-fault law, as well as the uninsured motorist law to the same extent as an insurer.

An Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer

A vehicle is considered "uninsured" where it was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.

In *Felice v. Chubb & Son, Inc.*,[24] the court noted that "an insurance carrier must give timely notice of a disclaimer 'as soon as is reasonably possible' after it first learns of the accident or grounds for disclaimer of liability." In fact, the insurance carrier has the burden of explaining the delay in notifying the insured or injured party of its disclaimer. The court also explained that "the issue of whether a disclaimer was unreasonably delayed is generally a question of fact, requiring an assessment of all relevant circumstances surrounding a particular disclaimer." In fact, "[c]ases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional and present extreme circumstances."

A notice of disclaimer must be in writing, and not oral, such as over the telephone, held the court in *Stillwater Central School District v. Great American E & S Ins. Co.*[25].

The notice of disclaimer must be sent to all of the insureds and the claimants. In *Maughn v. RLI Ins. Co.*,[26] the court held that although the disclaimer letter was sent to an address at which three distinct insureds were located, because it was actually addressed to only one of them, it was ineffective as to the other two.[27]

An insurance carrier must give timely notice of a disclaimer as soon as is reasonably possible after it first learns of the accident or ground for disclaimer of liability.

In *J. Lucarelli & Sons, Inc. v. Mountain Valley Indemnity Co.*,[28] the court noted that § 3420(d), by its terms, is limited to disclaimers "for death or bodily injury." Therefore, it is inapplicable in an action pertaining to a breach of contract and breach of warranty pertaining to the construction of a home.

In *JT Magen v. Hartford Fire Ins. Co.*,[29] the issue was whether the prompt disclaimer requirement of § 3420(d) is triggered when an insurance carrier receives the notice of claim from another insurance carrier on behalf of a mutual insured asking that the insured be provided a defense and indemnity. The court held that the tender letter sent by Travelers on behalf of JT Magen and others to Hartford fulfilled the policy's notice of claim requirements so as to trigger the insured's obligation to issue a timely disclaimer. The court distinguished its earlier holding in *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*,[30] in which it had previously held that § 3420(d) does not apply to inter-company notices.

The court, in *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*,[31] reiterated the general rule that notice of disclaimer "must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated." The court added that while, of course, "an insurer may reserve the right to disclaim

on such different or alternative grounds as it may later find to be applicable," the insurer must give written notice of disclaimer on such other grounds as soon as is reasonably possible, that is, the reservation of rights is not a disclaimer. The court further said that, "[a]s the duties to disclaim properly and specifically are imposed by law, an insurer cannot unilaterally absolve itself of these duties." Therefore, "an insurer cannot avoid a waiver of a defense of which it has actual or constructive knowledge (i.e., avoid its duties to disclaim promptly and with specificity on the basis of that defense), by a unilateral assertion in a disclaimer notice that it is reserving or not waiving a right to disclaim on other, unstated grounds."

New York City Housing Authority v. Underwriters at Lloyd's, London[35] concerned a late notice disclaimer issued more than three months after the plaintiff sent notice of claim to the insurer, and 73 days after the plaintiff turned over the file in the underlying case to the insurer, was held to be untimely as a matter of law. There was no need for an investigation to determine grounds that were apparent, and no proof that an investigation was conducted diligently.

In *GMAC Ins. Co. v. Jones*,[36] the tortfeasor's carrier received late notice of the accident from the claimant's attorney. Six days later, the carrier sent its insured a reservation of rights letter indicating that there was a "coverage question" based on his "failure to report an accident and cooperate in the investigation." Subsequently, the insurer attempted to locate its insured to allow him to explain his failure to notify it of the claim. These efforts included mail, personal visits, telephone calls to neighbors, and letters to relatives, all of which were unsuccessful. The insurer finally disclaimed 44 days after it had received notice. In holding that this disclaimer was not untimely, the court noted that "an insurer's delay in notifying the insured of a disclaimer may be excused when the insurer conducts an investigation into issues affecting [its] decision whether to disclaim coverage." When the insurer does conduct an investigation, "the burden is on the insurer to demonstrate that its delay was reasonably related to its completion of a thorough and diligent investigation." In *Jones*, the court concluded that the insurer's efforts constituted an "investigation into issues affecting [its] decision whether to disclaim coverage" and, therefore, the insurer established a reasonable excuse for the delay as a matter of law.

The court noted that the insurer did not conduct a prompt investigation and there was no justification for waiting over seven years from the execution of the non-waiver agreement until the denial.

In *Mayer's Cider Mill, Inc. v. Preferred Mutual Ins. Co.*,[32] the 12-year-old son of the insured's employee was injured in 1999 when he placed his hand inside machinery at the insured's plant. The minor did not bring a lawsuit until March 2009 (within the extended statute of limitations for minors). The insurer never disclaimed but, instead, had the insured's secretary/treasurer sign a "Non-Waiver Agreement" in 1999, pursuant to which the insurer indicated that it would investigate the claim and reserved its right to disclaim coverage on the issue of whether the injured plaintiff was an employee of the insured. By letter dated May 31, 2007, the insurer advised the plaintiff that its investigation into the matter "was continuing," noted that the policy did not apply to employees and continued to reserve its right to deny coverage. The court found that the insurer "failed to provide the requisite written notice of disclaimer to plaintiff as soon as [was] reasonably possible." The court further noted that the insurer did not conduct a prompt investigation and there was no justification for waiting over seven years from the execution of the non-waiver agreement until the denial. Thus, again, the courts have established that a reservation of rights letter is no substitute for a disclaimer.

In *Liriano v. Eveready Ins. Co.*,[33] the court held that the disclaimer letter was proper because it "adequately recited that the defendant was disclaiming coverage as to the plaintiff on the ground that he failed to provide the defendant with timely notice of the underlying litigation and with legal papers filed in connection therewith." Moreover, in *Guzman v. Nationwide Mutual Fire Ins. Co.*,[34] the court held that a 51-day delay in disclaiming for late notice of the underlying lawsuit was unreasonable.

On the other hand, in *Crocodile Bar, Inc. v. Dryden Mutual Ins. Co.*,[37] in which the record established that the insurer's claims adjuster was aware when he received the claim that it was excluded from coverage, the same court held that the insurer failed to establish that its 62-day delay was reasonably related to the completion of a necessary, thorough and diligent investigation. Thus, the disclaimer was untimely.

In *Roules v. State Farm Ins. Cos.*,[38] the court held that a notice of disclaimer sent 13 days after the carrier first received notice of the accident was timely as a matter of law.[39] Moreover, in *Progressive Ins. Co. v. Dillon*,[40] the court noted that the insurer's failure to timely issue a

disclaimer or denial does not create coverage where none existed.

Non-cooperation

It is well-established that an insurance carrier that seeks to disclaim coverage on the ground of lack of cooperation must meet the "heavy burden" of demonstrating that it complied with the three-pronged test set forth by the New York Court of Appeals in *Thrasher v. United States Liability Ins. Co.*[41]

In *State Farm Indemnity Co. v. Moore*,[42] the court upheld the respondent insurer's disclaimer based upon the ground of non-cooperation by its insured, by demonstrating that (1) it acted diligently in seeking to bring about its insured's cooperation, (2) its efforts were reasonably calculated to obtain its insured's cooperation, and (3) the attitude of its insured, after the cooperation of its insured was sought, was one of "willful and avowed obstruction." As to the third prong, the court noted that, "[a]lthough it is not required of the insurer to show that the insured openly avowed an intent to obstruct the investigation of the claim, the facts must support an inference that the failure to cooperate was deliberate." In *Moore*, the respondent insurer demonstrated that it promptly commenced a detailed investigation and diligently followed up on it. In addition to numerous telephone calls made to the number the insured provided in the insurance policy, letters via certified or registered mail were sent to the address provided by the insured, of which the insured signed for one. Further, visits were made to the insured's address, and his mother maintained that she did not know his whereabouts. Under these facts and circumstances, the court concluded, these unsuccessful efforts were reasonably calculated to obtain the insured's cooperation, and the inference that the insured deliberately chose not to cooperate was compelling.[43]

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order to effectively cancel an owner's policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes, rules, and regulations governing notices of cancellation and termination of insurance. These differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle and whether the policy was written under the "Assigned Risk Plan," and/or was paid for under a premium financing contract.

In *2-10 Jerusalem Avenue Realty v. Utica First Ins. Co.*,[44] the owner's tenant met with its insurer's agent on February 24, 2006, during the workday, and signed a writing requesting retroactive cancellation under a (non-auto) liability policy as of 12:01 a.m. on February 24, 2006. Unbeknownst to the tenant or the agent, an

accident had occurred on February 24, 2006, some time after 12:01 a.m., but before the request for cancellation. The owner, apparently an additional insured under the policy, argued that since the policy permits cancellation only as of a "future date" specified in a written notice, and the written notice here did not specify a date in the future, the cancellation could not have been effective, under the "midnight rule" set forth in *Savino v. Merchants Mutual Ins. Co.*,[45] until at least the day after the accident. As the court stated, "[a]ny policy limitation on retroactive cancellation would be for the sole benefit of the insurer – protecting it against an insured who waits until the end of the policy period, sends a retroactive cancellation to avoid paying for the policy – and thus could be waived by the insurer." Thus, the court held that the policy was canceled effective February 24, 2006, at 12:01 a.m., as the tenant requested, and, therefore, was not in effect at the time of the accident.

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant. Generally, the "insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely that physical contact occurred, the identity of the owner and operator of the offending vehicle could not be ascertained, and the insured's efforts to ascertain such identity were reasonable."[46] Where an accident involves an identifiable driver, "the issue of whether there was actual physical contact is irrelevant."[47]

In *New York Central Mutual Fire Ins. Co. v. Vento*,[48] the court noted that "[w]hen there is an issue of fact as to whether physical contact occurred, a hearing on the issue must be conducted." Where the record supports the determination that there was physical contact between the vehicle of the insured and an unidentified vehicle, it will not be disturbed on appeal.[49]

In *Gurvich v. MVAIC*,[50] the court observed that "the courts have consistently afforded a very liberal interpretation to the [requirement of notice to the police within 24 hours of the occurrence], accepting police contacts that fall far short of the operator's obtaining a written report."

Stolen Vehicle

Automobile liability policies generally exclude coverage for damage caused by drivers of stolen vehicles, drivers operating without the permission or consent of the owner, or drivers operating a vehicle outside the scope of the permission given. In such situations, the vehicles at issue are considered "uninsured" and the injured claimant will be entitled to present an uninsured motorist claim.

In *Amex Assurance Co. v. Kulka*,[51] the court noted that "Vehicle and Traffic Law § 388 creates a strong presumption of permissive use which can only be rebutted with substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's express or implied permission." However, the vehicle owner's uncontested testimony that the vehicle was operated without his or her permission will not, "by itself, overcome the presumption of permissive use."

A vehicle owner may be held liable, however, even where the vehicle is stolen if the owner violated Vehicle & Traffic Law § 1210(a) by permitting the vehicle to stand unattended without first stopping the engine, locking the ignition, removing the key, and setting the brake.[52]

In *Baldwin v. Garage Management Corp.*,[53] the defendant's garage attendant erroneously gave the car keys to an individual who falsely claimed to be the owner of the car parked in the garage. The individual then stole the car and 12 hours later was involved in a head-on collision with the plaintiffs. The court affirmed the grant of summary judgment in favor of the defendant garage owner on the ground that Vehicle & Traffic Law § 1210(a) did not apply because the vehicle was not stolen from a "parking lot" as defined by Vehicle & Traffic Law § 129-b. The basis for that determination was that the subject garage was not "provided *in connection with* premises having one or more stores or business establishments, and *used by the public as a means of access to and egress from* such stores and business establishments." In addition, the court held that the vehicle was not left to "stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake so as to constitute a violation of § 1210(a)." The court also dismissed the plaintiffs' common law negligence claim since "in the absence of an applicable statute, [a defendant cannot] be held liable for damages caused by [a thief] in the operation of [a plaintiff's] vehicle."

A vehicle owner may be held liable even where the vehicle is stolen if the owner violated Vehicle & Traffic Law § 1210(a).

Underinsured Motorist Issues

Triggering Coverage

In *Clarendon National Ins. Co. v. Nunez*,[54] the tortfeasor's insurer paid out the sums of $5,000 to one claimant and $15,000 each to three other claimants, which totaled the full $50,000 limits of coverage for the tortfeasor. The Appellate Division, Second Department rejected the underinsured motorist claims of each of the claimants under a 25/50 UM/SUM policy, noting that "[s]ince the tortfeasor's policy limits for bodily injury liability were identical to the petitioner's policy for bodily injury liability, the tortfeasor's vehicle was not underinsured." The Appellate Division added that "[c]ontrary to the respondent's contention, 11 NYCRR 60-2.3(f)(c)(3)(ii) does not render the tortfeasor's vehicle underinsured for purposes of triggering the SUM endorsement because of the payments the tortfeasor's insurer already made to them." The Appellate Division determined that the section of the Regulation 35-D SUM endorsement that defines an "uninsured motor vehicle" as one for which "there is a bodily injury liability insurance coverage or

bond applicable to such motor vehicle at the time of the accident, but . . . the amount of such insurance coverage or bond has been reduced by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of this policy," requires such reduction for payments made "to other persons" and not payments made to the claimants.[55]

The Court of Appeals affirmed the Appellate Division's decision that the SUM was not triggered under the circumstances. The majority quoted the pertinent provision from the underinsured motorist statute, which it found provided that "SUM coverage is only triggered where the bodily injury liability insurance limits of the policy covering the tortfeasor's vehicle are less than the third-party liability limits of the policy under which a party is seeking SUM benefits." The Court also observed that the statute "calls for a facial comparison of the policy limits without reduction from the judgment of other claims arising from the accident." In fact, the Court noted that "section 3420(f)(2) was enacted to allow policyholders to acquire the same level of protection for themselves and their passengers as they purchased to protect themselves against liability to others."

While recognizing the power and authority of the New York State Superintendent of Insurance "to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" and not "counter to the clear wording of a statutory provision," the majority interpreted the regulation in a manner that it believed was consistent with the statute. Thus, the majority concluded that "the 'payments to other persons' that may be deducted from the tortfeasor's coverage limits for purposes of rendering the tortfeasor 'uninsured' under a SUM endorsement do not encompass payments made to anyone who is an insured under the endorsement." As the majority further explained, "[a]s each claimant here falls within the endorsement's definition of an 'insured,' which encompasses all passengers in the covered vehicle, claimants are not 'other person[s].'" As a result, an insured is able to reduce the coverage limits of the tortfeasor's policy only when payments made under the tortfeasor's policy are to individuals, such as occupants of the tortfeasor's vehicle, injured pedestrians, or those operating a third vehicle, who are not covered under the SUM endorsement. The Court recognized that "[t]his guarantees that those who have purchased SUM coverage will receive the same recovery they have made available to third parties they injured – but no more." To allow the claimants in these cases to obtain additional coverage – up to an additional $50,000 in SUM benefits – after they received a total of $50,000 from the tortfeasor (for a total of $100,000) would be to provide an insured with more coverage than that provided to an injured third party under his or her policy ($50,000); a result that, in the majority's view, was not intended and should not be allowed.

Offset Provision

In *Clarendon National Ins. Co. v. Nunez*,[56] the Second Department held that the SUM carrier was entitled to offset the full $50,000 received by the respondents from the tortfeasor's insurer against the SUM limits of its policy, effectively allowing for an offset for payments made to the "insureds" (plural) despite the fact that the endorsement provision refers to the "insured" (singular), and precluding any recovery by any of the respondents under the $50,000 SUM policy. In affirming the decisions in both of those cases (based upon the "trigger" issue), the New York Court of Appeals did not address the offset issue at all.

Settlement Without Consent

In *In re Central Mutual Ins. Co. (Bemiss)*,[57] the respondent was injured in a multiple vehicle accident and negotiated a settlement with one of the tortfeasors for the full amount of that party's liability insurance policy. She then gave written notice to her SUM carrier of her intent to enter into this settlement, but the carrier did not respond to her request for permission to settle. Subsequently, she agreed to settle with a second tortfeasor for less than that party's liability limits without first giving any notice to, or obtaining the consent of, the SUM carrier. The respondent ultimately signed releases for both tortfeasors, which made no provision for protecting the SUM carrier's subrogation rights. When the respondent then made a claim for SUM benefits, the SUM carrier denied coverage based upon the failure to protect its subrogation rights. When the respondent demanded arbitration, the carrier moved for a permanent stay, which the trial court granted.

On appeal, the Appellate Division, Third Department agreed with the respondent that the settlement with the first tortfeasor was proper insofar as "the terms of the policy permitted her to settle with the first tortfeasor without preserving [the SUM carrier's] subrogation rights." Under Condition 10 of the SUM endorsement, since a request for consent to settle was made, and 30 days passed without a response, the insured was permitted to issue a release.

The Appellate Division reached a different conclusion, however, regarding the settlement with the second tortfeasor, concluding that such settlement, even for an amount less than the policy limits, destroyed the insurer's subrogation rights against that tortfeasor. Thus, the Appellate Division affirmed the grant of the petition on the basis of the respondent's failure to comply with the terms of her policy.

The Court of Appeals unanimously affirmed, rejecting the respondent's argument that once she settled with the

first tortfeasor for his full policy limits after notifying the SUM carrier of her intent to do so, she was not required to also notify the carrier in advance of her intent to settle with the second tortfeasor or to preserve the SUM carrier's subrogation rights as to him because she was not required to exhaust his liability limits prior to proceeding with her SUM claim.

Carefully examining the language and structure of Condition 10 ("Release or Advance"), the Court held that while the respondent contended that "any negligent party" referred only to the first tortfeasor whose policy was exhausted so as to make SUM benefits payable, "this is not readily apparent from the words used or the regulatory history." As the Court explained, "in short, Condition 10 delineates the *sole* situation in which an insured may settle with any tortfeasor in exchange for a general release, thus prejudicing the insurer's subrogation rights without the carrier's written consent."

In *Government Employees Ins. Co. v. Hengber*,[58] the court held that the insurer was not prejudiced by the respondent's failure to obtain its written consent to settle his personal injury action against the tortfeasor, who was insured by the same insurer as the claimant. "The settlement did not impair GEICO's subrogation rights against [the tortfeasor]," the court stated, "because an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered." ■

1. 65 A.D.3d 1216, 886 N.Y.S.2d 432 (2d Dep't 2009).
2. 65 A.D.3d 931, 885 N.Y.S.2d 285 (1st Dep't 2009). The court's decision setting the matter down for a framed issue hearing was reported on in last year's article. *See Continental Cas. Co. v. Lecei*, 47 A.D.3d 509, 850 N.Y.S.2d 76 (2d Dep't 2008).
3. 61 A.D.3d 970, 877 N.Y.S.2d 450 (2d Dep't 2009).
4. 63 A.D.3d 732, 880 N.Y.S.2d 164 (2d Dep't 2009).
5. *See also DeFalco*, 61 A.D.3d 970 (framed issue hearing required to determine whether collision was result of intentional act).
6. *See N.Y. Cent. Mut. Fire Ins. Co. v. Vento*, 63 A.D.3d 841, 882 N.Y.S.2d 126 (2d Dep't 2009); *Travelers Ins. Co. v. Cohen*, 61 A.D.3d 768, 877 N.Y.S.2d 189 (2d Dep't 2009).
7. 68 A.D.3d 772, 890 N.Y.S.2d 589 (2d Dep't 2009).
8. *See also Progressive Ne. Ins. Co. v. McBride*, 65 A.D.3d 632, 884 N.Y.S.2d 167 (2d Dep't 2009).
9. 61 A.D.3d 1406, 877 N.Y.S.2d 562 (4th Dep't 2009).
10. *See also Vento*, 63 A.D.3d 841; *In re Liberty Mut. Ins. Co. (Frenkel)*, 58 A.D.3d 1089, 872 N.Y.S.2d 590 (3d Dep't 2009); *cf., Cohen*, 61 A.D.3d 768 (no requirement to demonstrate prejudice for untimely notice of an SUM claim where no prior notice of the accident received).
11. 68 A.D.3d 618, 892 N.Y.S.2d 78 (1st Dep't 2009).
12. *See Bd. of Managers of 1235 Park Condo. v. Clermont Specialty Managers, Ltd.*, 68 A.D.3d 496, 891 N.Y.S.2d 340 (1st Dep't 2009); *Sevenson Envt'l Servs., Inc. v. Sirius Am. Ins. Co.*, 64 A.D.3d 1234, 883 N.Y.S.2d 423 (4th Dep't 2009).
13. 60 A.D.3d 1013, 877 N.Y.S.2d 114 (2d Dep't 2009).
14. *See also Sputnik Rest. Corp. v. United Nat'l Ins. Co.*, 62 A.D.3d 689, 878 N.Y.S.2d 428 (2d Dep't 2009) (injured party "is not charged vicariously with an insured's delay").
15. 63 A.D.3d 554, 882 N.Y.S.2d 47 (1st Dep't 2009).
16. 65 A.D.3d 632, 884 N.Y.S.2d 167 (2d Dep't 2009).
17. 66 A.D.3d 447, 886 N.Y.S.2d 399 (1st Dep't 2009).
18. 14 N.Y.3d 809, 899 N.Y.S.2d 751 (2010).
19. *See State Farm Mut. Auto. Ins. Co. v. Waite*, 68 A.D.3d 1006, 889 N.Y.S.2d 866 (2d Dep't 2009); *Liberty Mut. Ins. Co. v. Zacharoudis*, 65 A.D.3d 1353, 885 N.Y.S.2d 610 (2d Dep't 2009) (notice of intention to arbitrate); *Liberty Mut. Ins. Co. v. Argueta*, 59 A.D.3d 446, 872 N.Y.S.2d 521 (2d Dep't 2009). *See also Hermitage Ins. Co. v. Escobar*, 61 A.D.3d 869, 877 N.Y.S.2d 413 (2d Dep't 2009).
20. *See In re Matarasso (Cont'l Cas. Co.)*, 56 N.Y.2d 264, 451 N.Y.S.2d 703 (1982); *Argueta*, 59 A.D.3d 446.
21. 18 Misc. 3d 1123(A), 856 N.Y.S.2d 499 (Sup. Ct., Nassau Co. 2008), *appeal dismissed*, 65 A.D.3d 1150, 885 N.Y.S.2d 227 (2d Dep't 2009).
22. *MetLife Auto & Home v. Zampino*, 65 A.D.3d 1151, 1152, 886 N.Y.S.2d 697 (2d Dep't 2009).
23. 25 Misc. 3d 13, 887 N.Y.S.2d 742 (App. Term, 1st Dep't 2009).
24. 67 A.D.3d 861, 888 N.Y.S.2d 437 (2d Dep't 2009).
25. 66 A.D.3d 1260, 887 N.Y.S.2d 719 (3d Dep't 2009).
26. 68 A.D.3d 1067, 892 N.Y.S.2d 172 (2d Dep't 2009).
27. *See also J.T. Magen v. Hartford Fire Ins. Co.*, 64 A.D.3d 266, 879 N.Y.S.2d 100 (1st Dep't 2009); *Guzman v. Nationwide Mut. Fire Ins. Co.*, 62 A.D.3d 946, 880 N.Y.S.2d 302 (2d Dep't 2009); *Mayer's Cider Mill, Inc. v. Preferred Mut. Ins. Co.*, 63 A.D.3d 1522, 879 N.Y.S.2d 858 (4th Dep't 2009).
28. 64 A.D.3d 856, 881 N.Y.S.2d 708 (3d Dep't 2009).
29. 64 A.D.3d 266, 879 N.Y.S.2d 100 (1st Dep't 2009).
30. 27 A.D.3d 84, 806 N.Y.S.2d 53 (1st Dep't 2005).
31. 62 A.D.3d 33, 873 N.Y.S.2d 592 (1st Dep't 2009).
32. 63 A.D.3d 1522, 879 N.Y.S.2d 858 (4th Dep't 2009).
33. 65 A.D.3d 524, 884 N.Y.S.2d 248 (2d Dep't 2009).
34. 62 A.D.3d 946, 880 N.Y.S.2d 302 (2d Dep't 2009).
35. 61 A.D.3d 726, 877 N.Y.S.2d 193 (2d Dep't 2009).
36. 61 A.D.3d 1358, 877 N.Y.S.2d 572 (4th Dep't 2009).
37. 61 A.D.3d 1361, 877 N.Y.S.2d 778 (4th Dep't 2009).
38. 59 A.D.3d 514, 873 N.Y.S.2d 183 (2d Dep't 2009).
39. *See also Key Bank U.S.A., N.A. v. Interboro Ins. Co.*, 65 A.D.3d 521, 884 N.Y.S.2d 246 (2d Dep't 2009) (13-day delay timely).
40. 68 A.D.3d 448, 889 N.Y.S.2d 583 (1st Dep't 2009).
41. 19 N.Y.2d 159, 278 N.Y.S.2d 793 (1967).
42. 58 A.D.3d 429, 872 N.Y.S.2d 82 (1st Dep't 2009).
43. *See also State-Wide Ins. Co. v. Luna*, 68 A.D.3d 882, 889 N.Y.S.2d 488 (2d Dep't 2009) (noncooperation disclaimer upheld).
44. 62 A.D.3d 481, 878 N.Y.S.2d 358 (1st Dep't 2009).
45. 44 N.Y.2d 625, 407 N.Y.S.2d 468 (1998).
46. *See N.Y. Cent. Mut. Fire Ins. Co. v. Vento*, 63 A.D.3d 841, 882 N.Y.S.2d 126 (2d Dep't 2009); *Travelers Indem. Co. v. Panther*, 61 A.D.3d 984, 878 N.Y.S.2d 174 (2d Dep't 2009).
47. *Panther*, 61 A.D.3d 984.
48. 63 A.D.3d 841.
49. *See Progressive Ne. Ins. Co. v. Harding*, 63 A.D.3d 947, 880 N.Y.S.2d 536 (2d Dep't 2009).
50. 66 A.D.3d 677, 885 N.Y.S.2d 770 (2d Dep't 2009).
51. 67 A.D.3d 614, 888 N.Y.S.2d 577 (2d Dep't 2009).
52. *See* Norman H. Dachs & Jonathan A. Dachs, *Stolen Vehicles and the Key in the Ignition Law*, N.Y.L.J., July 16, 1998, p. 3, col. 1.
53. 62 A.D.3d 818, 880 N.Y.S.2d 298 (2d Dep't 2009).
54. 48 A.D.3d 460, 850 N.Y.S.2d 639 (2d Dep't 2008), *aff'd sub nom. Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 883 N.Y.S.2d 755 (2009).
55. *See also, to same effect, Allstate Ins. Co. v. Rivera*, 50 A.D.3d 680, 855 N.Y.S.2d 217 (2d Dep't 2008), *aff'd*, 12 N.Y.3d 602, 883 N.Y.S.2d 755 (2009).
56. 48 A.D.3d 460; *Rivera*, 50 A.D.3d 680.
57. 54 A.D.3d 499, 862 N.Y.S.2d 654 (3d Dep't 2008), *aff'd*, 12 N.Y.3d 648, 884 N.Y.S.2d 222 (2009).
58. 66 A.D.3d 1020, 887 N.Y.S.2d 683 (2d Dep't 2009).