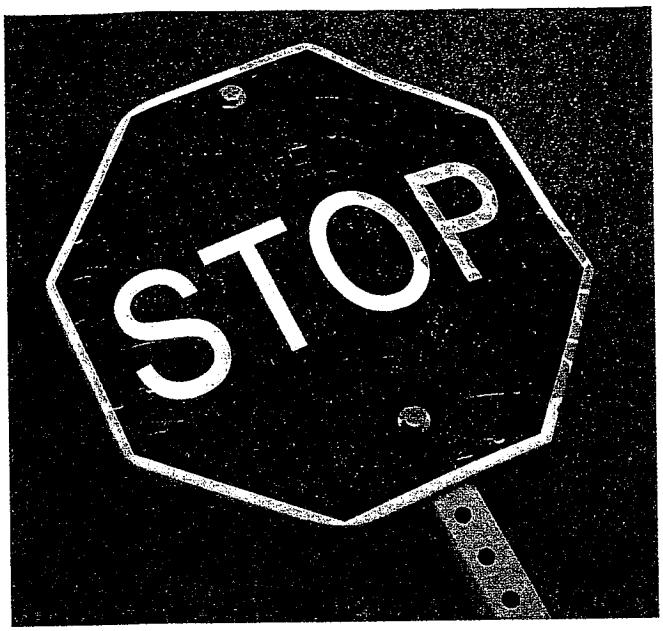

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2010 Review of Uninsured, Underinsured, and Supplementary Uninsured Motorist Insurance Law

By Jonathan A. Dachs

Consistent with recent history, 2010 was another busy and important year in this ever-changing and highly complex area of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law.

GENERAL ISSUES

Insured Persons

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

"Named Insured"

In *Gallaher v. Republic Franklin Ins. Co.*,[1] the court held that the plaintiff, a volunteer fireman who was injured after exiting a fire company truck while in the process of directing traffic away from the scene of a motor vehicle accident, was not a "named insured" under the fire company's policy because the "named insured" was the fire company and, thus, the term "you" as used in the definition of an "insured" referred only to the fire company, and did not refer to an employee of the fire company.

Residents

In *Konstantinou v. Phoenix Ins. Co.*,[2] the court noted that "[a] person is a resident of a household for insurance purposes if he or she 'lives in the household with a certain degree of permanency and intention to remain.'" Here, the court held that an individual who lived at college at the time of the accident was a resident of her mother's household, where she lived with her mother during summers, received mail, stayed every other weekend, and listed the household as her address on her car's title and insurance.

In *State Farm Mutual Automobile Ins. Co. v. Bonifacio*,[3] the respondent testified that she lived most of her life

at her parents' residence in Yorktown Heights until she graduated from college in 2005. Shortly thereafter, she rented an apartment in Manhattan with two other people. Two months later, she began employment in Manhattan where she worked five days a week for 11 to 12 hours per day. The court held that the respondent had failed to establish that she was residing at her parents' residence at the time of the accident, despite the following evidence: her testimony that she visited her parents' home at least once a month; her parents maintained a room for her where she left some of her personal belongings; her driver's license still listed her parents' address as her home address; she still possessed a key to that residence; she had voted in Yorktown Heights (after the accident); and she had opened a bank account there. The court specifically noted that the respondent was emancipated from her parents, paid rent at the Manhattan residence, filed her own tax return, and was no longer listed as a dependent on her parents' tax returns. Insofar as the respondent was not a "covered person" under her parents' policy, the parents' insurer's petition to permanently stay arbitration was granted.

In *Allstate Ins. Co. v. Ban*,[4] the court held that the claimants were residents of the household of someone insured by Allstate. The fact that prior to the accident the claimants had purchased a separate home, to which they intended to move after extensive renovations were completed, did not require a different conclusion. The claimants' undisputed testimony, confirmed by documents including driver's licenses and financial account statements, demonstrated that while they had sometimes reported their address as that of their new home in order to avoid confusion of claimant Jozsef Ban's mail with that of his father, of the same name, they had been living in the house owned by the named insured (Jozsef Ban's mother) for at least seven years prior to the accident, and had not yet moved to their new home. Thus, on the date of the accident, they "actually resided in the [named insured's] household with some degree of permanence and with the intention to remain for an indefinite period."

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 *Rosado v. Hartford Fire Ins. Co.*,[5] the plaintiff was injured when he was struck by a box truck while standing outside a truck he utilized for his job making beer deliveries. After making a delivery to a bar, he wheeled his hand truck back to the driver's side of the delivery truck and opened a locked bay on the truck so that he could place empty cases of beer into it. At the time of the accident, he had not yet placed any of the empty cases into the truck. He was standing with his feet on the pavement, looking into a side bay of the truck and his hands were reaching into the bay to rearrange the empty cases of beer, when he was struck by the box truck. He testified that 10 minutes had passed from the time he exited the truck. As a result of the impact with the box truck, he was pushed 10 to 12 feet and pinned between the truck and the box truck. On these facts, the court found "[i]n accordance with the liberal interpretation afforded the term 'occupying' [citation omitted]," that "the injured plaintiff was 'in' or 'upon' the delivery truck at the time of the accident such that he was 'occupying' the delivery of the truck within the meaning of the SUM endorsement." On the other hand, in *Gallaher*,[6] the court held that a volunteer fireman, who had exited the fire truck and was directing traffic away from the scene of a motor vehicle accident, was not "occupying" the truck within the meaning of that term in the policy, i.e., "in, upon, entering into, or exiting from a motor vehicle," because his conduct in directing traffic was "unrelated to the [truck]" and was "not incidental to his exiting it."

In *Commerce & Industry Ins. v. Reiss*,[7] the court held that the claimant was not an "occupant" of the vehicle at the time of the accident when she exited the vehicle in which she had been traveling, crossed the street, entered a restaurant, ate a bowl of soup, used the restroom, and was then walking back across the street toward the car when she was struck by a hit-and-run vehicle.

Owned Vehicles Exclusion

The SUM endorsement contains an exclusion for "bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made."

In *New York Central Mutual Fire Ins. Co. v. Polyakov*,[8] the court applied that exclusion to deny the SUM claim of an insured injured while riding a motorcycle he owned. The court observed that this exclusion was not ambiguous and that the "petitioner was entitled to have the provisions it relied on to disclaim coverage enforced."

Insured Events

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

"Use or Operation"

In *Liberty Mutual Fire Ins. Co. v. Malatino*,[9] the court held that the claimant's injury, sustained when she was returning to work after taking a break in her employer's parking lot, as a result of her walking into a piece of sheet metal extending approximately five feet beyond the tailgate of a co-worker's parked pickup truck, arose out of the "use" of the truck, thereby entitling her to make an SUM claim. As noted by the majority of the court, "'[u]se' of a vehicle

encompasses more than just driving, and extends to other incidental activities." Although the truck was not being operated at the time of the accident, it was being used by the co-worker to transport the sheet metal to the junkyard after work. The court further stated, "Construing the language of the supplemental underinsured motorists policy liberally 'in favor of the insured and strictly against the insurer,' [citation omitted], and given the causal connection between the use of the pickup truck to transport the sheet metal and respondent's injuries, we find that respondent's request for arbitration falls within the scope of the parties' agreement."[10]

Claimant/Insured's Duty to Provide Timely Notice of Claim

The 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.[16] The issue of late notice of claim may also be relevant to the determination of whether the alleged offending vehicle is "uninsured" in cases where there has been a disclaimer or denial of coverage based on such late notice (see discussion below).

> "Where an insurance policy requires that notice of an occurrence be given 'as soon as practicable,' notice must be 'given within a reasonable [period of] time under all the circumstances.'"

In *Progressive Halcyon Ins. Co. v. Giacometti*,[11] the majority held that the claimant, a passenger, who, after the vehicle's owner/operator had steered to the left, grabbed the steering wheel and pulled the vehicle to the right, causing the vehicle to go off the road, become airborne and crash into trees, did not have the express or implied permission of the owner/operator to use the vehicle. He did not have express permission to take control of the steering wheel, and the owner/operator did not impliedly consent to the claimant's use of the vehicle in that matter.[12]

In *Kohl v. American Transit Ins. Co.*,[13] the plaintiff was a passenger in a taxicab who injured a bicyclist when he opened the door into the bicyclist. The Court of Appeals held that the plaintiff was not insured under the taxi owner's business automobile liability policy, which provided that it "shall inure to the benefit of any person legally operating" the insured vehicle in the business of the insured. In the view of the Court, "[t]he word 'operating' cannot be stretched to include passengers riding in the car or opening the door."[14]

"Accidents"

In *Travelers Indemnity Co. v. Richards-Campbell*,[15] where the claimants were intentionally struck by an individual who pleaded guilty to three counts of assault in the second degree, admitting that she intentionally struck them, the court held that the tortfeasor's insurer was not obligated to provide coverage under the automobile insurance liability policy because the injuries were not the result of an accident, but, rather, an intentional criminal act. Moreover, the court held that the claimants' SUM carrier properly disclaimed UM benefits because the claimants' injuries were caused by intentional criminal acts and not by accidents.

In *McGovern-Barbash Assoc., LLC v. Everest National Ins. Co.*,[17] the court noted that "[w]here an insurance policy requires that notice of an occurrence be given 'as soon as practicable,' notice must be 'given within a reasonable [period of] time under all the circumstances.' An insured's failure to satisfy the notice requirement constitutes 'a failure to comply with a condition precedent which, as a matter of law, vitiates the contract'" (citations omitted).

In *Prince Seating Corp. v. QBE Ins. Co.*,[18] the court noted that "absent some evidence of an agency relationship, even timely notice of an accident by an insured to a broker is not effective and does not constitute notice to the insurance company, as a broker is considered to be an agent only of the insured" (citations omitted). In this case, although there was no evidence that a principal-agent relationship between the broker and the insurer existed, the court held that summary judgment could not be granted to the insurer based on its late notice defense where the plaintiff gave timely notice to the broker because "the terminology of the policy, including the notice provision in which the words 'we,' 'us,' and 'our,' referring to 'the company providing this insurance,' were used to describe who should be notified, is ambiguous."[19]

In determining whether notice was timely, factors to consider include, *inter alia*, whether the claimant has offered a reasonable excuse for any delay, such as latency of his or 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.[20] The inter-

pretation of the phrase "as soon as practicable" continues, as always, to be a hot topic.

In *Tri-State Ins. Co. v. Furboter*,[21] the court held that the respondent's delay of 16 months in notifying the petitioner of his claim for underinsurance benefits was "attributable to the belief of his various treating physicians that his injuries were relatively minor and would resolve with treatment." Thus, where the respondent gave notice promptly after he was made aware of the worsening and permanent nature of his injuries, such notice was deemed timely under the circumstances.

In *American Transit Ins. Co. v. Brown*,[22] the Court of Appeals held, "Defendant Brown 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," where the notice was sent to an old and incorrect address of the insurer because he was never advised of the insurer's change of address. In so holding, the Court adopted the view of the dissenting justices at the Appellate Division, that there is no obligation on the part of a liability insurer to advise of a change of address, especially when the insurer's address easily could have been ascertained via the Internet.

It should be remembered that for coverage claims under New York liability policies issued on or after January 17, 2009, insurers will be required to demonstrate prejudice from the late notice, unless the notice was delayed by more than two years. Still undecided, and to be litigated, is the question of whether that two-year period, which shifts the burden of proving or disproving prejudice, must be measured separately for each of the policy provisions pertaining to notice – i.e., notice of accident or claim, and notice of lawsuit.

Discovery

The UM and SUM endorsements contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations, and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *GEICO v. Mendoza*,[23] the court held that where the insurer presents a justifiable excuse for its failure to seek discovery, "a temporary stay of arbitration will be granted in order to allow the insurer to obtain the information sought." Here, a justifiable excuse was shown to exist, i.e., "the parties were involved in good faith communications regarding liability for the accident, and the insurer reasonably relied on the assurances by the respondent's attorney that a different insurance carrier was accepting liability for the losses suffered in the accident, and that he was not planning on making an uninsured motorist claim."

In *Travelers Indemnity Co. v. United Diagnostic Imaging, P.C.*,[24] the court stated that "[a] court should only order disclosure to aid in arbitration pursuant to CPLR 3102(c) if 'extraordinary circumstances' exist." Moreover, "[t]he test for ordering disclosure in aid of arbitration is 'necessity,' as opposed to 'convenience.' Thus, court-ordered disclosure to aid in arbitration is justified only where that relief is 'absolutely necessary for the protection of the rights of a party' to the arbitration" (citations omitted).

In *State Farm Mutual Automobile Ins. Co. v. Urban*,[25] the court held that it was error to direct discovery in the event the matter proceeded to arbitration since the petitioner's failure to move to stay arbitration within the applicable 20-day period to do so "is a bar to judicial intrusion into the arbitration proceedings." Moreover, by repudiating liability for the claim in an earlier disclaimer/denial letter, the insurer could not thereafter insist upon adherence to the terms of its policy, including those pertaining to pre-arbitration discovery.

It should be remembered that pursuant to 2008 N.Y. Laws chapter 388, effective January 17, 2009, a new Insurance Law § 3420(d)(1) was created, which provides, 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, 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 Ins. Law § 2601(a) ("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.

In *State Farm Mutual Automobile Ins. Co. v. Urban*, discussed above, the claimant sent a letter to his insurer, by certified mail, return receipt requested, informing it that he intended to arbitrate a claim for SUM benefits, since the accident in which he was injured involved a

motorist who left the scene of the accident. That letter contained information concerning the policy number, claimant's name and address, and a warning that unless within 20 days of receipt thereof the insurer applied to stay arbitration, it would "be precluded from objecting that a valid agreement was not made or complied with and from asserting in court the bar of a limitation of time." Notwithstanding that the letter was received on December 26, 2008, it was not until April 8, 2009, that the insurer denied the SUM claim. Thereafter, on June 10, 2009, the claimant sent the insurer a "Request for Arbitration" with the American Arbitration Association. The insurer moved to stay arbitration within 10 days after receipt of that "request."

In finding the insurer's Petition to Stay Arbitration untimely, the court observed that the letter received by the insurer on December 26, 2008, was a proper notice of intention to arbitrate, to which the 20-day period to seek a stay applied. The subsequent service of the Request for Arbitration filed with the AAA did not reset the 20-day period. Thus, the petition was time-barred, thereby preventing the insurer from raising any issues regarding insurance coverage for the offending vehicle or physical contact with the alleged hit-and-run vehicle.[26]

In *United Services Automobile Association v. Kungel*,[27] the court held that although the petitioner erroneously served the petition and notice of petition one day prior to purchasing an index number and filing process with the court,

> the recent amendment to CPLR 2001 was enacted expressly "to fully foreclose dismissal of actions for technical . . . non-prejudicial defects" in commencement . . . regardless of whether the defendant objected in a timely and proper manner, so long as "the mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process" does not prejudice a substantial right of a party (citations omitted).

Burden of Proof

In *American International Ins. Co. v. Giovanielli*,[28] the court stated that "[i]n a proceeding to stay arbitration of a claim for uninsured motorist benefits, the claimants' insurer has the initial burden of proving that the offending vehicle was insured at the time of the accident, and thereafter the burden is on the party opposing the stay to rebut that prima facie showing" (citations omitted). In this case, the petitioner made a prima facie showing that the alleged offending vehicle was insured by Lloyd's at the time of the accident by submitting the police accident report containing the vehicle's policy number, as well as correspondence from the insurer's representative identifying Lloyd's as the insurer of the vehicle.[29] In opposition, Lloyd's failed to establish a lack of coverage or a timely and valid disclaimer of coverage. Thus, the Petition to Stay Arbitration was properly granted. In *Progressive Preferred Ins. Co. v. Williams*,[30] the court held that the "petitioner's own submissions showed that the policy previously issued to the driver of the offending vehicle had been terminated before the accident" via a notice of cancellation that contained the required statement regarding proof of financial security, as mandated by Vehicle & Traffic Law § 313(1)(a). Thus, the court denied the Petition to Stay Arbitration of an uninsured motorist claim *without a hearing*.

In *Integon National Ins. Co. v. Montagna*,[31] after the petitioner established, prima facie, that the respondent carrier insured the offending vehicle, the burden shifted to that carrier to establish a lack of coverage on a timely and valid disclaimer of coverage. Although that carrier came forward with rebuttal proof showing that its policy did not cover the vehicle, the petitioner presented additional proof of insurance, which overcame the rebuttal proof. Accordingly, the petition to permanently stay arbitration was granted.

In *GEICO v. O'Neil*,[32] the court held that the petitioner met its prima facie burden of showing that the offending vehicle was insured on the date of the accident by submitting a New Jersey DMV record indicating coverage. The burden then shifted to the purported insurer for the offending vehicle to prove that it never insured the vehicle or that its coverage was terminated prior to the accident. The affidavit of the purported insurer's junior underwriter did not rebut the DMV record, failing as it did to provide any grounds upon which to find that the information set forth therein was erroneous. Accordingly, the court granted the Petition to Stay Arbitration and directed the purported insurer to provide coverage for the subject loss.

In *Mid City Construction Co., Inc. v. Sirius American Ins. Co.*,[33] the insurer offered no evidence as to standard office practices for mailing disclaimer letters, and the court held that the affidavit of the claims representative was insufficient to raise a triable issue of fact since he did not have personal knowledge of the mailing of the disclaimer letter. The court further noted that a certified mail receipt, standing alone, was insufficient to raise a triable issue as to actual mailing.

In *GEICO v. Brunner*,[34] an underwriter who testified at the framed issue hearing failed to offer "evidence of an office [procedure] geared to insure the likelihood that [endorsements reducing the coverage limits] are always properly addressed and mailed."

In *AutoOne Ins. Co. v. Umanzor*,[35] the Petition to Stay Arbitration was unverified, and the petitioner offered no evidentiary proof that the claimant was not a "resident relative" of the insured, entitled to coverage as an insured under its policy. Thus, the court held that the petitioner failed to sustain its initial burden of demonstrating that a factual issue existed as to the resident relative status of the claimant.

Arbitration Awards

Scope of Review

In *Falzone v. New York Central Mutual Fire Ins. Co.*,[36] the court noted, "Arbitrators are not required to provide reasons for their decisions." The Court of Appeals, in its decision, also observed that "a court may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds specifically enumerated limitations on the arbitrator's power. Even when an arbitrator has made an error of law or fact, courts generally may not disturb the arbitrator's decision" (citations omitted).

In *Progressive Northeastern Ins. Co. v. Turek*,[37] the court held that "the arbitrator neither committed misconduct (*see* CPLR 7511(b)(1)(i)) nor exceeded his authority (*see* CPLR 7511(b)(1)(iii)) when he considered the issue of liability in determining whether the [claimant was] entitled to [uninsured] motorist benefits under [the SUM endorsement]." Moreover, the arbitrator did not err in considering the testimony of a non-party witness on the issue of whether "the claimant's negligence was the sole proximate cause of the accident."

In *MVAIC v. NYC East-West Acupuncture, P.C.*,[38] the court observed,

> It is well settled that "[a]djournments generally fall within the sound exercise of an arbitrator's discretion pursuant to CPLR 7506(b), the exercise of which will only be disturbed when abused." The burden falls to "the party seeking to avoid an arbitration award to demonstrate by clear and convincing proof that the arbitrator has abused his discretion in such a manner so as to constitute misconduct sufficient to vacate or modify an arbitration award." Arbitral misconduct is established not by the refusal of an adjournment, but where the refusal forecloses "the presentation of material and pertinent evidence to the [movant's] prejudice" [citations omitted].

Here, the court held that the arbitrator's decision not to grant a postponement in order to allow MVAIC to investigate an adversary's contention was within his sound discretion and powers.

UNINSURED MOTORIST ISSUES

Self-Insurance

In *Elrac, Inc. v. Exum*,[39] the court rejected the contention of the UM carrier that since the accident occurred while the claimant was operating a motor vehicle owned by his employer, a self-insured company, and was in the regular course of his employment, the exclusivity provisions of the Workers' Compensation Law precluded the claimant from arbitrating a claim against his employer. The court noted that "although petitioner is self-insured, it is required to provide uninsured motorist benefits pursuant to Insurance Law § 3420(f)(1)." Thus, the court held, "Given the public policy of this State requiring insurance against injury caused by an uninsured motorist [citation omitted], we find that a self-insured employer is required to provide mandatory uninsured motorist benefits to employees and that the Worker's Compensation Law does not preclude the employee from filing such a claim against the employer."

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.

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. Law § 3420(d))

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.[40]

In *Hunter Roberts Construction Group, LLC v. Arch Ins. Co.*,[41] the court stated,

> The insurer bears the burden to explain the reasonableness of any delay in disclaiming coverage. The reasonableness of any delay is computed from the time that the insurer becomes sufficiently aware of the facts which would support a disclaimer. Although the timeliness of such a disclaimer generally presents a question of fact, where the basis for the disclaimer was, or should have been readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law. Where the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as a matter of law. If the delay allegedly results from a need to investigate the facts underlying the proposed disclaimer, the insurer must demonstrate the necessity of conducting a thorough and diligent investigation [citations omitted].

In *Magistro v. Buttered Bagel, Inc.*,[42] where the insurer did not have a readily apparent basis for a denial or disclaimer until it conducted an investigation into the underlying incident and its insured's awareness of the circumstances surrounding it, the court held that the denial only three weeks after receiving the investigator's report and becoming aware that the insured had known

about the incident, during which time the insurer consulted with counsel, was timely as a matter of law. In *New York Central Mutual Fire Ins. Co. v. Ramirez*,[43] on the other hand, the court held that the insurer did not establish that its delay in disclaiming on the ground of late notice was justified by a necessary or diligently conducted investigation into the possible grounds for the disclaimer.

In *Blue Ridge Ins. Co. v. Empire Contracting and Sales, Inc.*,[44] the court held that an insurer's commencement of a declaratory judgment action can constitute a notice of disclaimer pursuant to Ins. Law § 3420(d). In *Henner v. Everdry Marketing and Management, Inc.*,[45] the court reiterated that "a reservation of rights does not qualify as a timely disclaimer."

The *Henner* court also explained that an insurer "will be estopped from later raising a defense that it did not mention in the notice of disclaimer."[46] Accordingly, the court held that where the insurer disclaimed on the ground that its insured did not provide timely notice of the accident and also raised certain policy exclusions, but did not disclaim on the ground that the plaintiffs failed to provide it with timely notice of the accident, the insurer was precluded from relying upon that defense.

In *Mid-City Construction Co., Inc. v. Sirius America Ins. Co.*,[47] the court held that a 54-day delay in providing written notice of disclaimer precluded effective disclaimer, even though the insured's own notice of the incident was untimely.

In *Hunter Roberts Construction Group, LLC v. Arch Ins. Co.*,[48] the court held that a four-month delay in disclaiming was not justified by alleged difficulties in the insurer's investigation of the claim because the insurer failed to explain "why anything beyond a cursory investigation was necessary" to determine whether the insured gave timely notice of the claim.

In *Progressive Northeastern Ins. Co. v. Lamba*,[49] the court held that a disclaimer sent 71 days after the insurer was placed on notice of the claim, and 55 days after the insurer obtained all of the information upon which the disclaimer was based by way of a recorded interview with the insured, was untimely as a matter of law. The court rejected the insurer's contention that the delay was actually only 35 days because it had to wait for the insured to return the executed interview transcript before disclaiming based thereon.

In *Travelers Indemnity Co. v. Orange & Rockland Utilities, Inc.*,[50] the court noted that Ins. Law § 3420(d), by its terms, is limited to disclaimers "for death" or "bodily injury" and is, therefore, inapplicable in an action pertaining to a breach of contract and breach of warranty pertaining to the construction of a home, and/or a claim involving pollution insurance.

In *Konstantinou v. Phoenix Ins. Co.*,[51] the court noted that "disclaimer pursuant to [Ins. Law] §3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (citations omitted).[52]

In *York Restoration Corp. v. Solty's Construction, Inc.*,[53] the court held that the insurer was not required to provide prompt notice of disclaimer where the claimant was not an insured under the policy on the date of the accident, since no coverage existed.

An insurer "will be estopped from later raising a defense that it did not mention in the notice of disclaimer."

Non-Cooperation

It is well established that "[a]n insurance carrier that seeks to disclaim coverage on the ground of lack of cooperation must demonstrate that it acted diligently in seeking to bring about the insured's cooperation; that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation; and that the attitude of the insured, after his [or her] cooperation was sought, was one of 'willful and avowed obstruction.'"[54]

In *AutoOne Ins. Co. v. Hutchinson*,[55] the court observed that "since a disclaimer based upon lack of cooperation penalizes the injured party for the actions of the insured and 'frustrates the policy of this State that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them,' an insurer seeking to disclaim for noncooperation has a heavy burden of proof" (citing *Thrasher*, 19 N.Y.2d 159).

In that case, the insurer's letters demanding that its insured appear at an examination under oath made reference to his purported status as a claimant for no-fault benefits and warned him that the failure to appear could result in the denial of such benefits, despite the fact that there is no indication that the insured was injured in the accident and sought no-fault benefits. Under these circumstances, the court held that the trial court should not have determined that the insurer validly disclaimed coverage without conducting a hearing. Accordingly, the court remitted the case to the supreme court for an evidentiary hearing to determine the issue of whether the insurer validly disclaimed coverage.

In *Hunter Roberts Construction Group, LLC v. Arch Ins. Co.*,[56] the court held that the heavy burden of establishing noncooperation was not met, where the evidence established that the investigator called the insured's main

business number three times and was told that he would have to supply the name of the individual with whom he wished to speak. There was no indication that the investigator ever went to the office personally or ever made a specific demand to produce an appropriate person for interview, and there was no indication that further efforts would have been futile.

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, which differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan, and/or whether it was paid for under premium financing contract.

In *Tobias v. Liberty Mutual Fire Ins. Co.*,[57] the court observed that "[t]he insurer has the burden of proving the validity of its timely cancellation of an insurance policy." Once that initial burden is met, the burden shifts to the party disputing coverage to establish noncompliance with statutory cancellation requirements as to form and procedure.[58]

In *Progressive Northeastern Ins. Co. v. Akinyooye*,[59] the court held that the respondent insurer demonstrated that its insured was provided with a notice of intent to cancel and a cancellation notice fully compliant with N.Y. Banking Law § 576 more than one year prior to the subject accident. Thus, the Petition to Stay Arbitration of a UM claim was denied.

In *Lincoln General Ins. Co. v. Williams*,[60] the court observed that "[w]here an insured initiates a policy cancellation, the insurer is not required to send to the insured any notice of termination described in Vehicle & Traffic Law § 313." However, the insurer is still required to file a notice of termination with the Commissioner of Motor Vehicles within 30 days after the effective date of the cancellation for that cancellation to be effective against third parties.[61]

In *Eveready Ins. Co. v. Smith*,[62] the court rejected the SUM insurer's contention that the alleged offending vehicle was insured on the date of the accident. Its insurer did not file a notice of termination with the Commissioner of the Department of Motor Vehicles because "[a]ccording to the version of Vehicle and Traffic Law § 313(2) which was in effect on the date of the accident and at the time of the termination of the policy, an insurer was not required to file a notice of termination with the Commissioner due to a nonrenewal of a policy of liability insurance (*see* VTL former § 312[2])." The court added that "[t]o the extent that regulation contained in 15 NYCRR 34.3(4) provides to the contrary, it is inconsistent with the legislative intent of the version of Vehicle and Traffic Law § 313(2) applicable to this case" (citations omitted).

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 *State Farm Fire & Casualty Co. v. Hayes*,[63] the court observed that "[t]he strong presumption of permissive

use afforded by Vehicle & Traffic Law § 388, can only be rebutted by substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's consent" (citations omitted). The court further noted that "[t]he determination of the fact-finding court should not be disturbed on appeal unless its conclusions could not be reached on any fair investigation of the evidence, especially where, as here, the determination turns largely upon the credibility of witnesses" (citations omitted).

In *Progressive Halcyon Ins. Co. v. Giacometti*,[64] the court held that the claimant, who, after the vehicle's owner/operator steered the vehicle to the left, grabbed the steering wheel and pulled the vehicle to the right, causing the vehicle to go off the road to the right, become airborne and crash into trees, did not have the express or implied permission of the owner/operator to use the vehicle. He did not have express permission to take control of the steering wheel, and the owner/operator did not impliedly consent to the claimant's use of the vehicle in that manner.

In *State Farm Mutual Automobile Ins. Co. v. Taveras*,[65] the court upheld the trial court's finding, after a framed issue hearing, that the evidence of theft and non-permissive use was insufficient to overcome the presumption of permissive use. In so concluding, the hearing court properly took into account the owner's failure to adequately explain his substantial delay in calling the police to report the alleged theft, which call immediately followed an alleged assault on the owner and his friends by a mob of angry people.

UNDERINSURED MOTORIST ISSUES

Trigger of Coverage

In *New Hampshire Ins. Co. v. Bobak*,[66] the court observed that "[SUM] coverage will be available [only] where the limits of liability of the motor vehicle liable for the damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by the insured's polic[ies]."

Exhaustion of Underlying Limits

In *Kemper Ins. Co. v. Russell*,[67] the tortfeasor had $50,000 in liability coverage, but the plaintiff's counsel failed to timely commence an action against the tortfeasor. Accordingly, counsel settled the legal malpractice action brought against him by the claimant with a payment of $50,000. In a proceeding by the claimant's SUM carrier to stay arbitration of his SUM claim, the majority of the court, as a matter of first impression, granted the insurer's Petition to Stay Arbitration on the ground that the primary insurer paid nothing insofar as the claimant was forced to recover damages in a separate legal malpractice action. "As the other driver's policy limit was not exhausted by payment, respondent's own SUM coverage does not come into play."[68] This case is expected to be heard and decided by the Court of Appeals in the coming year.

Settlement Without Consent

In *Eveready Ins. Co. v. Vilmond*,[69] although the claimant reached an agreement to settle with the tortfeasor for a specific amount, and accepted and negotiated a settlement check for that amount before obtaining the SUM insurer's consent to settle, there was no proof that she ever executed a release. Thus, the court held that she did not violate the terms of her policy or prejudice the SUM insurer's subrogation rights and, therefore, denied the insurer's Petition to Stay Arbitration.

Priority of Coverage

In *State Farm Mutual Auto. Ins. Co. v. Thomas*,[70] the court noted that both New York and New Jersey SUM policies contain a "priority of coverage" provision, pursuant to which where an insured is entitled to SUM coverage under more than one policy, the order of priority is:

> (a) A policy covering a motor vehicle occupied by the injured person at the time of the accident;
>
> (b) A policy covering a motor vehicle not involved in the accident under which the injured person is a named insured; and
>
> (c) A policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Furthermore, coverage under a lower priority policy applies "only to the extent that it exceeds the coverage of a higher priority policy."

1. 70 A.D.3d 1359 (4th Dep't), *lv. to appeal denied*, 14 N.Y.3d 711 (2010).
2. 74 A.D.3d 1850, 1851 (4th Dep't), *lv. to appeal denied*, 15 N.Y.3d 712 (2010).
3. 69 A.D.3d 864, 865 (2d Dep't 2010).
4. 77 A.D.3d 653, 654 (2d Dep't 2010).
5. 71 A.D.3d 860, 861 (2d Dep't 2010).
6. 70 A.D.3d at 1360.
7. 28 Misc. 3d 1208(A) (Sup. Ct., N.Y. Co. 2010).
8. 74 A.D.3d 820, 822 (2d Dep't 2010).
9. 75 A.D.3d 967, 968–69 (3d Dep't 2010).
10. The dissenting opinion observed that "[i]f respondent had walked into the parked truck itself, her injuries would not have arisen out of the use of the vehicle [citing *Wooster v. Soriano*, 167 A.D.2d 233 (1990), and *McConnell v. Fireman's Fund Am. Ins. Co.*, 49 A.D.2d 676 (1975)]. The same result should follow when she walked into materials protruding from the bed of the truck." The dissenter added, "Rather than expanding the application of the statute and regulation requiring coverage for injuries arising out of a 'motor vehicle's ownership, maintenance or use,' we should adhere to the current rule that looks to whether the 'circumstances constituted an "ongoing activity relating to the vehicle" which would necessitate a conclusion that the vehicle was in use'" (citations omitted).
11. 72 A.D.3d 1503, 1504, 1509 (4th Dep't 2010).
12. *Id.* at 1510–11. The dissenting opinion focused on the "use" of the vehicle, rather than its "operation." As stated by the dissenter, "'[u]se' and 'operation' of a motor vehicle are, of course, not interchangeable, inasmuch as 'one who uses a vehicle does not necessarily have to be operating it [citation omitted].' The 'use' of a vehicle 'includes more than driving or riding in an automobile; it extends to utilizing the vehicle as an instrumental means to an end in any

manner intended or contemplated by the insured. 'Operation' is interpreted more narrowly than 'use' and is defined as the exercise of direction and control over the vehicle necessary to move the vehicle from one point to another (i.e., driving the vehicle)." In the view of the dissent, "The meaning of the term 'use' is the pivotal issue in this case. The noun 'use' has been defined as, inter alia, 'the fact or state of being used,' and the verb 'use' has been defined as, inter alia, 'to carry out a purpose or action by means of' [citation omitted]. In other words, 'utilize' is a synonym of 'use.'" Accordingly, the dissent concluded that the claimant "'used' the vehicle at the time of the accident in the sense that the vehicle facilitated the travel giving rise to the accident." He also concluded that the claimant's use of the vehicle was permissive "at least to the extent that [he] traveled in the vehicle," especially where there was no evidence that the owner/operator resisted the efforts of the claimant to assume control of the vehicle.

13. 59 A.D.3d 681 (2d Dep't 2009), *aff'd*, 15 N.Y.3d 763 (2010).

14. *See also* Norman H. Dachs & Jonathan A. Dachs, *Coverage in Context: Defining "Use" of a Motor Vehicle*, N.Y.L.J., Sept. 14, 2010, p. 3, col. 1.

15. 73 A.D.3d 1076 (2d Dep't 2010).

16. *See Tower Ins. Co. of N.Y. v. Miles*, 74 A.D.3d 410 (1st Dep't 2010); *Bigman Brothers, Inc. v. QBE Ins. Corp.*, 73 A.D.3d 1110 (2d Dep't 2010).

17. 79 A.D.3d 981 (2d Dep't 2010).

18. 73 A.D.3d 884 (2d Dep't 2010).

19. *See Jeffrey v. Allcity Ins. Co.*, 26 A.D.3d 355 (2d Dep't 2006).

20. *See Tri-State Ins. Co. v. Furboter*, 71 A.D.3d 682 (2d Dep't 2010); *Ponok Realty Corp. v. United Nat'l Specialty Ins. Co.*, 69 A.D.3d 596 (2d Dep't 2010); *Bauerschmidt & Sons, Inc. v. Nova Cas. Co.*, 69 A.D.3d 668 (2d Dep't 2010).

21. 71 A.D.3d 682 (2d Dep't 2010).

22. 66 A.D.3d 447 (1st Dep't 2009), *rev'd*, 14 N.Y.3d 809 (2010).

23. 69 A.D.3d 623 (2d Dep't 2010).

24. 73 A.D.3d 791 (2d Dep't 2010).

25. 78 A.D.3d 1064, 1066 (2d Dep't 2010).

26. *See also Allstate Ins. Co. v. Raynor*, 78 A.D.3d 1173, 1174 (2d Dep't 2010) (insurer required to move to stay arbitration within 20 days after receipt of a letter from claimant's counsel claiming, *inter alia*, SUM benefits and containing a notice of intention to arbitrate and stating that unless the insurer applied to stay arbitration within 20 days after receipt of the notice, it would thereafter be precluded from objecting, *inter alia*, that a valid agreement to arbitrate was not made or complied with, and not to wait until after the claimant subsequently served a Request for Arbitration upon it).

27. 72 A.D.3d 517 (1st Dep't 2010).

28. 72 A.D.3d 948, 949 (2d Dep't 2010).

29. *See also AutoOne Ins. Co. Hutchinson*, 71 A.D.3d 1011, 1012 (2d Dep't 2010) (petitioner made a prima facie showing that the offending vehicle was insured by Nationwide through the submission of a police accident report containing the vehicle's insurance code); *GEICO v. O'Neil*, 74 A.D.3d 1068 (2d Dep't 2010).

30. 78 A.D.3d 578 (1st Dep't 2010).

31. 69 A.D.3d 626 (2d Dep't 2010).

32. 74 A.D.3d 1068, 1069 (2d Dep't 2010).

33. 70 A.D.3d 789, 790 (2d Dep't 2010).

34. 69 A.D.3d 853, 854 (2d Dep't 2010).

35. 74 A.D.3d 1335, 1336 (2d Dep't 2010).

36. 64 A.D.3d 1149, 1150 (4th Dep't 2009), *aff'd*, 15 N.Y.3d 530 (2010).

37. 71 A.D.3d 899, 900 (2d Dep't 2010).

38. 77 A.D.3d 412, 415–16 (1st Dep't 2010).

39. 73 A.D.3d 431, 432 (1st Dep't 2010).

40. *See Progressive Preferred Ins. Co. v. Townsend*, 79 A.D.3d 893 (2d Dep't 2010) ("Once the petitioner disclaimed liability coverage of the subject vehicle under the livery use exclusion provision of the subject policy, the vehicle was rendered an uninsured motor vehicle under the policy, as required by Insurance Law §3420(f)(1).").

41. 75 A.D.3d 404, 409 (1st Dep't 2010).

42. 79 A.D.3d 822 (2d Dep't 2010).

43. 76 A.D.3d 1078, 1079 (2d Dep't 2010).

44. 73 A.D.3d 959 (2d Dep't 2010).

45. 74 A.D.3d 1776, 1778 (4th Dep't 2010).

46. *Id.* at 1777.

47. 70 A.D.3d 789 (2d Dep't 2010).

48. 75 A.D.3d 404, 409 (1st Dep't 2010).

49. 79 A.D.3d 719 (2d Dep't 2010).

50. 73 A.D.3d 576, 577 (1st Dep't), *lv. to appeal dismissed*, 15 N.Y.3d 834 (2010).

51. 74 A.D.3d 1850, 1852 (4th Dep't), *lv. to appeal denied*, 15 N.Y.3d 712 (2010).

52. *See also Herdendorf v. GEICO Ins. Co.*, 77 A.D.3d 1461 (4th Dep't 2010).

53. 79 A.D.3d 861 (2d Dep't 2010).

54. *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159 (1967). *See Johnson v. GEICO*, 72 A.D.3d 900 (2d Dep't 2010).

55. 71 A.D.3d 1011, 1013 (2d Dep't 2010).

56. 75 A.D.3d 404 (1st Dep't 2010).

57. 78 A.D.3d 928 (2d Dep't 2010).

58. *See also Auto One Ins. Co. v. Forrester*, 78 A.D.3d 1174 (2d Dep't 2010).

59. 70 A.D.3d 956 (2d Dep't 2010).

60. 73 A.D.3d 778 (2d Dep't 2010).

61. Vehicle & Traffic Law § 313(2).

62. 79 A.D.3d 1040 (2d Dep't 2010).

63. 78 A.D.3d 1063 (2d Dep't 2010).

64. 72 A.D.3d 1503, 1504 (4th Dep't 2010).

65. 71 A.D.3d 606 (1st Dep't 2010).

66. 72 A.D.3d 1647, 1649 (4th Dep't 2010).

67. 75 A.D.3d 724 (3d Dep't), *lv. to appeal granted*, 15 N.Y.3d 711 (2010).

68. The dissenting opinion focused on the fact that the claimant did obtain the full amount of the "limits of liability" of the tortfeasor's policy, albeit from another carrier, thus fulfilling the purpose of the SUM statute and scheme.

69. 75 A.D.3d 640, 641 (2d Dep't 2010).

70. 75 A.D.3d 644, 647 (2d Dep't 2010).

"Bad news, Stevens. While monitoring your email I discovered that you're monitoring my email."