2011 Review of Uninsured, Underinsured and Supplementary Uninsured Motorist Insurance Law

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Consistent with recent history, 2011 was another busy and important year in the ever-changing and highly complex areas of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law.

PART I. 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 *Roebuck v. State Farm Mutual Automobile Ins. Co.*,[1] the court held that the plaintiff, a sole shareholder (with his wife) of a corporation that owned and insured a dump truck, could not make a claim for SUM benefits under the dump truck's policy for injuries he sustained while working as a Deputy Sheriff and driving a county-owned patrol car. As stated by the court:

> Where an automobile insurance policy contains a SUM provision and is issued to an individual, that individual and others in his or her family may be afforded SUM coverage under the policy when such person is injured in any vehicle, including a vehicle owned and insured by a third party. Where such a policy is issued to a corporation, however, the SUM provision does not follow any particular individual, but instead "covers any person [injured] while occupying an automobile owned by the corporation or while being operated on behalf of the corporation" (*Buckner v. Motor Veh. Acc. Indem. Corp.*, 66 N.Y.2d 211, 215 [1985]). The policy language is not rendered ambiguous by the inclusion of words such as "you" or "spouse" and "relatives" when a corporation is the named insured, because it is obvious to the average reader, construing the language according to common speech, that a corporation cannot have family members; those portions of the mandatory policy language are merely inapplicable to the corporate insured.[2]

In *American Alternative Ins. Corp. v. Pelszynski*,[3] the court held that a volunteer fireman injured in an accident while en route to a fire emergency in his own vehicle (equipped with blue light and two-way radio provided by the Volunteer Fire Department) was not an insured under the Volunteer Fire Department's SUM Endorsement and, therefore, not entitled to make an SUM claim thereunder. The court explained, "'You' in the definition refers to the Fire Company, which cannot have a spouse or relative." The court did not address Pelszynski's second argument, that is, he was covered under the Volunteer Fire Department's policy because he was occupying a vehicle which was being operated by the Fire Department and for its benefit.

Residents

In *Waldron v. New York Central Mutual Fire Ins. Co.*,[4] the court held that the 22-year-old injured party was a resident of her parents' household at the time of the accident. Although she was renting an apartment off campus while attending college, she maintained a bedroom in her parents' house, where she kept her clothing, visited on weekends and lived on school holidays and semester breaks. Moreover, her college considered her parents' address to be her permanent address, and she retained her parents' address for voting and tax purposes. Accordingly, she was entitled to make a claim for SUM benefits under her father's policy.

In *Farm Family Casualty Ins. Co. v. Nason*,[5] the court found that

> "[t]he term household has been characterized as ambiguous or devoid of any fixed meaning in similar contexts . . . and, as such, its interpretation requires an inquiry into the intent of the parties . . . . The interpretation must reflect the reasonable expectation and purpose of the ordinary business [person] when making an insurance contract . . . and the meaning which would be given to it by the average [person] . . . . Moreover, the circumstances particular to each case must be considered in construing the meaning of the term." In addition, "the term should . . . be interpreted in a manner favoring coverage, as should any ambiguous language in an insurance policy."[6]

In this case, which involved a policy covering a parcel of property upon which the insured maintained his residence and a dairy business, the insured's son did not reside exclusively on the property where the accident took place, but, rather, also resided with his girlfriend at another location. The insurer established that the insured did not consider his son to be a member of his household, nor would he have anticipated that the son would be afforded coverage under his insurance policy inasmuch as he lived separately from the insured, either in a trailer on the subject property or with a girlfriend. Moreover, members of the insured's family testified that the son did not reside with the other members of the family, either, and, indeed, was not welcome in the family home. Thus, the court held that the insurer established as a matter of law that the son was not a member of the insured's household and, therefore, not entitled to coverage under the policy.

Exclusion – Owned Vehicles

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."[7]

In *USAA Casualty Ins. Co. v. Cook*, the claimant's decedent was riding a motorcycle he owned when he was involved in a fatal accident with a motor vehicle.

The motorcycle was insured under a policy issued by the proposed additional respondent, Pacific Specialty Insurance Co. At the time of the accident, the decedent was married to the appellant, Lisa Cook, who owned a Toyota motor vehicle, which was insured by the petitioner-respondent, USAA. In response to Ms. Cook's attorney's letter advising of "my client's intention to make a claim under the Uninsured and Underinsured provision of the [USAA] policy," USAA responded 28 days later with a disclaimer letter, relying upon the exclusion for "bodily injury incurred while occupying a motor vehicle owned by that insured if such motor vehicle is not insured for at least the minimum bodily injury liability limits and UM limits required by law by the policy under which a claim is made . . . ." In granting USAA's petition to stay arbitration of Ms. Cook's SUM claim, the court held that "the disclaimer notice and 'the policy language in question was not ambiguous and [USAA] is entitled to have the provisions it relied on to disclaim coverage enforced.'"[8]

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.

"Accidents"

On March 29, 2011, the New York Court of Appeals rendered a decision that quite unexpectedly overturned the commonly accepted view that the Uninsured/Underinsured Motorist (UM) endorsement does not provide coverage for injuries and/or death intentionally caused by the tortfeasor since such injuries are not caused by an "accident." In *State Farm Mutual Automobile Ins. Co. v. Langan*,[9] a case involving a claimant/decedent who was one of numerous people struck by the offending vehicle, the driver of which pleaded guilty to second degree murder and admitted that he intentionally drove his vehicle into several pedestrians, including the claimant/decedent, the Court of Appeals held that "consistent with the reasonable expectation of the insured under the policy and the stated purpose of the UM endorsement (to provide coverage against damage caused by uninsured motorists), the intentional assault of an innocent insured is an accident within the meaning of his or her own policy. The occurrence at issue was clearly an accident *from the insured's point of view*," and, thus, the claimant was entitled to benefits under the UM endorsement.[10]

Claimant/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." As numerous recent cases have again held, a failure to satisfy the notice requirement vitiates the policy.[11]

In *Spentrev Realty Corp. v. United National Specialty Ins. Co.*,[12] the court observed that "[w]here an insurance policy . . . requires an insured to provide notice of an accident or loss as soon as practicable, such notice must be provided within a reasonable time in view of all of the facts and circumstances." Providing an insurer with timely notice of a potential claim is a condition precedent, and thus "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy."[13]

It is well-settled that 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. 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. Numerous cases in 2011 reaffirmed this basic principle of insurance law.[14]

In *Waldron v. New York Central Mutual Fire Ins. Co.*,[15] the court observed that "[g]enerally, notice to an insurance broker is not necessarily considered notice to the carrier, whereas notice to an agent of the insurer typically constitutes notice to the insurer."[16]

In *Spentrev Realty Corp.*,[17] the court noted that

> Insurance Law § 3420(a)(3) gives the injured party an independent right to give notice of the accident and to satisfy the notice requirement of the policy. However, the injured party has the burden of proving that he or she, or counsel, acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer. "In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insured." "The injured person's rights must be judged by the prospects for giving notice that were afforded to him, not by those available to the insured. What is reasonably possible for the insured may not be reasonably possible for the person he has injured. The passage of time does not of itself make delay unreasonable."[18]

The Second Department, in *Tower Ins. Co. of N.Y. v. New Wok Hing Trading, Inc.*,[19] found that the injured parties failed to provide any explanation for their more than *five-month* delay in ascertaining the tortfeasor's insurer's identity and notifying that insurer of the accident, and failed to raise a triable issue of fact as to whether they diligently attempted to identify that insurer. Accordingly, summary judgment was granted to the insurer, declaring that it was not obligated to defend or indemnify those insured.

In determining whether notice was timely, factors to consider include, *inter alia*, whether the claimant/insured 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.

In *NGM Ins. Co. v. Haak*,[20] the court observed that "in the SUM [/UM] context, the phrase 'as soon as practicable' means that 'the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured.' Whether an insured has given notice as soon as practicable should be determined on a case-by-case basis, taking into account all of the relevant circumstances. Factors to consider include the seriousness and nature of the insured's injuries, and the extent of the tortfeasor's coverage, as well as the time within which an insured's injuries manifest themselves.'"[21]

Therein, the court held that the respondent's notice of a potential claim, given almost two years after the accident, was untimely, as "[i]t was obvious from the outset that respondent had sustained a serious injury within the meaning of Insurance Law § 5104 (*see* § 5102[d]), and respondent knew or should have known shortly after the accident that [the tortfeasor] was uninsured." Notably, the court rejected the respondent's argument to the effect that he was not required to provide notice of the claim until the court in the underlying personal injury action had granted the motion by the owner of the offending vehicle for summary judgment dismissing the complaint against it based upon the Graves Amendment (49 U.S.C. § 30106) (which generally exempts rental car companies from the vicarious liability provisions of Vehicle & Traffic Law § 388) because, until then, he did not know that the offending vehicle was uninsured or underinsured. As the court said,

> [t]he Graves Amendment unequivocally applies to [the owner] unless Davis's use of the vehicle was not "during the period of the rental or lease" (49 USC § 30106[a]). In our view, that information could have been ascertained by respondents well before the court granted the [owner's] motion in the underlying action and, in any event, there is no indication in the record before us that respondents made any efforts to obtain such information. We thus conclude that respondents failed to meet their burden "of establishing a reasonable excuse for the [almost] two-year delay in giving notice."[22]

In *Travco Ins. Co. v. Schwartz*,[23] the court held that the respondents met their burden of establishing that they complied with their obligation under the policy to give the SUM carrier notice of the claim "as soon as practicable" by submitting the uncontroverted affirmation of their counsel stating that the respondents were unaware of the seriousness of their injuries until such time as one of the respondents underwent knee surgery. (It is not at all clear why the affirmation of counsel – a person without personal knowledge of the facts – was deemed sufficient for this purpose.) Nevertheless, the insurer, upon a motion to renew, submitted evidence in the form of medical records obtained in discovery, which raised a triable issue of fact as to whether the respondent knew or should have known of the severity of the injuries at an earlier date and, whether, in fact, their notice was untimely.

The New York Court of Appeals rendered a decision that quite unexpectedly overturned the commonly accepted view that the Uninsured/Underinsured Motorist (UM) endorsement does not provide coverage for injuries and/or death intentionally caused by the tortfeasor since such injuries are not caused by an "accident."

The Third Department, in *Waldron v. New York Central Mutual Fire Ins. Co.*,[24] noted that the recent legislation that requires an insurer to show prejudice[25] does not apply to cases in which the pertinent policy was issued before the effective date of the statute. However, "even prior to the statutory amendment, when an insurer received notice of an accident in a timely fashion, the insurer could not properly disclaim a late SUM claim absent a showing of prejudice."[26]

In *Vernet v. Eveready Ins. Co.*,[27]

> the court said that with respect to policies issued before January 17, 2009 (see Insurance Law §3420[c][2][A]), as the subject policy was, an insurer could disclaim coverage when the insured failed to satisfy the notice condition, without regard to whether the insurer was prejudiced by the insured's failure to satisfy the condition. Thus, the absence of timely notice of litigation is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract. Where there is no excuse or mitigating factor for the failure to give notice, the question of reasonable notice is a legal determination.[28]

In this case, however, despite the no-prejudice rule, the insurance policy provided, *inter alia*, that a person seeking coverage must "'send [the defendant] copies of any notices or legal papers received in connection with the accident or loss as soon as reasonably possible,' and further, that the defendant had no duty to provide coverage 'if the failure to comply [with the policy] is prejudicial to [the defendant].'" Thus, based upon this specific policy language, the court held that the defendant was required, on its motion for summary judgment, to show

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that it was provided untimely notice *and* that it was prejudiced as a result of the untimely notice. The court further held that the defendant met its burden by demonstrating that it was first informed of the commencement of an action against the insured more than two years after the commencement of the action, and that the failure of the insured to provide notice until after a default judgment had been entered prejudiced it because it lost its right to appear and interpose an answer, "thus requiring it to shoulder the burden of moving to vacate the default."

The interpretation of the phrase "as soon as practicable" continued, as always, to be a hot topic.

In *Tower Ins. Co. of N.Y. v. NHT Owners LLC*,[29] the court observed that "[a] liability policy that requires an insured to provide notice of an occurrence to its insurer 'as soon as practicable' obligates the insured to give notice of the occurrence within a reasonable period of time." In this case, however, the court was not required to reach the question of whether, under all of the circumstances, the insured's notice of claim, 62 days after the occurrence, was timely, where they conducted an inquiry into the underlying accident and believed that there was no liability because the insurer did not disclaim on the ground of late notice in a timely fashion (see discussion below).

The Third Department, in *Waldron v. New York Central Mutual Fire Ins. Co.*,[30] held that a factual issue existed as to whether a delay of *two months* in giving notice under a liability policy that required such notice to be given "as soon as reasonably practicable, but in no event more than 30 days after the accident" was sufficiently justified under the circumstances, where the insured's daughter had sustained very serious injuries in the accident and he had immediately left New York to be with his daughter in Florida, and even at the time notice was given, his daughter was still hospitalized and there was continuing concern that she might lose a leg as a result of her injuries.

In *Nabutovsky v. Burlington Ins. Co.*,[31] the court held that the insured's failure to give notice of the plaintiff's personal injury claims until more than three months after the incident occurred, despite the insured's knowledge of the incident at the time it occurred, constituted a failure to give notice within a reasonable time.

In *Tower Ins. Co. of N.Y. v. Classon Heights, LLC*,[32] the court observed that "an insured bears the burden of proving under all the circumstances, the reasonableness of the belief [that they had a *good faith belief in non-liability*]." "Where, as here, the policy requires prompt notice of an 'occurrence' that 'may result in a claim,' the issue is not 'whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him.'"[33] In numerous cases decided last year,[34] the courts analyzed the reasonableness of this type of excuse for delayed notice of claim, in several contexts, and with differing results. These cases are very fact specific and should be analyzed carefully.

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 *Progressive Specialty Ins. Co. v . Alexis*,[35] the court denied the petitioner's request for disclosure in aid of arbitration pursuant to CPLR 3102(c) because "the petitioner failed to demonstrate that 'extraordinary circumstances' existed 'such that relief would be absolutely necessary for the protection of its rights.'"[36]

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 *Auto One Ins. Co. v. Lopez*,[37] the court reminded that "CPLR 7503(c) requires that an application to stay arbitration be made within 20 days after service of a notice of intention to arbitrate," but noted that "'[t]he timeliness of a proceeding to stay arbitration is measured with respect to the earlier filing of the petition, not with respect to the later service.'"[38] Thus, where the respondents served their notice of intention to arbitrate on April 20, 2010, and the petitioner filed its petition to stay arbitration on May 3, 2010, the action was commenced within the 20-day limitation period and was, thus, timely.

In *GEICO v. Morris*,[39] the court held that "the timeliness of a proceeding for a stay of arbitration is measured with respect to the earlier filing of the petition, not with respect to its later service." Thus, the petition in this case, filed within 20 days of receipt of the demand for arbitration (but served after the 20-day period expired) was timely.

In *Maya Assurance Co. v. Hussain*,[40] the court held that "[a]lthough service of the notice of petition to stay arbitration by registered or certified mail (return receipt requested) is sufficient to confer jurisdiction over a party to the proposed arbitration (*see* CPLR 7503[c]), it was

insufficient to confer jurisdiction over [the other insurer] since it was not a party to the proposed arbitration."[41]

In *Travelers Indemnity Co. v. Armstead*,[42] the court reversed the grant of the petitioner's petition for a permanent stay of arbitration because the court lacked jurisdiction over the alleged insurer for the offending vehicle, which had not yet been formally joined as an additional respondent and had not yet been served with a supplemental notice of petition and petition. The court, therefore, ordered such formal addition of that insurer, and a hearing on the issue of its purported cancellation of its policy.

Burden of Proof

Based upon a police report that showed that the offending vehicle might have been insured at the time of the accident, and the affirmation of the respondent's attorney in which he acknowledged that the offending vehicle had been insured up until a few hours before the accident, the court, in *GEICO v. Morris*,[43] held that the petitioner made a sufficient showing that the offending vehicle might have been insured at the time of the accident to warrant a framed issue hearing, to which the proposed additional respondents (including the alleged insurer for the offending vehicle) would be joined as a necessary party.

In *Victoria Select Ins. Co. v. Munar*,[44] the court held that the documents submitted by the parties raised issues of fact as to whether the purported insurer of the offending vehicle properly disclaimed coverage for the subject accident. Accordingly, it was error to determine, without the joinder of the purported insurer and the tortfeasors, and without conducting a hearing, that the disclaimer was improper or invalid.

The court in *Allstate Ins. Co. v. Tae Hong Ji*[45] observed that "[w]here, as here, a case is determined after a hearing held before a justice, this Court's power to review the evidence is as broad as that of the hearing court, taking into account in a close case the fact that the hearing judge had the advantage of seeing the witness." In that case, the court declined to disturb the Supreme Court's finding that there was no physical contact with an alleged hit-and-run vehicle.[46]

In *Travelers Ins. Co. v. Rogers*,[47] the court reversed an order that had denied vacatur of an order granting the SUM insurer's petition to stay arbitration upon the respondent's failure to appear at the hearing or to submit opposition papers. As stated by the court,

> [v]acatur should have been granted on the ground of "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]). A review of the record in this case reveals several potential instances of intentional and material misrepresentations of fact by petitioner, which, at least in part, may have formed the basis of Supreme Court's decision and order to permanently stay arbitration.[48]

The petitioner insurance company denied in its petition that it ever received notice of the SUM claim, despite the fact that it had signed a "green card" acknowledging receipt, and its internal log indicated such receipt.

Arbitration Awards: Scope of Review

In *Miro Leisure Corp. v. Prudence Orla, Inc.*,[49] the court stated,

> Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court reviewing an arbitration award may not "re-weigh or reexamine the evidence," or otherwise "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." The Court of Appeals has "stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." "An arbitration award can be vacated by a court pursuant to CPLR 7511(b)[(1)(iii)] on only three narrow grounds: if it is clearly violative of a strong public policy, if it is totally or completely irrational, or if it manifestly exceeds a specific, enumerated limitation on the arbitrator's power."[50]

The Second Department, in *New York Central Lines, LLC v. Vitale*,[51] stated, "An award is irrational if there is 'no proof whatsoever to justify the award.' Even if the arbitrator misapplies substantive rules of law or makes an error of fact, unless one of the three narrow grounds applies in the particular case, the award will not be vacated pursuant to CPLR 7511(b)(1)(iii) as exceeding the arbitrator's power. 'An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be.'"[52]

Res Judicata/Collateral Estoppel

In *Mose v. Sangiovanni*,[53] the court held that the doctrine of collateral estoppel was not applicable to the holding by the Supreme Court in the context of a petition to stay a UM arbitration that the statute of limitations on an action against the tortfeasor was tolled during the pendency of the Petition to Stay proceeding, because that finding was "a gratuitous finding that was not material to a determination of the CPLR Article 75 proceeding." Furthermore, neither the driver of the alleged offending vehicle, who was not a party to the Article 75 proceeding, nor the owner of the alleged offending vehicle "had a full and fair opportunity to litigate the statute of limitations issue."[54] The court went on to hold that there was no toll, and, thus, that the action against the tortfeasor was time-barred.

Direct Actions Against Insurers

The Third Department, in *Symonds v. Progressive Ins. Co.*,[55] held that Progressive, the plaintiff's SUM carrier, lacked standing under New York law to seek a judgment, by way of a third-party action in the context of the plaintiff's breach of contract action against it, against the purported insurer for the offending vehicle, declaring that its policy was in effect at the time of the accident. As explained by the court,

> [u]nder Insurance Law §3420(a)(2), a declaratory judgment action seeking a judgment declaring that the at-fault party's insurance company was obligated to defend and indemnify its insured can only be commenced after the third party seeking the declaration obtains a judgment against the at-fault insured, and it has gone unpaid for 30 days (*see Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 354–355 [2004]; *Sabatino v. Capco Trading, Inc.*, 27 A.D.3d 1019, 1021 [2006]). Likewise, since defendant [Progressive], as plaintiffs' subrogee, stands in the shoes of its subrogor and "is subject to any claims or defenses which may be raised against the subrogor" (*Peerless Ins. Co. v. Michael Beshara, Inc.*, 75 A.D.3d 733, 735-736 [2010] [internal quotation marks and citation omitted]; See *United States Fed. & Guar. Co. v. Smith Co.*, 46 N.Y.2d 498, 504 [1979]), and since plaintiffs have not obtained a judgment against [the offending driver], defendant does not have standing to seek a declaratory judgment against [the offending driver's] carrier. . . .[56]

Statute of Limitations

In *Progressive Northeastern Ins. Co. v. Rogers*,[57] the insurer for the offending vehicle (Legion Insurance Company) was declared insolvent after the accident, and all claims against it were assumed by the New York Public Motor Vehicle Liability Security Fund (PMV Fund). After the injured party's claim was denied by the PMV Fund, the injured party filed a claim for uninsured motorist benefits under the UM endorsement of her policy with Progressive. That claim was filed 12 years after the accident.

While the parties agreed that the six-year statute of limitations for contract claims governed the proceeding to compel arbitration of the UM claim, they disagreed on the date on which the limitations period began to run.

The court noted that a claim under the UM endorsement of an automobile insurance policy "accrues either when the accident occurred or when the allegedly offending vehicle thereafter becomes uninsured." Where, as in this case, there was a 12-year period between the accident and the filing of the petition to compel arbitration, the burden was on the injured party to establish an accrual date later than the date of the accident. Here, the injured party met that burden with evidence that the PMV Fund did not deny coverage within the meaning of Ins. Law § 3420(f)(1) until December 30, 2009. As explained by the court, "[w]here the alleged tortfeasor's insurer becomes insolvent, the PMV Fund assumes the obligations of the defaulting insurer, and the injured party is precluded from proceeding against his or her own insurer pursuant to the UM endorsement of the relevant automobile insurance policy until the PMV Fund disclaims liability or denies coverage."[58] Thus, the UM claim did not accrue until the PMV denial, which was within six years prior to the petition to compel, which was, therefore, timely.

The court noted the distinction between a claim for (basic) UM coverage, which this case involved, and a claim for optional SUM coverage, which the injured party chose not to pursue. In the latter type of claim, only, the injured party is entitled to seek benefits upon the insolvency of the alleged tortfeasor's insurer, and need not proceed against the PMV Fund.[59]

PART II. UNINSURED MOTORIST ISSUES

Self-Insurance

In *Elrac, Inc. v. Exum*,[60] the Appellate Division 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 that "[g]iven the public policy of this State requiring insurance against injury caused by an uninsured motorist, 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."[61]

In affirming the First Department Decision and Order, the Court of Appeals held that "[a] self-insured employer whose employee is involved in an automobile accident may be liable to that employee for uninsured motorist benefits, notwithstanding the exclusivity provisions of the Workers' Compensation Law."[62] As explained by the Court,

> Workers' Compensation Law § 11 says: "The liability of an employer [for workers' compensation benefits] . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouses, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom." Although the words "any other liability whatsoever" seem all-inclusive, there are cases – of which this is one – in which they cannot be taken literally. Specifically, the statute cannot be read to bar all suits to enforce contractual liabilities. If an employer agrees, as part of a contract with an employee, to provide life insurance or medical insur-

> ance, and breaches that contract, an action to recover damages for the breach would not be barred, though the action might literally be "on account of . . . injury or death." An action against a self-insurer to enforce the liability recognized in [*Allstate Ins. Co. v.*] *Shaw* [*i.e.*, the liability of providing UM coverage] is, in our view, essentially contractual. The situation is as though the employer had written an insurance policy to itself, including the statutorily-required provision for uninsured motorist coverage. This action is therefore not barred by Workers' Compensation Law § 11.[63]

> is not readily apparent, the insurer has a duty to promptly and diligently investigate the claim.[68]

Similarly, in *Fish King Enterprises v. Countrywide Ins. Co.*,[69] the court noted that "[t]he timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage," and that "[a]n insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay."[70] In this case, the insurer argued that after its receipt of the summons and complaint in

A self-insured employer whose employee is involved in an automobile accident may be liable to that employee for uninsured motorist benefits, notwithstanding the exclusivity provisions of the Workers' Compensation Law.

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.

In *Loeffler v. Sirius America Ins. Co.*,[64] the court noted that "when an insurer disclaims coverage, the 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 (*Hazen v. Otsego Mutual Fire Ins. Co.*, 286 A.D.2d 708, 709, quoting *General Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864)."[65] Since the disclaimer was based only on its insured's failure to notify it of the claim, it was not effective against the injured party, who gave notice of the claim.

Moreover, the court rejected the defendant's contention that the notice provided by the injured party did not need to be addressed in the disclaimer because it was rendered superfluous by notice provided by certain entities claiming to be additional insureds under the policy. "The notice provided to the [insurer] by those entities of the plaintiff's claim against them, arising out of the subject accident, did not operate to provide the defendant with notice of the plaintiff's claim against [the insured]."[66]

In *GPH Partners, LLC v. American Home Assurance Co.*,[67] the court stated that

> timeliness of an insurer's disclaimer is measured from the time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. Thus, where an insurer "becomes sufficiently aware of facts which would support a disclaimer," the time to disclaim begins to run, and the insurer bears the burden of explaining any delay in disclaiming coverage. Where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, the insurer's explanation for its delay fails as a matter of law. Even where the basis for disclaimer

the underlying action, an investigation was required to evaluate the full extent of the actions and the identity of all relevant parties. However, the proffered basis for the disclaimer was that the plaintiff in the underlying action was an employee of Fish King – a fact that was readily ascertainable from the face of the underlying complaint. Under these circumstances, the disclaimer, issued *49 days* after receipt of that complaint, was held to be untimely as a matter of law.

In *George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, PA*,[71] the First Department declined to follow and expressly overruled its prior long-standing rule, set forth in *DiGuglielmo v. Travelers Property Casualty*,[72] wherein it had previously held that, notwithstanding the statutory language in Ins. Law § 3420(d) requiring a liability insurer to give written notice of disclaimer "as soon as is reasonably possible," an insurer "is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer."[73] Based upon its reassessment of the statutory language and the decisions of the Court of Appeals interpreting it, and "dictated by fidelity to the plain language chosen by the Legislature, the teachings of our State's highest court, and the policy considerations embodied in the law,"[74] the court held – in agreement with prior decisions/law in the Second Department[75] – that "§ 3420(d) precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid – here, late notice of the claim – while investigating other possible grounds for disclaiming."[76] Thus, because the insurer in this case had sufficient information to disclaim coverage on the ground of late notice but did not issue a disclaimer on that ground until nearly four months later, that disclaimer was ineffective as a matter of law. The court further noted that once the insurer possessed all of the information it needed to determine that the plaintiffs, which sought coverage as

additional insureds, had failed to give timely notice of the claim, as required by the policy, it "had no right to delay disclaiming on the late notice ground while it continued to investigate whether Plaintiffs were, in fact, additional insureds. . . ."[77] As the court further explained, the plain language of Ins. Law § 3420(d)

> cannot be reconciled with allowing the insurer to delay disclaiming on a ground fully known to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim. If the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of "reasonably possible" by the insurer's ongoing investigation of the possibility that the insured may have breached other policy provisions, that the claim may fall within a policy exclusion, or (as here) that the person making the claim is not covered at all. Stated otherwise, the statute mandates that the disclaimer be issued, not "as soon as is reasonable," but "as soon as is reasonably *possible*."[78]

Finally, the court added that

> [t]o follow the *DiGuglielmo* rule would be in effect to permit an insurer to delay deciding whether to disclaim on grounds known to it while pursuing an investigation of other potential grounds for disclaiming liability or denying coverage. More than 40 years ago, however, the Court of Appeals specifically rejected an insurer's argument that the statute (then codified as Insurance Law §167[8]) should be read to "requir[e] speed [in giving notice] once the decision to disclaim has been made . . . [but to] permit delay in making the decision" (*Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 268 [1970]). Thus, "[t]he literal language of th[e] statutory provision requires prompt notice of disclaimer after decision to do so, and by logical and practical extension, there is imported the obligation to reach the decision to disclaim liability or deny coverage promptly too, that is, within a reasonable time" (Payne and Wilson, New York Insurance Law §31:15, at 927 [31 West's N.Y. Prac. Series 2010-2011], citing *Gross*. The proposition that an insurer is entitled to hold a known ground for disclaiming in reserve while investigating other grounds for rejecting the claim cannot be squared with *Gross*. . . . In view of the foregoing, adhering to the *DiGuglielmo* rule would be tantamount to deliberately setting aside the rule promulgated by the Court of Appeals (and flowing naturally from the language of the statute) that *"once the insurer has sufficient knowledge of facts entitling it to disclaim,* . . . it must notify the policyholder in writing as soon as is reasonably possible" (*Jetco*, 1 N.Y.3d at 66 [emphasis supplied]). We decline to replace the Court of Appeals' rule with a rule that measures the timeliness of a notice of disclaimer from the point in time when the insurer has completed its investigation of *any* and *all* possible grounds for rejecting the claim, regardless of when the insurer had sufficient knowledge to disclaim on the particular grounds relied upon . . . . Moreover, just as we would not permit the insured to delay giving the insurer notice of claim while investigating other possible sources of coverage, we should not permit the insurer to delay issuing a disclaimer on a known ground while investigating other possible grounds for avoiding liability. Any uncertainty as to the existence of coverage is irrelevant to the insurer's ability to issue a timely disclaimer based on the insured's breach of a condition precedent to coverage, such as late notice of claim, that is known to the insurer. As previously discussed, such a disclaimer will not preclude the insurer's ability later to take the position that no coverage exists, should that prove to be the case.[79]

UM coverage is available to victims of accidents involving a "hit-and-run," i.e., an unidentified vehicle that leaves the scene of the accident.

The First Department, in *Tower Ins. Co. of N.Y. v. NHT Owners LLC*,[80] held that a disclaimer based upon late notice of the occurrence, which was not issued by the insurer until *33 days* after receipt of the late notice, was untimely as a matter of law.

The Second Department, in *Alejandro v. Liberty Mutual Ins. Co.*,[81] held that a delay of *59 days* in disclaiming, when the basis for disclaiming should have been readily apparent, was untimely as a matter of law.

In *Nabutovsky v. Burlington Ins. Co.*,[82] the court held that a disclaimer of coverage made approximately 30 days after receipt of notice of the occurrence was timely as a matter of law.

In *USAA Casualty Co. v. Cook*,[83] the court upheld a disclaimer based upon an exclusion from coverage issued by the insurer 28 days after it received notice of the claimant's intention to make a UM/UIM claim, rejecting the contention, *inter alia*, that the disclaimer was untimely.

In *Huguens v. Village of Spring Valley*,[84] the court held that the delay in issuing the disclaimer was not unreasonable where the insurer "presented ample evidence demonstrating, as a matter of law, that the delay was reasonably related to a prompt, diligent, and necessary investigation it conducted into the question of whether the third-party plaintiff unduly and inexcusably delayed in providing it with notice of the lawsuit, in violation of the applicable insurance policy."[85]

The First Department, in *GPH Partners, LLC v. American Home Assurance Co.*,[86] noted that "[a] disclaimer

is unnecessary when a claim does not fall within the coverage terms of an insurance policy . . . [but] a timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion."[87]

And, in *Progressive Northeastern Ins. Co. v. Farmers New Century Ins. Co.*,[88] the court noted that "an insurer will not be estopped from disclaiming coverage where, as here, it timely 'reserve[d] its right to claim that the policy does not cover the situation at issue, while defending the action.'"[89]

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 was paid for under premium financing contract.

In *Global Liberty Ins. Co. v. Pelaez*,[90] the court noted that "Vehicle and Traffic Law § 313(1)(a) supplants an insurance carrier's common-law right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation, and mandates that the cancellation of a contract pursuant to its provisions may only be effected prospectively." This provision "places the burden on the insurer to discover any fraud before issuing the policy, or as soon as possible thereafter, and protects innocent third parties who may be injured due to the insured's negligence."[91] Since, in this case, there was no evidence that the injured passengers in the insured's vehicle participated in the alleged fraud, the insurer was precluded from denying coverage to those claimants on the ground that the policy was fraudulently obtained.

Hit-and-Run

UM coverage is available to victims of accidents involving a "hit-and-run," i.e., an unidentified vehicle that leaves the scene of the accident.

In *Liberty Mutual Ins. Co. v. Vella*,[92] the court reminded that

> [p]hysical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle. "The insured has the burden of establishing that the contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable."[93]

In this case, the uncontroverted evidence adduced at the framed issue hearing, which consisted of the claimant's testimony, two post-accident photographs of her vehicle, and a Department of Motor Vehicles report signed by the claimant stating, *inter alia*, that her vehicle was struck from the rear, established that the subject accident was caused by physical contact with a hit-and-run vehicle. Thus, the court reversed the trial court's determination that there was no physical contact, as not supported by the record.

In *State Farm Mutual Automobile Ins. Co. v. Beddini*,[94] the respondents were traveling on a Vespa motor scooter behind a pickup truck being operated by an unidentified driver. A large cardboard box flew off of the pickup truck and became lodged in the front wheel of the Vespa. This caused the respondents to be ejected from the Vespa and to sustain personal injuries. Because the cardboard box was not an integral part of the pickup truck, the court held that the respondent's collision with the box did not constitute the type of physical contact required to impose uninsured motorist coverage.[95]

In *Travelers Property & Casualty Co. of America v. Mayen*,[96] the court upheld the denial of the UM carrier's petition to stay arbitration "since petitioner failed to meet its burden of proof that a hit and run accident did not occur." The evidence adduced at a framed issue hearing demonstrated that the respondent was indeed involved in a hit-and-run accident. "Although the police accident report indicated that the respondent told the responding officer that the crash was the result of a blown out tire, the court reasonably attributed this statement to the fact that the respondent was falling in and out of consciousness at the accident scene."[97]

In *Pagan v. MVAIC*,[98] MVAIC opposed a petition for leave to commence an action against it on the grounds that the petitioner failed to establish his compliance with the statutory requirement and condition precedent to qualifying for benefits from MVAIC, that notice to a police, peace, or judicial officer of the subject accident be given within 24 hours. In support of his contention that the alleged hit-and-run accident occurred on July 27, 2007, and that he told the police of the accident on that date, the petitioner submitted, *inter alia*, an affidavit stating that he was arrested at the accident scene based on eyewitness statements that he had been involved in a crime, and setting forth the criminal identification number and docket number arising from the arrest, as well as an EMS report, dated July 28, 2007, identifying him as a prisoner. The court held that this evidence only indicated that the accident may have occurred on July 27, 2007, and that the petitioner was in police custody on July 28, 2007, but did not contain any evidence that the police were actually told of the accident within 24 hours of its occurrence. Moreover, the court noted that the petition, the petitioner's affidavit of no insurance, a DMV Accident report form, and the proposed Complaint against MVAIC all identified July 25, 2007, as the date of the accident. Thus, there was a question of fact as to whether the petitioner complied with the 24-hour notice requirement, which required an evidentiary hearing to resolve.

Actions Against MVAIC

In *Williams v. MVAIC*,[99] the court held that although "police vehicles are exempted from the provisions of the MVAIC statute to the extent that otherwise eligible claimants are barred from filing a claim for injuries *caused by* the negligent operation of a police vehicle . . . , 'the uninsured occupant of a police vehicle may file a claim with the MVAIC for injuries sustained in an accident caused by an uninsured motor vehicle.'"[100]

PART III. UNDERINSURED MOTORIST ISSUES

Trigger of Coverage

In *AIU Ins. Co. v. Hibbert*,[101] the court held that where the host vehicle, in which multiple claimants were riding, and the tortfeasor's vehicle had identical bodily injury liability limits of 25/50, the tortfeasor's vehicle was not underinsured, and that payment by the tortfeasor's insurer to another passenger in the host vehicle did not render the tortfeasor's vehicle "underinsured" for the purpose of triggering the host vehicle's SUM coverage "since the other passenger was also an 'insured' under the [host] policy and not an 'other person.'"[102] Thus, the tortfeasor's policy limits were not reduced by payments made to any of the occupants of the host vehicle.[103]

Exhaustion of Underlying Limits

In *Liberty Mutual Ins. Co. v. Walker*,[104] the court reminded that a claimant is not required to exhaust the coverage limits of all tortfeasors before being entitled to submit a SUM claim, provided that the claimant exhausts the full liability limits of at least one tortfeasor.

Offset/Reduction in Coverage

The Second Department, in *Liberty Mutual Ins. Co. v. Walker*,[105] held that while the claimant, who had a $100,000 SUM policy, settled with the vehicle that struck her for $25,000, and settled with Verizon, whose trucks were parked at the intersection where the accident occurred, for $650,000, no SUM recovery was possible because there was nothing to arbitrate – i.e., the cumulative total of the payments "received by the insured or the insured's legal representative, from or on behalf of all insurers that may be legally liable for the bodily injury sustained by the insured,"[106] effectively wiped out the SUM coverage.[107]

Note, however, that although in quoting the pertinent policy provision (Condition 6), the court omitted the pertinent words "the motor vehicle bodily injury liability insurance or bond payments," it is clear that those words were important to the decision. The offset was applied to include the payments made by Verizon because those payments consisted of motor vehicle bodily injury insurance payments. If the second tortfeasor was something other than a motor vehicle tortfeasor, e.g., a municipality, a bar (Dram Shop), or a doctor (malpractice), the amounts received from such defendants would *not* be included in the calculation of the offset or reduction in coverage. ■

1. 80 A.D.3d 1126 (3d Dep't 2011).
2. *Id.* at 1127–28 (citations omitted).
3. 85 A.D.3d 1157 (2d Dep't 2011), *lv. to appeal denied*, 18 N.Y.3d 803 (2012).
4. 88 A.D.3d 1053 (3d Dep't 2011).
5. 89 A.D.3d 1401 (4th Dep't 2011).
6. *Id.* at 1402 (citations omitted).
7. 84 A.D.3d 825 (2d Dep't 2011).
8. *Id.* at 826 (citations omitted); *see USAA Cas. Ins. Co. v Hughes*, 35 A.D.3d 486, 487 (2d Dep't 2006); *see also Gen. Acc. Ins. Grp. v Cirucci*, 46 N.Y.2d 862, 864 (1979); *N.Y. Cent. Mut. Fire Ins. Co. v. Polyakov*, 74 A.D.3d 820 (2d Dep't 2010); *Utica Mut. Ins. Co. v Reid*, 22 A.D.3d 127 (1st Dep't 2005).
9. 16 N.Y.3d 349, 922 N.Y.S.2d 233 (2011).
10. *Id.* at 356 (emphasis added); *see also Progressive Ne. Ins. Co. v. Vanderpool*, 85 A.D.3d 926 (2d Dep't 2011) ("Here, from Vanderpool's perspective, his encounter with Pullum's vehicle was unexpected, unusual, and unforeseen. Consequently, whatever Pullum's intent, the occurrence was an "accident" within the meaning of the SUM endorsement of Vanderpool's policy"); Norman H. Dachs & Jonathan A. Dachs, *Definition of "Accident" Undergoes Significant Change*, N.Y.L.J., May 10, 2011, p. 3, col. 1.
11. *See Ciampa Estates, LLC v. Tower Ins. Co. of N.Y.*, 84 A.D.3d 511 (1st Dep't 2011); *Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc. v. Merchants Mut. Ins. Co.*, 84 A.D.3d 717 (2d Dep't 2011).
12. 90 A.D.3d 636 (2d Dep't 2011).
13. *Id.* at 636 (citations omitted); *see also Columbia Univ. Press, Inc. v. Travelers Indem. Co. of Am.*, 89 A.D.3d 667 (2d Dep't 2011).
14. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Great Am. E & S Ins. Co.*, 86 A.D.3d 425 (1st Dep't 2011); *Zimmerman v. Peerless Ins. Co.*, 85 A.D.3d 1021 (2d Dep't 2011); *Tower Ins. Co. of N.Y. v. Alvarado*, 84 A.D.3d 1354 (2d Dep't 2011); *Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc. v. Merchants Mut. Ins. Co.*, 84 A.D.3d 717 (2d Dep't 2011); *NGM Ins. Co. v. Haak*, 81 A.D.3d 1458 (4th Dep't 2011); *Nabutovsky v. Burlington Ins. Co.*, 81 A.D.3d 615 (2d Dep't 2011).
15. 88 A.D.3d 1053 (3d Dep't 2011).
16. *Id.* at 1055 (citations omitted). *See also Nabutovsky*, 81 A.D.3d 615 (notice to the insurance broker for the insured did not constitute notice to the defendant insurer).
17. 90 A.D.3d 636.
18. *Id.* at 637; *see also Tower Ins. Co. of N.Y. v. New Wok Hing Trading, Inc.*, 89 A.D.3d 1079 (2d Dep't 2011); *Hanover Ins. Co. v. Prakin*, 81 A.D.3d 778 (2d Dep't 2011) (injured party failed to explain seven-month delay in notifying defendant's insurer of the accident despite uncontroverted proof that they were informed of the existence of the policy).
19. 89 A.D.3d 1079 (2d Dep't 2011).
20. 81 A.D.3d 1458 (4th Dep't 2011).
21. *Id.* at 1459 (citations omitted).
22. *Id.* at 1459–50 (citation omitted).
23. 83 A.D.3d 1085 (2d Dep't 2011).
24. 88 A.D.3d 1053 (3d Dep't 2011).
25. Ins. Law § 3420(a)(5), as added by L. 2008, ch. 388, § 2 (eff. Jan. 17, 2009).
26. *Waldron*, 88 A.D.3d at 1054–55 (citations omitted).
27. 89 A.D.3d 725 (2d Dep't 2011).
28. *Id.* at 726–27 (citations omitted); *see also Columbia Univ. Press, Inc. v. Travelers Indem. Co. of Am.*, 89 A.D.3d 667 (2d Dep't 2011).
29. 90 A.D.3d 532 (1st Dep't 2011).
30. 88 A.D.3d 1053 (3d Dep't 2011).
31. 81 A.D.3d 615 (2d Dep't 2011).
32. 82 A.D.3d 632 (1st Dep't 2011).

33. *Id.* at 634 (citation omitted).

34. *See Fine Line Builders & Remodelers, Inc. v. Atl. Cas. Ins. Co.*, 90 A.D.3d 702 (2d Dep't 2011); *Lobosco v. Best Buy, Inc.*, 80 A.D.3d 728 (2d Dep't 2011); *Tower Ins. Co. of N.Y. v. Amsterdam Apartments, LLC*, 82 A.D.3d 465 (1st Dep't 2011); *Tower Ins. Co. of N.Y. v. R&R Dental Modeling, Inc.*, 82 A.D.3d 607 (1st Dep't 2011); *Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc.*, 84 A.D.3d 717 (2d Dep't 2011); *Tower Ins. Co. of N.Y. v. Babylon Fish & Clam, Inc.*, 83 A.D.3d 547 (1st Dep't 2011); *Zimmerman v. Peerless Ins. Co.*, 85 A.D.3d 1021 (2d Dep't 2011); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Great Am. E&S Ins. Co.*, 86 A.D.3d 425 (1st Dep't 2011); *Merchants Mut. Ins. Co. v. Rutgers Cas. Ins. Co.*, 84 A.D.3d 756 (2d Dep't 2011); *Tower Ins. Co. v. Alvarado*, 84 A.D.3d 1354 (2d Dep't 2011).

35. 90 A.D.3d 933 (2d Dep't 2011).

36. *Id.* at 933 (citations omitted).

37. 88 A.D.3d 701 (2d Dep't 2011).

38. *Id.* at 702 (citations omitted).

39. 83 A.D.3d 709, 710 (2d Dep't 2011).

40. 87 A.D.3d 536 (2d Dep't 2011).

41. *Id.* at 536 (citations omitted).

42. 90 A.D.3d 460 (1st Dep't 2011).

43. 83 A.D.3d 709.

44. 80 A.D.3d 707 (2d Dep't 2011).

45. 81 A.D.3d 940 (2d Dep't 2011).

46. *Id.* at 940; *see also Am. Transit Ins. Co. v. Tagliaferro*, 84 A.D.3d 1078 (2d Dep't 2011) (ample proof to sustain petitioner's *prima facie* burden establishing that no accident occurred).

47. 84 A.D.3d 469 (1st Dep't 2011).

48. *Id.* at 469.

49. 83 A.D.3d 945 (2d Dep't 2011).

50. *Id.* at 945–46 (citations omitted).

51. 82 A.D.3d 1244 (2d Dep't 2011).

52. *Id.* at 1244–45 (citations omitted).

53. 84 A.D.3d 1041 (2d Dep't 2011).

54. *Id.* at 1043 (citation omitted).

55. 80 A.D.3d 1046 (3d Dep't 2011).

56. *Id.* at 1047.

57. 90 A.D.3d 666 (2d Dep't 2011).

58. *Id.* at 668 (citations omitted).

59. *See Metro. Prop. & Cas. Ins. Co. v. Carpentier*, 7 A.D.3d 627, 628 (2d Dep't 2004); *Am. Mfrs. Mut. Ins. Co. v. Morgan*, 296 A.D.2d 491, 493–94 (2d Dep't 2002).

60. 73 A.D.3d 431 (1st Dep't 2010), *aff'd*, 18 N.Y.3d 325 (2011).

61. *Id.* at 432 (citation omitted).

62. 18 N.Y.3d at 327.

63. *Id.* (citation omitted).

64. 82 A.D.3d 1172 (2d Dep't 2011).

65. *Id.* at 1173.

66. *Id.* at 1174.

67. 87 A.D.3d 843 (1st Dep't 2011).

68. *Id.* at 843–44.

69. 88 A.D.3d 639 (2d Dep't 2011).

70. *Id.* at 641, 642.

71. 92 A.D.3d 104 (1st Dep't 2012).

72. 6 A.D.3d 344 (1st Dep't), *lv. to appeal denied*, 3 N.Y.3d 608 (2004).

73. *George Campbell Painting*, 92 A.D.3d at 105.

74. *Id.* at 106.

75. *Id.*; *see City of N.Y. v. N. Ins. Co. of N.Y.*, 284 A.D.2d 291 (2d Dep't), *lv. dismissed*, 97 N.Y.2d 638 (2001).

76. *George Campbell Painting*, 92 A.D.3d at 106.

77. *Id.*

78. *Id.* at 111.

79. *Id.* at 113–15 (citations omitted).

80. 90 A.D.3d 532 (1st Dep't 2011).

81. 84 A.D.3d 1132 (2d Dep't 2011).

82. 81 A.D.3d 615 (2d Dep't 2011).

83. 84 A.D.3d 825 (2d Dep't 2011).

84. 82 A.D.3d 1159 (2d Dep't 2011).

85. *Id.* at 1160 (citations omitted).

86. 87 A.D.3d 843 (1st Dep't 2011).

87. *Id.* at 843 (citations omitted); *see also Gen. Star Nat'l Ins. Co. v. Niagara Frontier Transit Metro Sys., Inc.*, 82 A.D.3d 1627 (4th Dep't 2011); *Progressive Ne. Ins. Co. v. Farmers New Century Ins. Co.*, 83 A.D.3d 15193 (4th Dep't 2011) (plaintiff was not required to provide "'notice of [disclaimer] when there never was any insurance in effect'"); *State Farm Mut. Auto. Ins. Cos. v. Jaenecke*, 81 A.D.3d 1474 (4th Dep't), *lv. to appeal denied*, 17 N.Y.3d 701 (2011); *McCabe v. St. Paul Fire & Marine Ins. Co.*, 79 A.D.3d 1612 (4th Dep't 2010), *reargument denied*, 81 A.D.3d 1388 (4th Dep't 2011) ("[W]here the issue is the existence or nonexistence of coverage . . . the doctrine of waiver is simply inapplicable.").

88. 83 A.D.3d 1519 (4th Dep't 2011).

89. Id. at 1520 (citation omitted).

90. 84 A.D.3d 803 (2d Dep't 2011).

91. *Id.* at 803 (citations omitted).

92. 83 A.D.3d 716 (2d Dep't 2011).

93. *Id.* at 717 (citations omitted).

94. 88 A.D.3d 519 (1st Dep't 2011).

95. *Cf. Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325 (1991) (tire and rim from unidentified vehicle were integral parts of the vehicle, essential to its operation).

96. 82 A.D.3d 402 (1st Dep't 2011).

97. *Id.*

98. 82 A.D.3d 1102 (2d Dep't 2011).

99. 82 A.D.3d 1109 (2d Dep't 2011).

100. *Id.* at 1110 (citations omitted).

101. 85 A.D.3d 779 (2d Dep't 2011).

102. *Id.* at 780.

103. *See Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 610 (2009).

104. 84 A.D.3d 960 (2d Dep't 2011) (citing *S'Dao v. Nat'l Grange Mut. Ins. Co.*, 87 N.Y.2d 853 (1995)).

105. *Id.*

106. *Id.* at 961.

107. *See* Norman H. Dachs & Jonathan A. Dachs, *The SUM Offset/Reduction in Coverage Provision*, N.Y.L.J., Nov. 8, 2011, p. 3, col. 1.