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2012 Review of UM, UIM and SUM Law

By Jonathan A. Dachs

Once again, and for the 20th year in a row, we present this annual survey of developments in the area of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from the previous year. As always, 2012 was a busy and important year in this ever-changing and highly complex area of the law.

PART I. GENERAL ISSUES

Insured Persons

The definition of an "insured" under the SUM endorsement (and most 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 *American Alternative Ins. Corp. v. Pelszynski*,[1] the court held that a volunteer firefighter injured in an accident while on route to a fire emergency in his own vehicle (equipped with a blue light and a 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."[2]

Note, however, that by legislation that was proposed in 2012, and which became effective in April 2013,[3] and is applicable to any policies issued or renewed on or after that date, Insurance Law § 3420(f) (Ins. Law) was amended by adding a new subdivision (5). Section 3420(f)(5) requires that all policies under which a fire department, fire company (as defined in General Municipal Law § 100), ambulance service, or "voluntary ambulance service" (as defined in Public Health Law § 3001) is a named insured shall provide Supplementary Uninsured/Underinsured Motorist coverage to an individual employed by, or who is a member of, such entities and who is injured by an uninsured or underinsured motor vehicle while acting in the scope of his or her duties for the named insured entity, except with respect to the use or operation by such individual of a motor vehicle not covered under the policy.[4]

In *Morette v. Kemper, Unitrin Auto & Home Ins. Co., Inc.*,[5] the named insured under a commercial auto insurance policy was a limited liability company (LLC), of which the injured party/decedent was the sole member. The injured party's estate sought to make a claim for SUM benefits under the SUM endorsement of the LLC's policy. The endorsement in question defined

> "[t]he unqualified term 'insured' . . . to mean [y]ou, as the named insured and, while residents of the same household, your spouse and the relative of either you or your spouse." Similarly, "survivor rights" coverage was afforded to "you or your spouse, if a resident of the same household," should either one die, in which event "this SUM coverage shall cover . . . [t]he survivor as named insured [and] . . . [t]he decedent's legal representative as named insured, but only while acting within the scope of such representative's duties as such." At the time the policy was issued, "spousal liability" was excluded, but the insurer issued a notice to the LLC that "upon written request of an insured, and upon payment of the premium" it would provide "Supplemental Spousal Liability Insurance coverage

> . . . cover[ing] the liability of an insured spouse because of the death of or injury to his or her spouse, even where the injured spouse must prove the culpable conduct of the insured spouse." Also, the policy excluded as an "insured" a member of a limited liability company only "while moving property to or from a covered auto" or "for a covered auto owned by him or her or a member of his or her household." No other language was contained in the policy excluding members of a limited liability company from coverage.[6]

One fairly common ground for disclaiming liability or denying coverage is the ground of non-cooperation by the insured.

Analyzing this policy in accordance with general rules governing interpretation of insurance policies, the court observed that "[o]nly by employing a construction which allows for a member of the limited liability company who is a 'natural person' (Limited Liability Law § 102(w)) to be an 'insured' under the policy can these policy provisions be given any effect; otherwise they are illusory." Accordingly, the court held that the decedent, as the sole member of the named insured LLC, was an "insured" for whom SUM benefits were provided. Finally, the court went on to distinguish the case law cited and relied upon by the insurer, which held that a business auto policy issued to a corporation does not provide uninsured motorist coverage to a family member of the sole shareholder of the corporation, from cases involving limited liability companies, to the extent that their members are "natural persons." The court noted,

> "The LLC was designed as a hybrid of the corporate and limited partnership forms, offering the tax benefits and operating flexibility of a limited partnership with the limited liability of a corporation."
>
> Significantly, a limited liability company is "an *unincorporated* organization of one or more persons having limited liability for the contractual obligation and other liabilities of the business" (Limited Liability Company Law § 102(m) emphasis added). A limited liability company is more akin to a partnership (see Partnership Law §§ 2, 10) since both entities are "combination[s] of individuals, who can suffer injuries and do have spouses, households and relatives."[7]

Finally, the court pointed to the case of *Aetna Casualty & Surety Co. v. Mantovani*,[8] wherein an arbitration award in favor of a partner for underinsured motorist benefits under a business auto policy issued to a partnership was upheld.

Residents

In *Neary v. Tower Ins.*,[9] the court noted that "[t]he standard for determining residency for purposes of insurance coverage requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain. Mere intention to reside at certain premises is not sufficient."[10]

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 *Allstate Ins. Co. v. Reyes*, where the respondent was bitten on her breast by a dog that reached out through an open window in a parked car (in a no-parking zone), the supreme court held that the term "use" in the definition of an "uninsured motor vehicle" (i.e., "ownership, maintenance or use") encompassed the facts of that case. As explained by the court in denying the petition to stay arbitration, "[c]ertainly, the use of a vehicle to transport a household pet is now commonplace and the dog would not have been close enough to bite the respondent's right breast without the use of Mr. Kazimer's vehicle to haul the dog and Mr. Kazimer's act of permitting the rear window to remain open. It is not necessary that the use of the vehicle be *the* proximate cause of the respondent's injuries. Rather, this court finds that the use of the vehicle was a proximate cause of the respondent's injuries."[11]

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." Liability policies contain similar notice provisions.

Numerous recent cases have again held 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.[12] "Where no excuse or mitigating factor is offered, the reasonableness of the delay is determined as a matter of law."[13]

In *Gilliard v. Progressive*, the court observed,

> "In the context of supplementary uninsured/underinsured motorist (hereinafter SUM) claims, it is the claimant's burden to prove timeliness of notice, which is measured by the date the claimant knew or should have known that the tortfeasor was underinsured. Timeliness of notice is an elastic concept, the resolution of which is highly dependent on the particular circumstances.

> 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/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."[14]

Here, the plaintiff met his prima facie burden with respect to the issue of "due diligence" by submitting the correspondence he sent within two weeks of the accident to the alleged tortfeasor, vehicle owner and insurer, seeking its policy limits, as well as a subsequent discovery demand for the policy limits served in the course of litigating the underlying personal injury action.

In *Rosier v. Stoeckeler*, the court observed that "notice of a claim or a potential claim provided by an insured only to the insured's broker, and not to the carrier or its agent, generally is not considered sufficient notice to the carrier."[15]

The court, in *Konig v. Hermitage Ins. Co.*, observed that

> Insurance Law § 3420(a)(3) gives the injured party an independent right to give notice of the accident to the insurer and to satisfy the notice requirement of the policy. "[W]hile an insured's failure to provide notice may justify a disclaimer vis-a-vis the insurer and the insured, it does not serve to cut off the right of an injured claimant to make a claim as against the insurer." As such, the injured person "is not to be charged vicariously with the insured's delay." "However, where an injured party fails to exercise the independent right to notify the insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well."[16]

In *GEICO v. Torres*,[17] the court held that the claimants were not diligent in ascertaining the identity of the proposed additional respondent's insurer or in notifying the insurer of the claim, where the police accident report prepared the night of the accident contained the insurer's policy number, but respondents waited eight months to inform the insurer of the accident.

In *Kalthoff v. Arrowood Indemnity Co.*,[18] where notice to the insurer was provided by the injured party and not by the insured, the court held that the disclaimer, which referred to late notice by both the injured party and the insured, was effective against the injured party because it was sent to the insured with a copy to the injured party.

In *Castro v. Prana Associates Twenty One, LP*,[19] Prana wrote a letter to Northfield, dated September 29, 2009, notifying it of the underlying action and requesting defense and indemnification as an additional insured under the Northfield policy. However, the court held that the letter did not trigger Northfield's duty to disclaim coverage as to Four Star, its named insured. Both insureds were required to provide notice of a claim; accordingly, notice provided by Prana could not be imputed to Four Star. Prana and Four Star were not united in interest; in fact, they were adverse to one another.

In several recent cases, the courts have noted that the legislation that requires an insurer to show prejudice does not apply to cases in which the pertinent policy was issued *before* the effective date of the statute.[20]

Yet, it should be remembered that "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."[21]

In *Donald Braasch Construction, Inc. v. State Ins. Fund*,[22] the court stated,

> "Notice provisions in insurance policies afford the insurer an opportunity to protect itself . . . , and the giving of the required notice is a condition to the insurer's liability. . . . Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy. The burden of justifying the delay by establishing a reasonable excuse is upon the insured," and such excuses include the lack of knowledge of an accident; a good-faith and reasonable basis for a belief in nonliability; and a good-faith and reasonable basis for a belief in noncoverage.[23]

In numerous cases decided in 2012,[24] the courts analyzed the reasonableness of the excuses for late notice in several contexts with fairly consistent results – rejecting the proffered explanation or excuse. Cases in this area are very fact specific, and, thus, 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 Northern Ins. Co. v. Foss*,[25] the court held that the SUM insurer had ample time to seek the discovery it sought via its petition to stay arbitration *before* commencing the proceeding but "unjustifiably failed to do so." Accordingly, the court granted the claimants' motion to dismiss the petition.

In *Goel v. Tower Ins. Co. of New York*,[26] the court held that the defendant insurer did not establish that the plaintiff's failure to comply with the coverage conditions by not sitting for an examination under oath (EUO) and by not producing all of the documents sought by the insurer constituted willful non-compliance with the terms of the subject policy and, therefore, affirmed the denial of the insurer's motion for summary judgment and directed the plaintiff to appear for an EUO within 90 days. The court further noted that the court below "properly considered the totality of the circumstances in concluding that plaintiff's conduct was not so willful as to require excusing defendants from liability. . . . Moreover, the record shows that defendants did not act diligently to obtain plaintiff's

cooperation in a manner that was reasonably calculated to bring it about."[27]

In *Jones v. American Commerce Ins. Co.*,[28] an action to recover uninsured motorist benefits, the claimant/insured moved for summary judgment on the issue of liability prior to the exchange of any discovery. In reversing the trial court's grant of that motion, the Second Department held that "[s]ince the defendant [insurer] had no personal knowledge of the relevant facts, it should be afforded the opportunity to conduct discovery, including depositions of the plaintiff, the operator of the uninsured vehicle, and an eyewitness identified in the police accident report."[29]

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 *Allstate Ins. Co. v. LeGrand*, the court noted that "[t]he failure to move to stay arbitration within the 20-day period specified in CPLR 7503(c) generally constitutes a bar to judicial intrusion into the arbitration proceedings [but that] a motion to stay arbitration may be entertained outside the 20-day period when 'its basis is that the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with.'"[30] In this case, the accident took place while the insured was driving a rental car in Mexico. The policy provided benefits for accidents that occurred within the state of New York, "the United States, its territories or possessions or Canada." Since the policy did not provide for coverage in the geographic area where the accident occurred, the court held that "it cannot be said that the parties ever agreed to arbitrate this claim."[31] Thus, the petition to stay arbitration, filed more than 20 days after receipt of the demand for arbitration, was not untimely.

The court, in *GEICO v. Albino*,[32] held that it was proper to allow the petitioner leave to amend its petition to include, *inter alia*, a claim that no hit-and-run accident had occurred. The court stated, "While CPLR 7503(c) provides that a party served with a demand for arbitration must seek a stay within 20 days thereafter or be precluded from doing so, it does not prohibit the amendment of a timely petition."[33]

Arbitration Awards: Scope of Review

In *In re Bobak (AIG Claims Services, Inc.)*, an SUM case, the court observed, "In a case such as this, '[w]here arbitration is compulsory, our decisional law imposes closer judicial scrutiny of the arbitrator's determination under CPLR 7511(b). . . . To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious.'"[34]

In *Allstate Ins. Co. v. GEICO*,[35] the court stated that "[a]n arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached.'"[36]

In *Modafferi v. Manhattan and Bronx Surface Transit Operating Authority*, the court stated that "'[a]n 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.'"[37] There, the defendant failed to demonstrate the existence of any of the statutory grounds for vacating the arbitrator's award, and, thus, its motion to vacate the award was denied (and the award was confirmed).

PART II. UNINSURED MOTORIST ISSUES

Self-Insurance

In *Incorporated Village of Rockville Centre v. Ziegler*,[38] the claimant, a police officer injured while on duty when his police vehicle was struck by an underinsured motor vehicle, sought SUM benefits from the Incorporated Village – his employer and the owner of the vehicle he was occupying at the time – and from an insurer that issued an excess policy to the Village, which provided SUM coverage with a limit of $500,000 subject to a $500,000 self-insured retention. The Village and the insurer contended that no coverage was available to the claimant because the Village was self-insured and its self-insured retention did not provide SUM coverage. Based upon evidence "tending to show that the Village did not provide underlying underinsured motorist coverage," and the fact that "there was no agreement to arbitrate," the court reversed the denial of the petition and granted a permanent stay of arbitration.

The Second Department, in *Metropolitan Property & Casualty Ins. Co. v. Singh*,[39] observed that the New York City Transit Authority, the owner of a bus, was a self-insurer. The claimant's failure to rebut that showing led to the granting of the claimant's insurer's petition to stay arbitration of his uninsured motorist claim.

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 *City of New York v. Greenwich Ins. Co.*, the court observed,

> Under Insurance Law § 3420(d)(2), an insurer wishing to deny coverage for death or bodily injury must "give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage." "When

> an insurer fails to do so, it is precluded from disclaiming coverage based upon late notice, even where the insured has in the first instance failed to provide the insurer with timely notice of the accident." 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.[40]

"[T]he timeliness of an insurer's disclaimer [or denial] is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage."[41]

In *How Shim Yu v. General Security Ins. Co.*, the court observed that "[a]n insurer's failure to provide notice [or disclaimer] as soon as is reasonably possible precludes effective disclaimer, even where the policyholder's own notice of the incident to its insurer is untimely."[42]

The Fourth Department, in *RLI Ins. Co. v. Smiedala*,[43] noted that an insurer's opposition to a motion for summary judgment in a declaratory judgment action could be deemed a written disclaimer/denial of coverage, subject, of course, to the timeliness requirement of Ins. Law § 3420(d)(2).

In *George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, PA*,[44] the First Department declined to follow, and expressly overruled, its prior longstanding rule, set forth in *DiGuglielmo v. Travelers Property Casualty*,[45] wherein it had 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."[46] 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," the court held – in agreement with prior decisions/law in the Second Department[47] – 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."[48] 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 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."[49]

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*."[50]

The First Department, in *AIU Ins. Co. v. Veras*, held that a letter of disclaimer sent 15 days after the insurer completed its two-week internal investigation, which led to the decision to disclaim, was untimely as a matter of law. The court further rejected the insurer's argument that the delay was due to its investigation of other possible grounds for disclaiming. Citing *George Campbell Painting*, the court stated: "'[J]ust 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.'"[51]

In *Brother Jimmy's BBQ, Inc. v. American International Group, Inc.*,[52] the court held that a delay of 38 days in disclaiming excess coverage was unreasonable as a matter of law, because the ground alleged as support for the disclaimer was clear from the face of the notice of claim and other documents submitted to the excess carrier.[53]

In *City of New York v. Greenwich Ins. Co.*,[54] the notice of claim received by the insurer contained only the date of loss and did not indicate when the insured first learned of the subject accident. The insurer's investigation did not begin until more than 31 days after it received the notice letter and continued for approximately five and a half months. Noting that "insurers have a duty to 'expedite' the disclaimer process," and that the insurer did not explain "why anything beyond a cursory investigation" was necessary to determine whether the insured timely notified it of the claim, the court held that the five-and-a-half month delay in disclaiming was unreasonable as a matter of law.

The court in *Country-Wide Ins. Co. v. Preferred Trucking Services Corp.*[55] held that the disclaimer was untimely because it came approximately four months after the insurer learned of the ground for the disclaimer. The court rejected the insurer's contention that the disclaimer was timely because it had no basis for disclaiming coverage until it became apparent that the operator of the subject truck would not cooperate with the defense of the underlying personal injury action. The court explained, "Plaintiff's diligent conduct prior to the disclaimer, in

attempting to secure the cooperation of both Preferred's owner and the operator of the truck, shows that plaintiff believed that both had knowledge or information pertaining to the accident and the underlying litigation, and belies plaintiff's representation that its sole concern was with the testimony of the operator of the truck."[56]

In *City of New York v. General Star Indemnity Co.*,[57] the court held that issues of fact remained as to whether information the insurer received, which failed to identify the named insured or the number of the master policy, provided a sufficient basis for a disclaimer, and whether the disclaimer subsequently issued by the insurer was timely. The insurer claimed that it did not receive sufficient documentation until 11 days after it received first notice of the claim, and it disclaimed 30 days later.

In *How Shim Yu v. General Security Ins. Co.*,[58] the insurer learned by August 27, 2004, that the plaintiff had served the summons and complaint in the underlying action on the Secretary of State on December 31, 2001, that the Secretary of State had sent the documents to the address on file for the insured, and that those documents had been returned unclaimed. Thus, the insurer was aware by that date of the grounds for disclaimer but did not disclaim until July 18, 2007 – almost three years later. This delay was held to be unreasonable as a matter of law; the court rejected the insurer's contention that it had to wait until the motion court in the underlying action confirmed the Special Referee's finding that the insured had deliberately left its mail unclaimed.

The Second Department, in *Tower Ins. Co. v. Khan*,[59] held that a disclaimer issued 17 days after the insurer obtained all of the facts necessary to support the disclaimer was timely.

In *Castro v. Prana Associates Twenty One, LP*,[60] where the insurer did not receive notice until it received notice of the summons and complaint from the claimant on May 25, 2010, and from the insured's broker on June 2, 2010, the court held that using either notice date, the insurer's disclaimer letter, dated June 14, 2010 (either 20 or 12 days later), was timely as a matter of law.

In *City of New York v. General Star Indemnity Co.*,[61] the court held that issues of fact existed as to the timeliness of the disclaimer issued either 64 or 30 days after receipt of notice, and whether the insurer conducted a "diligent" investigation.

Several recent cases reiterated the proposition that a disclaimer pursuant to Ins. Law § 3420(d)(2) is unnecessary when a claim does not fall within the coverage terms of the insurance policy. Stated another way, "[a]n insurer is not required to deny coverage where none exists."[62]

One fairly common ground for disclaiming liability or denying coverage is the ground of non-cooperation by the insured. In order to support a disclaimer on that ground, the insurer must demonstrate that (1) it acted diligently in seeking to bring about the insured's cooperation; (2) the efforts it employed were reasonably calculated to obtain the insured's cooperation; and (3) the attitude of the insured, after his or her cooperation was sought, was one of "willful and avowed obstruction."[63]

In *American Transit Ins. Co. v. Hossain*,[64] the court held that although the insurer sent letters and investigators to three different addresses for the insured, the record did not establish that the insured received the letters or had actual notice of the attempts to contact him. Further, the insurer never attempted to contact the insured at various other addresses in its file or at a possible work location. Thus, the evidence was insufficient to establish lack of cooperation.

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 effectively to 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 a private passenger vehicle, whether the policy was written under the Assigned Risk Plan, and/or was paid for under a premium financing contract.

In *GEICO v. Phillip*,[65] the court noted that the initial burden of demonstrating a valid cancellation is on the insurance company that disclaimed coverage on that ground. In addition, the court observed that Vehicle & Traffic Law § 313 (V&TL) governs the procedures which an insurance carrier must follow in order to properly cancel an automobile insurance policy. Pursuant to § 313(2)(a), an insurance carrier is required to file with the Commissioner of Motor Vehicles a notice of cancellation within 30 days after the cancellation in order for the cancellation to be valid and effective against third parties.

In *GEICO v. Allen*,[66] the claimant was injured while a passenger in a vehicle that was operated by Clifton Jordan and insured by Infinity Auto Ins. Co., under a policy issued to Sarah Pemberton. In opposing the petition to stay the uninsured motorist arbitration sought by the claimant against his own insurer, Infinity contended that its policy to Pemberton had been validly "rescinded ab initio" based upon Pemberton's death seven years earlier. The court rejected that contention, however, because "'Vehicle and Traffic Law § 313(1)(a) supplants an [insurer'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.'"[67]

Stolen Vehicle/Non-Permissive Use

Also in *GEICO v. Allen*, where the respondent was injured on August 7, 2010, in a letter dated September 1, 2010, Infinity also disclaimed coverage on the ground that

owner Pemberton had died in 2003, and, thus, Jordan was operating the vehicle without the permission of its owner. The respondent then made an uninsured motorist claim against GEICO, and GEICO sought to stay arbitration on the ground that Infinity insured the vehicle. In response to that proceeding, Infinity contended that not only had the policy issued to Pemberton been validly "rescinded ab initio" based on her death in 2003 but, further, that it had validly disclaimed coverage based on nonpermissive use, submitting in support a transcript of a recorded statement from Jordan "that could be interpreted as indicating that he 'had no business' driving the subject car, which had belonged to his ex-wife's deceased mother and was sitting outside the home of his ex-wife, who never used it."[68] The supreme court granted the petition and permanently stayed the arbitration, without a hearing. On appeal, the Second Department reversed.

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident.

Although the court agreed that Infinity did not validly disclaim on the ground that it rescinded the policy upon learning of the insured's death in 2003, noting that the right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation has been overridden by V&TL § 313(1)(a), which mandates only *prospective* cancellations, it held that the issue of permissive use could be validly litigated and a hearing was necessary to determine that issue. The fact that Pemberton had died seven years prior to the accident did not conclusively resolve the issue in favor of Infinity. After her death, the vehicle could have come under the ownership of another individual who gave Jordan express or implied permission to operate it. Thus, the matter was remitted for a hearing on permissive use.

In *Fiduciary Ins. Co. of America v. Jackson*,[69] the court held that the presumption of permissive use was rebutted by evidence that the vehicle owner left the keys on a table in his mother's home with instructions that his mother or his cousin would pick it up for repairs. As explained by the court,

> a finding of constructive consent requires a consensual link between the negligent operator and one whose possession of the car was authorized. Here, there was no evidence showing a consensual link between the owner and his mother on the one hand, and the driver on the other. There is no basis to disturb the court's finding that the owner's testimony that he did not give the driver permission to use the car was credible.[70]

Hit-and-Run

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

In *Allstate Ins. Co. v. Stricklin*,[71] at a framed issue hearing concerning the possible identity of the hit-and-run vehicle, the respondent testified that within "about five minutes" after the accident, an unidentified individual handed him a piece of paper containing the license plate number of the car that fled the scene. The respondent further stated that this individual told him that he "went down the road and retrieved the plate number." While the respondent was "headed into the ambulance," he gave the piece of paper to a police officer at the scene. The plate number and identifying information of the offending vehicle were included in the subsequently prepared police accident report. The individual identified as the owner of the vehicle denied involvement in an accident. The hearing court admitted the uncertified police report into evidence even though no police officer testified and concluded, based thereon, that "there is another tortfeasor for which there is coverage."[72] Thus, the hearing court granted the petition to permanently stay the uninsured motorist claim.

The Second Department reversed, on the basis that the police accident report was inadmissible under the present sense exception to the hearsay rule, since the statement contained therein was not made "substantially contemporaneously" with the witness's observations, and the declarant's description of the relevant events was not "sufficiently corroborated by other evidence." Since there was no other evidence that the alleged identified vehicle was involved in the subject accident, the court denied the petition to stay arbitration.

In *GEICO v. Baik*,[73] the court upheld the granting of the insurer's petition to stay arbitration on the ground that the petitioner established that neither the respondent nor the policyholder reported the alleged hit-and-run accident to the police, a peace or judicial officer, or to the Commissioner of Motor Vehicles within 24 hours of the accident, or as soon as possible thereafter, as required for a valid hit-and-run claim.

In *GEICO v. Albino*,[74] the court observed that where a case is determined after a hearing, the appellate division'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 witnesses."[75] Thus, the court upheld the determination, made after a framed issue hearing, that there was no physical contact between the claimant's vehicle and an alleged hit-and-run vehicle.[76]

Actions Against the Motor Vehicle Accident Indemnification Corp. (MVAIC)

In *Johnson v. MVAIC*,[77] the court held that the petition to commence an action against MVAIC was time-barred.

The petitioner's accident occurred on January 20, 2003, when he was 14 years old. The applicable three-year statute of limitations for a personal injury action was tolled until the petitioner turned 18, and expired on April 27, 2009, when he turned 21. The petition for leave to sue MVAIC was not filed until June 14, 2010, after the expiration of the statute of limitations.

PART III. UNDERINSURED MOTORIST ISSUES

Purpose

In *Weiss v. Tri-State Ins. Co.*, the court observed that "SUM coverage in New York is a converse application of the golden rule; its purpose is 'to provide the insured with the same level of protection he or she would provide to others were the insured a tortfeasor in a bodily injury accident.'"[78]

Trigger of Coverage

In *Bobak v. AIG Claims Services, Inc.*,[79] although the evidence established that Reliance, the tortfeasor's primary insurer, was insolvent, and that no benefits would be afforded to the claimant by the guaranty association that assumed the liabilities of the insolvent insurer, the evidence also established that the tortfeasor had a $1,000,000 excess liability policy with Travelers, and that Travelers had not disclaimed coverage thereunder. The court, therefore, counted the Travelers $1,000,000 coverage in the trigger comparison and found, based thereon, that the claimant's $1,000,000 SUM policy was not triggered because the tortfeasor's $1,000,000 bodily injury limits were not less than the claimant's $1,000,000 bodily injury limits.

Justice Carni, the lone dissenter, would have held that the SUM coverage was triggered simply by the insolvency of the primary insurer, and that "where, as here, a vehicle is insured by a motor vehicle liability policy issued by an insolvent insurance company and is thus an 'uninsured motor vehicle,' the existence of an excess insurance policy does not change its status as such." He explained, "In other words, an excess or umbrella policy does not constitute a 'bodily injury liability insurance policy' for purposes of determining whether a motor vehicle is 'an uninsured motor vehicle' triggering SUM coverage." He further concluded that "the amount of a tortfeasor's coverage under a motor vehicle liability policy may not be combined with the amount of his or her coverage under a commercial general liability excess policy in determining whether SUM coverage is implicated."[80]

Consent to Settle

The Third Department, in *State Farm Mutual Automobile Ins. Co. v. Perez*,[81] observed that

> [w]here an insurance policy "expressly requires the insurer's prior consent to any settlement by the insured with a tortfeasor, failure of the insured to obtain such prior consent from the insurer constitutes a breach of a condition of the insurance contract and disqualifies the insured from availing himself of the pertinent benefits of the policy . . . unless the insured can demonstrate that the insurer, either by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced in the settlement."[82]

In that case, the respondent sent two letters to the petitioner. The first notified it of the respondent's intent to commence a negligence action against the tortfeasor, who maintained liability coverage limits of 25/50, and, thus, of the potential for an SUM claim. The second stated that the respondent and the tortfeasor agreed to a binding arbitration proceeding. The respondent was awarded $50,000 in the arbitration and thereafter executed a general release with the tortfeasor in the amount of $25,000 and filed a request for an SUM claim. The petitioner denied the SUM claim on the ground that it did not receive a written notice of an intention to settle or a request for consent to settle with the tortfeasor. The respondent's contention that his second letter satisfied the written notice requirement and that the petitioner acquiesced to the settlement by its silence in response thereto was rejected by the court. That letter did not contain any reference to any intention to settle – only to an intention to arbitrate. Thus, notice was not provided as required by the SUM policy, which impermissibly impaired the petitioner's subrogation rights.

In *GEICO v. Morris*,[83] the issue was whether the respondent ever sent to the petitioner a written request for consent to settle. Although the petitioner denied receiving any written request for consent to settle, the claimant's counsel stated that he sent such a letter and that the petitioner had twice orally assured him that such written consent would be sent. At the conclusion of a framed issue hearing, the supreme court held that the respondent never sought the petitioner's written consent to settle, and, thus, granted the petition for a permanent stay of arbitration. The Appellate Division affirmed, noting that the petitioner had effectively rebutted the presumption that a properly-mailed item was received by the addressee by submitting evidence demonstrating its "regular practices and procedures in retrieving, opening, and indexing its mail and in maintaining its files on existing claims." The court also upheld the supreme court's credibility determinations.

In *Day v. One Beacon Ins.*,[84] the court held that the "Release or Advance" Condition of the SUM Endorsement (Condition 10) applies only to settlements with motor vehicle bodily injury insurers, and not to settlements with non-motor vehicle defendants. In addition, the court held that the provision in Condition 10 that prohibits settlement with "any negligent party" without the SUM insurer's written consent, did not apply only to motorist tortfeasors, but included non-motorist tortfeasors, as against whom the SUM insurer would have a subrogation right pursuant to Condition 13 (Subrogation) of the Endorsement ("any person legally responsible for the bodily injury or loss"). As explained by the court in expressly rejecting the claim-

ant's contention that the consent to settle provision applies only to motor vehicle defendants,

> [t]he provision on its face plainly refers to settlements with "any negligent party" and does not refer merely to motorist tortfeasors. We thus reject plaintiff's "strained, unnatural and unreasonable" interpretation of that policy condition. Plaintiff's interpretation would require the replacement of the word "motorist" for "party" in the last sentence of Condition 10, such that the phrase would read "negligent motorist" rather than "negligent party." Had the sentence been intended to read in the manner suggested by plaintiff, it would have been easy enough to phrase it that way.[85]

Thus, in this case, where the SUM insurer offered to advance the amount of the settlement offered by the motor vehicle tortfeasor, but not the amount offered by the non-motor vehicle tortfeasor, the court held that it complied fully with its obligations under Condition 10. Moreover, where the claimant settled with both the motor vehicle tortfeasor and the non-motor vehicle tortfeasor without the insurer's consent, the court held that the claimant violated Conditions 10 and 13 of the Endorsement and, thus, vitiated the SUM coverage provided by that policy. The court, therefore, granted the insurer's motion for summary judgment dismissing the breach of contract complaint against it.[86]

In *Warner v. New York Central Mutual Fire Ins. Co.*,[87] the plaintiff, who was injured in a two-car accident, commenced a personal injury action against the owner/operator of the other vehicle and notified New York Central, his insurer, that he would be pursuing an SUM claim. Thereafter, the plaintiff's counsel advised New York Central (in writing, following a telephone call with an associate liability examiner) that the tortfeasor's policy limits had not yet been offered, and that the case would be proceeding to trial or "there [was] a possibility that the case would be arbitrated instead." Counsel's letter noted that the liability examiner with whom he had spoken had advised that "regardless of whether the [tortfeasor's] $25,000 policy limit is paid as a result of settlement, trial or arbitration, there would be no effect on [the plaintiff's] right to pursue his SUM claim."[88] New York Central did not respond or refute this assertion. The plaintiff then proceeded to a high/low arbitration in which the agreement was that the plaintiff would receive at least $7,500 regardless of the arbitrator's decision, and, if the arbitrator found that the case was worth at least $25,000, the tortfeasor's carrier would tender the policy limit. The arbitrator did find that the claim was worth "in excess of $25,000," without specifying the amount, and the plaintiff advised New York Central of this decision and requested its consent to settle for the full $25,000 of the tortfeasor's policy. New York Central then disclaimed SUM coverage on the ground that the plaintiff had violated the policy by entering into arbitration without its written consent and by compromising its subrogation rights. The plaintiff thereafter went ahead and settled with the tortfeasor, issuing a general release, and then commenced this action for declaratory judgment against New York Central. Both parties moved for summary judgment.

The court denied summary judgment to both parties, finding in the record the existence of issues of fact. First, the court noted that although the plaintiff entered into "binding" arbitration, it was unclear whether the plaintiff was in fact bound to accept the policy offer from the tortfeasor. If the plaintiff was not so bound, the arbitration proceeding did not impair, or even affect, New York Central's subrogation rights. If, in fact, New York Central's rights were still preserved after the plaintiff received the policy offer and notified it of the offer, as required, "then, in accord with the policy terms, [New York Central] could have advanced the proposed settlement funds to plaintiff and stepped into the litigation, requiring plaintiff's cooperation in the pending claim."[89] Indeed, if New York Central's rights were fully protected at the time the plaintiff formally notified it of the policy limits offer, then execution of the general release more than 30 days later was also proper, pursuant to the terms of the Release or Advance provision. The court noted that, under these circumstances, "we discern no reason why the parties' obligations under the SUM policy should be altered merely because the policy limits were tendered as the result of an arbitration proceeding rather than through negotiation."[90] There was, however, insufficient proof in the record as to the parties' understanding of the high/low agreement to warrant summary judgment in favor of the plaintiff. In addition, there was an issue of fact as to whether New York Central should be estopped from disclaiming coverage based on its alleged representations and acquiescence to the plaintiff regarding participation in the arbitration. While the plaintiff's counsel set forth those representations in an affidavit, New York Central denied that consent was given in the affidavit of its liability examiner, thus warranting the denial of summary judgment.

Offset/Reduction in Coverage

In *Rivera v. Amica Mutual Ins. Co.*,[91] the court held that the offset/reduction-in-coverage provision of the SUM Endorsement (Condition 6) was not ambiguous because it referred to "[t]he SUM limit shown on the Declarations," and the Declarations clearly set forth a "per accident" limit. In so holding, the First Department aligned itself with the Fourth Department in *In re Graphic Arts Mutual Ins. Co. (Dunham)*,[92] and the Second Department in *Automobile Ins. Co. of Hartford v. Ray*[93] and *GEICO v. Young*,[94] and disagreed with the Third Department in *Butler v. New York Central Mutual Fire Ins. Co.*[95]

Non-Duplication

Regulation 35-D's SUM Endorsement contains a provision entitled "Non-Duplication" (Condition 11), which

provides that the SUM coverage shall not duplicate any of the following:

> (a) benefits payable under workers' compensation or other similar laws;
>
> (b) non-occupational disability benefits under article nine of the Workers' Compensation Law or other similar law;
>
> (c) any amounts recovered or recoverable pursuant to article fifty-one of the New York Insurance Law or any similar motor vehicle insurance payable without regard to fault;
>
> (d) any valid or collectible motor vehicle medical payments insurance; or
>
> (e) any amounts recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds.

In *Weiss v. Tri-State Ins. Co.*,[96] the court held that where the maximum SUM coverage was $500,000 per accident, and the claimants settled the underlying bodily injury action by accepting the $100,000 coverage limits of the offending vehicle, and an additional $255,000 from a defendant bar/diner, in settlement of Dram Shop claims against them – for a total settlement of $355,000 – the SUM coverage was reduced to $145,000. As noted by the court, the Dram Shop recovery constituted under Condition 11(e) ("Non-Duplication") an amount "recovered as bodily injury damages from sources other than motor vehicle bodily injury insurance policies or bonds."[97] Since Condition 11 does not allow duplicate recovery of such damages "under the terms of the SUM endorsement, the plaintiff's receipt of the Dram Shop recovery reduces, by that same $255,000, the amount payable under the SUM endorsement. The plaintiffs are not penalized by this reduction, since they secured the maximum amount for which they are covered under the SUM endorsement" (i.e., $500,000). Note, however, that the court did not appear to consider the question of whether, in fact, the recovery from the Dram Shop defendants constituted duplication, or simply additional benefits required to make the severely injured plaintiff whole. ■

1. 85 A.D.3d 1157 (2d Dep't 2011), *lv. to appeal denied*, 18 N.Y.3d 803 (2012).
2. The court did not address Pelszynski's second argument, i.e., that 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.
3. 2013 N.Y. Laws ch. 11 (eff. Apr. 16, 2013).
4. *See* Norman H. Dachs & Jonathan A. Dachs, *SUM Legislation – Good News/Bad News*, N.Y.L.J., Mar. 12, 2013, p. 3, col. 1.
5. 35 Misc. 3d 200 (Sup. Ct., Essex Co. 2012).
6. *Id.* at 206–07.
7. *Id.* at 207–08 (some citations omitted).
8. 240 A.D.2d 566 (2d Dep't), *lv. to appeal denied*, 90 N.Y.2d 810 (1997).
9. 94 A.D.3d 725 (2d Dep't 2012).
10. *Id.* at 725–26 (citations omitted). *See also Schenback v. United Frontier Mut. Ins. Co.*, 101 A.D.3d 1788 (4th Dep't 2012) ("[a] resident is one who lives in the household with a certain degree of permanency and intention to remain").
11. 38 Misc. 3d 478, 480 (Sup. Ct., Dutchess Co. 2012).
12. *See Albano-Plotkin v. Travelers Ins. Co.*, 101 A.D.3d 657 (2d Dep't 2012); *Donald Braasch Constr., Inc. v. State Ins. Fund*, 98 A.D.3d 1302 (4th Dep't 2012); *AH Prop., LLC v. New Hampshire Ins. Co.*, 95 A.D.3d 1243 (2d Dep't 2012); *see also Spartacus Sch. of Sports, Inc. v. Nationwide Mut. Ins. Co.*, 101 A.D.3d 1105 (2d Dep't 2012); *Gilliard v. Progressive*, 96 A.D.3d 718 (2d Dep't 2012).
13. *Konig v. Hermitage Ins. Co.*, 93 A.D.3d 643 (2d Dep't 2012).
14. *Gilliard*, 96 A.D.3d at 718–19 (citations omitted).
15. 101 A.D.3d 1310, 1312–13 (3d Dep't 2012) (citations omitted). *See also Prince Seating Corp. v. QBE Ins. Co.*, 99 A.D.3d 881 (2d Dep't 2012).
16. 93 A.D.3d 643, 645 (2d Dep't 2012) (citations omitted).
17. 100 A.D.3d 411 (1st Dep't 2012).
18. 95 A.D.3d 1413 (3d Dep't 2012).
19. 95 A.D.3d 693 (1st Dep't 2012).
20. Ins. Law § 3420(a)(5), as added by N.Y. Laws 2008, ch. 388, § 2 (eff. Jan. 17, 2009). *See, e.g., Rosier*, 101 A.D.3d 1310; *Chiarello v. Rio*, 101 A.D.3d 793 (2d Dep't 2012); *Avenue New Realty, LLC v. Alea N. Am. Ins. Co.*, 96 A.D.3d 489 (1st Dep't 2012); *AH Prop., LLC v. New Hampshire Ins. Co.*, 95 A.D.3d 124 (2d Dep't 2012).
21. *Waldron v. N.Y. Cent. Mut. Fire Ins. Co.*, 88 A.D.3d 1053 (3d Dep't 2011). *See Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, 4 N.Y.3d 468, 476 (2005); *In re Brandon (Nationwide Mut. Ins. Co.)*, 97 N.Y.2d 491, 498 (2002); *Bhatt v. Nationwide Mut. Ins. Co.*, 61 A.D.3d 1406, 1406–07 (4th Dep't 2009).
22. 98 A.D.3d 1302 (4th Dep't 2012).
23. *Id.* at 1303 (citations omitted); *see Chiarello*, 101 A.D.3d 793.
24. *Albano-Plotkin v. Travelers Ins. Co.*, 101 A.D.3d 657 (2d Dep't 2012); *Hermitage Ins. Co. v. JDG Lexington Corp.*, 99 A.D.3d 428 (1st Dep't 2012); *Lancer Ins. Co. v. Super Value, Inc.*, 96 A.D.3d 807, 946 N.Y.S.2d 213 (2d Dep't 2012); *AH Prop., LLC*, 95 A.D.3d 1243; *Chiarello*, 101 A.D.3d 793; *Castlepoint Ins. Co. v. Mike's Pipe Yard & Building Supply Corp.*, 101 A.D.3d 504 (1st Dep't 2012); *Szczukowski v. Progressive Ne. Ins. Co.*, 100 A.D.3d 1454 (4th Dep't 2012); *Aponte v. GEICO*, 92 A.D.3d 476 (1st Dep't 2012); *Kalthoff v. Arrowood Indem. Co.*, 95 A.D.3d 1413 (3d Dep't 2012).
25. 96 A.D.3d 855 (2d Dep't 2012).
26. 96 A.D.3d 629 (1st Dep't 2012).
27. *Id.* at 629 (citation omitted).
28. 92 A.D.3d 844 (2d Dep't 2012).
29. *Id.* at 845 (citations omitted).
30. 91 A.D.3d 502, 502 (1st Dep't 2012).
31. *Id.*
32. 91 A.D.3d 870 (2d Dep't 2012).
33. *Id.* at 871; see *In re Allcity Ins. Co. (Russo)*, 199 A.D.2d 88 (1st Dep't 1993).
34. 97 A.D.3d 1103, 1104, *lv. to appeal denied*, 98 A.D.3d 1326 (4th Dep't 2012), *lv. to appeal denied*, 20 N.Y.3d 1055 (2013) (citations omitted).
35. 100 A.D.3d 878 (2d Dep't 2012).
36. *Id.* at 878 (citing *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479–80 (2006)).
37. 93 A.D.3d 673, 673 (2d Dep't), *lv. to appeal denied*, 19 N.Y.3d 805 (2012) (citations omitted).
38. 94 A.D.3d 1002 (2d Dep't), *motion for lv. to appeal denied*, 19 N.Y.3d 815 (2012).
39. 98 A.D.3d 580 (2d Dep't 2012).
40. 95 A.D.3d 732, 733 (1st Dep't 2012) (citations omitted).
41. *RLI Ins. Co. v. Smiedala*, 96 A.D.3d 1409, 1412 (4th Dep't 2012).
42. 92 A.D.3d 568, 568, *recalled, vacated & substituted by* 95 A.D.3d 627 (1st Dep't 2012).
43. 96 A.D.3d 1409.
44. 92 A.D.3d 104 (1st Dep't 2012).
45. 6 A.D.3d 344, 346 (1st Dep't), *lv. to appeal denied*, 3 N.Y.3d 608 (2004).
46. *George Campbell Painting*, 92 A.D.3d at 105.
47. *See City of N.Y. v. Northern Ins. Co. of N.Y.*, 284 A.D.2d 291 (2d Dep't), *lv. dismissed*, 97 N.Y.2d 638 (2001).
48. *George Campbell Painting*, 92 A.D.3d at 106.
49. *Id.*
50. *Id.* at 111.
51. 94 A.D.3d 642, 643 (1st Dep't 2012).
52. 96 A.D.3d 429 (2d Dep't 2012).
53. *See also Munoz v. City of N.Y.*, 95 A.D.3d 648 (1st Dep't 2012) (43 days).
54. 95 A.D.3d 732 (1st Dep't 2012).
55. 99 A.D.3d 582 (1st Dep't 2012).
56. *Id.* at 582–83.
57. 96 A.D.3d 431 (1st Dep't 2012).
58. 92 A.D.3d 568, *recalled, vacated & substituted by* 95 A.D.3d 627 (1st Dep't 2012).
59. 93 A.D.3d 618 (2d Dep't 2012).

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412, 577 N.Y.S.2d 110 (2d Dep't 1991)).

3. CPLR 2103(e).

4. David D. Siegel, New York Practice § 364, at 624 (5th ed. 2011).

5. Barr et al., *supra* note 1, § 30:91, at 30-13.

6. *Id.* § 30:110, at 30-14.

7. *Id.*

8. *Id.* § 30:112, at 30-14.

9. *Id.*

10. Weinstein et al., *supra* note 2, ¶ 3123.08, at 31-540.

11. Barr et al., *supra* note 1, § 30:120, at 30-15.

12. 1 Byer's Civil Motions § 24:47 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.); Siegel, *supra* note 4, at § 364, at 624 (citing *Seidenberg v. Rosen*, 114 N.Y.S.2d 279, 280 (Sup. Ct. N.Y. County 1952)).

13. Barr et al., *supra* note 1, § 30:242, at 30-24.

14. Siegel, *supra* note 4, at § 364, at 624-25 (citing *Barnes v. Shul Private Car Serv., Inc.*, 59 Misc. 2d 967, 968, 301 N.Y.S.2d 907, 908 (Sup. Ct. Kings County 1969)); Barr et al., *supra* note 1, § 30:152, at 30-17.

15. CPLR 3123(a); Barr et al., *supra* note 1, § 30:151, at 30-17.

16. Barr et al., *supra* note 1, § 30:151, at 30-17.

17. Adapted from Barr et al., *supra* note 1, § 30:151, at 30-17.

18. *Id.* § 30:125, at 30-16.

19. *Id.*

20. Byer's Civil Motions, *supra* note 12, § 24:47; CPLR 3123(a).

21. Weinstein et al., *supra* note 2, ¶ 3123.08, at 31-540.

22. Siegel, *supra* note 4, at § 364, 624 (citing *Nader v. Gen. Motors Corp.*, 53 Misc. 2d 515, 517, 279 N.Y.S.2d 111, 114 (Sup. Ct. N.Y. County), *aff'd*, 29 A.D.2d 632, 286 N.Y.S.2d 209 (1st Dep't 1967); *Epstein v. Consol. Edison Co. of N.Y.*, 31 A.D.2d 746, 746, 297 N.Y.S.2d 260, 261 (2d Dep't 1969)).

23. Barr et al., *supra* note 1, § 30:201, at 30-20 (quoting *Nader*, 53 Misc. 2d at 516, 279 N.Y.S.2d at 112).

24. See last month's issue for more information on what's permissible in a notice to admit: *Drafting New York Civil-Litigation Documents: Part XXV — Notices to Admit*, 85 N.Y. St. B.J. 64 (June 2013).

25. Barr et al., *supra* note 1, § 30:200, at 30-19.

26. *Id.* § 30:202, at 30-20.

27. *Id.* § 30:100, at 30-13.

28. *Id.* § 30:204, at 30-20.

29. CPLR 3020(d).

30. Weinstein et al., *supra* note 2, ¶ 3123.08, at 31-540.

31. Siegel, *supra* note 4, § 364, at 625 (citing *Elrac, Inc. v. McDonald*, 186 Misc. 2d 830, 833, 720 N.Y.S.2d 912, 915 (Sup. Ct. Nassau County 2001); *contra Barnes*, 59 Misc. 2d at 968, 301 N.Y.S.2d at 908).

32. Weinstein et al., *supra* note 2, ¶ 3123.08, at 31-540 (citing *In re Weill's Estate*, 35 Misc. 2d 64, 64-65, 229 N.Y.S.2d 503, 504 (Sur. Ct. Nassau County 1962) (finding that an attorney may verify the response to a notice to admit); *contra Barnes*, 59 Misc. 2d at 968, 301 N.Y.S.2d at 908 (finding that an attorney may not verify the response to a notice to admit)).

33. *Elrac*, 186 Misc. 2d at 833, 720 N.Y.S.2d at 915 ("While the Court is not prepared to state that an attorney may never answer a notice to admit, an attorney should only be permitted to do so if the attorney has knowledge of the facts or if the answers are based on documentary evidence, in the same manner as an attorney having such knowledge or using such documentary evidence may do so in a motion for summary judgment.").

34. Barr et al., *supra* note 1, § 30:92, at 30-13.

35. Adapted from Barr et al., *supra* note 1, § 30:141, at 30-16.

36. Barr et al., *supra* note 1, § 30:190, at 30-19; CPLR 2212(b), 2214(d).

37. *Id.* § 30:192, at 30-19 (citing CPLR 2004).

38. *Id.*

39. *Id.*

40. Byer's Civil Motions, *supra* note 12, § 24:47.

41. Barr et al., *supra* note 1, § 30:212, at 30-21.

42. Siegel, *supra* note 4, at § 364, at 624 (citing CPLR 3123(b)).

43. Barr et al., *supra* note 1, § 30:215, at 30-21.

44. *Id.* § 30:216, at 30-22; Weinstein et al., *supra* note 2, ¶ 3123.13, at 31-545.

45. Barr et al., *supra* note 1, § 30:170, at 30-18.

46. *Id.*

47. *Id.* § 30:230, at 30-23.

48. CPLR 3123(b); Barr et al., *supra* note 1, § 30:04, at 30-5.

49. Barr et al., *supra* note 1, § 30:231, at 30-23.

50. *Id.* § 30:232, at 30-23.

51. *Id.* § 30:232, at 30-23.

52. Siegel, *supra* note 4, § 364, at 625.

53. *Glasser v. City of N.Y.*, 265 A.D.2d 526, 526, 697 N.Y.S.2d 167, 168 (2d Dep't 1999) ("CPLR 3123 is self-executing . . . the penalties embodied in CPLR 3126 do not apply.").

54. Byer's Civil Motions, *supra* note 12, at § 24:47 (citing *Reid v. Unique Van Serv., Inc.*, 284 A.D.2d 520, 521, 726 N.Y.S.2d 578, 578 (2d Dep't 2001)).

55. Byer's Civil Motions, *supra* note 12, § 24:47; Siegel, *supra* note 4, at § 364, at 625.

56. CPLR 3123(c).

57. CPLR 3123(c); Byer's Civil Motions, *supra* note 12, at § 24:47.

58. Siegel, *supra* note 4, § 364, at 625 (emphasis added).

59. CPLR 3123(c).

60. Siegel, *supra* note 4, § 364, at 625 (citing *Halligan v. Glazebrook*, 59 Misc. 2d 712, 713, 299 N.Y.S.2d 951, 952 (Sup. Ct. Suffolk County 1969) (finding motion made two days after trial ended untimely)).

61. Barr et al., *supra* note 1, § 30:182, at 30-18 (citing *Coyne v. State Farm Fire & Cas. Co.*, 50 Misc. 2d 58, 60, 269 N.Y.S.2d 868, 871 (Syracuse City Ct. 1966) (finding that because witness was necessary to prove plaintiff's case, plaintiff not entitled to costs for proving ancillary fact elicited from the same witness)).

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60. 95 A.D.3d 693 (1st Dep't 2012).

61. 96 A.D.3d 431 (1st Dep't 2012).

62. *See State Farm Fire & Cas. Co. v. Raabe*, 100 A.D.3d 738 (2d Dep't 2012) ("when a claim is denied because the claimant is not an insured under the policy, there is no statutory obligation to provide prompt notice of the disclaimer"). *See also Hasbani v. Nationwide Mut. Ins. Co.*, 98 A.D.3d 563 (2d Dep't 2012) ("Since the policy did not provide coverage to the plaintiffs with regard to the vehicle involved in the accident, requiring payment of a claim upon a failure to timely disclaim would create coverage where it never existed"); *Utica Mut. Ins. Co. v. GEICO*, 98 A.D.3d 502 (2d Dep't 2012); *1812 Quentin Rd., LLC v. 1812 Quentin Rd. Condominium Ltd.*, 94 A.D.3d 1070 (2d Dep't 2012); *Hough v. USAA Cas. Ins. Co.*, 93 A.D.3d 405 (1st Dep't 2012).

63. *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 168–69 (1967).

64. 100 A.D.3d 421 (1st Dep't 2012), *lv. to appeal denied*, 20 N.Y.3d 859 (2013).

65. 98 A.D.3d 6169 (2d Dep't 2012).

66. 95 A.D.3d 1322 (2d Dep't 2012).

67. *Id.* at 1323 (citations omitted).

68. *Id.* at 1322.

69. 99 A.D.3d 625 (1st Dep't 2012).

70. *Id.* at 625–626 (citation omitted).

71. 93 A.D.3d 717 (2d Dep't 2012).

72. *Id.* at 718.

73. 94 A.D.3d 888 (2d Dep't 2012).

74. 91 A.D.3d 870 (2d Dep't 2012).

75. *Id.* at 871 (citations omitted).

76. *See also GEICO v. Tuzzo*, 94 A.D.3d 996 (2d Dep't 2012).

77. 91 A.D.3d 541 (1st Dep't 2012).

78. 98 A.D.3d 1107, 1110 (2d Dep't 2012), *lv. to reargue/lv. to appeal denied*, ___ A.D.3d ___ (2d Dep't 2013).

79. 97 A.D.3d 1103, *lv. to appeal denied*, 98 A.D.3d 1326 (4th Dep't 2012), *lv. to appeal denied*, 20 N.Y.3d 1055 (2013).

80. *Id.* at 1106–07.

81. 94 A.D.3d 1314 (3d Dep't 2012).

82. *Id.* at 1314 (citations omitted). *See also Warner v. N.Y. Cent. Mut. Fire Ins. Co.*, 97 A.D.3d 1065 (3d Dep't 2012).

83. 95 A.D.3d 887 (2d Dep't 2012).

84. 96 A.D.3d 1678, *motion reargue granted in part*, 99 A.D.3d 1261 (4th Dep't 2012), *lv. to appeal dismissed*, 20 N.Y.3d 992, *lv. to appeal denied*, 20 N.Y.3d 862 (2013).

85. *Id.* at 1681 (citations omitted).

86. *See* Norman H. Dachs & Jonathan A. Dachs, *Settlement With Non-Motor Vehicle Tortfeasor Under SUM Endorsement*, N.Y.L.J., July 10, 2012, p. 3, col. 1.

87. 97 A.D.3d 1065 (3d Dep't 2012).

88. *Id.*

89. *Id.* at 1067–68.

90. *Id.* at 1068.

91. 91 A.D.3d 562 (1st Dep't 2012).

92. 303 A.D.2d 1038 (4th Dep't 2003).

93. 51 A.D.3d 788 (2d Dep't 2008).

94. 39 A.D.3d 751 (2d Dep't 2007).

95. 274 A.D.2d 924 (3d Dep't 2000).

96. 98 A.D.3d 1107 (2d Dep't 2012), *lv. to reargue/lv. to appeal denied*, ___ A.D.3d ___ (2d Dep't 2013).

97. *Id.* at 1110.