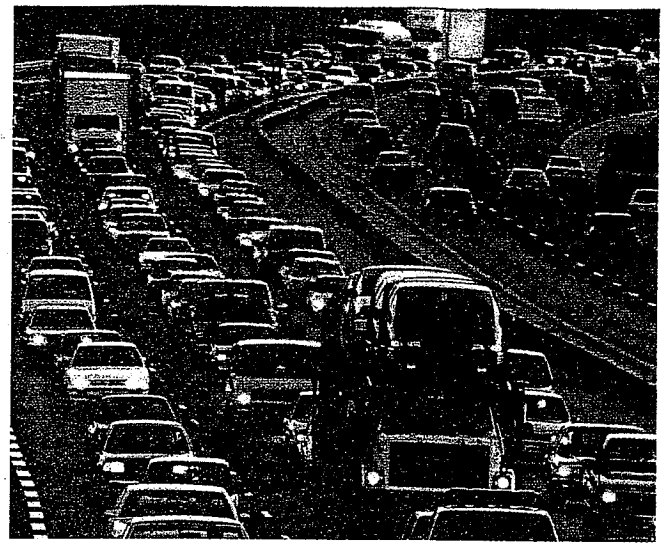

2004 Case Update – Part I

Uninsured, Underinsured, Supplementary Uninsured Motorist Law

By Jonathan A. Dachs

I am once again pleased to report, for the 12th consecutive year,[1] on developments in the area of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from the last calendar year. The year 2004 was another busy and significant period in this ever-changing, highly complex area of the law. Indeed, as a result of the increased volume of cases in 2004, this material is presented in two sections. This month's installment addresses general issues pertinent to both uninsured and underinsured motorist claims. Part II, which will appear in an upcoming issue of the *Journal*, will discuss several additional general issues, and will also address issues more specific to these separate categories of coverage.

Insured Persons – "Insureds"

The term "named insured" applies only to those persons or entities listed on the declarations page of the policy. It is not always easy to determine others who are covered by the term "insured."

In *Atlantic Mutual Cos. v. Ceserano*,[2] the policy included an endorsement that provided liability coverage for an automobile not owned by the insured corporation while being used by an executive officer, except for an automobile owned by that individual. The endorsement defined an "insured" to include an executive officer using a covered automobile. Because the claimant was an executive officer, but owned the vehicle involved in the accident, she was not deemed an "insured" under the policy. Thus, the SUM arbitration demanded by the claimant was permanently stayed.

In *Jacofsky v. Travelers Ins. Co.*,[3] the umbrella policy issued by Travelers explicitly stated that to be an "insured" under the policy, a "family member" of the named insured also had to be insured under one or more primary insurance policies for not less than the applicable deductible amount for an occurrence. Here, the named insured's son was a "family member" but was not an "insured" because he maintained an automobile insurance policy with liability limits below the umbrella policy's applicable deductible.

Occupant vs. Pedestrian

The claimant must be an "occupant" of a particular vehicle to qualify for coverage under that vehicle's policy. As defined in the mandatory UM endorsement, the term "occupying" means "in or upon or entering into or alighting from" a vehicle. Similarly, the Regulation 35-D SUM endorsement defines "occupying" as "in, upon, entering into, or exiting from a motor vehicle."[4]

In *Coregis Ins. Co. v. McQuade*,[5] the claimant was a sanitation worker who was struck by an underinsured vehicle while he was waiting near the curb for his sanitation truck to return and pick up the garbage he had collected. In reversing the determination of the Supreme Court, and granting the Petition to Stay Arbitration, the Appellate Division held that while the claimant

> intended to return to the truck, his departure from it was not "incident to some temporary interruption in the journey of the vehicle" such that his original occupancy of the truck could be deemed continuing in nature. Moreover, at the time of the accident [the claimant] was not in the immediate vicinity of the truck which was between one and four blocks away. Nor can [the claimant] be deemed to have been entering the truck at the time he was injured merely because he was waiting for it to arrive.[6]

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Thus, since the claimant was not "occupying" the insured vehicle, he did not qualify as an insured for purposes of the SUM endorsement.

In *Travelers Ins. Co. v. Youdas*,[7] where the claimant had just exited his vehicle and was in the process of unloading it to make a delivery, the court held that he was still occupying the vehicle since he "had not yet severed his connection" with it and was still "vehicle oriented" at the time he was struck by another car. His conduct in unloading the vehicle was "not part of a new or separate course of conduct unrelated to the vehicle"; he had not yet completed exiting the vehicle.[8]

Resident

The definition of an "insured" under the SUM endorsement 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.

In *Palazzo v. Hartford Ins. Co. of the Midwest*,[9] and *State Farm Mutual Automobile Ins. Co. v. Nicoletti*,[10] the courts noted that the concept of residence has two components: physical presence and intent to remain.

In *New York Casualty Ins. Co. v. Enzinna*,[11] the court noted that there is a common expectation that a child away from home attending school remains a member of the household. Thus, the insured's 21-year-old daughter, who lived off-campus while she attended college, was held to be a resident of the insured's household and covered by the insured's auto policy, even though she had moved from place to place after living in a dormitory. The court held that her mere physical presence elsewhere was not sufficient to establish an intent to abandon her mother's residence. The evidence did not support a finding that the daughter desired or intended to cease being a resident of her mother's home or that her absence from home was anything other than transient in nature.

In *Allstate Ins. Co. v. Rapp*,[12] the 11-year-old claimant attempted to make a claim for UM benefits under a policy issued to his maternal grandfather. In moving to stay arbitration, Allstate contended that the claimant did not reside with his grandfather, but, rather, with his mother, at a different address. In opposition to the petition, the grandfather submitted an affidavit stating that at the time of the accident and for six years before that, the claimant lived with him and his wife in their apartment and was listed, along with his siblings, on the apartment lease. He also stated that at the time of the accident, the claimant attended a school within the apartment complex, and that the school's records would confirm that the address listed for the claimant was the grandfather's address.

The claimant's mother submitted her own affidavit confirming those allegations, and testified at the framed issue hearing that because she, a single mother, worked long hours, her children stayed with her parents during the week, spending the weekends with her at her own apartment. At the hospital, the mother gave the claimant's address as hers, and in 2000 she claimed him as a dependent on her income tax returns. During July and August, the claimant stayed with his mother, but his grandparents would take care of him during the days. Based on this evidence, the hearing court granted the petition, finding that the claimant was not a "resident relative" of his grandfather's at the time of the accident.

On appeal, the First Department reversed, finding that the documentary evidence, specifically the grandfather's rent recertification, and the uncontroverted testimony offered in the claimant's behalf, established his residency at his grandfather's home Mondays through Fridays, from September through June for the six years prior to the accident, an arrangement by which the claimant spent more time with his grandparents than he did with his mother. As the court stated, "Thus, it is readily apparent that while his mother had legal custody, [the claimant] had a significant tie to his grandfather's household, reflective of that degree of permanency and the intent to continue to reside there indefinitely required of a resident," and that the claimant could, "for insurance purposes, be a resident of more than one household."[13]

In *State Farm Mutual Auto. Ins. Co. v. Nicoletti*,[14] the claimant's father testified that she last lived with him three years prior to the accident and was not living with him at the time of the accident. The claimant testified that she lived in her parents' house "on and off" for two years, and that during the three years prior to the accident, when she had a serious drug problem, she lived in the houses of various friends and her sister. At an examination under oath (EUO), she testified that she lived at an address other than her parents' house. Thus, the claimant was held not to be a resident of her father's household because the record was "devoid of evidence to demonstrate that [she] stayed at her parents' house with any degree of permanency with an intention to remain there."[15] Evidence that she received mail at her parents'

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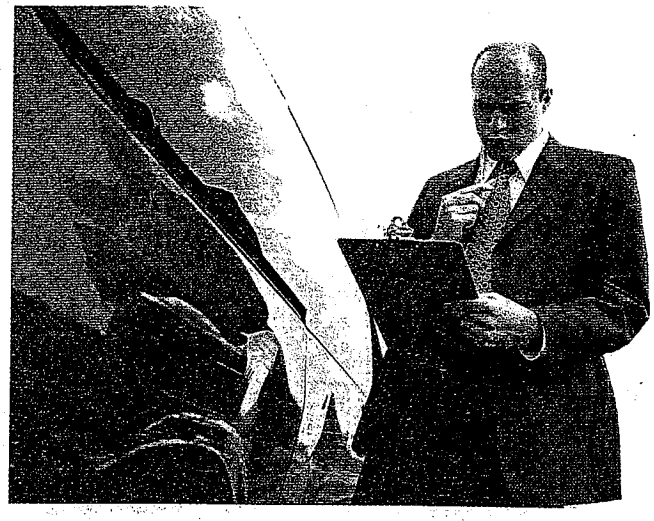

address, had the key to the house and kept some belongings there was insufficient to establish her residence at her parents' house.

In *Palazzo v. Hartford Ins. Co. of the Midwest*, mentioned above, the court held that an erroneous statement by a claims representative that the defendant was an insured under his grandparent's policy did not raise an issue of fact as to the defendant's residence and could not create coverage where none existed.

"Use or Operation"/Accidents

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 motor vehicle.

In *Progressive County Mutual Ins. Co. v. McNeil*,[16] the court found that the subject collision was one of two accidents that occurred over a short period of time (two weeks) that were deliberately caused to fraudulently obtain insurance benefits. Thus, the court held that because the injuries sustained by the claimants, who were occupants of another vehicle struck by the alleged perpetrators of the fraud, were caused by "an intentional collision," they could not recover uninsured motorist benefits. Notably, the court recognized the unfair result of its decision, which it was bound by *stare decisis* to make, but which removed protection for innocent victims. As stated by the court, "Legislative action is necessary in order to remedy this glaring void where innocent victims of intentional collisions are left without recourse for compensation for their injuries by the insurance industry."[17]

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 notice timely to the insurer of an intention to make a claim. Although the new mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy and, under current New York law, the insurer need not demonstrate any prejudice before it can assert the defense of noncompliance with the notice provisions.

In *St. Charles Hospital and Rehabilitation Center v. Royal Globe Ins. Co. of America*,[18] then-supreme court Justice James M. Catterson offered an interesting opinion on the subject of the "no prejudice" rule. He wrote:

> This Court is well aware that New York is one of a minority of states that still maintain a "no prejudice" standard in insurance law. The "no prejudice" rule means that failure of timely notice by an insured allows an insurer to disclaim coverage without showing prejudice. The "no prejudice rule is an exception to the well-established principle of general contract law that one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice." The Court of Appeals has made it clear that this exception is tolerated because of "the insurer's need to protect itself from fraud by investigating claims soon after the underlying events; to set reserves and to take an active early role in settlement discussions." In *Brandon*, Chief Judge Kaye established that the "no prejudice" exception is a limited one.[19]

Justice Catterson went on to note that there has been a "turning of the tide" and that the Court of Appeals demonstrated its "aversion" to the "no-prejudice" rule, which allows insurers to "avoid their obligations to premium-paying clients." Indeed, he wrote that

> [t]he *Brandon* decision is the clearest signal yet, of the Court's acknowledgment that the time has come for New York to recognize what the majority of other states have recognized, namely that the egregious imbalance between insurer and insured needs to be corrected. In *Brandon*, the Court, while noting the late notice of claim was not the issue before it, appeared, albeit in a footnote, to consider the possibility of adopting a "prejudice" standard for late notice of claims. In particular, Chief Judge Kaye pointed to recent decisions in two other jurisdictions, observing that the shift to a prejudice standard often starts in contexts like the uninsured motorist context in *Brandon* where three public policy concerns are implicated. The Court enumerated these as [1] the adhesive nature of insurance contracts; [2] the public policy objective of compensating tort victims and [3] the inequity of the insurer receiving a windfall due to a technicality.[20]

He added that "New York's Court of Appeals has not newly arrived at this juncture. The Court signaled its inclination toward the majority view almost a decade prior to *Brandon* when it refused to extend the no-prejudice exception to late notices of claim submitted to reinsurers."[21]

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Applying these ideas to the facts of the case before him, which involved an underlying medical malpractice action pertaining to alleged negligence that had occurred 21 years earlier, Justice Catterson held that the defendant hospital's insurer was required to demonstrate prejudice before its disclaimer of coverage for late notice could be upheld. In the opinion of the court, "no sound reasons exist for extending the 'no-prejudice' exception to a situation where notice of legal action served also as notice of claim, and where an investigation of the underlying claim could not have been launched any sooner than twenty-one years after the occurrence." Mindful of the fact that "there is a need to balance . . . [the] 'prejudice' standard with the historical reluctance in this jurisdiction to inhibit the freedom of contract by finding insurance policy clauses violative of public policy," Justice Catterson nevertheless found that the facts of this case implicated precisely the public policy concerns raised by *Brandon*. Finally, Justice Catterson noted that while "even in jurisdictions that have struck down the no-prejudice exception, the insurer may still prevail by showing that it was prejudiced by late notice," the insurer in this case made no such showing of prejudice. "An insurer cannot assert prejudice with regard to its ability to conduct an investigation that it never even tried to conduct."

In *Blue Ridge Ins. Co. v. Jiminez*,[22] the defendants' contention that "New York should abandon the rule that an insured's failure to provide timely notice of an occurrence vitiates the insurance policy and relieves the insurer of its obligations *even in the absence of prejudice*" was rejected by the court because "whether such precedent should be overruled is a matter for the Court of Appeals."[23]

More recently, in *Great Canal Realty Corp. v. Seneca Ins. Co.*,[24] Justice Catterson, now an Appellate Division justice, writing for a 3-2 plurality, again confronted the issue of "the validity of the no-prejudice exception in New York whereby an insurer can disclaim coverage without demonstrating prejudice when its disclaimer is based on late notice of an occurrence." Justice Catterson noted that "[i]n adhering to the 'no-prejudice' exception, New York now finds itself in the minority of jurisdictions justifying their positions by holding that the right to timely notice is fundamental because of the insurer's need 'to protect itself from fraud by investigating claims soon after the underlying events; to set reserves; and to take an active, early role in settlement discussions.' In other words, the insurer has been granted, wholly through judicial largess, the benefit of a conclusive presumption of prejudice."[25]

In Justice Catterson's opinion, this conclusive presumption is "in derogation of fundamental principles of the law of contracts," and creates an inherent inequity. After noting that insurance contracts are "contracts of adhesion," Justice Catterson wrote that the Court of Appeals has already made clear that the "no-prejudice" exception "is to be applied narrowly and only in circumstances which support its raison d'etre." He then stated that the *Brandon* court's conclusion that the no-prejudice exception should not apply to disclaimers of late service of legal papers "militates equally toward moving to a 'prejudice' standard as to the initial notice requirements," and that *Brandon* "is the clearest signal yet of the Court's acknowledgment of the soundness of the principle followed by the majority of other states, namely, that the egregious imbalance between insurer and insured needs to be corrected." Justice Catterson thus concluded that "we see no reason to extend the 'no-prejudice' exception

As We Go To Press . . .

On April 5, 2005, the Court of Appeals, in *Rekemeyer v. State Farm Mutual Automobile Ins. Co.*, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2005 WL 756620 (2005), held that the "no-prejudice" rule should be relaxed in SUM cases and, thus, "where an insured previously gives timely notice of the accident, the [SUM] carrier must establish that it is prejudiced by a late notice of SUM claim before it may properly disclaim coverage."

By contrast, on the same day, the Court of Appeals, in *Argo Corp. v. Greater New York Mutual Ins. Co.*, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2005 WL 756613 (2005), held that the "no-prejudice" rule was not abrogated by *Brandon v. Nationwide Mutual Ins. Co.*, 97 N.Y.2d 491 (2002), which held that the carrier must show prejudice before disclaiming based on late notice of a lawsuit in the SUM context, and that *Brandon* should not be extended to cases where the carrier received unreasonably late notice of the claim. Insofar as the "rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy," the Court held that a primary (liability) insurer need not demonstrate prejudice to disclaim coverage based upon a late notice of lawsuit.

to allow insurers to disclaim coverage on the basis of late notice of claim where 'lateness' is an arbitrary temporal standard applied to a lapse between occurrence and notice, and where contractual rights favor just one party, the insurer."[26]

In view of the two dissenting opinions that expressed the view, among other things, that the Appellate Division was without authority to change the long-standing no-prejudice rule, it is likely that this case, and this significant issue, will be decided by the Court of Appeals in the near future.

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

In *State Farm Mutual Automobile Ins. Co. v. Dowling*,[27] the claimant notified the SUM carrier of the accident immediately after it occurred in connection with a no-fault claim, but could not at that time, or at any time prior to the grant of summary judgment in the personal injury action she had brought, know that the only defendant in that action with significant insurance coverage (the driver of the car in which she was a passenger) would be absolved of liability, and that she, therefore, had a valid underinsured claim. The claimant's subsequent notice was deemed timely because "it was the grant of summary judgment to defendant's insured in the personal injury action that marked the commencement of respondent's obligation to give written notice of claim 'as soon as practicable.'"[28]

In *New York Central Mutual Ins. Co. v. Guarino*,[29] a 19-month delay in giving notice of an SUM claim was held to be reasonable, and the claimant was found to have acted with "due diligence" in ascertaining the material facts underlying her SUM claim under the following circumstances: The claimant was injured in a rear-end collision on March 8, 1997. Although she immediately consulted with various medical providers for treatment of back and neck injuries, all initial indications were that she did not sustain a "serious injury." An MRI report in October 1999 indicated a "minimal right C5-6 disc bulge causing no apparent compromise" to the nerve, and that the claimant's spine was "otherwise normal." The defendant's independent medical examination (IME) physician concluded in March 1998 that the claimant had sustained only cervical and lumbar strains, which were expected to heal within a few weeks or months. On the basis of the IME report, the petitioner denied no-fault benefits.

The court held that it would be "both inconsistent and inequitable" in light of the March 1998 no-fault denial for the petitioner to contend that the claimant was then on notice that she had a viable SUM claim. The court found that it was not until July 1998, at the earliest, when the claimant received the report of her orthopedic surgeon indicating that the March 1997 MRI may have been misread and might, indeed, have shown a disc herniation at C5-6, that the claimant was on notice that she sustained a "serious injury." Within six weeks of receipt of a second MRI report confirming the presence of a herniation, the claimant gave the petitioner written notice of her SUM claim.

The interpretation of the phrase "as soon as practicable" continues to be a hot topic.

In *State Farm Mutual Automobile Ins. Co. v. Linero*,[30] the court held that the claimant exercised due diligence by investigating and pursuing the prospect of insurance for the tortfeasor immediately after the accident and continuing until that potential source of recovery was exhausted by the other carrier's disclaimer, and then promptly notifying the SUM carrier of the claim.[31]

By contrast, in *State Farm Mutual Automobile Ins. Co. v. Mears*[32] and *State Farm Mutual Automobile Ins. Co. v. Bombace*,[33] the courts held that the insureds failed to provide the petitioner insurance company with notice of their uninsured motorist claims "as soon as practicable."

In *Rekemeyer v. State Farm Mutual Automobile Ins. Co.*,[34] notice of an underinsured motorist claim given after a delay of one year was held to be untimely where the claimant commenced a lawsuit in April 1999 seeking $1 million in damages, which in and of itself evidenced the perceived serious nature of her injuries, asserted as early as July 1999 that she was suffering from severe and permanent injuries to her left arm and cervical spine, including a "herniated paracentral disc 'causing severe neck, left shoulder and arm pain with weakness and loss of mobility,'" and the claimant knew as early as September 1999 that the tortfeasor's policy provided less bodily injury coverage than her own policy and, therefore, that the tortfeasor was "underinsured," yet waited an additional six months before providing notice of intent to make an underinsured motorist claim.

In *Brown v. Travelers Ins. Co.*,[35] the court held that the insured did not provide her insurer with notice of her SUM claim "as soon as practicable" where she failed to provide notice of claim until 16 months after "proclaim[ing] [her] injuries as 'serious'" and eight months after she ascertained the amount of the tortfeasor's coverage limits. The court rejected the insured's contention that her delay should be excused because she was not "reasonably certain" that she sustained a serious injury until shortly before she gave notice in view of the testimony of her doctor that her injury was "totally disabling" from the first date of his treatment, almost two years previously, and the fact that the insured commenced an action alleging that she sustained a "serious injury" almost a year and a half previously.

In *State Farm Mutual Automobile Ins. Co. v. Jackson*,[36] the insured's 15-month delay in notifying her SUM carrier of

her claim for uninsured motorist benefits was held to be unreasonable; although she was pregnant at the time of the accident, and later suffered a miscarriage, she was found to be totally disabled because of her injuries within one month of the accident, and was actively engaged in physical therapy following the miscarriage.

In *Continental Ins. Co. v. Marshall*,[37] the court held that notice was untimely as a matter of law where the claimant failed to ascertain the insurance status of the alleged tortfeasor and to notify the SUM carrier of her claim until approximately 22 months after the accident, and more than one year after she was diagnosed with multiple disc herniations and a pinched nerve, among other things.

In *State Farm Mutual v. Kathehis*,[38] the court held that the claimant's failure to notify the SUM carrier of a potential uninsured motorist claim for two years only because of a lack of a police report with the offending vehicle's license number represents a lack of diligence and "forecloses a finding that notice had been filed as soon as practicable."

In *State Farm Mutual Automobile Ins. Co. v. Celebucki*,[39] the court rejected the claimant's contention that she provided notice to the insurer approximately three months after the accident, in view of the insurer's presentation of affidavits of a claims representative stating that no such letter was located in the file and the fact that there was no evidence in the record, other than "the unsubstantiated assertion of [the claimant's] counsel that he 'did cause to execute and forward' said letter," to validate this claim. The court specifically noted the absence of any proof of "regular mailing procedures and office practices 'geared to ensure the proper addressing or mailing of this letter'" which would have entitled the claimant to a rebuttable presumption of receipt by the insurer.

In *Ambrosio v. Newburgh Enlarged City School District*,[40] the court noted that the insured and additional insured have independent duties to provide timely notice of an occurrence to the insurer.

In *First Central Ins. Co. v. Malave*,[41] the court reminded that notice provided to the insured's insurance broker was not notice to the insurer.

In *American Transit Ins. Co. v. Sartor*,[42] the claimant was injured when a vehicle he was driving was involved in an accident with a taxicab. American Transit insured the taxicab in the name of the registered owner. Although a taxi operator was required under Vehicle and Traffic Law § 370 (VTL) to provide notice to its insurer within five days of an accident or face a misdemeanor criminal charge, the driver, the registered owner, and the taxicab company each failed to inform American Transit of the collision.

Seven months later, the claimant's attorney notified American Transit of the accident, and requested information regarding the name of its claim adjuster and the policy's limits. American Transit never responded to this inquiry. The claimant then initiated a personal injury action against the driver, registered owner, and taxicab company. None of the defendants answered the complaint or informed American Transit of the suit. Nor did the claimant, whose attorney had contacted American Transit three months earlier, sending the insurer notice that he had filed a lawsuit. After obtaining a default judgment and an award of damages, the claimant served a copy of the judgment on American Transit, which disclaimed coverage on the basis that it had not been timely notified by any party of the commencement of the litigation. In this declaratory judgment action for coverage under the policy, the Court held that VTL § 370(4) does not "alter long-standing insurance industry practice with regard to notice or the right that Insurance Law section 3420(a)(3) grants to injured claimants" to provide independent notice. The purpose of the statute is to "establish an incentive to the operator of a vehicle for hire to supply its insurer with immediate notice that an accident has occurred in order to avoid criminal liability for noncompliance" – it does not undermine an insurer's right to receive notice of litigation. Thus, VTL § 370 does not negate the notice condition precedent required by the policy, and the insurer was entitled to disclaim coverage under these circumstances.

Discovery

The UM and SUM endorsements also 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 *State Farm Mutual Automobile Ins. Co. v. Bautista*,[43] the court held that it was a provident exercise of discretion to direct the claimant to provide pre-arbitration discovery.

In *Rodriguez v. Metropolitan Property & Casualty Ins. Co.*,[44] the court held that where the claimants failed to meet the conditions precedent to arbitration pertaining to the provision of documentation and submission to medical examinations, their action against the insurer for SUM benefits was properly dismissed. ■

1. *See* Jonathan A. Dachs, *2003 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists*, N.Y. St. B.J., May 2004, at 38; *2002 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists*, N.Y. St. B.J., June 2003, at 32; *A Review of Uninsured Motorist and Supplementary Uninsured Motorist Cases Decided in 2001*, N.Y. St. B.J., July/Aug. 2002, at 20; *Actions by Courts and Legislature in 2000 Addressed Issues Affecting Uninsured and Underinsured Drivers*, N.Y. St. B.J., Sept. 2001, at 26; *Summing Up 1999 'SUM' Decisions: Courts Provide New Guidance on Coverage Issues for Motorists*, N.Y. St. B.J., July/Aug. 2000, at 18; *Decisions in 1998 Clarified Issues Affecting Coverage for Uninsured and Underinsured Motorists*, N.Y. St. B.J., May/June 1999, at 8; *Legislative and Case Law Developments in UM/UIM/SUM Law – 1997*, N.Y. St. B.J., Sept./Oct. 1998, at 46; *Developments in Uninsured and Underinsured Motorist Coverage*, N.Y. St. B.J., Sept./Oct. 1997, at 18; *The Parts of the "SUM": Uninsured and Underinsured Motorist Coverage Cases in 1995*, N.Y. St. B.J., July/Aug. 1996, at 42; *Uninsured and Underinsured Motorist Coverage in*

1994, N.Y. St. B.J., Nov. 1995, at 24; *Uninsured and Underinsured . . . But Not Underlitigated – 1993: An Important Year for UM/UIM Coverage*, N.Y. St. B.J., Sept./Oct. 1994, at 13.

2. 5 A.D.3d 382, 773 N.Y.S.2d 80 (2d Dep't 2004).

3. 5 A.D.3d 557, 773 N.Y.S.2d 446 (2d Dep't 2004).

4. 11 N.Y.C.R.R. § 60-2.3(f) (prescribed SUM endorsement).

5. 7 A.D.3d 794, 779 N.Y.S.2d 497 (2d Dep't 2004).

6. *Id.* at 795 (citations omitted).

7. 13 A.D.3d 1044, 787 N.Y.S.2d 475 (3d Dep't 2004).

8. *See* N. Dachs & J. Dachs, *"Occupancy" and Uninsured Motorist Coverage*, N.Y.L.J., July 13, 2004, p. 3, col. 1.

9. 10 A.D.3d 711, 782 N.Y.S.2d 124 (2d Dep't 2004).

10. 11 A.D.3d 702, 784 N.Y.S.2d 128 (2d Dep't 2004).

11. 6 Misc. 3d 199, 784 N.Y.S.2d 819 (Sup. Ct., Erie Co. 2004).

12. 7 A.D.3d 302, 776 N.Y.S.2d 285 (1st Dep't 2004).

13. *Id.* at 303–04.

14. 11 A.D.3d 702, 784 N.Y.S.2d 128 (2d Dep't 2004).

15. *Id.* at 703.

16. No. 6715/03, 2004 N.Y. Misc. LEXIS 1501 (Sup. Ct., Nassau Co. 2004).

17. *Id.*; *see also State Farm Mut. Auto. Ins. Co. v. Bryant*, Index No. 1401/02 (Sup. Ct. Nassau Co. Jan. 29, 2004) (not officially reported).

18. N.Y.L.J., May 25, 2004, p. 20 (Sup. Ct., Suffolk Co.).

19. *Id.* (citations omitted).

20. *Id.* (citing *Brandon v. Nationwide Mut. Ins. Co.*, 97 N.Y.2d 491, 496, n.3, 743 N.Y.S.2d 53 (2002) (Kaye, C.J.)).

21. *Id.*; *see Unigard Security Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992).

22. 7 A.D.3d 652, 777 N.Y.S.2d 204 (2d Dep't 2004).

23. *Id.* at 654 (emphasis added); *see Garay v. Nat'l Grange Mut. Ins. Co.*, No. 04-0453-CV, 2004 U.S. App. LEXIS 24086 (2d Cir. 2004) ("While the propriety of expanding New York's no-prejudice rule has been questioned, it remains the law of this state") (citations omitted)); *see also* Dennis M. Wade & David F. Tarella, *No Prejudice Rule Lives (Apparently)*, N.Y.L.J., Dec. 15, 2004, p. 3, col. 1; Louis G. Adolfsen & Ignatius John Melito, *New York Insurance Law's Late Notice Is Alive and Well*, N.Y.L.J., Oct. 28, 2004, p. 1, col. 1; John H. Gross, *A Case for Changing New York's "No-Prejudice" Exception*, N.Y.L.J., Aug. 5, 2002, p. 3, col. 1.

24. 13 A.D.3d 227, 787 N.Y.S.2d 22 (1st Dep't 2004), *appeal granted*, 2005 N.Y. App. Div. LEXIS 1509 (1st Dep't 2005).

25. *Id.* at __, 787 N.Y.S.2d at 25 (citations omitted).

26. *Id.* at __, 787 N.Y.S.2d at 29.

27. 5 A.D.3d 277, 774 N.Y.S.2d 679 (1st Dep't 2004).

28. *Id.* at 278.

29. 11 A.D.3d 909, 784 N.Y.S.2d 268 (4th Dep't 2004).

30. 13 A.D.3d 546, 786 N.Y.S.2d 580 (2d Dep't 2004).

31. *See also Fenske v. State Farm Mut. Auto. Ins. Co.*, 8 A.D.3d 1005, 778 N.Y.S.2d 363 (4th Dep't 2004) (issue of fact whether plaintiff had a reasonable excuse for delay of nearly one year in providing notice of SUM claim).

32. 7 A.D.3d 533, 775 N.Y.S.2d 581 (2d Dep't 2004).

33. 5 A.D.3d 782, 773 N.Y.S.2d 575 (2d Dep't 2004).

34. 7 A.D.3d 955, 777 N.Y.S.2d 551 (3d Dep't), *modified*, ___ N.Y.3d___, ___ N.Y.S.2d ___, 2005 WL 756620 (2005) (notice of SUM claim was untimely as a matter of law, but insurer must demonstrate prejudice in order to disclaim where insured gave timely notice of the accident).

35. 4 A.D.3d 835, 772 N.Y.S.2d 434 (4th Dep't 2004).

36. 6 A.D.3d 1029, 776 N.Y.S.2d 615 (3d Dep't 2004).

37. 12 A.D.3d 508, 784 N.Y.S.2d 608 (2d Dep't 2004).

38. No. 0015302/04, 2004 N.Y. Misc. LEXIS 1211 (Sup. Ct., Bronx Co. 2004).

39. 13 A.D.3d 1023, 787 N.Y.S.2d 454 (3d Dep't 2004).

40. 5 A.D.3d 410, 774 N.Y.S.2d 153 (2d Dep't), *appeal denied*, 2 N.Y.3d 704, 780 N.Y.S.2d 310 (2004).

41. 3 A.D.3d 494, 771 N.Y.S.2d 141 (2d Dep't 2004).

42. 3 N.Y.3d 71, 781 N.Y.S.2d 630 (2004).

43. 11 A.D.3d 471, 782 N.Y.S.2d 372 (2d Dep't 2004).

44. 7 A.D.3d 775, 776N.Y.S.2d 868 (2d Dep't 2004).