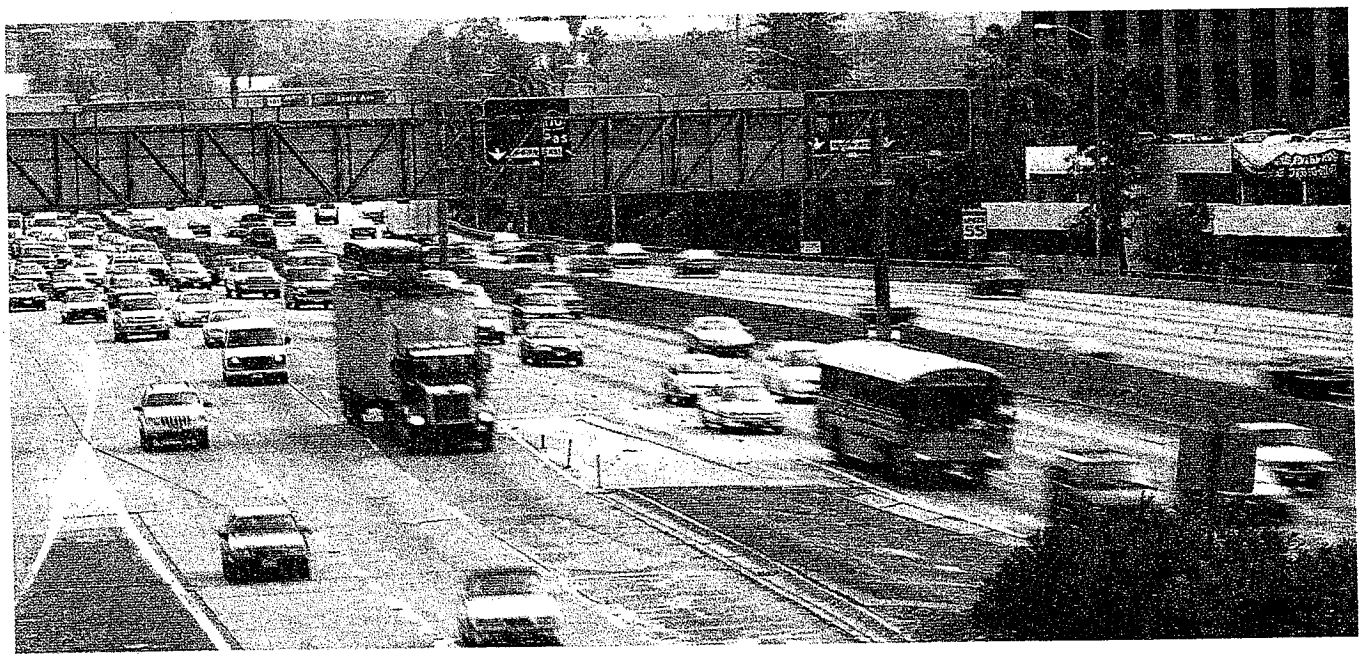
2004 Case Update – Part II

Uninsured, Underinsured, Supplementary Uninsured Motorist Law

By Jonathan A. Dachs



Many developments in the field of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from 2004 were covered in last month's issue of the *Journal*. In this issue, we will discuss several additional general issues that pertain to both uninsured and underinsured motorist claims, and will also address issues more specific to each of these separate categories of coverage.

General Issues[1]

Petitions to Stay Arbitration: Arbitration vs. Litigation

In *Russell v. New York Central Mutual Fire Ins. Co.*,[2] the court held that insofar as the insured's endorsement provided for more than the minimum amount of uninsured motorist coverage mandated by Insurance Law § 3420(f)(1), and the insured did not exercise his option to arbitrate the dispute, the dispute could be resolved through an action at law instead of arbitration.

In *Sclafani v. Allstate Ins. Co.*,[3] the court held that where there is a dispute arising under the right of an insured to payment of SUM benefits, or as to the amount of those

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benefits, the insured will always have the right to initiate legal action, or, in the alternative, to demand arbitration.

Two examples of SUM lawsuits are *Mendoza v. Allstate Ins. Co.*[4] and *Brathwaite v. New York Central Mutual Fire Ins. Co.*[5] In both of those cases, the courts considered the issue of whether the plaintiff sustained a "serious injury" as defined in the No-Fault Law[6] – a condition precedent to a valid UM/SUM claim.

Filing and Service

Civil Practice Law and Rules 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within 20 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.[7]

In *Allstate Ins. Co. v. Duffy*,[8] the court held that where the issue of whether the insured/claimant is entitled to uninsured/underinsured motorist benefits under a particular policy relates to "whether certain conditions of coverage were satisfied, not whether the parties agreed to arbitrate"; the insurer must seek a stay of arbitration within the 20-day limitation period set forth in CPLR 7503(c).[9]

In *State Farm Mutual Auto. Ins. Co. v. Dowling*,[10] the insurer's application to stay arbitration was deemed untimely, the court noting that "[i]t does not avail petitioner that it timely commenced a proceeding to stay the arbitration in Queens County, that the Queens County court ordered to be transferred to New York County, and that it instituted the instant stay proceeding only because of ministerial difficulties it encountered in effectuating the transfer."

In *State Farm Mutual v. Kathehis*,[11] the court noted that when the 20th day after receipt of the demand for arbitration is a Sunday (or Saturday or public holiday), according to General Construction Law § 25-a, the petition to stay arbitration may be filed the next business day.

In three cases that originated from the Supreme Court, Westchester County (Nastasi, J.), the Appellate Division, Second Department addressed the proper way to commence a special proceeding to stay arbitration. In *Allstate Indemnity Co. v. Martinez*,[12] the court noted that "[u]nder New York's commencement-by-filing system, in order to commence a special proceeding, the petition must be filed with the Clerk of the Court and the filing fee paid." Further, "when service of process is made without filing, the resulting proceeding is a nullity, it not having been properly commenced, and such nonfiling constitutes a nonwaivable jurisdictional defect." In this regard, *One Beacon Ins. Co. v. Daly*[13] and *Progressive Northeastern Ins. Co. v. Frenkel*[14] should be reviewed. Although in *Martinez* and *Daly* the court affirmed the denials of the petitions because the petitioner failed to demonstrate that the petition had been filed with the county clerk, in *Frenkel* the court reversed on the basis of evidence, upon renewal, that established such a filing.

In *Liberty Mutual Ins. Co. v. Tigre*,[15] the court held that where a petition was filed on June 25, 2004, but bore a return date of June 27, 2004, a period of just two days, and there was no affidavit of service in the record, and on June 30, 2004, the petitioner served an amended petition bearing a return date of July 27, 2004, the petition was jurisdictionally defective because it failed to give adequate notice of the return date, and the amended petition was jurisdictionally defective because it was improperly served by regular mail on the respondents' attorney.

In *Nationwide Ins. Co. v. Singh*,[16] the claimant's counsel sent to the insurer, by certified mail, return receipt requested, a letter enclosing a no-fault application and "Notice of Intention to Make Claim and Arbitrate," which was skillfully created so as to appear virtually identical in appearance, content, layout and color to the Blumberg form entitled "Notice of Intention to Make Claim." More than three months later, and after the insurer disclaimed coverage on the grounds of late notice, counsel served a demand for arbitration upon the insurer. Within 20 days of receipt of the demand – but nearly four months after receipt of the notice of intention – the insurer commenced a proceeding to stay arbitration. The claimant cross-moved to dismiss the stay proceeding on the ground that it was not timely commenced following the undisputed receipt of the notice. In opposition to the cross-motion the insurer argued, incorrectly, in an affirmation of its counsel, that the notice of intention to arbitrate was not a formal demand to arbitrate against which a proceeding to stay would be required. Counsel did not, however, argue that the notice was misleading or deceptive. The supreme court, *sua sponte*, raised the issue and held that the notice of intention to arbitrate, in its timing and circumstances, was intended to mislead. Thus, the court measured the 20-day period from the subsequent demand for arbitration and granted the petition.

On appeal, however, the Second Department reversed that determination. Despite recognizing that "service intended to conceal a notice of intention to arbitrate and to precipitate an insurer's default will not be given preclusive effect when the notice is buried among unrelated documents or is served on a remote office of the insurer," citing several of the cases cited above, the court noted that "these cases were not decided in a vacuum." The court further stated that "[t]he issue of misleading tactics had to be raised by the petitioners who tardily sought to stay arbitration, and had to be supported by someone with knowledge of the facts on the basis of which they contended that they had been misled." Noting that the insurer never claimed to have been misled and that, therefore, no affidavit was submitted by an

insurance company employee to support such a contention, the court reversed and denied the petition. Interestingly, the court focused solely upon the fact that the claimant's counsel, to his credit, did not bury the notice among a sheaf of other documents, and that service of the notice to the insurer's North Syracuse office did not adversely affect its ability to respond promptly to it; the court did not comment at all on the misleading and deceptive nature of the notice itself.[17]

Burden of Proof

An insurer seeking to stay arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a *prima facie* case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.[18]

> Arbitration awards are subject to great judicial deference, therefore, "it is imperative that the integrity of the process . . . be zealously safeguarded."

In *GEICO v. Burrell*,[19] the petitioner submitted proof of coverage on the offending vehicle by State Farm. In opposition to the petition, State Farm asserted that it had disclaimed coverage on the ground, *inter alia*, of late notice of claim. The supreme court granted the petition, without a hearing, on the basis of its finding that State Farm's disclaimer was invalid. On appeal, the Second Department reversed and held that an evidentiary hearing on the issue of whether State Farm validly disclaimed coverage was necessary.

In *New York Central Mutual Fire Ins. Co. v. Hall*,[20] the petitioner submitted the police accident report, which indicated coverage for the offending vehicle by Allstate and a copy of a letter from Allstate disclaiming coverage to its insured. The court held that this evidence raised a question of fact as to whether Allstate timely and validly disclaimed coverage for the offending vehicle and, therefore, remitted the case for an evidentiary hearing on the timeliness and validity of Allstate's disclaimer, to which the proposed additional respondents would be joined as parties.

In *Liberty Mutual Ins. Co. v. Morgan*,[21] however, the court held that the petitioner, which submitted *only* a copy of the other insurer's disclaimer letter (and no police report or DMV record indicating the existence of coverage in the first instance), "failed to establish its entitlement to a stay of arbitration" and, therefore, upheld the denial of the petition to stay the uninsured motorist claim.

In *AIU Ins. Co. v. Marciante*,[22] the proof established that the tortfeasor's insurer's purported cancellation was defective and invalid. Thus, the policy would have remained in effect until its stated termination date unless another event, such as the insured's procurement of replacement coverage, excused the provision of a proper notice of cancellation. Since the insurer did not produce any documents showing that the tortfeasor had actually acquired other insurance, it failed to establish that it was relieved of its obligation to defend and indemnify the tortfeasor.

In *New York Central Mutual v. Coriolan*,[23] the court held that the insurer's *prima facie* showing of coverage was rebutted by testimony of the other insurer's claims representative, as corroborated by the documentary evidence, that several searches of the company's records were conducted and no policy could be located.

In *State Farm Mutual Auto. Ins. Co. v. Jackson*,[24] the court held that a jury trial may be requested where there is a factual issue preliminary to arbitration pursuant to an uninsured or underinsured motorist claim.

Waiver of Right to Appeal

In *Windsor Group v. Gentilcore*,[25] the court reiterated the established rule that where the parties participate in the arbitration that was the subject of an unsuccessful petition to stay arbitration, without seeking interim relief (*i.e.*, a stay of the hearing), the unsuccessful insurer waives its right to appellate review of the denial of its petition, and its appeal must be dismissed.[26]

Default – Limits of Coverage

In *Kleynshvag v. GAN Ins. Co.*,[27] the court was faced with the interesting question of what limits of coverage to apply in a direct action against an insurer to recover on a judgment obtained against its purported insured where the insurer contended that it never issued a policy to the "insured," but a finding of coverage was rendered against the insurer by default in a proceeding to stay arbitration. Although the supreme court held that "faced with the task of ascertain[ing] the terms of a policy which, in fact, does not appear to exist," the logical conclusion was to limit the insurer's liability to the statutory minimum automobile liability insurance limits set forth in Vehicle & Traffic Law § 311(4)(a) (*i.e.*, $25,000), the Appellate Division disagreed. In the view of the Second Department, under the circumstances of this case, which included the fact that the insurer was made a party respondent to the proceeding to stay arbitration and knowingly chose not to participate therein, the insurer chose not to seek to vacate the default judgment against it for some five years (and such motion was denied), and the insurer failed to meet its burden to prove any limita-

tion on the plaintiff's right to recover. "Plaintiff's recovery should not have been limited to the statutory minimum of $25,000 but, instead should have been allowed to the full extent of the judgment in the underlying action to recover damages for personal injuries," *i.e.*, $125,000.

Arbitration Awards: Issues for the Arbitrator

In *Karadhimas v. Allstate Ins. Co.*,[28] the court vacated an arbitration award in which the arbitrator considered and ruled upon the issue of whether there was physical contact with the claimant's vehicle, notwithstanding the fact that the insurer never sought to stay arbitration prior to the hearing. Repeating the rules that "an arbitrator may not decide the question of whether there was contact with a 'hit and run' vehicle on the ground that lack of contact constitutes a 'contractual coverage defense' and not a 'liability defense,'" and "where the insurance carrier's application to stay arbitration is untimely, '[t]he arbitrator may not decide this issue by creating an artificial distinction between contractual issues and liability issues,'"[29] the court noted that "[t]he arbitrator could determine liability and dismiss the claim based upon a determination that the claimant's negligence was the sole proximate cause of the accident," but that "the arbitrator was required to base his determination upon a finding that there was in fact contact with an unidentified vehicle." Thus, the court remanded the matter for a rehearing before a different arbitrator on the questions of negligence and comparative negligence.

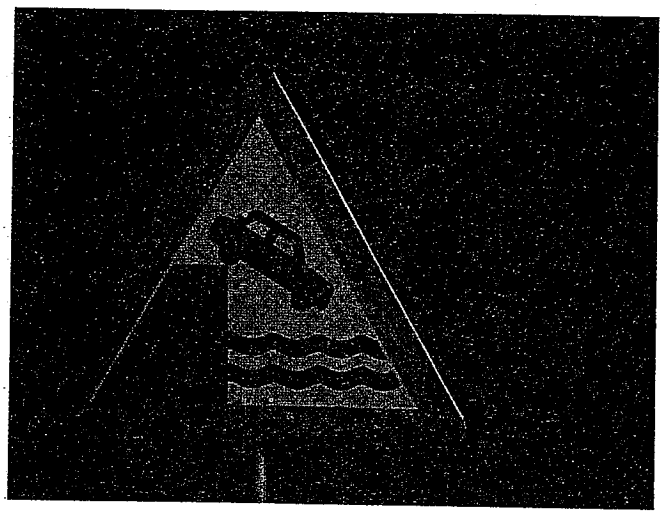
Scope of Review

In *Lumbermen's Mutual Casualty Co. v. City of New York*,[30] the court noted that "[p]ursuant to CPLR 7511(a), an application to vacate an arbitrator's award must be made by a party within ninety days after [its] delivery to [that party]." Moreover, the court added that "the fact that the arbitrator's decision was served on the petitioner by mail did not extend its time to commence [the] proceeding by five days, as the provision of CPLR 2103 extending time for service made by mail 'is expressly restricted to service "in a pending action"' (citations omitted)."

In *NCO Financial Systems, Inc. v. Pettas*,[31] the court reiterated that "even though CPLR § 7511(a) imposes a 90 day limit to modify or vacate an arbitration award, a respondent may wait until the prevailing party moves to confirm the award to seek that relief" by way of a cross-motion to vacate.

In *State Farm Mutual Auto. Ins. Co. v. Perez*,[32] the court stated,

> Arbitration awards are subject to great judicial deference, therefore, "it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." As a result, an arbitrator must grant a fundamentally fair hearing. "A fundamentally fair hearing requires notice, an opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decision makers are not infected with bias."



In that case, the SUM arbitrator rejected certain of the claimant's medical evidence on the basis that it did not contain an original signature but rather a rubber-stamped signature. The court held that, in so doing, the arbitrator failed to take into account a subsequently submitted, properly sworn and signed affidavit, which reaffirmed the doctor's stamped report and thus cured the defect with the authenticity of that report. Moreover, the court noted that although the arbitrator had given notice in her "Pre-Hearing Memorandum" that she would not consider reports that were "dictated but not read," she gave no notice regarding her objection to stamped material, which, in the view of the court, was not equivalent. Whereas the use of the phrase "dictated but not read" indicates "a tolerance for uncorrected errors and an indifference to significant matters of legal import," the use of a signature stamp "does not necessarily suggest that the physician did not read his own report, only that he did not sign every copy. The stamping of a copy after the original has been signed is a common practice." The court found that the arbitrator's rejection of relevant and material evidence, and her "unsupported and conflicting conclusions," resulted in the denial of a fair hearing "due to the appearance of bias" and, accordingly, vacated the arbitrator's award and directed that a new hearing be held.

In *Reilly v. Progressive Ins. Co.*,[33] the claimants' attempted to vacate an arbitrator's award against them, which denied their claims for UM benefits, on the ground that the arbitrator was not impartial and that his determination was irrational. The partiality argument was based upon the fact that the arbitrator and the attorney for the insurer allegedly kissed each other hello prior to the commencement of the hearing, and that during the hearing, the arbitrator referred to defense counsel by her first name. The court rejected the claimants' contentions and affirmed the award because the claimants "waived their

right to object to the determination on the ground of partiality by participating in the arbitration without objection after observing the conduct they believed revealed such partiality." The court also found the arbitrator's award to have been rational.

In *Kaufman v. Allstate Ins. Co.*,[34] the court held that the arbitrator's denial of a request for an adjournment did not constitute either an abuse of discretion or misconduct sufficient to warrant vacatur of an award.

Actions Against Insurance Agents/Brokers

In *Utica First Ins. Co. v. Floyd Holding, Inc.*,[35] the court held that if an insurance broker was negligent in making a representation on an insurance application that resulted in the insurer disclaiming coverage, the insured would be entitled to indemnification from the broker for any liability incurred in the underlying action against the insured.

In *Venditti v. Liberty Mutual Ins. Co.*,[36] the court noted that the allegation that an insurance agent or broker breached the common-law duty to obtain requested coverage "sets forth a claim in tort which requires the application of the three-year limitations period."[37]

The arbitrator's "unsupported and conflicting conclusions," resulted in the denial of a fair hearing.

In *Rendeiro v. State-Wide Ins. Co.*,[38] the court held that "[a]lthough an insurance broker is generally considered to be an agent of the insured, a broker will be held to have acted as the insurer's agent where there is some evidence of 'action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred.'"

Conflicts of Law

In *GEICO v. Nichols*,[39] the issue was whether to apply New York law or Florida law to resolve a dispute over the retroactive cancellation of a policy on the ground of material misrepresentation on the application for insurance. Florida law allows such retroactive cancellations, but New York law does not. Because the policy at issue was issued in Florida, to residents of Florida, covered vehicles registered in Florida, referenced and incorporated Florida law, and the only connection between the policy and New York was that the insured was driving the vehicle in New York at the time of the accident, the court applied Florida law and found it to be controlling under New York's conflict of law rules.

Statute of Limitations

In *Allcity Ins. Co. v. Cedena*,[40] the court explained that

> [a] demand for arbitration of an uninsured motorist's claim is subject to the six-year Statute of Limitations, which runs from the date of the accident or from the time when subsequent events render the offending vehicle "uninsured." . . . Where a claim is filed more than six years after the accident date, therefore, the party bringing said claim is "required to come forward with legally sufficient proof that a later accrual date applies."

In *Provenzano v. Ioffe*,[41] the court rejected the plaintiff's contentions that his personal injury action against the tortfeasor was tolled, pursuant to CPLR 204(b), during the time period that he attempted to arbitrate a claim for uninsured motorist benefits against his insurer. In the view of the court CPLR 204(b) did not apply, because the demand for arbitration did not concern a personal injury claim asserted in a common-law negligence action but, rather, the plaintiff's contractual rights to uninsured motorist benefits under his insurance policy.

Thus, it is incumbent upon the claimant's attorney to protect against the statute of limitations by commencing a lawsuit against the tortfeasor within three years of the date of the accident, even if the framed issue hearing is still pending.[42]

Uninsured Motorist Issues

Prompt Written Notice of Denial or Disclaimer

Insurance Law § 3420(d) requires liability insurers to "give written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." The statute applies when an accident occurs in the state of New York and the insurer will be estopped from disclaiming liability or denying coverage if it fails to comply with this statute. The timeliness of an insurer's disclaimer or denial is measured from the point in time when it first learns of the grounds for the disclaimer or denial.[43]

In *Baust v. Travelers Indemnity Co.*,[44] the court reiterated the rule that a disclaimer after the date of an accident relates back to the date of the accident and renders the vehicle uninsured at the time of the accident for the purposes of a UM/SUM claim.[45]

In *2833 Third Avenue Realty Assoc. v. Marcus*,[46] the court held that a delay of 37 days in issuing a disclaimer based upon the insured's failure to give timely notice of claim and failure to forward the summons and complaint, as required by the policy, was unreasonable as a matter of law because the grounds for the disclaimer were evident from the face of the late notice of claim.

In *Progressive Northeastern Ins. Co. v. Cirocco*,[47] a delay of "over 80 days" after receiving notice of the facts upon which the disclaimer was based was held to be unreason-

able as a matter of law. The court further noted that the insurer offered no explanation or excuse for waiting "more than 60 days" before commencing its investigation into the facts that supported its exclusion from coverage.

In *Mann v. Gulf Ins. Co.*,[48] the court held that an excess liability insurer's delay of four months in disclaiming liability after learning that the insured's vice president and claims manager has ascertained that brokers to whom notice was allegedly sent were not the insurer's agents, was unreasonable as a matter of law. In *U.S. Underwriters Ins. Co. v. City Club Hotel*,[49] the court held that a four-to-five-month delay in investigating the terms of a lease was unreasonable as a matter of law, particularly where another ground for disclaimer existed. And, in *New Hampshire Ins. Co. v. Zurich Ins. Co.*,[50] a delay of either 111 days or 58 days was held to be unreasonable as a matter of law.[51]

On the other hand, in *New York Central Mutual Fire Ins. Co. v. Majid*,[52] the court held that a disclaimer issued 31 days after the insurer's completion of its investigation was not unreasonably late. It was not unreasonable for the insurer to investigate the claim and to consult with counsel regarding the livery vehicle exclusion prior to disclaiming coverage based thereon.[53]

In *New York State Ins. Fund v. Merchants Ins. Co. of New Hampshire*,[54] the court held that a 49-day delay in issuing a disclaimer based upon an exclusion for bodily injuries to employees of the insured was not unreasonable because there was confusion as to the identity of the injured party's employer.[55]

The New York courts have repeatedly held that for the purpose of determining whether a liability insurer has a duty to promptly disclaim in accordance with Insurance Law § 3420(d), a distinction must be made between (a) policies that contain no provisions extending coverage to the subject loss, and (b) policies that do contain provisions extending coverage to the subject loss, and that would thus cover the loss but for the existence, elsewhere in the policy, of an exclusionary clause. It is only in the former case that compliance with Insurance Law § 3420(d) may be dispensed with.[56]

In *Liberty Mutual Ins. Co. v. McDonald*,[57] the court held that

> [w]here an insurer attempts to disclaim coverage under a policy of liability insurance by invoking the terms of an exclusion, including an exclusion for nonpermissive use, it must do so "as soon as is reasonably possible" after learning of the grounds for disclaimer. However, where the nonpermissive use falls outside the policy's coverage and the denial of the claim is based upon lack of coverage, estoppel may not be used to create coverage regardless of whether or not the insurance company was timely in issuing its disclaimer.[58]

Florida law allows such retroactive cancellations, but New York law does not.

In *Ambrosio v. Newburgh Enlarged City School District*,[59] the court noted that the insured and an additional insured have independent duties to provide timely notice of an occurrence to the insurer.

Where notice is provided directly by the injured party, the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party and the insured. However, where the insured is the first to notify the insurer, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer.[60] In *GEICO v. Jones*,[61] the court held that "in order for a disclaimer letter to be valid against an injured party, the notice of disclaimer must specifically advise the claimant that his or her notice of claim was untimely." Thus, where the injured party provided notice to the insurer pursuant to Insurance Law § 3420(a)(3), but the disclaimer letter was based solely upon the insured's failure to timely notify it of the accident, the disclaimer was held to be invalid.[62]

In *First Central Ins. Co. v. Malave*,[63] the court held that because the claimant did not exercise his right pursuant to Insurance Law § 3420(a)(3) to provide independent notice to the insurer, the disclaimer letter, which stated untimely notice by the insured as the ground for disclaimer without any reference to untimely notice by the claimant, was proper.[64]

In *New York State Ins. Fund v. Merchants Ins. Co. of New Hampshire, Inc.*,[65] the court held that

> [i]n order to disclaim coverage on the ground of an insured's lack of cooperation, the carrier must demonstrate that (1) it acted diligently in seeking to bring about the insured's cooperation, (2) the efforts employed by the carrier were reasonably calculated to obtain the insured's cooperation, and (3) the attitude of the insured, after cooperation was sought, was one of willful and avowed obstruction.[66]

Moreover, inaction by the insured, by itself, will not justify a disclaimer of coverage on the ground of lack of cooperation.[67]

In *Blue Ridge Ins. Co. v. Jiminez*,[68] the court noted that "[a] 'reservation of rights' letter does not constitute an effective notice of disclaimer."[69]

In *Scappatura v. Allstate Ins. Co.*,[70] the court noted that property damage claims do not fall within the ambit of Insurance Law § 3420(d).

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

A proper notice of cancellation must also adequately specify the reasons for the cancellation. In *Lumbermen's Mutual Casualty Co. v. Brooks*,[71] the reason for the cancellation stated on the notice was "Producer's Account Closed" and the insured was referred to Code No. 4, which stated, in pertinent part, "after the issuance of the policy . . . discovery of an act or omission, or a violation of any policy condition that substantially and materially increases the hazards insured against, and which occurred subsequent to inception of the current policy period." The court held that this notice was deficient because it did not specify the act or omission or violation. Moreover, the court held that the notice did not mention the real reason for the cancellation, which was that the policy had been procured by a brokerage that had allegedly engaged in fraudulent policy procurement practices – a ground that nevertheless would have been inadequate as a basis to terminate the policy in the absence of any demonstrable link between the asserted fraud and the procurement of the particular policy at issue.

In *Badio v. Liberty Mutual Fire Ins. Co.*,[72] the court noted that

> [t]he insurer has the burden of proving the validity of its timely cancellation of an insurance policy. An insurer is entitled to a presumption that a cancellation notice was received when "the proof exhibits an office practice and procedure followed by the insurers in the regular course of their business, which shows that the notices of cancellation have been duly addressed and mailed." In order for the presumption of receipt to arise "office practice must be geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed."[73]

In *Badio*, the court held that the insurer presented sufficient evidence of its office mailing practice through the testimony of an employee who possessed personal knowledge of the office mailing practice, including how the mail was picked up and counted and how the names and addresses on each item were confirmed.

The court further noted that "[a]n insured's denial of receipt, standing alone, is insufficient to rebut the presumption," and that "[i]n addition to a claim of no receipt, there must be a showing that routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed."

And, in *York v. Allstate Indemnity Co.*,[74] the court specifically held that the insurer's proof that it mailed a copy of the notice of cancellation to the address shown on the insured's signed application established that it effectively canceled its policy, regardless of whether or not the address on the policy was the correct address of the insured at the time the notice was mailed, because the carrier was not notified that the address shown on the policy was incorrect.

In *MetLife Auto & Home v. Agudelo*,[75] the court held that Vehicle & Traffic Law § 313(1)(a)

> "supplants an insurance carrier's common-law right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation, and mandates that the cancellation of a contract pursuant to its provisions may only be effected prospectively." . . . This provision "places the burden on the insurer to discover any fraud before issuing the policy, or as soon as possible thereafter, and protects innocent third parties who may be injured due to the insured's negligence."[76]

In *AIU Ins. Co. v. Marciante*,[77] the court held that "[a] supervening policy of liability insurance terminates a prior insurer's obligation to indemnify irrespective of the prior insurer's noncompliance with the notice requirements of section 313 of the Vehicle & Traffic Law."[78]

Stolen Vehicle

In *New York Central Mutual Fire Ins. Co. v. Dukes*,[79] the court reiterated that Vehicle & Traffic Law § 388(1) creates a presumption that the driver of a vehicle was using the vehicle with the owner's express or implied permission, which may only be rebutted by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent. Evidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use.

Moreover, the court held that the issue of whether the vehicle was stolen or being used without permission at the time of the accident was within the scope of the order of reference to the Judicial Hearing Officer to hear and determine the issue of "insurance coverage" insofar as the petition affirmatively alleged that the vehicle owned by its insured was stolen at the time of the accident, and the petitioner raised no objection at the hearing to the admission of evidence on the issue of permissive use.

An owner of a vehicle that is used without the owner's permission may still be held liable if he or she violated the provisions of Vehicle & Traffic Law § 1210(a), the "key in the ignition" statute.

In *Merchants Ins. Group v. Haskins*,[80] the court applied Vehicle & Traffic Law § 1210(a) to hold the insurer of a stolen vehicle responsible to cover the loss of a motorist injured in an accident with the stolen vehicle where the evidence established that a permissive user of the vehicle (the vehicle owner's friend) left the vehicle parked on a public roadway with the keys on the dashboard, thus precipitating the theft.

Hit-and-Run

One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is "physical contact" between an unidentified vehicle and the person or motor vehicle of the claimant.[81]

In *Metropolitan Property & Casualty Co. v. Sands*,[82] the court noted that where the determination that there was not physical contact between the claimant's vehicle and an alleged hit-and-run vehicle is supported by a fair interpretation of the evidence adduced at the hearing, that determination should not be disturbed on appeal.[83]

Another requirement for a valid hit-and-run claim is the filing of a statement under oath concerning the details of the claim. In *Empire Ins. Co. v. Dorsainvil*,[84] the court held that the claimant's failure to file a sworn statement under oath providing details of a hit-and-run accident constituted a breach of a condition precedent to coverage and, therefore, vitiated coverage under the individual motorist endorsement of the policy.

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an "uninsured" motor vehicle a vehicle whose insurer "is or becomes insolvent."

In *Eagle Ins. Co. v. Hamilton*,[85] the court held that where an insured policyholder is entitled to UM coverage, as opposed to SUM coverage, from his or her own insurer, and the alleged tortfeasor's insurer has paid into the New York Public Motor Vehicle Liability Security Fund (known as the PMV Fund), but has been declared insolvent after the underlying accident, the injured policyholder's recourse is not against his or her own insurer for UM coverage but against the PMV Fund. The court then discussed the question of what is to occur if the Superintendent of Insurance, as administrator of the PMV Fund, denies the claimant recovery from the fund. Specifically, the court inquired whether this would be a denial of coverage within the meaning of Insurance Law § 3420(f)(1), thereby triggering the claimant's right to UM coverage from his own insurer. Insofar as the only evidence in the record on the issue of whether the superintendent was denying the claim was a letter from the superintendent stating that coverage from the PMV Fund was being denied "at this time" due to "financial strain," the court referred the question of whether the denial of recovery from the PMV Fund is a denial of coverage, to the supreme court for determination at a hearing, at which the superintendent would be joined as a party.

The insurer has the burden of proving the validity of its timely cancellation of an insurance policy.

This decision was rendered after granting the superintendent's motion to reargue or clarify the court's prior order, rendered in February 2004.[86]

In *Metropolitan Property & Casualty Ins. Co. v. Carpentier*,[87] the court reiterated that where the insured purchased SUM coverage, as opposed to merely compulsory UM coverage, "the insured is entitled to seek such benefits under the insolvency of the alleged tortfeasor's insurer and need not proceed against the PMV Fund."[88]

In *Pomerico v. ELRAC Inc.*,[89] the court held that once the tortfeasor's insurer became insolvent, the tortfeasor became an uninsured person for purposes of Insurance Law § 5208 and, thus, the injured party was entitled to compel the Motor Vehicle Accident Indemnification Corp. (MVAIC) to represent the tortfeasor.

Underinsured Motorist Issues

Trigger of Coverage

In *Russell v. New York Central Mutual Fire Ins. Co.*,[90] the court held that "[a]n insurer's duty to pay SUM benefits

does not arise until the insured demonstrates that the limits of his or her bodily injury coverage exceeds the same coverage in the tortfeasor's policy."

In *Rodriguez v. Metropolitan Property & Casualty Ins. Co.*,[91] the court held that where the claimants failed to provide the documentation to establish that their bodily injury coverage exceeded the policy limits available to the tortfeasor, their action to recover SUM benefits was properly dismissed.

Consent to Settle

The Regulation 35-D SUM endorsement requires that the claimant obtain consent to any settlement with the tortfeasor(s) as a condition precedent to an underinsured motorist claim.

In *State Farm Mutual Auto. Ins. Co. v. Lucano*,[92] the court rejected the claimant's contention that her belated verification that no excess insurance was available excused her failure to obtain the petitioner's consent to her settlement of the underlying action and execution of a general release because that fact did not obviate the prejudice to the petitioner's subrogation rights since the tortfeasors were not judgment-proof.

Exhaustion of Underlying Limits

By statute and by the terms of the applicable SUM endorsement, no obligation exists under an underinsured motorist policy unless and until the underlying limits of the tortfeasor's insurance coverage have been exhausted by the payment of judgments or settlements.

In *Russell v. New York Central Mutual Fire Ins. Co.*,[93] the court held that a valid underinsured motorist claim does not arise until the limits of all available bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

In *Webb v. Lumberman's Mutual Casualty Co.*, the court reminded that the underinsured motorist scheme "requires primary insurers to pay every last dollar and requires plaintiffs to accept no less, prior to the initiation of an underinsurance claim."[94] In that case, the court found that the dismissal of the underlying personal injury action against the tortfeasor on the ground that there was no causal connection between the defendant's negligence and the claimant's alleged injuries precluded such exhaustion and, therefore, eliminated the claimant's entitlement to SUM benefits.

In *Liberty Mutual Ins. Co. v. Doherty*,[95] the court held that the underinsured motorist benefits provision of the policy was triggered when the claimant exhausted, through a settlement, the bodily injury liability policy limits under the policy of the offending vehicle, which was less than the liability coverage provided under the SUM policy. The court further held that the claimant was not also required to exhaust the liability coverage limits under a separate policy for the operator of the offending vehicle prior to pursuing a claim for underinsured motorist benefits. ■

1. This section continues the discussion of "General Issues" from Part I in the May 2005 issue of the *Journal*.
2. 11 A.D.3d 668, 783 N.Y.S.2d 404 (2d Dep't 2004).
3. 3 Misc. 3d 634, 777 N.Y.S.2d 251 (Sup Ct., Richmond Co. 2004).
4. 13 A.D.3d 594, 786 N.Y.S.2d 341 (2d Dep't 2004).
5. 13 A.D.3d 405, 785 N.Y.S.2d 707 (2d Dep't 2004).
6. Ins. Law § 5102(d).
7. *State Farm Mut. Auto. Ins. Co. v. Kankam*, 3 A.D.3d 418, 770 N.Y.S.2d 714 (1st Dep't 2004).
8. 5 A.D.3d 476, 772 N.Y.S.2d 588 (2d Dep't 2004).
9. *See In re Steck*, 89 N.Y.2d 1082, 1084, 659 N.Y.S.2d 839 (1996).
10. 5 A.D.3d 277, 774 N.Y.S.2d 679 (1st Dep't 2004).
11. 4 Misc. 3d 1012A, 791 N.Y.S.2d 874 (Sup. Ct., Bronx Co. 2004).
12. 4 A.D.3d 422, 771 N.Y.S.2d 378 (2d Dep't 2004).
13. 7 A.D.3d 717, 776 N.Y.S.2d 829 (2d Dep't 2004).
14. 8 A.D.3d 390, 777 N.Y.S.2d 652 (2d Dep't 2004).
15. 6 Misc. 3d 1035A, 2004 N.Y. Misc. LEXIS 3027 (Sup. Ct., Queens Co. 2004).
16. 6 A.D.3d 441, 776 N.Y.S.2d 291 (2d Dep't 2004).
17. *See* N. Dachs & J. Dachs, *Tricks of the Trade: Let the 'Trickster' and 'Trickee' Beware*, N.Y.L.J., May 11, 2004, p. 3, col. 1.
18. *See Liberty Mut. Ins. Co. v. Morgan*, 11 A.D.3d 615, 782 N.Y.S.2d 662 (2d Dep't 2004); *AIU Ins. Co. v. Marciante*, 8 A.D.3d 266, 778 N.Y.S.2d 55 (2d Dep't 2004); *N.Y. Cent. Mut. v. Coriolan*, 5 A.D.3d 493, 772 N.Y.S.2d 827 (2d Dep't 2004).
19. 11 A.D.3d 463, 783 N.Y.S.2d 379 (2d Dep't 2004).
20. 7 A.D.3d 629, 775 N.Y.S.2d 890 (2d Dep't 2004).
21. 11 A.D.3d 615.
22. 8 A.D.3d 266, 778 N.Y.S.2d 55 (2d Dep't 2004).
23. 5 A.D.3d 493.
24. 12 A.D.3d 1142, 784 N.Y.S.2d 410 (4th Dep't 2004).
25. 8 A.D.3d 582, 778 N.Y.S.2d 713 (2d Dep't 2004).
26. *See Commerce & Indus. Ins. Co. v. Nester*, 230 A.D.2d 795 (2d Dep't 1996), *aff'd*, 90 N.Y.2d 255, 660 N.Y.S.2d 366 (1997); *see also One Beacon Ins. Co. v. Bloch*, 298 A.D.2d 522, 748 N.Y.S.2d 783 (2d Dep't 2002).
27. 13 A.D.3d 588, 789 N.Y.S.2d 160 (2d Dep't 2004).
28. 9 A.D.3d 429, 781 N.Y.S.2d 41 (2d Dep't 2004).
29. *Nationwide Ins. Co. v. McDonnell*, 272 A.D.2d 547, 548, 708 N.Y.S.2d 146 (2d Dep't 2000).
30. 5 A.D.3d 684, 774 N.Y.S.2d 758 (2d Dep't 2004).
31. N.Y.L.J., Mar. 23, 2004, p. 20, col. 5 (Sup. Ct., Nassau Co. 2004).
32. N.Y.L.J., Mar. 5, 2004, p. 20, col. 1 (Sup. Ct., Nassau Co. 2004) (citations omitted).
33. 5 A.D.3d 776, 773 N.Y.S.2d 608 (2d Dep't 2004).
34. 9 A.D.3d 431, 779 N.Y.S.2d 788 (2d Dep't 2004).
35. 5 A.D.3d 762, 774 N.Y.S.2d 565 (2d Dep't 2004).
36. 6 A.D.3d 961, 774 N.Y.S.2d 849 (3d Dep't 2004).
37. *Id.* at 962 (citing *Santiago v. 1370 Broadway Assoc.*, 96 N.Y.2d 765, 766, 725 N.Y.S.2d 599 (2001)).
38. 8 A.D.3d 253, 777 N.Y.S.2d 323 (2d Dep't 2004).
39. 8 A.D.3d 564, 780 N.Y.S.2d 19 (2d Dep't 2004).
40. 6 Misc. 3d 1007A (Sup. Ct., Kings Co. 2004).
41. 12 A.D.3d 353, 784 N.Y.S.2d 138 (2d Dep't 2004).

42. *See* Mitchell S. Lustig & Jill Lakin Schatz, *Representing the SUM Claimant: Beware the Statute of Limitations*, N.Y.L.J., Dec. 6, 2004, p. 4, col. 4.

43. *See Moore v. Ewing*, 9 A.D.3d 484, 781 N.Y.S.2d 51 (2d Dep't 2004); *79th Realty Co. v. Wausau Ins. Co.*, 7 A.D.3d 507, 776 N.Y.S.2d 96 (2d Dep't 2004); *Alvarez v. Allstate Ins. Co.*, 5 A.D.3d 270, 773 N.Y.S.2d 298 (1st Dep't 2004); *N.Y. Cent. Mut. Fire Ins. Co. v. Majid*, 5 A.D.3d 447, 773 N.Y.S.2d 429 (2d Dep't 2004).

44. 13 A.D.3d 788, 786 N.Y.S.2d 604 (3d Dep't 2004).

45. *Id. See In re Vanguard Ins. Co. (Polchlopek)*, 18 N.Y.2d 376, 275 N.Y.S.2d 515 (1966). Note: The *Baust* decision contains the puzzling statement that the SUM insurer "could have protected itself from recovery of benefits in this situation by 'exclud[ing] from the definition of an uninsured auto those autos upon which a disclaimer of coverage is made subsequent to an accident.'" The basis and validity of this statement is unclear given the existence of the standard, mandatory SUM endorsement of Regulation 35-D.

46. 12 A.D.3d 329, 784 N.Y.S.2d 863 (1st Dep't 2004).

47. 4 A.D.3d 530, 771 N.Y.S.2d 717 (2d Dep't 2004).

48. 3 A.D.3d 554, 771 N.Y.S.2d 176 (2d Dep't 2004).

49. 369 F.3d 102 (2d Cir. 2004).

50. N.Y.L.J., July 27, 2004, p. 19, col. 3 (Sup. Ct., Nassau Co. 2004).

51. *See also Heegan v. United Int'l Ins. Co.*, 2 A.D.3d 403, 767 N.Y.S.2d 861 (2d Dep't 2003) (no excuse by insurer for failing promptly to commence investigation); *Martin v. Safeco Ins. Co. of Am.*, 1 Misc. 3d 912A, 781 N.Y.S.2d 625 (Sup. Ct., N.Y. Co. 2004) (disclaimer untimely where insurer waited 47 days before commencing investigation and an additional 21 days before issuing disclaimer).

52. 5 A.D.3d 447, 773 N.Y.S.2d 429 (2d Dep't 2004).

53. *See also Lake Carmel Fire Dep't, Inc. v. Utica First Ins. Co.*, 2 Misc. 3d 1004A, 784 N.Y.S.2d 921 (Sup. Ct., Queens Co.) ("It is perfectly reasonable that the insurer verify the surrounding facts so that, if it chooses to disclaim, it does so on the basis of concrete evidence").

54. 5 A.D.3d 449, 773 N.Y.S.2d 431 (2d Dep't 2004).

55. *See also Blue Ridge Ins. Co. v. Jiminez*, 7 A.D.3d 652, 777 N.Y.S.2d 204 (2d Dep't 2004) (27-day delay was reasonable as a matter of law); *Pub. Serv. Mut. Ins. Co. v. Harlen Hous. Assoc.*, 7 A.D.3d 421, 777 N.Y.S.2d 438 (1st Dep't 2004) (27- or 37-day delay was not unreasonable).

56. *See Greenidge v. Allstate Ins. Co.*, 312 F. Supp. 2d 430 (S.D.N.Y. 2004); *Atl. Mut. Cos. v. Ceserano*, 5 A.D.3d 382, 773 N.Y.S.2d 80 (2d Dep't 2004) (no duty to disclaim where "coverage did not exist under the terms of the policy in the first instance"); *Nat'l Union Fire Ins. Co. v. Utica First Ins. Co.*, 6 A.D.3d 681, 775 N.Y.S.2d 175 (2d Dep't 2004) ("Disclaimer pursuant to section 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under such circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed."); *see also N.H. Ins. Co. v. Zurich Ins. Co.*, N.Y.L.J., July 27, 2004, p. 19, col. 3 (Sup. Ct., Nassau Co. 2004).

57. 6 A.D.3d 614, 775 N.Y.S.2d 83 (2d Dep't 2004) (citations omitted).

58. *Id.* at 615 (citations omitted).

59. 5 A.D.3d 410, 774 N.Y.S.2d 153 (2d Dep't 2004).

60. *See Hereford Ins. Co. v. Mohammod*, 7 A.D.3d 490, 776 N.Y.S.2d 87 (2d Dep't 2004).

61. 6 A.D.3d 534, 774 N.Y.S.2d 435 (2d Dep't 2004).

62. *See also Halali v. Evanston Ins. Co.*, 8 A.D.3d 431, 779 N.Y.S.2d 119 (2d Dep't 2004).

63. 3 A.D.3d 494, 771 N.Y.S.2d 141 (2d Dep't 2004).

64. *See also Viggiano v. Encompass Ins. Co.*, 6 A.D.3d 695, 775 N.Y.S.2d 533 (2d Dep't 2004); Mitchell S. Lustig & Jill Lakin Schatz, *Disclaimers of Coverage for Late Notice*, N.Y.L.J., June 7, 2004, p. 1, col. 1.

65. 5 A.D.3d 449, 773 N.Y.S.2d 431 (2d Dep't 2004).

66. *Id.* at 450 (citing *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 168–69, 278 N.Y.S.2d 793 (1967)).

67. *See Pawtucket Mut. Ins. Co. v. Soler*, 184 A.D.2d 498, 499, 584 N.Y.S.2d 192 (2d Dep't 1992); *see also Baust v. Travelers Indem. Co.*, 13 A.D.3d 788, 786 N.Y.S.2d 604 (3d Dep't 2004) (defendant failed to meet "heavy" burden of providing willful and avowed obstruction on the part of plaintiff as a matter of law where plaintiff allegedly refused to attend numerous IMEs); *N.Y. Cent. Mut. Fire Ins. Co. v. Bresil*, 7 A.D.3d 716, 777 N.Y.S.2d 174 (2d Dep't 2004) (refusal to answer questions and referral to attorney do not reflect attitude of willful and avowed obstruction); *Blinco v. Preferred Mut. Ins. Co.*, 11 A.D.3d 924, 782 N.Y.S.2d 483 (4th Dep't 2004); *Warnock v. Blue Ridge Ins. Co.*, 6 A.D.3d 697, 775 N.Y.S.2d 158 (2d Dep't 2004); *MetLife Auto & Home v. Burgos*, 4 A.D.3d 477, 772 N.Y.S.2d 357 (2d Dep't 2004); *see also* N. Dachs & J. Dachs, Thrasher *Threshold Thriving*, N.Y.L.J., Mar. 15, 2005, p. 3, col. 1.

68. 7 A.D.3d 652, 777 N.Y.S.2d 204 (2d Dep't 2004).

69. *See Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979); *Haslauer v. N. Country Adirondack Coop. Ins. Co.*, 237 A.D.2d 673, 654 N.Y.S.2d 477 (3d Dep't 1997); *Aetna Cas. & Sur. Co. v. Rosen*, 205 A.D.2d 684, 613 N.Y.S.2d 664 (2d Dep't 1994).

70. 6 A.D.3d 692, 775 N.Y.S.2d 162 (2d Dep't 2004).

71. 13 A.D.3d 198, 786 N.Y.S.2d 482 (1st Dep't 2004).

72. 12 A.D.3d 229, 785 N.Y.S.2d 52 (1st Dep't 2004).

73. *Id.* (quoting *Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829, 414 N.Y.S.2d 117 (1978)).

74. 8 A.D.3d 663, 780 N.Y.S.2d 357 (2d Dep't 2004).

75. 8 A.D.3d 571, 780 N.Y.S.2d 21 (2d Dep't 2004).

76. *See also Am. Home Assurance Co. v. Manzo*, 12 A.D.3d 369, 783 N.Y.S.2d 304 (2d Dep't 2004).

77. 8 A.D.3d 266, 778 N.Y.S.2d 55 (2d Dep't 2004).

78. *Id.* at 267 (citing *Employers Commercial Union Ins. Co. v. Firemen's Fund Ins. Co.*, 45 N.Y.2d 608, 611 (1978); *Kaplan v. Travelers Ins. Co.*, 205 A.D.2d 501, 503, 612 N.Y.S.2d 658 (2d Dep't 1994)).

79. 14 A.D.3d 704, 789 N.Y.S.2d 267 (2d Dep't 2005).

80. 11 A.D.3d 694, 783 N.Y.S.2d 400 (2d Dep't 2004).

81. *See Utica Mut. Ins. Co. v. Leconte*, 3 A.D.3d 534, 770 N.Y.S.2d 750 (2d Dep't 2004).

82. 5 A.D.3d 601, 772 N.Y.S.2d 850 (2d Dep't 2004).

83. *See also Merch. Mut. Ins. Group v. Idore*, 10 A.D.3d 613, 781 N.Y.S.2d 674 (2d Dep't 2004).

84. 5 A.D.3d 480, 772 N.Y.S.2d 565 (2d Dep't 2004).

85. __ A.D.3d __, 791 N.Y.S.2d 605, 2005 N.Y. App. Div. LEXIS 2630 (2d Dep't 2005); *see also Agway Ins. Co. v. De Leon*, 5 Misc. 3d 1018A (Sup. Ct., Queens Co. 2004).

86. 4 A.D.3d 355, 773 N.Y.S.2d 68 (2d Dep't 2004).

87. 7 A.D.3d 627, 777 N.Y.S.2d 146 (2d Dep't 2004).

88. *See Am. Mfrs. Mut. Ins. Co. v. Morgan*, 296 A.D.2d 491, 746 N.Y.S.2d 726 (2d Dep't 2002); *Allcity Ins. Co. v. Cedena*, 6 Misc. 3d 1007A (Sup. Ct., Kings Co. 2004).

89. 1 Misc. 3d 908A, 781 N.Y.S.2d 627 (Civ. Ct., Queens Co. 2004).

90. 11 A.D.3d 668, 783 N.Y.S.2d 404 (2d Dep't 2004).

91. 7 A.D.3d 775, 776 N.Y.S.2d 868 (2d Dep't 2004).

92. 11 A.D.3d 548, 783 N.Y.S.2d 618 (2d Dep't 2004).

93. 11 A.D.3d 668.

94. __ F. Supp. 2d __, 2004 U.S. Dist. LEXIS 12942 (W.D.N.Y. July 2, 2004); *Fed. Ins. Co. v. Watnick*, 80 N.Y.2d 539, 546, 592 N.Y.S.2d 624 (1992).

95. 13 A.D.3d 629, 789 N.Y.S.2d 55 (2d Dep't 2004).