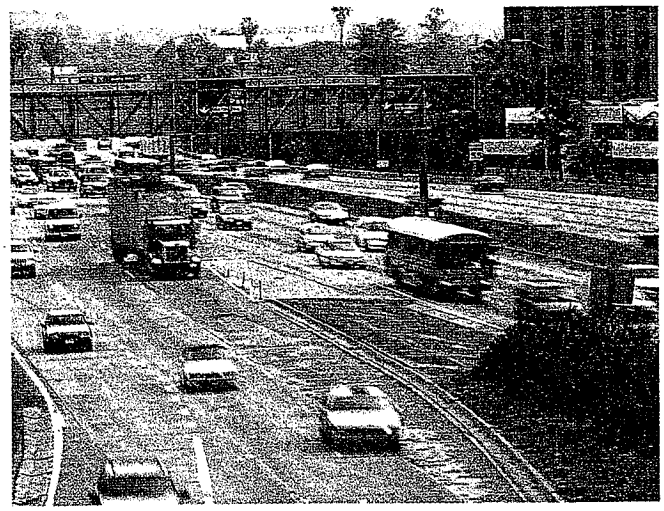

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2005 Update on Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part II

By Jonathan A. Dachs

Developments from 2005 with respect to general issues pertaining to the areas of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law from 2005 were discussed in the June 2006 issue of the *Journal*. Part II will discuss several additional general issues addressed by the courts that year, as well as other issues more specific to these separate categories of coverage.

Arbitration Awards – Scope of Review

In *Cardeon v. New York Central Mutual Fire Ins. Co.*,[1] the court held that although the arbitrator kept the record open so the respondent could submit the supplemental report of a doctor it retained to review the claimant's medical records, this did not establish "actual bias or the appearance of bias from which a conflict of interest may be inferred."

In *State Farm Mutual Automobile Ins. Co. v. Gutkin*, the court observed that "[a]s a general rule, the extent of an insurer's liability and the availability of offsets in a Supplemental Uninsured Motorist arbitration proceeding are matters to be determined by the arbitrator, whose decision will not be disturbed so long as it is rational and not arbitrary or capricious."[2] Here, an error of law was made by the arbitrator when he failed to allow evidence of, or to take into consideration in making his award, the amount recovered by the claimant in settlement with the third-party insurer. This was a "fundamental error" that, in the court's view, "rendered the award irrational as a matter of law (CPLR 7511[d])."

Conflicts of Law

In *Santiago v. State Farm Indemnity Co.*,[3] the court was called upon to determine the choice of law to be applied by the arbitrator – New York, or New Jersey. The claimant, a resident of New York, was a passenger in a car owned by a New Jersey resident, which was involved in an accident in New York. The host vehicle was insured by a New Jersey insurance carrier. The offending vehicle was owned by a New Jersey company and operated by a New

Jersey resident, and was uninsured as defined by the policy. Pursuant to Stipulation, and the terms of the policy, the parties agreed that the UM arbitration was to take place in New York City, the claimant's place of residence. The policy contained a provision stating that "state court rules governing procedure and admission of evidence shall be used." The policy also provided that "[t]he written decision of any two arbitrators shall be binding on each party unless the amount of the damages awarded exceeds the minimum limit of liability specified by the financial responsibility law of New Jersey."

Focusing on this latter provision, and the fact that "the policy specifies that a certain law of New Jersey is to be applied as concerns the amount of the award," it was "logical to assume" that "because the policy clearly specified New Jersey law in this context, in other contexts where New Jersey's law is not specified, but only 'state' law, the policy means to apply the law of the state in which the arbitration is conducted." Applying a choice of law analysis to the facts of this case "does not lead to a different conclusion." Under the "interest analysis," the court concluded that New York had a greater interest in regulating the conduct of drivers within its borders and distributing the loss after the accident and, thus, New York's law should apply.

Scotland v. Allstate Ins. Co.[4] also concerned an accident that occurred in New York. The claimant sought to recover UM benefits under a policy written in Virginia. In an action commenced by the claimant against the UM carrier, the defendant insurer raised as an affirmative defense that the action was barred or limited based upon plaintiff's failure to sustain a "serious injury" as defined by New York's Ins. Law § 5102(d). The plaintiff argued that he was not obligated to demonstrate a "serious injury" because there was no such requirement under Virginia law or in the Virginia policy.

The court noted that this action, involving a claim by an insured against his insurer for benefits to which he claimed entitlement under the policy, is a contract action, and not a tort action. The court added that "claims for uninsured motorist benefits by an insured against an insurer present issues which are actually a mixture of contract and tort" because "payment of benefits under the contract terms depends upon the uninsured motorist's tort liability to the insured."

Analyzing the specific terms of the Virginia statute pertaining to uninsured motorist coverage, the court observed that the carrier is obligated thereunder to pay all sums that the insured is "legally entitled to recover," which, in the court's view, requires the insured "to prove fault and damages just as if he or she proceeded against the uninsured motorist instead of the carrier"; in other words, the insured must prove entitlement in the venue in which he chooses to commence the action. The court concluded that New York law should apply insofar as the accident location and situs of the loss are in New York, and "strong public policy considerations underlie New York's serious injury threshold requirement."

In *State Farm Mutual Automobile Ins. Co. v. Williams*,[5] the underlying motor vehicle accident took place in New York; the offending vehicle was owned and operated by a New Jersey resident, and insured under a policy issued in New Jersey. The tortfeasor's insurer disclaimed coverage based upon a livery exclusion in the policy. At a framed issue hearing to determine the validity of the disclaimer, the court performed a conflicts-of-law analysis and determined as follows:

> [A]lthough the underlying action arose from a motor vehicle accident in New York, a tort action, the court is now faced with an issue that arises out of the language of a contract and an exclusionary clause within that contract. The contract is a New Jersey automobile insurance policy between an insured, a New Jersey resident, and the insurer, a company licensed to do business in New Jersey. After applying a "grouping of contacts" analysis, it is plain that this dispute overwhelmingly centers on New Jersey[,] . . . the place where the contract was negotiated and made. The parties to the contract are both New Jersey entities. The subject matter of the contract, a vehicle, does not have a fixed location, but is registered in New Jersey. Thus, most of the factors plainly point to New Jersey law.

Then, finding that there is no conflict between New York and New Jersey law regarding the definition of a "taxi" or "for hire" vehicle, the court held that under either state's law, the tortfeasor's vehicle was "used indiscriminately in conveying the public, without limitation to certain persons or particular occasions or without being governed by special terms," and was, therefore, a livery vehicle within the meaning of the exclusionary clause. The court thus upheld the disclaimer.

Statute of Limitations

The court in *Jenkins v. State Farm Ins. Co.* held that "claims made under the uninsured motorist endorsement of automobile insurance policies are governed by the six-year statute of limitations applicable to contract actions. The claim accrues either when the accident occurred or when the allegedly offending vehicle thereafter becomes uninsured."[6]

Moreover, the court noted, in cases where more than six years has elapsed between the date of the accident and the assertion of a claim for UM benefits, the claimant has the burden of showing that an accrual date later than the date of the accident is applicable.

Uninsured Motorist Issues

Provision of UM Coverage – Self-Insureds

In *State Farm Mutual Automobile Ins. Co. v. Olsen*,[7] the court held that Suffolk County Fleet Services, which exist-

ed as part of the self-insured municipality, was required to provide mandatory UM coverage to employees who operated municipal motor vehicles. Moreover, the court held that a statutory arbitration proceeding to resolve a coverage dispute concerning an uninsured motorist claim is *not* a claim founded upon a tort; consequently, there is no requirement that a notice of claim be served as a condition precedent to the commencement of the proceeding under General Municipal Law § 50-e(1)(a).

The insurer had adequately explained the delay, which was caused by its diligent efforts to obtain the information and independent legal advice necessary to determine whether a disclaimer would be proper.

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

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. A failure by the insurer to give notice of disclaimer as soon as is reasonably possible precludes effective disclaimer or denial.[8]

In *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*,[9] the court noted that the disclaimer statute, Ins. Law § 3420(d), requires the liability insurer to give prompt written notice of disclaimer of liability or denial of coverage not only to the insured but also to "any party that has a claim against the insured arising under the policy." As explained by the court:

> The purpose of section 3420(d) is "to protect the insured, the injured person, and any other interested party who has a real stake in the outcome, from being prejudiced by a belated denial of coverage."
>
> . . .
>
> It is clear that the notice requirement of section 3420(d) is designed to protect the insured and the injured person or other claimant against the risk, posed by a delay in learning the insurer's position, of expending energy and to recover damages from an insurer or forgoing alternative methods for recovering damages until it is too late to pursue them successfully.[10]

The court noted in *Republic Franklin Ins. Co. v. Pistilli*[11] that "the obligation to provide prompt notice under Insurance Law § 3420(d) is triggered when the insurer has a reasonable basis upon which to disclaim coverage, and cannot be delayed indefinitely until all issues of fact regarding the insurer's coverage obligations have been resolved." The court went on to advise that "[w]hen in doubt, an insurer should issue a prompt disclaimer and then seek a declaratory judgment concerning its duty to defend or indemnify, rather than seeking such a judgment in lieu of issuing a disclaimer."[12]

In *Bovis*, the court observed that "[i]n most cases, the timeliness of an insurer's notice of disclaimer 'will be a question of fact, dependent on all of the circumstances of a case that make it reasonable, or unreasonable, for an insurer to investigate coverage.' However, 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, and where the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as a matter of law."[13]

The *Bovis* court held that a commercial general liability insurer's delay of at least 36 days in issuing a written notice of disclaimer was not reasonable, and was not excused by the fact that its assigned claims specialist unexpectedly resigned during the applicable period; the insurer's staffing problem was not an external factor beyond its control.

In *Pennsylvania Lumbermans Mutual Ins. Co. v. D & Sons Construction Corp.*,[14] the court held that where the insurer, instead of promptly disclaiming, chose to consult with counsel, and then commence an action 47 days after receipt of late notice, the disclaimer was untimely as a matter of law.

The court held in *American Express Property Casualty Co. v. Vinci*[15] that a delay of 48 days from the time the insurer was aware of the facts necessary to support its disclaimer for material misrepresentation was unreasonable as a matter of law.[16]

On the other hand, in *McGinley v. Odyssey Re (London)*,[17] the court held that a delay of 39 days in disclaiming based upon an exclusion from coverage after receipt of notice of the claim was not unreasonable. The insurer had adequately explained the delay, which was caused by its diligent efforts to obtain the information and independent legal advice necessary to determine whether a disclaimer would be proper.

In *Halloway v. State Farm Ins. Cos.*,[18] the plaintiff was a passenger in a vehicle insured under a policy that excluded coverage for liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee. The initial notice to the insurer, on December 7, 2001, included a copy of the police report, which stated, *inter alia*, that immediately after the acci-

dent the owner of the vehicle/insured informed the plaintiff and another alleged passenger "that there would be 'no charge' for [the] fare." The police report and the vehicle owner, however, simultaneously indicated that there were no passengers in the vehicle.

This prompted the insurer to conduct an investigation, and upon its completion the insurer disclaimed coverage based upon the livery vehicle exclusion in its policy. The court concluded that in view of the contradictory factual allegations, it was reasonable for the insurer to investigate to determine if the exclusion applied. Moreover, the disclaimer, issued contemporaneously with the completion of the insurer's investigation, was timely as a matter of law.

In *St. Charles Hospital & Rehabilitation Center v. Royal Globe Ins. Co.*,[19] the court held that a delay in disclaiming of "just over one month" after the insurer first received a late notice of claim was not unreasonable.

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 Ins. Law § 3420(d), a distinction must be made between (1) policies that contain no provisions extending coverage to the subject loss, and (2) policies that do contain provisions extending coverage to the subject loss, and which 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 Ins. Law § 3420(d) may be dispensed with.

As the court stated in *City of New York v. St. Paul Fire & Marine Ins. Co.*:

> A disclaimer is unnecessary when a claim falls outside the scope of a policy's coverage portion since "requiring payment of a claim upon a failure to timely disclaim would create coverage where it never existed." Conversely, a timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion.[20]

In *Allstate Ins. Co. v. Massre*,[21] the court held that Ins. Law § 3420(d) did not require the insurer to issue a disclaimer of coverage where the collision that caused the claimant's injuries was intentional, and not the result of an accident. Such a denial is based upon a lack of coverage and not a policy exclusion. Similarly, in *GEICO v. Spence*,[22] the court held that since the insurer was endeavoring to adduce evidence of fraud – *i.e.*, a staged accident – which may have established that the occurrence or collision was not covered, there was no need for it to disclaim in a timely fashion. And, in *Eagle Ins. Co. v. Davis*,[23] the court observed that "[a] collision caused in the furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance" – and, therefore, no timely disclaimer was required.[24]

Lack of cooperation by the insured was at issue in *Liberty Mutual Ins. Co. v. Roland-Staine*.[25]

> When an insured deliberately fails to cooperate with its insurer in the investigation of a claim as required by the policy, the insurer may disclaim coverage. However, to prevent innocent injured parties from suffering the consequences of a lack of coverage based upon "the imprudence of the insured, over whom he or she has no control," courts strictly scrutinize the facts and will allow a disclaimer due to lack of cooperation only where, inter alia, the insured's actions are deliberate. . . . Mere inaction by the insured . . . is an insufficient basis for disclaimer.

When an insurer obtained two addresses for the insured from Department of Motor Vehicles (DMV) records and another database, its investigator went to these locations and attempted to find the insured. He was not at either place, and there was no evidence that the investigator spoke to anyone at the scene to verify the insured's address. There also was no indication that the insured received any of the letters mailed to him, or left for him, at the two addresses. Under these circumstances, the court held that the evidence was insufficient to support an inference that the insured's failure to cooperate was deliberate and willful.[26]

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order to cancel effectively 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. These can differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan and/or paid for under a premium financing contract.

In *Chubb Group of Ins. Cos. v. Williams*,[27] the court noted that pursuant to Vehicle & Traffic Law § 313 (VTL), a canceling insurer is required to file the notice of cancellation with the DMV. In *Williams*, the cancellation was not filed because, during the time period involved, the DMV had imposed a "blackout" period for electronic transmissions, including cancellations.[28] However, even after the old electronic system was converted to a new system and the "blackout" period ended (in September 2000), the insurer never notified the DMV of the cancellation during the nearly two-year period preceding the accident at issue. Thus, the court held, the termination of coverage was not effective as to the injured claimant. In another case involving electronic filings, *Progressive Northern Ins. Co. v. White*,[29] the court held that if an insurer failed to complete the initial load of its New York State automobile policyholders into the new system between June 12, 2000 and September 12, 2000, it was not relieved "of any ongoing reporting requirement."[30] The court also noted that a cancellation will be ineffective against third parties unless it is filed with the DMV within 30 days of the cancellation.

The court in *Colonial Penn Ins. Co. v. New York Central Mutual Ins. Co.*[31] stated that "where replacement insurance is actually obtained so as to continue coverage from the expiration date of the previous policy, the superseded insurer is relieved of the risk despite failure to notify the commissioner of termination of coverage."

American Transit Ins. Co. v. Hinds[32] concerns the distinction between cancellations under VTL § 313 and those governed by VTL § 370. Although the cancellation at issue would have been invalid under § 313 because the Notice of Termination was filed with the DMV prior to the termination date, § 313 did not apply because the policy involved covered a vehicle for hire.

VTL § 321 exempts policies covering such vehicles from the notification provisions under § 313; cancellations of policies for vehicles for hire are governed by VTL § 370. According to § 370, the insurer is required to file a Certificate of Cancellation with the Commissioner of Motor Vehicles; the DMV then sends the notification to the owner. Here, the plaintiff had complied with § 370 by sending the Commissioner notice that it intended to cancel the policy. Since the policy was effectively canceled when the subject accident took place, the plaintiff insurer had no liability for any actions brought as a result of that accident.

Stolen Vehicles/Non-Permissive Use

Automobile insurance policies generally exclude coverage for damages caused by drivers of stolen vehicles and/or drivers operating without the permission or consent of the owner. In such situations, the vehicle at issue is considered "uninsured" and the injured claimant will be entitled to make an uninsured motorist claim.[33]

In *State Farm Mutual Automobile Ins. Co. v. Fernandez*, the court reiterated that "Vehicle & Traffic Law § 388(1) creates a presumption that a driver uses a vehicle with the owner's express or implied permission, which may be rebutted only by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent."[34] In that case, the court held that the affidavit of the vehicle owner was insufficient to rebut the presumption of permissive use because she admitted therein that she left the car keys in the vehicle at the time the vehicle was stolen – thus raising a question as to whether VTL § 1210(a), the "keys in the ignition statute," was implicated.

The defendants in *Tuchten v. Palazzola*[35] sought summary judgment dismissing the complaint against them on the ground that their vehicle was stolen at the time of the accident. In support of their motion, the defendants submitted the affidavit of the vehicle owner, and a report of a lost, stolen or confiscated motor vehicle, stating that at the time of the accident his vehicle was stolen and operated without his permission.

In denying defendants' motion for summary judgment, the court stated that "this document does not conclusively dispose of this action, particularly in view of the fact that the report was filed approximately five hours after the occurrence of the accident, and the keys to the vehicle that defendant alleges to have misplaced, were found in the ignition of that vehicle at the site of the accident." In addition, there were allegations that the description of the person seen running away from the vehicle matched that of the defendant. 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." 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.

In *State Farm Mutual Automobile Ins. Co. v. Roach*,[36] the court held that where the insured's son, who had permission to drive the insured vehicle, gave the keys to a friend for the limited purpose of allowing him to sit in the car until his "ride" picked him up from school, the presumption of permissive use was rebutted. As stated by the court, "The transfer of possession of the keys to a vehicle does not alone establish permission to drive the vehicle absent the grant of express or implied permission to the holder of the keys to drive the vehicle."

The court in *Correa v. City of New York*,[37] held that the presumption of permissive use was not rebutted as a matter of law by the owner's and the driver's sworn statements denying permission to use the vehicle, as the plaintiffs submitted evidence in the form of traffic tickets issued by the police to the driver (the owner's son) on three occasions in the four months prior to the subject accident(s) – thus raising a triable question of fact regarding implied permissive use.

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.[38] Where a factual issue exists as to whether there was the requisite "physical contact," a framed issue hearing is required.[39]

Another requirement for a valid hit-and-run claim is the filing of a statement under oath concerning the details of the claim. In *New York Central Mutual Fire Ins. Co. v. Aguirre*,[40] the court held that the insured/claimant's failure to file a sworn statement with the SUM carrier after an alleged hit-and-run accident vitiated coverage. Moreover, the fact that the insurer received some notice of the accident did not negate the breach of this policy requirement.

Vicarious Liability

NOTE: By amendment to subchapter 1 of chapter 301 of title 49, United States Code, signed by President George W. Bush and effective August 10, 2005, states were prohibited from holding leasing or rental companies vicariously liable for accidents involving their leased or rented vehicles. The effect of this federal provision is to nullify N.Y. Vehicle & Traffic Law § 388 as it applies to leasing companies or rental agencies. Specifically, the new law provides that "[a]n owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if – (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner."

In *Allstate Ins. Co. v. Aziz*,[41] the court reiterated that a condition precedent to UM coverage is the filing of a sworn statement by the claimant, within 90 days of the occurrence, that he or she has a cause of action arising out of an accident with a hit-and-run vehicle. Where the UM endorsement contains ambiguous notice of claim provisions, a failure to file the sworn statement does not necessarily vitiate coverage when the insurer otherwise receives adequate notice of the hit-and-run claim within the 90-day period. However, the claimant in this case was not saved by the notice of claim letter notifying the petitioner of a claim for UM/SUM benefits, or the "Notice of Intention to Make Claim" forms and applications for no-fault benefits submitted to the petitioner, since none of those documents indicated that an unidentified/hit-and-run vehicle was involved in the accident.

The claimant in *Hereford Ins. Co. v. Frota*[42] was a passenger in the petitioner's insured's cab, and was injured in a hit-and-run accident. The cab driver never called the police and did not stop the other vehicle from leaving the scene; nor did he ask the claimant whether he needed medical attention. A few blocks from the scene, the claimant requested the cab driver to pull over and let him out. After visiting the hospital, and within 24 hours after the accident, the claimant went to the local police precinct and reported the incident. Instead of making out a police report, he was handed a blank accident report and told to return after he had completed the forms, which he did at some subsequent date.

The petitioner sought to stay arbitration on the ground that the claimant failed to provide it with a sworn statement within 90 days of the hit-and-run accident, or as soon as practicable. The court rejected that contention and excused the claimant's failure to file the sworn statement because the claimant was neither the owner nor the driver of the vehicle, nor the insured under the policy and, therefore, did not know of the existence of the 90-day provision.

Finally, it should be noted that in *Allstate Ins. Co. v. Albino*,[43] the court held that the failure to seek a stay of arbitration based on the absence of physical contact results in a waiver of that claim.

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,[44] 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 Public Motor Vehicle Liability Security Fund ("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 Ins. Law § 3420(f)(1), thereby triggering the claimant's right to UM coverage from his own insurer. 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 directed a hearing to determine whether the denial of recovery from the PMV Fund constituted a denial of coverage; the Superintendent was to be joined as a party.

Actions Against the Motor Vehicle Accident Indemnification Corporation (MVAIC)

In *Lesley v. MVAIC*,[45] the court noted that Ins. Law § 5218(b) provides that the court may summarily make an order permitting an action against MVAIC when, after a hearing, it is satisfied that: (1) the applicant has complied with the requirements of Ins. Law § 5218; (2) the applicant is a "qualified person"; (3) the injured or deceased person was not at the time of the accident operating an uninsured motor vehicle in violation of an order of suspension or revocation; (4) the applicant has a cause of action against the operator or owner of the motor vehicle; and (5) all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator, but the identity of the motor vehicle, the owner or the operator of the motor vehicle cannot be established.

Underinsured Motorist Issues

Consent to Settle

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

For example, in *Prudential Property & Casualty Ins. Co. v. Ambeau*,[46] the court held that the petitioner was entitled to a stay of arbitration since it established that the respondents violated the terms of their policy by failing to obtain the insurer's written consent to settle with the tortfeasor prior to asserting claim for SUM/underinsured motorist benefits.

Offset Provision

In *State Farm Mutual Automobile Ins. Co. v. Bigler*,[47] the court noted that where the declarations page of the policy contains a single, combined limit of uninsured/underinsured motorists coverage, the offset provision (for the amount received from the offending tortfeasor[s]) is valid and enforceable. Moreover, where the amount of the offset is equal to the limit of SUM coverage available, the SUM arbitration should be permanently stayed.

Priority of Coverage – Non-Stacking

In *MetLife Auto & Home v. Leonorovitz*,[48] the claimants/insureds were involved in an accident with a hit-and-run vehicle. A SUM claim was made to the insurer for the vehicle occupied by the claimants/insureds, and the full $300,000 limit of that $100,000/$300,000 policy was paid for SUM benefits. Claimants/insureds then sought additional SUM benefits under a $100,000/$300,000 policy issued to one of the claimants/insureds covering a vehicle that was not involved in the accident.

The SUM endorsement in the policy provided that "[i]f an insured is entitled to uninsured motorist coverage or supplementary uninsured/underinsured motorists coverage under more than one policy, the maximum amount such insured may recover shall not exceed the highest limit of such coverage for any one vehicle under any one policy." The court rejected the attempt to "stack" coverage, saying "the fact that the [claimants/insureds] are claiming SUM benefits from two different policies issued by two different carriers does not mean that the SUM coverage from each policy may be 'stacked' to provide additional SUM coverage."

1. 17 A.D.3d 1037, 794 N.Y.S.2d 194 (4th Dep't 2005).
2. 9 Misc. 3d 1103(A), 806 N.Y.S.2d 449 (Sup. Ct., Richmond Co. 2005) (citations omitted).
3. 7 Misc. 3d 1018(A), 801 N.Y.S.2d 229 (Sup. Ct., N.Y. Co. 2005).

4. 10 Misc. 3d 127(A), ___ N.Y.S.2d ___ (App. Term, 2d & 11 Jud. Dists. 2005).

5. 7 Misc. 3d 1029(A), 801 N.Y.S.2d 242 (Sup. Ct., Kings Co. 2005).

6. 21 A.D.3d 529, 530, 801 N.Y.S.2d 42 (2d Dep't 2005) (citations omitted).

7. 22 A.D.3d 673, 802 N.Y.S.2d 725 (2d Dep't 2005).

8. *See Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, ___ A.D.3d ___, 806 N.Y.S.2d 53 (1st Dep't 2005); *Halloway v. State Farm Ins. Cos.*, 23 A.D.3d 617, 805 N.Y.S.2d 107 (2d Dep't 2005); *Gregorio v. JM Dennis Constr. Co., Corp.*, 21 A.D.3d 1056, 803 N.Y.S.2d 678 (2d Dep't 2005); *City of New York v. St. Paul Fire & Marine Ins. Co.*, 21 A.D.3d 982, 801 N.Y.S.2d 389 (2d Dep't 2005); *Brighton v. Cent. Sch. Dist. v. Am. Cas. Co. of Reading, Pa.*, 19 A.D.3d 528, 800 N.Y.S.2d 415 (2d Dep't 2005); *Am. Express Prop. Cas. Co. v. Vinci*, 18 A.D.3d 655, 795 N.Y.S.2d 329 (2d Dep't 2005); *Danna Constr. Corp. v. Utica First Ins. Co.*, 17 A.D.2d 622, 794 N.Y.S.2d 72 (2d Dep't 2005).

9. 27 A.D.3d 84, 806 N.Y.S.2d 53 (1st Dep't 2005).

10. *Id.* at 90–92. The court then went on to hold that "another insurer does not fall within the specified categories," "section 3420(d) was never intended to apply to another insurer," and "section 3420(d) is not applicable to a request for contribution between insurers." *See also AIU Ins. Co. v. Investors Ins. Co.*, 17 A.D.3d 259, 260, 793 N.Y.S.2d 412 (1st Dep't 2005).

11. 16 A.D.3d 477, 791 N.Y.S.2d 639 (2d Dep't 2005).

12. *See also Vinci*, 18 A.D.3d 655; Peter L. Janoff, *Attorney for Carrier That Disclaimed Coverage: Corollary Caution*, N.Y.L.J., Dec. 28, 2004, p. 4, col. 4.

13. *Bovis*, 27 A.D.3d at 88 (citing *First Fin. Ins. Co. v. Jetco Constr. Corp.*, 1 N.Y.3d 64, 69, 70, 769 N.Y.S.2d 459 (2003).

14. 18 A.D.3d 843, 796 A.D.3d 122 (2d Dep't 2005).

15. 18 A.D.3d 655, 795 N.Y.S.2d 329 (2d Dep't 2005).

16. *See also Danna Constr. Corp. v. Utica First Ins. Co.*, 17 A.D.3d 622, 794 N.Y.S.2d 72 (2d Dep't 2005) (78-day delay unreasonable); *Banuchis v. GEICO*, 14 A.D.3d 581, 789 N.Y.S.2d 221 (2d Dep't 2005) (62-day delay in disclaiming based upon late notice unreasonable as a matter of law); *City of New York v. St. Paul Fire & Marine Ins. Co.*, 21 A.D.3d 982, 801 N.Y.S.2d 389 (2d Dep't 2005) (delay of over four months unreasonable as a matter of law); *Brighton Central Sch. Dist. v. Am. Cas. Co. of Reading, Pa.*, 19 A.D.3d 1528, 800 N.Y.S.2d 415 (2d Dep't 2005) (delay of 5 months unreasonable as a matter of law).

17. 15 A.D.3d 218, 790 N.Y.S.2d 13 (1st Dep't 2005).

18. 23 A.D.3d 617, 805 N.Y.S.2d 107 (2d Dep't 2005).

19. 18 A.D.3d 735, 795 N.Y.S.2d 343 (2d Dep't 2005).

20. 21 A.D.3d 982, 801 N.Y.S.2d 389 (2d Dep't 2005).

21. 14 A.D.3d 610, 789 N.Y.S.2d 206 (2d Dep't 2005).

22. 23 A.D.3d 466, 805 N.Y.S.2d 625 (2d Dep't 2005).

23. 22 A.D.3d 846, 803 N.Y.S.2d 679 (2d Dep't 2005).

24. *See also Allstate Ins. Co. v. Guillaume*, 23 A.D.3d 379, 804 N.Y.S.2d 761 (2d Dep't 2005); *Shell v. Fireman's Fund Ins. Co.*, 17 A.D.3d 444, 793 N.Y.S.2d 110 (2d Dep't 2005); *Vacca v. State Farm Ins. Co.*, 15 A.D.3d 473, 790 N.Y.S.2d 177 (2d Dep't 2005).

25. 21 A.D.3d 771, 802 N.Y.S.2d 6 (1st Dep't 2005).

26. *Id.* at 772–73. *See also Eagle Ins. Co. v. Sanchez*, 23 A.D.3d 655, 805 N.Y.S.2d 103 (2d Dep't 2005); *Eveready Ins. Co. v. Mack*, 15 A.D.3d 400, 790 N.Y.S.2d 49 (3d Dep't 2005) (defendant failed to demonstrate that it met the requirements set forth in *Thrasher* to disclaim coverage on the ground of lack of cooperation). *Cf. Allstate Ins. Co. v. Guillaume*, 23 A.D.3d 379, 804 N.Y.S.2d 761 (2d Dep't 2005) (non-cooperation defense upheld); *Utica First Ins. Co. v. Arken, Inc.*, 18 A.D.3d 644, 795 N.Y.S.2d 640 (2d Dep't 2005) (non-cooperation defense upheld); *Allstate Ins. Co. v. United Int'l Ins. Co.*, 16 A.D.3d 605, 792 N.Y.S.2d 549 (2d Dep't 2005) (non-cooperation disclaimer upheld – no need to show prejudice as result of non-cooperation); *Allstate Ins. Co. v. Ganesh*, N.O.R., N.Y.L.J., May 13, 2005, p. 20, col. 1 (Sup. Ct., Bronx Co. 2005). *See* Norman H. Dachs & Jonathan A. Dachs, *Thrasher Threshold Thriving*, N.Y.L.J., March 15, 2005, p. 3, col. 1. *See also Republic Franklin Ins. Co. v. Pistilli*, 16 A.D.3d 477, 791 N.Y.S.2d 639 (2d Dep't 2005).

27. 14 A.D.3d 561, 789 N.Y.S.2d 66 (2d Dep't 2005).

28. *See* 15 N.Y.C.R.R. § 34.7(a).

29. 23 A.D.3d 477, 808 N.Y.S.2d 108 (2d Dep't 2005).

30. *See* 15 N.Y.C.R.R. § 34.13(d).

31. 19 A.D.3d 532, 798 N.Y.S.2d 74 (2d Dep't 2005).

32. 14 A.D.3d 378, 788 N.Y.S.2d 346 (1st Dep't 2005).

33. *See State Farm Mut. Auto. Ins. Co. v. Roach*, 6 Misc. 3d 1036(A), 800 N.Y.S.2d 357 (Sup. Ct., Suffolk Co. 2005).

34. 23 A.D.3d 480, 481, 805 N.Y.S.2d 599 (2d Dep't 2005) (citations omitted).

35. 10 Misc. 3d 732, ___ N.Y.S.2d ___ (Sup. Ct., Queens Co. 2005).

36. 6 Misc. 3d 1036(A), 800 N.Y.S.2d 357 (Sup. Ct., Suffolk Co. 2005).

37. 18 A.D.3d 418, 794 N.Y.S.2d 408 (2d Dep't 2005).

38. *See Newark Ins. Co. v. Caruso*, 14 A.D.3d 613, 787 N.Y.S.2d 892 (2d Dep't 2005).

39. *Allstate Ins. Co. v. Hayes*, 17 A.D.3d 669, 794 N.Y.S.2d 85 (2d Dep't 2003). *Cf. Allstate Ins. Co. v. Albino*, 16 A.D.3d 682, 792 N.Y.S.2d 518 (2d Dep't 2005).

40. 20 A.D.3d 538, 797 N.Y.S.2d 916 (2d Dep't 2005).

41. 17 A.D.3d 460, 793 N.Y.S.2d 138 (2d Dep't 2005).

42. 9 Misc. 3d 1124(A), ___ N.Y.S.2d ___ (Sup. Ct., N.Y. Co. 2005).

43. 16 A.D.3d 682, 792 N.Y.S.2d 518 (2d Dep't 2005).

44. 16 A.D.3d 498, 791 N.Y.S.2d 605 (2d Dep't 2005). *NOTE:* This decision was rendered after granting the Superintendent's motion to reargue or clarify the court's prior Order, reported at 4 A.D.3d 355, 773 N.Y.S.2d 68 (2d Dep't 2004).

45. 8 Misc. 3d 1030(A), 806 N.Y.S.2d 445 (Sup. Ct., Kings Co. 2005).

46. 19 A.D.3d 999, 796 N.Y.S.2d 294 (2d Dep't 2005).

47. 18 A.D.3d 878, 796 N.Y.S.2d 368 (2d Dep't 2005).

48. 24 A.D.3d. 675, 808 N.Y.S.2d 310 (2d Dep't 2005).