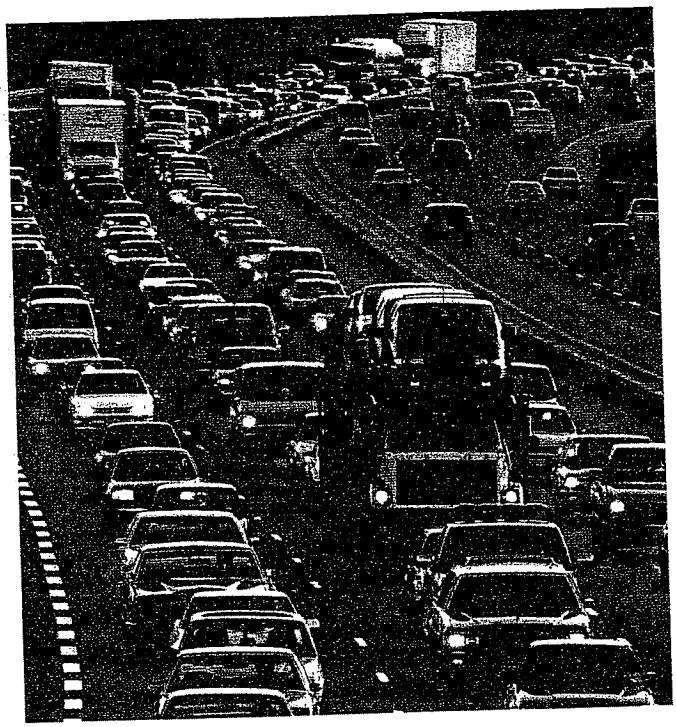

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Uninsured Motorist/ Supplementary Uninsured and Underinsured Motorist Update – Part I

A Review of Cases Decided in 2006

By Jonathan A. Dachs

As in the past, 2006 was an active and notable year in this constantly evolving and extremely complex area of insurance law. Indeed, so many interesting and significant decisions were handed down in 2006 that it is necessary to present this summary in two parts. This installment addresses general issues pertinent to uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law and practice. In Part II, which will appear in a following issue of the *Journal*, I will review several additional general issues, as well as certain issues more specific to the different types of coverage.

Insured Persons – "Residents"

The definition of an "insured" under the UM and SUM endorsements 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. The concept of residence has two components – physical presence and intent to remain.

In *Rohlin v. Nationwide Mutual Ins. Co.*,[1] the court noted that "[t]he term 'household,' as used in insurance policies, is ambiguous. Thus, 'its interpretation requires an inquiry into the intent of the parties,' and the term should therefore be interpreted in a manner favoring coverage, as

should any ambiguous language in an insurance policy." Moreover, the court observed that the issue of whether an individual is a member of the insured's household is often "best resolved by the trier of fact, 'taking into account the reasonable expectations of the average person purchasing [automobile liability] insurance, as well as the particular circumstances of [this] case.'"

In *State Farm Mutual Automobile Ins. Co. v. Jackson*,[2] the court observed that "'[a] resident is one who lives

The claimant must be an "occupant" of a particular vehicle to qualify for coverage under the UM or SUM coverage of that vehicle's policy.

in the household with a certain degree of permanency and intention to remain.'" In that case, the evidence established that the respondent, the father of six children, resided in Dunkirk, New York, with his girlfriend, who was the children's mother. The respondent was unemployed and received disability benefits that were sent to the girlfriend's address in Dunkirk. The accident occurred in Dunkirk when the respondent was a passenger in an uninsured car driven by a Dunkirk resident. After his hospitalization, the respondent was released to the care of his girlfriend in Dunkirk and all of his follow-up care took place in Dunkirk. Under these circumstances, the court upheld the jury's verdict that the respondent was not a member of his mother's household, but, rather, a member of his girlfriend's household (only).

Occupants

The claimant must be an "occupant" of a particular vehicle to qualify for coverage under the UM or SUM coverage of 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."

In *Travelers Property Casualty Co. v. Landau*,[3] the evidence established that the claimant/insured exited from his parked vehicle intending to help his friend make a delivery of food he was unloading from a minivan parked across the street. When the friend declined his offer of help, he turned and walked back to his vehicle. As he was preparing to re-enter his vehicle, he was struck from behind by another vehicle. Under these facts and circumstances, the court held that the finding that the claimant was not "occupying" his vehicle at the time of the accident was supported by a fair interpretation of the evidence. The trial court, which heard the witnesses and was in the best position to evaluate their credibility, resolved the issues of fact as to whether the claimant had departed from his vehicle incident only to some temporary interruption in the vehicle's journey. Thus, the trial court adequately determined whether his original occupancy could be deemed continuing in nature or, if not, whether at the moment he was struck, he was actually in the process of "entering into" his vehicle or merely intending to do so.

"Motor Vehicles"

The UM/SUM endorsements refer to the payment of damages for bodily injury caused by uninsured "motor vehicles," but do not specifically define the types of vehicles included within the coverage. In *Liberty Mutual Fire Ins. Co. v. Rondina*,[4] the court held that because all-terrain vehicles (ATVs) are specifically excluded from the definition of motor vehicles set forth in Vehicle & Traffic Law § 125, uninsured motorist coverage did not encompass a claim for injuries sustained by a passenger in an uninsured ATV.

"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 *Liberty Mutual Ins. Co. v. Goddard*,[5] the court reiterated the well-settled rule that "an intentional and staged collision caused in furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance. In *Eagle Ins. Co. v. Gueye*,[6] the court clarified that if the liability insurer is entitled to disclaim bodily injury coverage to the claimant on the ground that the injuries were not the result of an accident, "there can be no recovery for the same injuries under the uninsured motorist endorsement."[7]

Duty to Provide Timely Notice of Claim

The UM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy.[8]

As reported on last year, the Court of Appeals definitively spoke to the issue of the "no-prejudice" rule in two cases decided on the same day in April 2005. In *Argo Corp. v. Greater New York Mutual Ins. Co.*,[9] the Court held that the general "no-prejudice" rule applicable to liability insurance policies was not abrogated by *Brandon v. Nationwide Mutual Ins. Co.*[10] Three years earlier, *Brandon* had held that the carrier must show prejudice before disclaiming based on late notice of a lawsuit in the SUM

context. In *Argo*, the Court stated 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,"[11] the Court held that a primary (liability) insurer need not demonstrate prejudice to disclaim coverage based upon a late notice of lawsuit.

However, in *Rekemeyer v. State Farm Mutual Auto. Ins. Co.*,[12] the Court 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." The idea behind strict compliance with the notice provision in an insurance contract was to protect the carrier against fraud or collusion. In *Rekemeyer*, where the plaintiff gave timely notice of the accident and made a claim for no-fault benefits soon thereafter, the Court found that notice was sufficient to promote the valid policy objective of curbing fraud or collusion. Under these circumstances, "application of a rule that contravenes general contract principles is not justified." The Court further concluded that the insurer should bear the burden of establishing prejudice "'because it has the relevant information about its own claims-handling procedures and because the alternative approach would saddle the policyholder with the task of proving a negative.'"[13]

In *Nationwide Mutual Ins. Co. v. Mackey*,[14] the court applied *Rekemeyer* to a case involving a failure by the insured to complete and return a "Proof of Claim" form supplied by the insurer. As stated by the court,

> The rationale in *Rekemeyer* applies here, as respondent's attorney supplied prompt written notice of the accident, made a claim for no-fault benefits and indicated that SUM coverage was implicated. Written notice as to a SUM claim was repeated at least twice over the ensuing six months. The respondents forwarded to petitioner the police accident report of the accident as well as the pertinent medical records. The petitioner does not deny receiving any of these various letters and documents from the respondents. The petitioner failed to show any prejudice and, under the circumstances of this case, should not be permitted to disclaim SUM coverage.[15]

In *State Farm Mutual Automobile Ins. Co. v. Rinaldi*,[16] the court reiterated the *Rekemeyer* rule and held that, although no prejudice had been demonstrated by the insurer and because *Rekemeyer* was decided after the Supreme Court's decision, the matter should be remanded "'for the carrier to have an opportunity to demonstrate prejudice,' if any."[17]

In *New York Central Mutual Fire Ins. Co. v. Reinhardt*,[18] the court held that even though the insured/claimant did not comply with the SUM endorsement requirement that she "immediately" forward to the SUM carrier the summons and complaint in her lawsuit against the tortfeasor (a breach of the "Notice of Legal Action" condition), the carrier was required to show prejudice before relying on that breach pursuant to *Brandon v. Nationwide Mutual Ins. Co.* In *Reinhardt*, the carrier failed to do so.[19]

The interpretation of the phrase "as soon as practicable" continued to be a hot topic in 2006. In *Morris Park Contracting Corp. v. National Union Fire Ins. Co.*,[20] the court stated that "notice requirements are to be liberally construed in favor of the insured."

In *Steinberg v. Hermitage Ins. Co.*,[21] the court held that a delay of 57 days after the insured became aware of the incident that gave rise to the claim – without any valid excuse or explanation for the delay – was unreasonable as a matter of law. The court rejected the insured's contention that the delay was justified by the insured's "good faith belief" that it was not liable for the claimant's injuries because that claim was belied by evidence which established that upon reasonable investigation the insured should have realized that there was a reasonable possibility of liability. Moreover, while the injured party had an independent right to provide notice to the insurer, the unexplained delay of five months in providing such notice was unreasonable as a matter of law as well.

In *Hartford Ins. Co. of the Midwest v. Gamiel*,[22] the court held that notice of an SUM claim, provided 16 months after the claimant's receipt of notice that the tortfeasor's insurer was insolvent and in liquidation, was not deemed to be "as soon as practicable"; thus, it was untimely as a matter of law.

In *Allstate Ins. Co. v. Marcone*,[23] the court observed that, pursuant to Insurance Law § 3420(a)(3),

> [a] party injured by an insured individual has an independent interest in the protection afforded by the insured's liability coverage. Accordingly, "when the insured has failed to give proper notice, the injured party, by giving notice himself [or herself], can preserve his [or her] rights to proceed directly against the insurer." Notice given by an injured party "is not to be judged by the same standards, in terms of time, as govern notice by the insured, since what is reasonably possible for the insured may not be reasonably practical for the injured person. . . . In each case, the test is one of reasonableness, measured by the diligence exercised by the injured party in light of the prospects afforded to him under the circumstances."[24]

The court further recognized that in most cases, the reasonableness of any delay and the sufficiency of the excuse offered present questions of fact to be resolved at trial.

In *Progressive Northeastern Ins. Co. v. Yeger*,[25] the court held that "Insurance Law § 3420(a)(3) does not impose a *duty* on the injured party to provide notice to an alleged tortfeasor's insurer. Moreover, there is no exclusion from the requirement to provide compulsory uninsured motorists coverage pursuant to Insurance Law § 3420(f)(1) triggered by an injured party's failure to provide timely

notice to a tortfeasor's insurer." In *City of New York v. Welsbach Electric Corp.*,[26] the court held that "an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source." The court further noted that "it has been held that timely notice by the insured can constitute notice by an additional insured where the two parties can be said to be 'united in interest.'"[27]

In *Jeffrey v. Allstate Ins. Co.*,[28] the insured reported the accident to his broker three months after the accident. However, he failed to notify the insurer, which did not receive notice of the claim until 16 months after the accident. The policy in question had a notice provision containing "we," "us" and "our" to describe who should be notified, without clearly identifying the insurer as the party to whom those terms applied. Given this ambiguity, the court held that the policy should be interpreted to allow notice to the broker. The court further held that the insured complied with the provision requiring notice "as soon as practicable."

Discovery

The UM and SUM endorsements contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations and medical reports, and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *State-Wide Ins. Co. v. Womble*,[29] the court held that the insurer failed to make a timely request for the discovery it claimed to require, by making no attempt to obtain such discovery for a period of 17 months between its receipt of notice of the UM claim and its receipt of the Demand for Arbitration. Thus, the insurer waived its right to such discovery and/or a stay of arbitration pending such discovery. In *State Farm Mutual Automobile Ins. Co. v. Goldstein*,[30] on the other hand, the court held that three letters seeking disclosure, which went unanswered, "clearly manifested the petitioner's intent to pursue its policy rights to obtain disclosure and that the petitioner did not fail to pursue the opportunity to obtain disclosure." Thus, the court granted a temporary stay of arbitration pending the completion of pre-arbitration discovery.

The UM and SUM endorsements also provide that "[p]roof of claim shall be made upon forms we furnish unless we fail to furnish such forms within 15 days after receiving notice of claim." In *New York Central Mutual Fire Ins. Co. v. Gonzalez*,[31] the court held that the claimant's failure to complete and return a "Notice of Intention to Make Claim" form provided by their insurer constituted a breach of a condition of coverage under the SUM endorsement, providing a basis for disclaimer or denial of coverage. This idea was reaffirmed by the Court of Appeals in *New York Central Mutual Fire Ins. Co. v. Aguirre*.[32]

Petitions to Stay Arbitration

Under Regulation 35-D and its prescribed SUM endorsement, the insured has the choice of proceeding to court or to arbitration to resolve disputes in cases involving coverage in excess of the statutory minimums of $25,000 per person or $50,000 per accident. Cases involving 25/50 coverage must be submitted to arbitration and cannot be litigated in court.[33]

The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.

In *USAA v. Melendez*,[34] the policy issued by the petitioner in Connecticut provided for arbitration only if both parties agreed. Although the petitioner declined to arbitrate, the policy also contained uninsured motorist coverage sufficient to satisfy the requirements of Insurance Law § 5101. The court held that "[t]here is no requirement under the New York no-fault [and uninsured] statutes and regulations that mandates arbitration where, as here, a policy issued out of state meets the minimum financial security requirements of Insurance Law § 5107."[35]

Filing and Service

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.[36] In *State Farm Mutual Automobile Ins. Co. v. Scudero*,[37] the court rejected the insurer's contention that the 20-day limitation period does not apply when the basis for the stay is *res judicata*.

In *GEICO v. Castillo-Gomez*,[38] the court held that "[t]he validity of the 20-day limitation depends on compliance with the requirements of CPLR 7503(c), and not those of the rules promulgated by the American Arbitration Association." Since the claimant's notice of intent to arbitrate complied with all of the statutory requirements, it was held to be sufficient to commence the 20-day period of limitations. In *Liberty Mutual Ins. Co. v. Cooper*,[39] the

court reiterated the well-established rule that "[t]he 20-day period is to be calculated from the date the carrier receives the demand." 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 on the next business day.[40]

In *Harris v. Niagara Falls Board of Education*,[41] the Court of Appeals held that the plaintiff did not comply with the commencement-by-filing system when he began his personal injury action using an index number from a prior special proceeding. Because the defendants timely objected to the plaintiff's failure to purchase a new index number, the Complaint was dismissed. The Court noted,

> Pursuant to the commencement-by-filing system, a party initiates an action or special proceeding by paying the necessary fee, obtaining an index number and filing the initiatory papers – a summons and complaint or a summons with notice in an action, or a petition in a special proceeding – with the clerk of the court. Under the procedure mandated by the CPLR, "service of process without first paying the filing fee and filing the initiatory papers is a nullity, the action or proceeding never having been properly commenced."[42]

The plaintiff did not comply with the commencement-by-filing system when he began his personal injury action using an index number from a prior special proceeding.

The *Harris* court further noted that in *Fry v. Village of Tarrytown*,[43] it made clear that a defect in compliance with the commencement-by-filing system does not deprive a court of subject matter jurisdiction and is waived absent a timely objection by the responding party. "Strict compliance with CPLR 304 and the filing system is mandatory and the extremely serious result of noncompliance, so long as an objection is timely raised by an appearing party, is outright dismissal of the proceeding."

In *Ballard v. HSBC Bank USA*,[44] the Court of Appeals held that the failure by the petitioner to include a return date in a Notice of Petition does not constitute a non-waivable jurisdictional defect under Executive Law § 298. Since the respondents failed timely to raise a challenge to personal jurisdiction, that claim was waived and the petition was allowed to go forward. In *Kane v. Leistman*,[45] the court held that the mere fact that the RJI number was not purchased when the petition was filed does not constitute a jurisdictional defect mandating dismissal. Thus, the petitioner was not charged with the county clerk's error in accepting the Notice of Petition without an RJI, in violation of 22 N.Y.C.R.R. § 202.6(a).

Jurisdiction

In order successfully to bring another party into the proceeding to stay arbitration, such as the tortfeasor's purported insurer, there must be a jurisdictional basis to do so. In *GEICO v. Basedow*,[46] the alleged offending vehicle was insured by American Independent Insurance Co. After that insurer disclaimed coverage on the ground that its insured's policy had lapsed, the claimant demanded arbitration of a UM claim against his own carrier. In a proceeding to stay arbitration, the SUM carrier sought to join American as an additional respondent. On its motion to dismiss the petition for lack of personal jurisdiction, American argued that it was a Pennsylvania corporation and was not present in New York State for jurisdictional purposes. The court agreed that American "lacked sufficient contact with New York State to be subjected to personal jurisdiction in New York State absent a waiver,"[47] thus granting American's motion. Notably, the court granted the SUM carrier a stay of the hearing for 60 days to afford it an opportunity to commence an action in the state of Pennsylvania, American's domicile, to determine the issue of whether American's coverage was in effect on the date of the accident.[48] In *Eveready Ins. Co. v. Modeste*,[49] the court found that Southern United Fire Ins. Co. was a foreign insurer based in Alabama, was unauthorized to transact business in New York, and had no contacts with New York sufficient for the exercise of long-arm jurisdiction.

Burden of Proof

"A party seeking a stay of arbitration of an uninsured motorist claim has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue that would justify the stay."[50] In *Utica Mutual Ins. Co. v. Colon*,[51] the court held that by producing the police accident report containing the vehicle's insurance code, the petitioner showed, *prima facie*, that the proposed additional respondent insured the offending vehicle, thus shifting the burden to the other insurer to establish a lack of coverage.

In *Travelers Indemnity Co. v. Machado*,[52] the court held that testimony of an underwriter detailing the name address and vehicle searches she conducted to determine if the insurer insured the offending vehicle at the time of the accident, plus computer printouts corroborating the search results, constituted sufficient evidence of a

"exhaustive search" to rebut the *prima facie* showing of coverage. The court added that

> [t]o the extent that the Appellate Division, First Department's decision in *Highlands Ins. Co. v. Baez* (18 A.D.3d 238) can be read to hold that the [insurer] was required to attempt to locate the owner of the offending vehicle by telephone or letter or to compel her appearance at the hearing, we decline to follow it. It is properly the burden of the insurer for the claimant, not the disclaiming insurance company, to produce this type of additional evidence of coverage once sufficient evidence, *i.e.*, the "exhaustive search" is introduced to rebut the *prima facie* case.[53]

Scope of JHO's Authority

If the court determines that a hearing should be held on the issues raised in the Petition to Stay Arbitration, it may refer the matter to a referee or judicial hearing officer (JHO) to try at a framed issue hearing. In *Allcity Ins. Co. v. Rhymes*,[54] the issue raised on the Petition to Stay Arbitration of an uninsured motorist claim was whether the alleged offending vehicle was the one involved in the accident. The court referred the matter to a JHO to "determine all issues preliminary to arbitration, including the issue of the identity and participation of the . . . vehicle in this accident." The order of reference directed the JHO to hear and determine "all issues raised in the papers." Following a hearing, the JHO granted the petition to stay based upon the lack of any evidence that the claimants were involved in the subject accident.

That issue was raised, *sua sponte*, by the JHO at the close of the hearing, over the objection of counsel for the claimants. The court held that the JHO exceeded the scope of the order of reference in making her determination, and thus reversed, and denied the petition. "Even assuming that this was a threshold issue to be determined by the court in the first instance, nowhere in the petition or in any of the other papers submitted to the court did any party or proposed party raise an issue as to whether the [claimants] were involved in the underlying accident. . . . Thus, this issue should not have been reached by the JHO."[55] In *USAA Casualty Ins. Co. v. Hughes*,[56] the trial court determined that the petition was timely and referred the issue of coverage to a JHO to hear and determine. The JHO determined, inter alia, that the petition was untimely. The JHO was without authority to make such a determination.

In *Allstate Ins. Co. v. Joseph*,[57] the reference to the JHO was for a hearing "on the question of coverage." This reference was held to allow consideration of the issue of non-permissive use, which was relevant to the denial of coverage, notwithstanding that it was raised for the first time at the hearing. Thus, the JHO providently exercised her discretion to consider that issue. However, the JHO erroneously denied the insurer's request for a continuance to enable it to investigate the owner's story pertaining to non-permissive use, attempt to locate relevant witnesses and prepare a legal response to that newly raised issue, especially considering that a brief delay in the conclusion of the non-jury hearing would not likely have caused any prejudice.

"Serious Injury" Requirement

In *Raffellini v. State Farm Mutual Automobile Ins. Co.*,[58] the court held that notwithstanding the presence of specific language in the Regulation 35-D SUM endorsement,[59] which is applicable to both uninsured and supplementary uninsured/underinsured motorist coverage, indicating that the coverage does not apply "for non-economic loss, resulting from bodily injury to an insured and arising from an accident in New York State, unless the insured has sustained serious injury as defined in Section 5102(d) of the New York Insurance Law," a claimant is *not* required to demonstrate a "serious injury" in a contract action against his or her insurer to recover benefits under the optional, underinsurance coverage portion of the policy (as opposed to the basic mandatory uninsured motorist coverage). Indeed, the court invalidated that portion of the Regulation and, thus, the endorsement as applied to the underinsurance context, on the basis that it was unauthorized and, indeed, contrary to the enabling statute, Insurance Law § 3420(f)(2).

As noted by the court, whereas Insurance Law § 3420(f)(1), the provision governing the basic, mandatory *un*insured motorist coverage, specifically provides that "[n]o payment for non-economic loss shall be made under such policy provision to a covered person unless such person has incurred a serious injury, as such terms are defined in [§ 5102] of this chapter," no similar provision appears in § 3420(f)(2), dealing with the voluntary supplementary uninsured/*under*insured motorist cover-

Because the respondents could have contested the insurer's assertions in the prior proceeding, the doctrine of *res judicata* was properly applied.

age. In *Scotland v. Allstate Ins. Co.*,[60] the court held that the "serious injury" threshold of Insurance Law §§ 3420(f)(1) and 5102(d) does not apply where the subject policy was issued out of state.

Collateral Estoppel

The doctrines of *res judicata* and collateral estoppel are as applicable to arbitration awards as they are to judicial proceedings. In *New York Central Mutual Fire Ins. Co. v. Reinhardt*,[61] the claimant went to arbitration with the tortfeasor's insurer in lieu of a lawsuit. The arbitration agreement provided that the maximum amount of the award would be $25,000, the limit of the tortfeasor's policy, but it also provided that this limitation would be confidential and would not be revealed to the arbitrator. The arbitrator awarded exactly $25,000 to the claimant. Because it was unclear whether the claimant sought to establish damages of a greater amount, or withheld proof of the full extent of her injuries in light of the arbitrator's limited authority, and also whether, despite the agreement to "keep the arbitrator in the dark" about the agreed-upon maximum recovery, the arbitrator was aware of it and conformed the award to this limitation, the court remitted the matter for a framed issue hearing on whether the claimant was barred by collateral estoppel from seeking additional recovery under the SUM endorsement. Interestingly, the court added that "the arbitration award against the tortfeasor may be entitled to preclusive effect as to the amount of [the claimant's] damages even if the award was not confirmed and reduced to judgment. Moreover, the issue of whether to grant preclusive effect to a particular arbitration award in a later arbitration is for the court, not the arbitrator."[62]

In *Allstate Ins. Co. v. Williams*,[63] the respondents were involved in a motor vehicle accident with a vehicle that fled the scene. Although the operator of the vehicle was unknown, the police report contained the license plate number and identity of the registered owner of the vehicle. The respondents commenced an action for personal injuries against the registered owner. That party alleged, in defense, that his license plates had been removed from his vehicle and placed on another vehicle without his permission. The respondents thereafter filed a demand for uninsured motorist benefits and the SUM carrier moved to stay arbitration on the ground that the alleged offending vehicle was insured. The alleged owner and his insurer were added as additional respondents. The Petition to Stay Arbitration was subsequently granted on default. The respondents did not appeal that order, or seek a severance or any other relief. Instead, they continued to pursue their action against the driver, which ultimately resulted in dismissal after the owner produced proof that his license plates had been stolen. Thereafter, the respondents filed a second demand for arbitration and the carrier brought a second proceeding to stay arbitration, which was granted on the grounds of *res judicata*.

As explained by the court,

> The policy against relitigation of adjudicated disputes is strong enough to bar a second action or proceeding even when further investigation indicates that the prior determination was erroneously made, whether due to the parties' oversight or court error. Under New York's transactional approach to *res judicata*, once a claim is brought to final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or even if seeking a different remedy. The doctrine is applicable to an Order or Judgment entered upon default that has not been vacated, as well as to issues that were or could have been raised in the prior proceeding.[64]

Here, because the respondents could have contested the insurer's assertions in the prior proceeding, the doctrine of *res judicata* was properly applied. Having been aware of the owner's stolen license plate defense prior to their filing of the initial demand for arbitration, after the court stayed the arbitration on default of the other insurer, they could have sought a severance and requested a hearing on the stolen license plate issue. Instead, they took no further action in that proceeding and did not seek appellate review.

In *Culpepper v. Allstate Ins. Co.*,[65] prior to the trial of the plaintiff's action against the tortfeasor, the tortfeasor conceded liability in exchange for the plaintiff's agreement not to seek recovery against him personally in excess of his coverage limits of $25,000. The plaintiff also had SUM coverage of $100,000. The same carrier was the tortfeasor's bodily injury liability insurer and the plaintiff's SUM insurer. In exchange for the concession of liability, that carrier also agreed not to seek recovery against the tortfeasor for the amounts it would pay the plaintiff under the SUM coverage.

At the trial of the underlying action, at which the tortfeasor was represented by counsel supplied by the carrier, the jury awarded the plaintiff $115,000 in damages. After the carrier paid its liability limits of $25,000 in (partial) payment of the judgment, the plaintiff sought to recover from the carrier under her SUM coverage, but the carrier refused to pay that claim. The plaintiff thereafter sued the carrier for breach of contract.

The court granted the plaintiff's motion for summary judgment on the basis that the carrier was collaterally estopped from contesting the issue of damages insofar as the sole issue litigated at the trial of the personal injury action was the same issue that the carrier sought to litigate in the breach of contract action. At trial on the issue of damages, the carrier's interest and that of the tortfeasor/insured did not diverge and the carrier was the only party with a financial risk in that action. Thus, the carrier and the tortfeasor were "in privity" on the issue of damages for purposes of the doctrine of collateral estoppel. Moreover, the amounts at issue in the underlying action were not "trivial stakes." Thus, the carrier was collaterally estopped from contesting the issue of damages.

In *State Farm Mutual Auto. Ins. Co. v. Sceviour*,[66] the court held that a determination in a declaratory judgment action involving the tortfeasor's insurer was binding, under the doctrine of collateral estoppel, upon an uninsured motorist insurer in a separate proceeding. The court rejected the UM carrier's contention that a hearing was required on the issue of coverage for the tortfeasor because the determination of non-coverage in the declaratory judgment action was not binding on it because it was not a party to that proceeding. The court observed that

> a non-party may be said to have had sufficient opportunity to be heard in the prior proceeding if the non-party was, for purposes of that proceeding, in privity with a party who fully litigated the issue. . . . Generally, one in privity has "a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation."

Finding no doubt that the issue of the tortfeasor's coverage was "necessarily decided" in the declaratory judgment action, and that the claimant "asserted meaningful and comprehensive opposition to Clarendon's motions," the court found that there was privity between the UM carrier and the claimant in the prior proceeding because the UM carrier's "obligations are contingent upon [the claimant's] rights, albeit inversely." In the prior action, the interests of the UM carrier and the claimant were aligned because both would be served by a finding that the tortfeasor's insurer was required to provide coverage.

Finally, the court concluded that this result was not unfair insofar as the UM carrier had notice of the issues to be decided in the declaratory judgment action and of the potential impact upon its own interests, but it never sought to intervene. "Fairness does not require this Court to reward [the UM carrier's] decision to 'sit idly by' during the prior litigation by allowing it a second chance to proffer the same arguments and evidence that [the claimant] asserted without success. Nor does it require the imposition of a duplicative evidentiary burden upon [the tortfeasor's insurer]."[67]

In *State Farm Mutual Automobile Ins. Co. v. Chandler*,[68] the court held that the insurer was not obligated to provide coverage for any claims made in connection with a motor vehicle accident based upon the doctrine of judicial estoppel (the doctrine against inconsistent positions) because the claimants accepted a settlement of an uninsured motorist claim from their own insurer based upon the fact that the tortfeasor's insurer had disclaimed coverage. The claimants could not subsequently challenge the validity of that disclaimer. ■

1. 26 A.D.3d 749, 750, 809 N.Y.S.2d 374 (4th Dep't 2006) (citations omitted).
2. 31 A.D.3d 1171, 1171, 818 N.Y.S.2d 882 (4th Dep't 2006) (citation omitted).
3. 27 A.D.3d 477, 811 N.Y.S.2d 427 (2d Dep't 2006).

4. 32 A.D.3d 1230, 821 N.Y.S.2d 325 (4th Dep't 2006).

5. 29 A.D.3d 698, 699, 815 N.Y.S.2d 650 (2d Dep't 2006).

6. 26 A.D.3d 192, 810 N.Y.S.2d 26 (1st Dep't 2006).

7. *Id.* at 193. For cases discussing the nature and extent of proof necessary to establish that an "accident" was staged, see *State Farm Ins. Co. v. Paul*, N.Y.L.J., Nov. 3, 2006, p. 24, col. 1 (Sup. Ct., Nasssau Co.); *V.S. Med. Servs., P.C. v. Allstate Ins. Co.*, 11 Misc. 3d 334, 811 N.Y.S.2d 886 (Civ. Ct., Kings Co. 2006); *Universal Open MRI v. State Farm Mut. Auto. Ins. Co.*, 12 Misc. 3d 1151(A), 819 N.Y.S.2d 852 (Civ. Ct., Kings Co. 2006).

8. *See The Doe Fund v. Royal Indemnity Co.*, 34 A.D.3d 399, 825 N.Y.S.2d 450 (1st Dep't 2006); *Progressive Ins. Cos. v. House*, 34 A.D.3d 889, 823 N.Y.S.2d 560 (3d Dep't 2006); *Morris Park Contracting Corp. v. Nat'l Union Fire Ins. Co.*, 33 A.D.3d 763, 822 N.Y.S.2d 616 (2d Dep't 2006); *Allstate Ins. Co. v. Marcone*, 29 A.D.3d 715, 815 N.Y.S.2d 235 (2d Dep't 2006).

9. 4 N.Y.3d 332, 340, 794 N.Y.S.2d 704 (2005).

10. 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).

11. *Argo*, 4 N.Y.3d at 340.

12. 4 N.Y.3d 468, 476, 796 N.Y.S.2d 13 (2005).

13. *Id.* at 476 (citations omitted).

14. 25 A.D.3d 905, 808 N.Y.S.2d 797 (3d Dep't 2006).

15. *Id.* at 907.

16. 27 A.D.3d 476, 810 N.Y.S.2d 346 (2d Dep't 2006).

17. *Id.* at 477 (citation omitted); *see Nationwide Mut. Ins. Co. v. Perlmutter*, 32 A.D.3d 947, 821 N.Y.S.2d 253 (2d Dep't 2006).

18. 27 A.D.3d 751, 813 N.Y.S.2d 158 (2d Dep't 2006).

19. In *Am. Transit Ins. Co. v. B.O. Astra Mgmt. Corp.*, 12 Misc. 3d 740, 814 N.Y.S.2d 849 (Sup. Ct., N.Y. Co. 2006), the court held that the rationale of *Brandon* applied in a non-SUM case. Thus, where the insurer was not only given timely notice of claim (as in *Brandon*), but it was also informed that counsel had been retained, and in response, the insurer stated that it would investigate the claim and provided counsel with the name of a claims adjuster; where the insurer was also the No-Fault carrier and requested the claimant to appear for an IME five weeks after the accident and followed up that request with three additional requests; and where the insurer received notice of the lawsuit before a default judgment had been entered (unlike *Argo*) and, indeed, could have prevented the default "but chose instead to allow the default judgment to be entered unopposed so that it could later avail itself of the 'no-prejudice' rule," the court held that the "no-prejudice" rule did not apply. Furthermore, the court held that even if the "no-prejudice" rule were to apply under the facts of this case, the claimant's counsel's letter to the insurer informing it that counsel had been retained and of potential claims against it satisfied the notice of lawsuit requirement because it served the notice requirement's function, as identified in *Argo*, of allowing the insurer "to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves."

20. 33 A.D.3d 763, 764, 822 N.Y.S.2d 616 (2d Dep't 2006).

21. 26 A.D.3d 426, 809 N.Y.S.2d 569 (2d Dep't 2006).

22. 34 A.D.3d 244, 824 N.Y.S.2d 237 (1st Dep't 2006).

23. 29 A.D.3d 715, 815 N.Y.S.2d 235 (2d Dep't 2006).

24. *Id.* at 717 (citations omitted); *see USAA v. Ogilvie*, 12 Misc. 3d 1157(A), 819 N.Y.S.2d 213 (Sup. Ct., N.Y. Co. 2006).

25. 30 A.D.3d 524, 525, 817 N.Y.S.2d 119 (2d Dep't 2006) (emphasis added).

26. 11 Misc. 3d 1085(A), 819 N.Y.S.2d 847 (Sup. Ct., N.Y. Co. 2006).

27. *Id.* (citations omitted); *see Ocean Partners, LLC v. N. River Ins. Co.*, 25 A.D.3d 514, 810 N.Y.S.2d 430 (1st Dep't 2006) ("The insurer's actual knowledge of the fire at the subject building did not relieve plaintiff of its independent obligation to give timely notice of its own claim.").

28. 26 A.D.3d 355, 809 N.Y.S.2d 174 (2d Dep't 2006).

29. 25 A.D.3d 713, 811 N.Y.S.2d 707 (2d Dep't 2006).

30. 34 A.D.3d 824, 824, 825 N.Y.S.2d 248 (2d Dep't 2006).

31. 34 A.D.3d 816, 825 N.Y.S.2d 132 (2d Dep't 2006).

32. 7 N.Y.3d 772, 820 N.Y.S.2d 848 (2006).

33. *See Russell v. N.Y. Cent. Mut. Fire Ins. Co.*, 11 A.D.3d 668, 783 N.Y.S.2d 4((2d Dep't 2004); *Cacciatore v. N.Y. Cent. Mut. Fire Ins. Co.*, 301 A.D.2d 253, 7! N.Y.S.2d 712 (4th Dep't 2002).

34. 27 A.D.3d 296, 811 N.Y.S.2d 641 (1st Dep't 2006).

35. *Id.* at 297; *see also, to same effect*, Hartford *Ins. Co. v. Connolly*, 11 Misc. 3 1079(A), 819 N.Y.S.2d 848 (Sup. Ct., Queens Co. 2006), dealing with a Floric policy that required both parties to agree to arbitration. There, the cou observed that "[u]nder New York law, a party is not obligated to arbitrate dispute unless there is an explicit and unequivocal agreement to do so."

36. *See State Farm Mut. Auto. Ins. Co. v. Scudero*, 33 A.D.3d 927, 824 N.Y.S.2d 3((2d Dep't 2006); *GEICO v. Obi*, 12 Misc. 3d 1167(A), 820 N.Y.S.2d 843 (Sup. C N.Y. Co. 2006).

37. 33 A.D.3d 927, 824 N.Y.S.2d 300 (2d Dep't 2006).

38. 34 A.D.3d 477, 478, 824 N.Y.S.2d 159 (2d Dep't 2006) (citation omitted).

39. 10 Misc. 3d 1072(A), 814 N.Y.S.2d 562 (Sup. Ct., Kings Co. 2006).

40. *See GEICO v. Obi*, 12 Misc. 3d 1167(A), 820 N.Y.S.2d 843 (Sup. Ct., N.Y. C 2006).

41. 6 N.Y.3d 155, 811 N.Y.S.2d 299 (2006).

42. *Id.* at 158 (citations omitted).

43. 89 N.Y.2d 714, 723, 658 N.Y.S.2d 205 (1997).

44. 6 N.Y.3d 658, 815 N.Y.S.2d 915 (2006).

45. 13 Misc. 3d 1230(A), ___ N.Y.S.2d ___ (Sup. Ct., Richmond Co. 2006).

46. 28 A.D.3d 766, 816 N.Y.S.2d 106 (2d Dep't 2006).

47. *Id.* at 767.

48. *Cf. Utica Mut. Ins. Co. v. Colon*, 25 A.D.3d 617, 807 N.Y.S.2d 634 (2d Dep 2006) (hearing required to determine whether the court had personal jurisdi tion over American Independent Insurance Co.).

49. 25 A.D.3d 695, 810 N.Y.S.2d 89 (2d Dep't 2006).

50. *Utica Mut. Ins. Co. v. Colon*, 25 A.D.3d 617, 618, 807 N.Y.S.2d 634 (2d Dep 2006).

51. *Id.*

52. 28 A.D.3d 569, 813 N.Y.S.2d 497 (2d Dep't 2006).

53. *Id.* at 570.

54. 29 A.D.3d 787, 788, 816 N.Y.S.2d 505 (2d Dep't 2006).

55. *Id.* at 789; *see* CPLR 7503(b).

56. 35 A.D.3d 486, 825 N.Y.S.2d 531 (2d Dep't 2006).

57. 35 A.D.3d 730, 826 N.Y.S.2d 700 (2d Dep't 2006).

58. 36 A.D.3d 92, 103, 823 N.Y.S.2d 440 (2d Dep't 2006).

59. *See* 11 N.Y.C.R.R. subpt. 60-2.

60. 35 A.D.3d 584, 827 N.Y.S.2d 209 (2d Dep't 2006).

61. 27 A.D.3d 751, 813 N.Y.S.2d 158 (2d Dep't 2006).

62. *Id.* at 753 (citations omitted); *see Aetna Cas. & Sur. Co. v. Bonilla*, 219 A.D.2 708, 709, 631 N.Y.S.2d 438 (2d Dep't 1995); *Hilowitz v. Hilowitz*, 85 A.D.2d 62 444 N.Y.S.2d 948 (2d Dep't 1981).

63. 29 A.D.3d 688, 816 N.Y.S.2d 497 (2d Dep't 2006).

64. *Id.* at 690 (citations omitted).

65. 31 A.D.3d 490, 818 N.Y.S.2d 544 (2d Dep't 2006).

66. N.Y.L.J., Sept. 8, 2006, p. 26, col. 1 (Sup. Ct., Nassau Co.).

67. *Id.*; *cf. Town of Wilton v. Tarrant Mfg. Co.*, Index No. 2005-2585 (Sup. C Saratoga Co. June 13, 2006), (separate fire damage subrogation claims by tw different insurers – one of which insured a garage, and the other of whic insured the cars therein – wherein the Supreme Court declined to find th requisite privity between the two insurers to invoke the doctrine of collater estoppel on behalf of the alleged tortfeasor to bind the second insurer to th determination in favor of the tortfeasor and against the first insurer); *see al* Norman H. Dachs & Jonathan A. Dachs, *Issue Preclusion and UM/UIM/ SUI Cases*, N.Y.L.J., Jan. 9, 2007, p. 3, col. 1.

68. 35 A.D.3d 588, 827 N.Y.S.2d 207 (2d Dep't 2006).