2007 Insurance Law Update

Uninsured, Underinsured and Supplementary Uninsured Motorist Law – Part I

By Jonathan A. Dachs

This article will address several general areas pertinent to issues concerning coverage and claims, and will report on developments in uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law during 2007. This is the first of two parts; Part II will appear in a forthcoming issue of the *Journal*.

Insured Persons and Relatives

The definition of an "insured" under the SUM endorsement (and many liability policies, as well) includes a relative of the named insured and, while residents of the same household, the spouse and relatives of either the named insured or spouse. In *Korson v. Preferred Mutual Ins. Co.*,[1] the court observed that where the term "relative" is not defined in the policy, it must be construed consistently with its ordinary meaning to include persons related by "close affinity, if not consanguinity," such as a stepparent or stepchild.

Residents

In *Auerbach v. Otsego Mutual Fire Ins. Co.*,[2] the court stated that the term "household" has repeatedly been characterized as ambiguous or devoid of any fixed meaning, and that the interpretation of that term requires an inquiry into the intent of the parties and must reflect "the reasonable expectation and purpose of the ordinary business area when making an insurance contract." In *Hochhauser v. Electric Ins. Co.*,[3] the court reiterated the well-settled rule that "whether a person is a 'resident' of an insured's 'household' requires 'something more than temporary or physical presence and requires at least some degree of permanence and intention to remain.'"

The only admissible evidence in *Hochhauser* established that the plaintiff owned two homes and resided in both of them. The plaintiff's son, the insured, and his family lived in one of the two homes. The plaintiff spent weekends and holidays in the insured's home; had a key to the home; maintained her own bedroom in the home;

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in which she kept clothing and necessaries; and paid the heating, water costs and the real estate taxes for the home. The court held that the plaintiff was entitled to uninsured motorist coverage under the insured son's policy.

In *Allstate Ins. Co. v. DiBello*,[4] the court held that the carrier met its burden of demonstrating that the injured driver was not a resident of the same household as its insured, his daughter, based upon the address listed for the driver on the police report and his medical records. The court rejected the evidence presented by a deed showing that the named insured held joint title to the house in which the father resided because there was no proof that she resided there as well.

Occupants

The claimant must be an "occupant" of a particular vehicle in order to qualify for coverage under the UM or SUM coverage of that vehicle's policy. In *Kobeck v. MVAIC*,[5] the plaintiff pulled her vehicle over to the curb in response to a signal from another vehicle. The occupants of the other vehicle told the plaintiff that they needed directions and asked if she would write them down for them. The plaintiff got out of her car and approached the other vehicle, then leaned into the open passenger's window to take the pen and paper being offered. At that point, while she was leaning into the window of the other car, the male occupant of that car put his arm around her neck and grabbed her shirt, while the female occupant began to drive away. As the male pushed her away, her watch became stuck on the window and she was dragged approximately 30 feet by the moving car until she fell to the ground and the car drove off. The court held that the plaintiff would be deemed an occupant of the vehicle she had been driving only moments earlier. "Where a departure from a vehicle is occasioned by or is incident to some temporary interruption in the journey and the occupant remains in the immediate vicinity of the vehicle, and, upon completion of the objective occasioned by the brief interruption, he intends to resume his place in the vehicle, he does not cease to be a passenger."

"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 or underinsured motor vehicle. In *Travelers Indemnity Co. v. Cruz*,[6] the court held that the collision at issue was intentional, and thus the respondents were not entitled to coverage regardless of their innocence and regardless of whether the incident was motivated by fraud or malice. Moreover, insofar as the liability insurer was entitled to disclaim coverage on the ground that the injuries were not caused by an accident, there could be no recovery for the same injuries under the UM endorsement either.[7]

Exclusions

In *GEICO v. Lang*,[8] the court held that the owner of an uninsured motorcycle could not recover underinsured motorist benefits under a policy, issued to a member of his family household, containing an exclusion for uninsured "motor vehicles" owned by the insured. Specifically, the SUM endorsement of the policy, pursuant to which the claim was made, provided that

> [t]his SUM coverage does not apply . . . (2) to bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage under the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of this policy.

The claimant argued that the motorcycle was not a "motor vehicle," pointing out that the term "motor vehicle" and "motorcycle" were separately defined in the "Other Definitions" section of the no-fault (PIP, *i.e.*, personal injury protection) endorsement, and according to those definitions a motor vehicle did not include a motorcycle. That contention was rejected by the court, which noted that

> [w]hile the term motor vehicle was not specifically defined in the SUM endorsement of the policy, unlike the language in the PIP endorsement, a motorcycle

was not specifically excluded from its definition. Further, the term motor vehicle has been construed to include a motorcycle for purposes of uninsured motorist coverage. Specifically, the policy exclusion relied upon by GEICO has been held to be unambiguous as it applies to a motorcycle owned and occupied by the insured who is not insured for SUM coverage.[9]

Finally, as explained by the court, "[i]t is well-settled that the liability, no fault and uninsured motorist portions of a comprehensive automobile insurance policy are discrete and internally complete coverages and should be read that way. SUM coverage exists separate and apart from the policy to which it is annexed and thus can not be qualified by inapplicable provisions of the PIP portion of the policy."[10]

Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement simply requires that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy.[11] In the context of SUM coverage, "the phrase 'as soon as practicable' means that the 'insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured.'"[12]

One of the most significant issues in the context of notice of claim in recent years has been the issue of the "no-prejudice rule." In *Argo Corp. v. Greater New York Mutual Ins. Co.*,[13] the Court of Appeals held that the general "no-prejudice" rule applicable to liability insurance policies was not abrogated by *Brandon v. Nationwide Mutual Ins. Co.*,[14] which held three years earlier that the carrier must show prejudice before disclaiming based on late notice of a lawsuit in the SUM context, and that *Brandon* should not be extended to cases where the carrier received unreasonably late notice of the claim. Insofar as the "rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy," the Court held that a primary (liability) insurer need not demonstrate prejudice to disclaim coverage based upon a late notice of lawsuit.

The idea behind strict compliance with the notice provision in an insurance contract was to protect the carrier against fraud or collusion.

In *Rekemeyer v. State Farm Mutual Auto. Ins. Co.*,[15] however, the Court of Appeals 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. Under the circumstances of the *Rekemeyer* case, 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."

The Second Department, in *New York Central Mutual Ins. Co. v. Davalos*,[16] held that the rationale of the Court of Appeals in *Rekemeyer* was equally applicable to claims for *uninsured* motorist benefits made pursuant to an SUM endorsement as to *underinsured* motorist claims. Thus, in *Davalos*, where the insured had been given timely notice of the accident and the claimant's claim for no-fault benefits but not the uninsured motorist claim, the court held that "[s]ince the petitioner has not claimed any prejudice arising from the late notice of the SUM claim, the court correctly determined that it is not entitled to a stay of arbitration on this ground."[17]

In *Assurance Co. of America v. Delgrosso*,[18] where the insured failed to submit any notice of claim for over two years after the accident, one year and three months after he commenced a personal injury action and 11 months after he learned of the tortfeasor's policy limits, the court held that the insured's notice of claim was untimely. "[T]he insurer did not rely on the late notice of legal action defense. Rather, it relied on late notice under an SUM endorsement where the insured did not previously give any notice of the accident, thus there was no requirement for the insurer to demonstrate prejudice."[19]

In *New York Central Mutual Fire Ins. Co. v. Ward*,[20] a case involving the insured's failure to complete and return proof of claim forms supplied by the insurer, the Second Department followed the Third Department's 2006 decision in *Nationwide v. Mackey*[21] and held that "the notice of claim exception to the no-prejudice rule set forth by the court in *Rekemeyer* should now be extended to apply to proof of claim."[22] Thus, insofar as the record established that the insured substantially complied with the policy's notice and proof of claim conditions insofar as he supplied the petitioner with prompt written notice of the accident, an application for no-fault benefits, a sworn police accident report and authorizations to obtain

records, the court held that "the facts, as in *Rekemeyer*, warrant a showing of prejudice by the insurance carrier." The court determined that the insurer "demonstrated no prejudice in this matter stemming from the [insured's] failure to submit the proffered proof of claim form," and that it "did not meet this burden of showing that [the insured's] failure to comply with his contractual duties was prejudicial to it," and thus it denied the insurer's Petition to Stay Arbitration without a hearing.[23]

Notably, in *Ward*, the court also based its decision to deny the petition to stay arbitration on the fact that the policy at issue contained a provision requiring the insurer to demonstrate prejudice as a result of an alleged breach of the notice and proof of claim conditions.

In *American Transit Ins. Co. v. B.O. Astra Management Corp.*,[24] the court held that the rationale of *Brandon* applied in a non-SUM case. In this case the insurer was not only given timely notice of claim (as in *Brandon*) but was also informed that counsel had been retained. In response, the insurer stated that it would investigate the claim and provided counsel with the name of a claims adjuster. The insurer, who was also the no-fault carrier, asked the claimant to appear for an independent medical exam (IME) five weeks after the accident and followed that up with three additional requests. The insurer received notice of the lawsuit before a default judgment had been entered (unlike *Argo*)[25] 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, however, that the "no-prejudice" rule did not apply. Furthermore, said the court, even if the no-prejudice rule were to apply under the facts of this case, 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 functions identified in *Argo*, which allows 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."

The First Department essentially affirmed the lower court's decision, modifying only to declare in the insured's favor and holding that "[h]aving received timely notice of claim, plaintiff's insurer was not entitled to disclaim coverage based on untimely notice of the claimant's commencement of litigation unless it was prejudiced by the late notice, and such prejudice was not shown."[26]

In *Liberty Mutual Ins. Co. v. Rapisarda*,[27] the court held that the claimant failed to provide the SUM carrier with notice of his underinsured motorist claim "as soon as practicable," and thus ruled that the court below "providently exercised its discretion in granting the petition"

to stay arbitration. Interestingly, the court did not cite *Rekemeyer* and did not discuss the issue of prejudice to the insurer.

Presently, legislation is under consideration which, if signed, would create a new requirement that insurers must demonstrate prejudice, or, possibly, "material prejudice," before they can properly or validly deny a claim based on the failure to receive timely notice. Although both houses of the state Legislature and the Governor have already expressed support for such legislation, it remains to be seen when and in what form the ultimate statutory amendment will be made.[28] The interpretation of the phrase "as soon as practicable" continued, as always, to be a hot topic.

In *Progressive Ins. Cos. v. DeWitt*,[29] the court held that a question of fact existed as to the reasonableness of delay exceeding one year in providing notice of an SUM claim where the claimant alleged that he had hoped that his symptoms would improve during that period and, therefore, he had not intended to sue the tortfeasor. Evidence existed in the record, however, suggesting that the claimant should have been aware that he had sustained a serious injury as early as two months after the accident, when he was laid off from work because he was unable to carry out the necessary tasks of his job due to his injuries. Thus, the court remitted the matter for a hearing to determine whether the notice was given "as soon as practicable."

In *Massot v. Utica First Ins. Co.*,[30] the court held that a four-month delay in giving notice was reasonable given the injured party's own testimony that she experienced no pain, considered the wound superficial and did not initially seek medical treatment for her injury. In *New York Municipal Ins. Reciprocal v. McGuirk*,[31] the claimant just discovered that the tortfeasors were underinsured at the end of July 2005, when he received a letter from their insurer detailing their policy's liability limit. There was no allegation by the petitioner that, through diligent efforts, the claimant should reasonably have discovered that information earlier. The petitioner's allegation that the claimant was aware at any earlier time that the tortfeasor's coverage "may be sufficient," was held to be "of no moment" because "the timeliness of notice in the SUM context does not turn upon the suspicions of the insured, but upon when the insured actually knew that the tortfeasor's coverage was inadequate or when such information should reasonably have been discovered." Here, the court held that the claimant's notice of his SUM claim two weeks after his discovery that the tortfeasors were underinsured was "prompt."

On the other hand, in *State Farm Mutual Auto. Ins. Co. v. Tubis*,[32] the court held that a delay between "mid to late 2003," when the claimant became aware of the tortfeasor's insurer's insolvency, and May 12, 2004, when the UM claim was asserted, was unreasonable as a matter of law. In *Tower Ins. Co. of New York v. Mike's Pipe Yard & Building Supply Corp.*,[33] the court noted that "[n]otice to a broker cannot be treated as notice to the insurer since the broker is deemed to be the agent of the insured and not the carrier."

In *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.*,[34] the court distinguished between notice to a broker, which is insufficient to prove notice to the insurer, and notice effectuated by a claims service/broker directly to the insurer. In *Compass Construction of New York v. Empire Fire & Marine Co. of Omaha, Nebraska*,[35] the court held that oral notice to the insurer was sufficient to satisfy the notice of occurrence provision in the policy since that provision did *not* contain a *written* notice requirement.

Discovery

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

In *New York Central Mutual Fire Ins. Co. v. Serpico*,[36] the court held that the lower court "improvidently exercised its discretion" in denying that branch of the petitioner's motion directing the respondent to provide all medical authorizations, to obtain relevant medical reports and copies of relevant medical records, including reports and records pertaining to bodily injuries sustained before the subject accident occurred that were similar to those allegedly sustained in the subject accident. In *New York Central Mutual Fire Ins. Co. v. Rafailov*,[37] the court held that "[a]n unexcused and willful refusal to comply with disclosure requirements in an insurance policy is a material breach of the cooperation clause and precludes recovery on a claim." Further,

> [i]n order to establish breach of a cooperation clause, the insurer must show that the insured engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents. An insured's duty to cooperate is satisfied by substantial compliance, and where a delay in compliance is neither lengthy nor willful, and is accompanied by a satisfactory explanation, preclusion of a claim is inappropriate.[38]

Arbitration vs. Litigation

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/$50,000 per accident. Cases involving 25/50 coverage must be submitted to arbitration and cannot be litigated in court. In *Williams v. Progressive Northeastern Ins. Co.*,[39] the court held that where the plaintiff was seeking UM benefits for the statutory minimum amount, arbi-

tration was mandatory. The court added that the plaintiff was not entitled to a jury trial.

National Grange Mutual Ins. Co. v. Louie[40] concerned a Connecticut resident driving a Connecticut-registered and -insured car was involved in an accident in the Bronx with an uninsured/unregistered car owned and operated by a New Jersey resident. Since the accident occurred in New York State and the insurer did business there, the claimant notified the insurer of his intention to pursue arbitration of his UM claim. The insurer sought to stay arbitration on the ground that Connecticut policy and law do not entitle him to arbitration. The First Department found that New York's arbitration requirement, which is compelled by N.Y. Insurance Law, is imposed upon auto insurers when their vehicles are operated in New York and the insurer is authorized to transact business in New York.[41] Notably, the court specifically disagreed with the Second Department which, in *State Farm Mutual Auto. Ins. Co. v. Torcivia,*[42] had ruled that since the South Carolina policy in that case did not provide for the arbitration of uninsured motorist claims, the insurer could not be compelled to arbitrate, and that "there is no requirement under the New York no-fault statute and regulations that mandates arbitration where, as here, a policy issued out of state meets the minimum financial security requirements of Insurance Law § 5107." It is also noteworthy that the *Louie* court appeared to disregard its own First Department holding, in *SAA v. Melendez,*[43] which had agreed with *Torcivia.*

Jurisdiction

In *American Transit Ins. Co. v. Hoque,*[44] the court granted the motion by a Proposed Additional Respondent insurer to dismiss a petition brought against it on the basis that the insurer

> demonstrated, without rebuttal, that it is not doing business in New York (CPLR 301), since it is a Pennsylvania company not licensed to do business in New York, it maintains no offices in New York, has no bank accounts here, has no agents operating out of or representatives soliciting business in New York and does not own or possess real property in New York.[45]

The court specifically held that the insurer was not "transacting business in New York" because driving in New York in a vehicle registered in Pennsylvania was not "purposeful activity" on the part of the insurer. Thus, New York did not have personal jurisdiction over the insurer. Interestingly, the court, on its own, distinguished its prior decision in *Preferred Mutual Ins. Co. v. Chan,*[46] wherein the court, faced with evidence that the insurer did not do business in New York (the same as in *Hoque*), directed a hearing to determine whether there was jurisdiction. There, unlike here, the driver of the offending vehicle was a New York resident. This case raised the possibility that the insurer may have been transacting business in New York by knowingly issuing policies for New York drivers.

Filing and Service

The Third Department, in *New York Central Mutual Fire Ins. Co. v. Gordon,*[47] noted that "following the 2001 amendment to CPLR 304, '[a] special proceeding is commenced by filing a petition,' not by filing an executed order to show cause."

CPLR 304 ("Method of Commencing Action or Special Proceeding") was amended effective January 1, 2008.[48] The amendment reorganizes the sentences of the pre-existing CPLR 304 into separate subdivisions, with subdivision (a) continuing the rule that an action is commenced by filing, but now cross-referencing CPLR 2102, which applies to filing of papers generally. "An action is com-

menced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter." CPLR 2102(a) has, in turn, been amended to indicate that a filing in a supreme court or county court action is to be made with the county clerk.

While this essentially restates the existing law, CPLR 2102(b) notes that "[a] paper filed in accordance with the rules of the chief administrator or any local rule or practice established by the court *shall be deemed filed.*" This suggests that the chief administrator of the courts may adopt rules or practices that allow for filings with clerks working in offices other than those of the clerk of the court. In such an instance, CPLR 2102(b) directs that papers "shall be transmitted to the clerk of the court." Furthermore, CPLR 2102(c) provides that "a clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts, or order of the court."

In addition, CPLR 2001 was amended, effective August 15, 2007, to include mistakes made at the very commencement of the action or proceeding within the scope of the provision. This amendment allows any non-prejudicial "mistake, omission, defect or irregularity" to be corrected by the court without deadly consequences. Thus, the new statute explicitly includes mistakes in "the filing of a summons with notice, summons and complaint or petition to commence an action . . . including the failure to purchase or acquire an index number or other mistake in the filing process . . . provided that any applicable fees shall be paid."

It should be noted that the recommendation for this amendment, from the Chief Administrative Judge's Advisory Committee on Civil Practice, contained three cautionary notes: First, the revision of CPLR 2001 will "not excuse a complete failure to file within the statute of limitations." Second, the amendment is not addressed to mistakes in "what" is filed, only mistakes in the "method" by which a filing occurs. Third, any necessary filing fee must be paid.

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.

The Second Department noted, in *Lejbik v. Allstate Indemnity Co.*,[49] that "there is an exception to the 20-day time limitation when a stay is sought on the basis that the parties never agreed to arbitrate in the first place" (the *Matarasso* exception).[50] However, where the policy does contain an agreement to arbitrate, albeit one that is subject to a condition precedent, and the insurer's contention is that condition was not satisfied, it must move to stay within 20 days or be precluded from raising the breach of the condition precedent as a defense.[51]

In *Travelers Indemnity Co. v. Castro*,[52] the court rejected the petitioner's contention that the claimant's notices of intention to arbitrate were deceptive and intended to prevent it from contesting the issue of arbitrability. Instead, the court held that the untimeliness of a proceeding to stay arbitration resulted from neglect of the insurer's own employee, "not any deception on the part of the [insured]."

In *State Farm Ins. Cos. v. DeSarbo*,[53] after conducting communications with his SUM carrier's Saratoga and Monroe County offices, the claimant served a demand for arbitration on the insurer's home office in Bloomington, Illinois. The insurer subsequently moved to stay arbitration and the claimant contended that the application was untimely. The demand was dated February 16, 2006, and was received in the home office on February 20, 2006. After an internal transfer, being received by "claims" on March 1, 2006, the demand was forwarded to the Saratoga County office, where it was received on March 7, 2006. Thus, the demand made its way to Saratoga County before the 20-day period expired.

The insurer waited 45 days before moving for a stay, however. The court noted that "[t]he demand sent to the home office was not buried in other documents, but was a short document pertaining only to the demand for arbitration, together with a cover letter which included, in bold print, the policy number, respondent's last name and the date of loss." Earlier correspondence from the insurer's offices in Saratoga and Monroe Counties, referencing the home office in Bloomington and the affidavit of the insurer's employee articulating a time line of events, did not set forth any explanation "as to how mailing the demand to petitioner's home office, which was prominently set forth in prior correspondence, and receiving the demand in the home office before the 20 days expired," nevertheless resulted in the petitioner being so misled that it was unable to seek a stay for a month and a half. The court ultimately held that the petition to stay arbitration was untimely.

Similarly in *USAA v. DeRosa*,[54] the court held that, contrary to the insurer's contention, the demands for arbitration were not served in a manner intended to conceal their nature or to precipitate a default. Because the insurer failed to seek a stay within 20 days, the petition was denied as untimely.

Burden of Proof

In *Mercury Ins. Group v. Ocana*,[55] the petitioner made a *prima facie* showing that the offending vehicle was insured on the date of the accident via the submission of the police accident report, *inter alia*, showing the vehicle's insurance code. The burden then shifted to the claimant/respondent to establish either a lack of insurance coverage

or a timely and valid disclaimer. While it did not establish a valid disclaimer on the basis of a lack of cooperation or a matter of law, the disclaimer letter issued by the insurer was sufficient to raise a factual issue for determination at a hearing.

In *Nationwide Insurance Enterprise v. Harris*,[56] in response to proof that the offending vehicle was insured on the date of the accident through the New York Automobile Insurance Plan ("Assigned Risk"), the claimants demonstrated that the plan had assigned responsibility for providing coverage to New York Central Mutual Ins. Co., which had canceled its policy prior to the accident. They also submitted proof that, since that time, no application had been submitted to the plan for a new insurer to be assigned. The court held this evidence as sufficient to show the existence of a factual issue as to whether the offending vehicle was insured, which required a framed-issue hearing to resolve the dispute. In *Progressive Northwestern Ins. Co. v. Gjonaj*,[57] the court held that the petitioner's failure to meet its initial burden of showing that the offending vehicle was, in fact, insured on the date of the accident, mandated denial of the petition.

Arbitration Awards

In *Allstate Ins. Co. v. Duffy*,[58] the court noted,

> CPLR 7511 provides that an application to vacate an arbitration award by a party who has participated in the arbitration may only be granted upon the grounds that the rights of that party were prejudiced by corruption, fraud, or misconduct in procuring the award, partiality of the arbitrator, the arbitrator exceeded his powers or failed to make a final and definite award, or a procedural failure that was not waived.
>
> Consistent with public policy in favor of arbitration, the grounds specified in CPLR 7511 for vacating an arbitration award are few in number and narrowly applied, with the list of potential objections being exclusive.[59]

In *Allstate Ins. Co. v. Dandan*,[60] the court vacated an award made to an infant in an uninsured motorist arbitration on the ground that the award of damages was inconsistent with the arbitrator's findings and deviated from what would be considered reasonable compensation.

The petitioner alleged "partiality and misconduct" as a ground for vacating an arbitration award in *Aviles v. Allstate Ins. Co.*[61] However, the petitioner's application was supported only by a petition signed by an attorney who did not attend the arbitration hearing, and a copy of the arbitration award. No transcript of the hearing was included among the papers submitted to the court. Under these circumstances, the court held that the petitioner failed to carry his burden of establishing bias on the part of the arbitrator. Insofar as the award itself disclosed no bias, the court rejected petitioner's counsel's conclusory claim to the contrary, denied the petition, and reinstated and confirmed the award.

Service of Petition to Vacate

In *Scott v. Allstate Ins. Co.*,[62] the court held that where the "first application arising out of the arbitrable controversy" is the petitioner's application to vacate an arbitrator's award and there is no pending action, the notice of petition, petition and supporting papers must be filed and then served on the respondent "in the same manner as a summons in an action" upon the respondent, instead of merely upon respondent's counsel.

"Serious Injury" Requirement

In *Raffellini v. State Farm Mutual Auto Ins. Co.*,[63] the Court of Appeals *reversed* the decision of the Appellate Division, Second Department (reported on last year), and upheld the validity of the provision in the Regulation 35-D SUM endorsement that required proof of a "serious injury" as defined in the No-Fault Law as a condition precedent to a valid underinsured motorist claim (same as an uninsured motorist claim). In so holding, the Court rejected the plaintiff's contention that, by referencing "serious injury" in subsection (f)(1) of Ins. Law § 3420, *i.e.*, the mandatory uninsured motorist provision, but not in subsection (f)(2), the supplementary uninsured/underinsured motorist provision, the Legislature permitted insurers to condition recovery of mandatory uninsured motorist benefits on the existence of a "serious injury" but intended to preclude them from conditioning recovery of supplementary benefits on such a finding.

The Court viewed that argument as "run[ning] contrary to the interpretation of the Superintendent of Insurance expressed in Regulation 35-D." Moreover, the Court held that "the relevant statutory provision and the regulation are not contradictory" because "Insurance Law § 3420(f)(2) is silent on the issue of whether an insured can recover SUM benefits absent a serious injury and that silence does not, in this case, imply that the Legislature intended to permit such recovery." Further, "the legislative history of the relevant provisions refutes the argument that, by placing the serious injury exclusion in the mandatory benefits provision, but not the supplementary benefits provision, the Legislature intended to preclude the Superintendent from authorizing application of a serious injury exclusion for supplementary benefits."

The Court offered a lengthy analysis of the history of the drafting of the two statutory provisions, noting that, initially, both provisions appeared as two paragraphs within a single section. The second paragraph read as a continuation of the first, providing that "[a]ny *such* policy, shall at the option of the insured, *also* provide supplementary uninsured/underinsured motorist insurance," and that the Court has always viewed underinsured motorist coverage as an extension of uninsured motorist coverage. The Court concluded that the "serious injury" exclusion "can reasonably be viewed as having been intended to apply to both categories of benefits." Indeed, as the Court

stated, "[b]ased on the structure of [the predecessor statute to § 3420(f)], we cannot say that the Legislature's failure to restate the serious injury provision in the second paragraph evinced an intent to preclude application of such an exclusion to supplementary benefits."

Moreover, the two paragraphs were separated into two subsections in 1984, resulting in the placement of the serious injury exclusion in Ins. Law § 3420(f)(1) and not in Ins. Law § 3420(f)(2). The court observed that "this modification was not meant to effect a substantive change in the law – certainly, there is no reason to conclude that the Legislature split the two paragraphs into separate subsections to create a distinction between the two types of coverages that did not already exist."[64]

Collateral or "Judicial" Estoppel

In *New York Central Mutual Fire Ins. Co. v. Steiert*,[65] the court held that New York Central, the SUM carrier, was not collaterally estopped from challenging the validity of another insurer's disclaimer and was entitled to litigate that issue on the merits because it was not a party to the declaratory judgment action in which that disclaimer was unsuccessfully challenged by the claimant. The court discussed that "it was neither argued nor demonstrated that New York Central was in privity with a party to that action," and New York Central "has not afforded a full and fair opportunity to contest the determination in the declaratory judgment action."[66]

In *One Beacon Ins. Co. v. Espinoza*,[67] the court held that the claimant in the underlying personal injury action was not precluded by a jury verdict from claiming that the vehicle that struck her vehicle was unidentified because the jury had only concluded that there was no contact between the host vehicle and a vehicle owned by the defendant, Luongo. Even though the jury found that there was no accident or that there was a lack of physical contact with an (another) unidentified vehicle, the claimant was not precluded from making such a claim. Moreover, the court held that the doctrine of judicial estoppel, which precludes a party from framing his or her pleadings in a manner inconsistent with a position taken in a prior proceeding, was not applicable where the claimant did not obtain a favorable judgment as a result of the claimant's "contrary position" in the personal injury action. ■

1. 39 A.D.3d 483, 833 N.Y.S.2d 580 (2d Dep't 2007).
2. 36 A.D.3d 840, 829 N.Y.S.2d 195 (2d Dep't 2007).
3. 46 A.D.3d 174, 844 N.Y.S.2d 374 (2d Dep't 2007).
4. 40 A.D.3d 401, 835 N.Y.S.2d 576 (1st Dep't 2007).
5. 16 Misc. 3d 592, 836 N.Y.S.2d 864 (Sup. Ct., Madison Co. 2007).
6. 40 A.D.3d 362, 835 N.Y.S.2d 567 (1st Dep't 2007).
7. *See also Kobeck v. MVAIC*, 16 Misc. 3d 592, 836 N.Y.S.2d 864 (Sup. Ct., Madison Co. 2007).
8. 17 Misc. 3d 1136(A), 851 N.Y.S.2d 69 (Sup. Ct., Queens Co. 2007).
9. *Id.* (citations omitted). *See USAA Cas. Ins. Co. v. Hughes*, 35 A.D.3d 486, 825 N.Y.S.2d 531 (2d Dep't 2006); *Utica Mut. Ins. Co. v. Reid*, 22 A.D.3d 127, 799 N.Y.S.2d 509 (1st Dep't 2005); *Cohen v. Chubb Indem. Ins. Co.*, 286 AD2d 264, 729 N.Y.S.2d 105 (1st Dep't 2001); *Liberty Mut. Ins. Co. v. Panetta*, 187 A.D.2d 719, 590 N.Y.S.2d 290 (2d Dep't 1992).
10. *Lang*, 17 Misc. 3d 1136(A) (citations omitted). *See also N.Y. Cent. Mut. Fire Ins. Co. v. Gordon*, 46 A.D.3d 1296 (3d Dep't 2007).
11. *See St. James Mechanical, Inc. v. Royal & Sun Alliance*, 44 A.D.3d 1030, 845 N.Y.S.2d 83 (2d Dep't 2007).
12. *N.Y. Municipal Ins. Reciprocal v. McGuirk*, 45 A.D.3d 1166, 845 N.Y.S.2d 572 (3d Dep't 2007).
13. 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005).
14. 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).
15. 4 N.Y.3d 468, 796 N.Y.S.2d 13 (2005).
16. 39 A.D.3d 654, 655, 835 N.Y.S.2d 247 (2d Dep't 2007).
17. *Id.* at 655 (citing and relying upon *Rekemeyer*).
18. 38 A.D.3d 649, 831 N.Y.S.2d 545 (2d Dep't 2007).
19. *Id.* (citations omitted). *See Brandon*, 97 N.Y.2d at 491; *cf. Rekemeyer*, 4 N.Y.3d at 468. *See also Progressive Ne. Ins. Co. v. Heath*, 41 A.D.3d 1321, 837 N.Y.S.2d 476 (4th Dep't 2007).
20. 38 A.D.3d 898, 833 N.Y.S.2d 182 (2d Dep't 2007).
21. 25 A.D.3d 905, 808 N.Y.S.2d 797 (3d Dep't 2006).
22. *Ward*, 38 A.D.3d at 901.
23. Contra *State Farm Mut. Auto. Ins. Co. v. Rinaldi*, 27 A.D.3d 476, 810 N.Y.S.2d 346 (2d Dep't 2006) and *Nationwide Mut. Ins. Co. v. Perlmutter*, 32 A.D.3d 947, 821 N.Y.S.2d 753 (2d Dep't 2006), where the court remanded the matter "for the carrier to have an opportunity to demonstrate prejudice, if any."
24. 12 Misc. 3d 740, 814 N.Y.S.2d 849 (Sup. Ct., N.Y. Co. 2006), *aff'd*, 39 A.D.3d 432, 835 N.Y.S.2d 106 (1st Dep't), *appeal denied*, 9 N.Y.3d 802, 840 N.Y.S.2d 762 (2007).
25. *Argo Corp. v. Greater New York Mutual Ins. Co.*, 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005).
26. 39 A.D.3d 432, 835 N.Y.S.2d 106 (1st Dep't 2007) (citing *Rekemeyer* and *Brandon*) (It is interesting to note that neither the Supreme Court nor the Appellate Division in *Am. Transit*, 12 Misc. 3d 740, cited to or relied upon any of the pre-*Brandon* decisions in non-SUM cases, in which it was held or, at the very least, implied, that a showing of prejudice was required in order for the insurer to rely upon a breach of the notice of lawsuit provisions of its liability policy. *See Aetna Ins. Co. of Hartford, Conn. v. Millard*, 25 A.D.2d 341, 269 N.Y.S.2d 588 (3d Dep't 1966), a case involving a third-party liability policy, wherein the court noted that no prejudice had resulted to the insurer from its insured's failure to timely provide it with notice of the suit brought against him; *Melhado v. Catsimatidis*, 182 A.D.2d 576, 582 N.Y.S.2d 434 (1st Dep't 1992), also involving a liability policy, where the court specifically found that the insurer was prejudiced, *i.e.*, "irreparably harmed," by the insured's failure promptly to forward the legal process served upon him; and *N.Y. Mutual Underwriters v. Kaufman*, 257 A.D.2d 850, 685 N.Y.S.2d 312 (3d Dep't 1999), involving a homeowner's policy, where the court held that in the case of a failure to comply with the requirement to provide timely notice of suit, "late notice shall be excused where no prejudice has inured to the insurer." *But see Centenniel Ins. Co. v. Hoffman*, 265 A.D.2d 629, 695 N.Y.S.2d 774 (3d Dep't 1999), where the insured did not forward the summons and complaint until 4 1/2 months later, the court held that "since a policy's notice provision operates as a condition precedent, an insurer need not demonstrate prejudice to successfully assert the defense of non-compliance."
27. 43 A.D.3d 1062, 841 N.Y.S.2d 465 (2d Dep't 2007).
28. *See* Norman H. Dachs & Jonathan A. Dachs, *Legislative Initiatives Regarding the "No-Prejudice Rule,"* N.Y.L.J., Sept. 11, 2007, p. 3, col. 1.
29. 43 A.D.3d 1356, 842 N.Y.S.2d 804 (4th Dep't 2007).
30. 36 A.D.3d 499, 828 N.Y.S.2d 342 (1st Dep't 2007).
31. 45 A.D.3d 1166, 845 N.Y.S.2d 577 (3d Dep't 2007).
32. 38 A.D.3d 670, 831 N.Y.S.2d 520 (2d Dep't 2007).
33. 35 A.D.3d 275, 827 N.Y.S.2d 36 (1st Dep't 2006). *See also Temple Constr. Corp. v. Sirius Am. Ins. Co.*, 40 A.D.3d 1109, 837 N.Y.S.2d 689 (2d Dep't 2007) ("However, a broker will be held to have acted as the insurer's agent when 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.").
34. 38 A.D.3d 260, 832 N.Y.S.2d 502 (1st Dep't 2007).

35. 43 A.D.3d 1099, 842 N.Y.S.2d 554 (2d Dep't 2007).

36. 45 A.D.3d 598, 845 N.Y.S.2d 811 (2d Dep't 2007).

37. 41 A.D.3d 603, 840 N.Y.S.2d 358 (2d Dep't 2007).

38. *Id.* at 604–05.

39. 41 A.D.3d 1244, 839 N.Y.S.2d 381 (4th Dep't 2007).

40. 39 A.D.3d 293, 833 N.Y.S.2d 88 (1st Dep't 2007).

41. *See* Ins. Law § 5107.

42. 277 A.D.2d 321, 715 N.Y.S.2d 75 (2d Dep't 2000).

43. 27 A.D.3d 296, 811 N.Y.S.2d 641 (1st Dep't 2006). *See also* Norman H. Dachs & Jonathan A. Dachs, *Appellate Division: Recent Departmental Conflicts*, N.Y.L.J., July 10, 2007, p. 3, col. 1.

44. 45 A.D.3d 329, 846 N.Y.S.2d 91 (1st Dep't 2007).

45. *Id.* at 329.

46. 267 A.D.2d 181, 700 N.Y.S.2d 457 (1st Dep't 1999).

47. 46 A.D.3d 1296, 850 N.Y.S.2d 653 (3d Dep't 2007).

48. 2007 N.Y. Laws ch. 125.

49. 40 A.D.3d 644, 835 N.Y.S.2d 423 (2d Dep't 2007).

50. *Id.* at 645 (citing *In re Matarasso*, 56 N.Y.2d 264, 451 N.Y.S.2d 703 (1982)).

51. *See also State Farm Mut. Auto. Ins. Co. v. Juma*, 44 A.D.3d 963, 844 N.Y.S.2d 364 (2d Dep't 2007).

52. 40 A.D.3d 1005, 836 N.Y.S.2d 657 (2d Dep't 2007).

53. 36 A.D.3d 1193, 829 N.Y.S.2d 257 (3d Dep't 2007).

54. 36 A.D.3d 925, 830 N.Y.S.2d 716 (2d Dep't 2007).

55. 46 A.D.3d 561, 846 N.Y.S.2d 633 (2d Dep't 2007).

56. 44 A.D.3d 947, 844 N.Y.S.2d 121 (2d Dep't 2007).

57. 43 A.D.3d 1169, 841 N.Y.S.2d 794 (2d Dep't 2007).

58. 15 Misc. 3d 1116(A), 839 N.Y.S.2d 431 (Sup. Ct., Queens Co. 2007).

59. *Id.* at *3 (citations omitted).

60. 18 Misc. 3d 451, 847 N.Y.S.2d 832 (Sup. Ct., Kings Co. 2007).

61. 47 A.D.3d 710, 848 N.Y.S.2d 897 (2d Dep't 2008).

62. 45 A.D.3d 690, 846 N.Y.S.2d 248 (2d Dep't 2007).

63. 9 N.Y.3d 196, 848 N.Y.S.2d 1 (2007), *rev'g* 36 A.D.3d 92, 823 N.Y.S.2d 440 (2d Dep't 2006).

64. *See also Meegan v. Progressive Ins. Co.*, 43 A.D.3d 194, 836 N.Y.S.2d 451 (4th Dep't 2007), the Fourth Department, by a 3–2 vote, held that the plaintiff in an action to recover underinsured motorist benefits (pursuant to Ins. Law § 3420(f)(2) is required to establish a "serious injury" as defined by Ins. Law § 5102(d); *Kephart v. Safeco Ins. Co. of Am.*, 41 A.D.3d 1320, 836 N.Y.S.2d 460 (4th Dep't 2007); *Mavroudes v. Cronin & Byczek*, 45 A.D.3d 817, 847 N.Y.S.2d 591 (2d Dep't 2007). *See* Norman H. Dachs & Jonathan A. Dachs, *Appellate Division: Recent Departmental Conflicts*, N.Y.L.J., July 10, 2007, p. 3, col. 1.

65. 43 A.D.3d 1065, 842 N.Y.S.2d 494 (2d Dep't 2007).

66. *See also* Norman H. Dachs & Jonathan A. Dachs, *Issue Preclusion and UM/UIM/ SUM Cases*, N.Y.L.J., Jan. 9, 2007, p. 3, col. 1.

67. 37 A.D.3d 607, 830 N.Y.S.2d 287 (2d Dep't 2007).