2014-2015 Review of UM/UIM/SUM Law and Practice

By Jonathan A. Dachs

This is the second in a two-part series detailing changes in uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law and practice in New York. The first part included general information and highlights vital to UM practice and appeared in the March/April issue of the Journal. *This part will cover developments in UIM and SUM practice.*

UNINSURED MOTORIST ISSUES

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer[1]

A vehicle is considered "uninsured" where it was covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.

Insurance Law § 3420(d)(2) provides that if "an insurer shall disclaim liability or deny coverage for death or bodily injury . . . it shall give written notice as soon as reasonably possible of such disclaimer or liability or denial of coverage to the insured and the injured person or any other claimant." As the Court of Appeals observed in *KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.*,[2]

> [t]he legislature enacted section 3420(d)(2) to "aid injured parties" by encouraging the expeditious resolution of liability claims (citations omitted). To effect this goal, the statute "establishe[s] an absolute rule that unduly delayed disclaimer of liability or denial of coverage violates the rights of the insured [or] the injured party" (citation omitted). Compared to traditional common-law waiver and estoppel defenses, section 3420(d)(2) creates a heightened standard for disclaimer that "depends merely on the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel (citations omitted)."

Jonathan A. Dachs (jdachs@shaynedachs.com) is a member of the firm of Shayne, Dachs, Sauer & Dachs, LLP, in Mineola, New York. Mr. Dachs is a graduate of Columbia College of Columbia University and received his law degree from New York University Law School. He is the author of "Uninsured and Underinsured Motorist Protection," 2 *New Appleman New York Insurance Law*, Chapter 28 (Lexis Nexis), and of a chapter on UM/UIM and SUM (Pre- and Post-Regulation 35-D), which appears in *Weitz on Automobile Litigation: The No-Fault Handbook* (New York State Trial Lawyers Institute). He is also the author of a regular, featured column on Insurance Law in the *New York Law Journal*.

In *Highrise Housing & Scaffolding, Inc. v. Liberty Insurance Underwriters, Inc.*,[3] the court stated that "if a claim falls within the scope of the policy's insuring agreement, an insurer must issue a timely disclaimer pursuant to Insurance Law §3420(d) to deny coverage based upon an exclusion."[4] Moreover, the court reminded that "[e]xcess insurers have an obligation to disclaim pursuant to Insurance Law §3420(d)."

The Court of Appeals, in *Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp.*,[5] stated

> We have clarified the application of the statute by holding that "once the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the policy-

> holder in writing as soon as is reasonably possible ... [T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (citation omitted).

In *Vermont Mut. Ins. Co., Inc. v. Mowery Constr., Inc.*,[6] the court noted that "[a]n insurer's decision to disclaim liability insurance coverage must be given to the insured, in writing, as soon as is reasonably practicable, 'failing which the disclaimer or denial will be ineffective' (citations omitted)." The court went on to say, "While the timeliness of an insurer's notice of disclaimer generally raises an issue of fact for a jury to decide, where, as here, the basis for a disclaimer 'was or should have been readily apparent before the onset of the delay,' the delay will be found to be unreasonable as matter of law (citations omitted). 'Reasonableness of delay is measured from the time when the insurer learns of sufficient facts upon which to base the disclaimer' (citations omitted)."

The Court of Appeals, in *KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.*,[7] also noted that § 3420(d)(2) applies only in a particular context – those insurance cases involving death and bodily injury claims that arise out of a New York accident and were brought under a New York liability policy. The Court went on to say,

> "Where . . . the underlying claim does not arise out of an accident involving bodily injury or death, the notice of disclaimer provisions set forth in Insurance Law §3420(d)(2) are inapplicable" (citations omitted). In such cases, the insurer will not be barred from disclaiming coverage "simply as a result of the passage of time," and its delay in giving notice of disclaimer should be considered under common-law waiver and/or estoppel principles (citations omitted).

In *Mathis v. Am. Zurich Ins. Co.*,[8] the court reiterated that the restrictions of Ins. Law § 3420(d) do not apply to a policy that was not issued or delivered in the state of New York and in *B&R Consolidated, LLC v. Zurich American Ins. Co.*,[9] and *Key Fat Corp. v. Rutgers Cas. Ins. Co.*,[10] the courts held that Ins. Law § 3420(d)(2) is also inapplicable to claims that are not based on "death or bodily injury."

The court held in *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*[11] that in a matter involving property damage claims, the court rules on the common law for the proposition that "[a] ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense."

In *QBE Ins. Corp. v. Jinx-Proof, Inc.*,[12] the court reiterated the well-known rule that a reservation of rights letter is not effective as a denial or disclaimer.[13]

One of the increasingly common grounds for denial or disclaimer of coverage is the non-cooperation defense. In *West Street Properties, LLC v. American States Ins. Co.*,[14] the court observed that

> [t]he noncooperation of an insured party in the defense of an action is a ground upon which an insurer may deny coverage, and may be asserted by the insurer as a defense in an action on a judgment by an injured party pursuant to Insurance Law § 3420 (a) (2) (citations omitted). In order to establish a proper disclaimer based on its insured's alleged noncooperation, an insurer is required to demonstrate that "it acted diligently in seeking to bring about its insured's cooperation, that its efforts were reasonably calculated to obtain its insured's cooperation, and that the attitude of its insured, after the cooperation of its insured was sought, was one of 'willful and avowed obstruction'" (citations omitted). The insurer has a "heavy" burden of proving lack of cooperation.

In this case, the court held that the insurer's submissions "were insufficient to sustain their prima facie burden on the cross motion for summary judgment."

In *Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp.*,[15] the action against Preferred Trucking and its driver – insured by Country-Wide – was commenced in March 2007. Throughout the spring of 2007, Country-Wide made "numerous attempts" to contact Preferred's president and the driver – with no success. The president and driver did not respond to the lawsuit either, thus leading the plaintiff to file an application for a default judgment in September 2007. Country-Wide's receipt from the plaintiff's attorney of a copy of the default motion on October 4, 2007 was its first notice of the lawsuit. Thus, on October 10, 2007, Country-Wide informed Preferred and the driver by letter that it was exercising its "right to issue a disclaimer of indemnity" and reserving its "right to disclaim any duty to defend" because of the insureds' failure to cooperate.

During the ensuing months, Preferred's president contacted Country-Wide once to express his willingness to cooperate, but then proved impossible to reach. Country-Wide continued its efforts to contact the president and the driver through the summer of 2008. The law firm retained by Country-Wide to defend its insureds sent "multiple letters" to the driver advising him of a scheduled deposition and reminding him of the need to cooperate. Additional efforts to reach the owner and driver after the court warned that the failure to appear for deposition would result in the preclusion of evidence in support of Preferred's claims or defenses were futile. In July 2008, a Country-Wide investigator visited the president's home for the sixth time and left a message for him with his wife. The owner failed to respond to this message. Three weeks later, another investigator was able to speak to the driver's daughter, who advised that the driver did not speak English. On August 18, 2008, a Spanish-speaking investigator finally reached the driver, who said that he would cooperate. The next day, the lawyers wrote to the driver in Spanish informing him of the upcoming deposition and his need to respond. The driver never responded to that letter. On October 13, 2008, the Spanish-speaking investigator again spoke to the driver, who told him (for the first time) that he did not "care about the EBT date"

because of a "family situation." Subsequent telephone messages explaining the urgent need for the driver's appearance were ignored, and the driver did not appear. On October 16, 2008, the court granted the plaintiff's motion to strike the defendant's answer for failure to appear. On November 6, 2008, Country-Wide disclaimed its obligation to defend and indemnify Preferred and the driver based upon refusal to cooperate.

Addressing the question of whether the November 6, 2008 disclaimer was timely as a matter of law, the Court of Appeals found compelling Country-Wide's argument that although it knew or should have known in July 2008 that Preferred's president would not cooperate, it was not in a position to know that the driver would not cooperate until October 13, 2008, when he said he did not "care about the EBT date." The Court noted that during most of the period between July and October "the situation with respect to [the driver] remained opaque." Under the circumstances of the numerous efforts and contacts had by Country-Wide with the driver and his family members, in which the driver "punctuated periods of noncompliance with sporadic cooperation or promises to cooperate," the Court held that "Country-Wide established as a matter of law that its delay was reasonable." As the Court further explained, the named insured was Preferred Trucking, and its cooperation could occur through the driver. The driver, unlike the president, "had personal knowledge of the accident and was in a position to provide a meaningful defense, or alternatively, testify in such a manner as to bind Preferred Trucking. As Country-Wide argues, as long as it was still seeking [the driver's] cooperation in good faith, it could not disclaim."[16]

It is well-established that a proper notice of denial or disclaimer must apprise with a high degree of specificity of the ground or grounds on which it is predicated.[17]

In *24 Fifth Owners, Inc. v. Sirius Am. Ins. Co.*,[18] the court rejected the plaintiff insured's claim that the disclaimer letter did not specify that the late notice defense was based on the time that had elapsed between the insured's receipt of the underlying complaint and its tender to the insurer because the letter, which referenced the policy condition relied upon, "sufficiently apprised plaintiffs that notice was considered untimely relative to either event – the date of occurrence or of receipt of the lawsuit."[19]

In *Sierra v. 4401 Sunset Park, LLC*,[20] Scottsdale Ins. Co. issued a certificate of insurance to 4401 Sunset Park, LLC (Sunset Park), and Sierra Realty, in accordance with a construction agreement. On August 18, 2008, Juan Sierra allegedly was injured while working in the building under construction. On January 6, 2009, Sunset Park and Sierra Realty's own insurer, Greater New York Insurance Company (GNY), wrote to Scottsdale, tendering a claim for the defense and indemnification of the underlying action on behalf of Sunset Park and Sierra Realty. On February 2, 2009, Scottsdale disclaimed coverage and rejected the tender on the grounds that the GNY letter constituted late notice of the accident and did not comply with terms of the Scottsdale policy. Scottsdale did not send this letter to Sunset Park or Sierra Realty, but, rather, only to GNY.

In affirming the Supreme Court's grant of Sunset Park and Sierra Realty's motion for summary judgment declaring that Scottsdale was obligated to defend and indemnify them, the Appellate Division, Second Department observed that where a primary insurer, like GNY, tenders a claim for defense and indemnification to an insurer, in this case, Scottsdale, which issued a certificate of insurance indicating that they are additional insureds, that insurer must comply with the disclaimer requirements of Ins. Law § 3420(d)(2) by providing written notice of disclaimer of coverage to the additional insureds. According to the court,

> The fact that the tendering insurer provided untimely notice of the accident "does not excuse the insurer's unreasonable delay in disclaiming coverage" (citations omitted). The failure of Scottsdale to provide written notice of disclaimer to 4401 and Sierra Realty rendered the disclaimer of coverage ineffective against them (citations omitted). Under the circumstances of this case, GNY was not the real party in interest, such that the notice of disclaimer to GNY would be rendered effective as against 4401 and Sierra Realty.[21]

In unanimously affirming the Appellate Division's order, the Court of Appeals held that written notice of disclaimer to the insured's own carrier, but not to the insureds themselves, did not meet the requirements of the disclaimer statute. As explained by the Court:

> GNY was not an insured under Scottsdale's policy; it was another insurer. While GNY had acted on the insured's behalf in sending notice of the claim to Scottsdale, that did not make GNY the insureds' agent for all purposes, or for the specific purpose that is relevant here: receipt of a notice of disclaimer. GNY's interests were not necessarily the same as its insureds' in this litigation. There might have been a coverage dispute between GNY and the insureds, or plaintiff's claim might have exceeded GNY's policy limits. Because the insureds had their own interests at stake, separate from that of GNY, they were entitled to notice delivered to them, or at least to an agent – perhaps their attorney – who owed a duty of loyalty in this matter to them only. As the Appellate Division correctly held in *Greater N.Y. Mut. Ins. Co. v. Chubb Indem. Ins. Co.*, 105 A.D.3d 523, 524, 963 N.Y.S.2d 218 (1st Dept. 2013), the obligation imposed by the Insurance Law is "to give timely notice of disclaimer to the mutual insureds . . . not to . . . another insurer."[22]

Moreover, the Court rejected Scottsdale's argument that it had "substantially complied with the statute," relying upon *Excelsior Ins. Co. v. Antretter Contracting Corp.*[23] and *Cincinnati Ins. Cos. v. Sirius Am. Ins. Co.*[24] Indeed, the court stated that "if *Excelsior* and *Cincinnati* are read to stand for the general proposition that notice to an addi-

tional insured's liability carrier serves as notice to the additional insured under section 3420(d)(2), those cases should not be followed."[25]

Stolen Vehicle

A vehicle that is stolen is considered an "uninsured" motor vehicle. The issue of whether, in fact, a vehicle was used without the permission or consent (express or implied) of the owner often presents a triable issue of fact for determination at a framed issue hearing. In general, there is a strong presumption of permissive use, which can be overcome by evidence to the contrary.[26]

In *Allstate Ins. Co. v. Rolon*,[27] the court held that GEICO's opposition to Allstate's petition to stay arbitration, based upon its denial of coverage to the tortfeasor driver on the ground that he had been operating the vehicle without the permission of the vehicle's owner, was insufficient because GEICO failed to come forward with any admissible evidence, such as an affidavit by its insured (the vehicle owner), or a police report of the vehicle's theft.

In *Allstate Ins. Co. v. Cristobal Peralta*,[28] the court held that the evidence at the framed issue hearing did not overcome the presumption of permissive use. The evidence established that the car keys were stolen hours before the accident and that such theft was reported to the police. However, there was no evidence that the car was ever stolen or reported stolen. Under those circumstances, the court could reject the contention that the car must have been driven by an unknown thief, and there was no basis to disturb the findings of the hearing court.

In *Alvarez v. Bivens*,[29] the defendant parked his truck on the street near the old Yankee stadium. When he exited the truck, he locked it and placed a hide-a-key box with the spare key inside the rear wheel frame. When he returned later that night, the truck was gone and he reported it stolen. When it was recovered by the police about three days later, the hide-a-key box was missing, but the police recovered the key that had been in the box. In the meantime, two days after the alleged theft, the plaintiff was struck by the stolen truck. Six days later, an individual pled guilty to grand larceny in the fourth degree, admitting that he stole the truck.

Under these facts, the court concluded that the defendant "established by substantial evidence that his truck was stolen at the time of the accident, thereby rebutting the VTL §388 presumption that the motor vehicle was being operated with his consent."[30] The Court further held that the plaintiff failed to raise an issue of fact that the defendant had violated VTL § 1210(a) – the "key in the ignition" statute. Pursuant to that statute, "[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle." However, the statute further states that "'the provision for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency.' Thus, to avoid liability under the section, 'a motorist need only ensure that the ignition key is "hidden from sight"' and need not additionally conceal it so that the key is 'not readily discoverable by a prospective car thief without extreme difficulty (citations omitted).'"[31] Here, the defendant's testimony that someone could "probably" see the hide-away-box if he or she looked for it, and that "you would have a very small window as you are walking past it," from which you could "possibly" see the key, did not suffice to raise an issue as to whether the key was "hidden from sight." The defendant testified that one would "have to kind of be peeking around a little bit" to find the key in the hide-a-key box and the record established that the key was not in plain view and that one would have to be actively looking for it to find it.

In *State Farm Ins. Co. v. Walker-Pinckney*,[32] the court held that the vehicle owner's testimony that the vehicle was missing at the time of the accident, without more, was insufficient to overcome the presumption of permissive use. The sole witness at the framed issue hearing was the owner of the vehicle in question. His testimony established that, at some point, he noticed that the vehicle was "missing," that he reported this to the police, and that, less than two days later, he ascertained that the vehicle had been towed to an impoundment lot. When he recovered the vehicle, he saw that it had been seriously damaged; this was the first time he learned that the vehicle had been in an accident. He did not know who was driving the vehicle at the time of the accident, and he did not give anyone permission to drive the vehicle at that time. However, he also testified that both he and his wife had sets of keys to the vehicle, and that the wife was the last one to park the vehicle before the owner noticed it was "missing." Moreover, when the owner recovered the vehicle from the impoundment lot, a set of keys was inside the vehicle. No evidence was presented at the hearing with respect to whether the wife was using or operating the vehicle at the time of the accident, or whether she had given a third party permission to use the vehicle at the time. Under those circumstances, the court held that "the evidence adduced at the hearing was not sufficient to overcome the presumption of permissive use."[33]

Hit-and-Run

UM/SUM coverage is available to victims of accidents involving a "hit-and-run," i.e., an unidentified vehicle that leaves the scene of the accident.

In *Progressive Northwestern Ins. Co. v. Scott*,[34] the court held that "[p]hysical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle" and that "[t]he insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely, that physical contact occurred, that the identity of the owner and oper-

ator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable."

When there is a genuine triable issue of fact with respect to whether a claimant's vehicle had any physical contact with an alleged hit-and-run vehicle, the appropriate procedure is to stay arbitration pending a hearing on that issue.[35]

In *Merchants Preferrred Ins. Co. v. Waldo*,[36] the respondent raised a triable issue of fact warranting a framed issue hearing to determine whether there was "physical contact" between her vehicle and the hit-and-run vehicle by submitting an affidavit in which she averred that another vehicle struck her vehicle when it changed lanes, and that the other vehicle "skimmed" her front bumper.

In *National Continental Ins. Co. v. Brojaj*,[37] the court upheld the Supreme Court's determination, based upon the evidence presented at a framed issue hearing, that there was no contact between the truck driven by the respondent and an unidentified car. The court refused to upset the trial court's conclusion that the respondent's testimony was not credible.

Where the matter is determined after a hearing, the appellate court's power to review the evidence is "as broad as that of the hearing court, taking into account in a close case the fact that the hearing court had the advantage of seeing the witnesses (citations omitted)."[38]

In *Yi Song He v. Motor Veh. Acc. Indem. Corp.*,[39] the court held that the petitioner, who was riding a bicycle when he was hit by a vehicle that fled the scene, failed to establish that "all reasonable efforts" were made "to ascertain the identity of the motor vehicle and of the owner and operator thereof," where the police report identified two witnesses and reflected that two license plates were identified as belonging to the offending vehicle. Contrary to the petitioner's contention, the fact that one of the license plates was identified as a "possible plate," "does not mean that there is no substantial evidence linking that vehicle to the accident. Rather, it means that an investigation was required. Yet, petitioner has not identified any effort . . . to identify, or obtain information from the two witnesses." Accordingly, the court denied the petition to sue the MVAIC.

On the other hand, in *Alam v. Motor Veh. Acc. Indem. Corp.*,[40] the court held that the petitioner met his burden of establishing that the accident was one in which the identity of the owner and operator of the offending vehicle was not ascertainable through reasonable efforts, where the petitioner was struck by a motor vehicle while crossing the street on his way to pray at a mosque, the driver pulled over, exited the vehicle and approached the petitioner, the petitioner told the driver that he was fine, and, as a result, the driver left the scene. "Because petitioner did not believe he was seriously hurt, it was reasonable that he did not ask the driver for identifying information at that time (citation omitted). Once he knew he was seriously injured, petitioner undertook reasonable efforts to ascertain the identity of the vehicle owner or operator" by filing a police report, canvassing the mosque and surrounding area to locate possible eyewitnesses, and obtaining surveillance footage depicting the accident location – all of which proved unhelpful in identifying the operator or the license plate number of the offending vehicle.

In some instances, a claim is made that the subject vehicle was identified by the claimant/insured, but was not, in fact, involved in the subject accident. Such cases often result in framed issue hearings to determine the issue of involvement, with results dependent upon the specific facts of each case.

For example, in *Hertz Corp. v. Holmes*,[41] the court held that the uncontroverted evidence adduced at the hearing established involvement of the subject vehicle. At the scene of the accident, the driver of the offending vehicle went into a nearby house and came out with a telephone, and the claimant spoke on the phone to the driver's wife, who, *inter alia*, identified her place of employment. The offending driver moved the vehicle, which claimant described as a silver SUV, and parked it down the block from the accident scene, and the claimant followed and pulled her vehicle approximately six feet behind it and wrote down the plate number, which she gave to the police when they arrived. The plate was registered to a silver Mercury Mountaineer (an SUV), which was owned by an individual who resided near the accident scene. The driver admitted that his wife worked where the claimant said she did, and there was no damage to the vehicle.

On the other hand, in *Nationwide Mutual Ins. Co. v. Joseph-Sanders*,[42] the court concluded, after a hearing, that the special referee's determination that the subject vehicle was involved was not supported by any credible evidence. The testimony at the framed issue hearing established that immediately after the collision, which involved an alleged unidentified vehicle, the driver of the offending vehicle got out of his green Ford Taurus and apologized to the claimant, and was still present at the scene when the ambulance arrived. The police accident report did not indicate the presence of a hit-and-run vehicle, and no evidence was recovered at the scene pertaining to the identity of that vehicle. The operator of another vehicle, which claimant's vehicle struck after being hit by the hit-and-run vehicle, testified that she identified a green Ford Taurus owned by Melvin Hammer as the offending vehicle upon observing it parked in the vicinity of the accident a day after the accident. The testimony further established that after striking the rear of the claimant's vehicle, the offending vehicle backed up over a curb and struck a house. However, photos of the vehicle showed only light scratches on the front of the vehicle, consistent with Hammer's testimony that the vehicle had "wear and tear." In addition, her in-court identification of Hammer, more than one year after the

accident, was not credible. The other driver stated that she only observed him by "peeking out" from inside her car, and described him as a "very older" or elderly man with a long beard and wearing traditional Hasidic clothing. However, in court, Mr. Hammer was clean-shaven and did not dress in Hasidic garb, and testified that he was never Hasidic. Hammer consistently denied that his vehicle was involved in the accident.

In *Government Employees Ins. Co. v. Boohit*,[43] the petitioner established by admissible proof that a vehicle owned by the additional respondent was involved in the alleged accident. No objection was made to the admission of a police report containing the license plate number of that vehicle. Thus, the evidence was presumed to have been unobjectionable, and any error in its admission was deemed waived. In any event, the contents of the police report were admissible under the present sense impression exception to the hearsay rule since they were sufficiently corroborated by testimony at the hearing. No basis existed in the record to disturb the court's credibility determinations.

Cancellation/Termination

Although not specifically listed as a separate category of an "uninsured" motor vehicle under Ins. Law § 3420(f)(1), a vehicle whose insurer timely and properly *canceled* its policy prior to the date of the accident will be deemed an "uninsured motor vehicle."

In *Progressive Specialty Ins. Co. v. Alexis*,[44] the insurer's cancellation was based upon the contention that the insured, who did not register the insured vehicle, did not have an insurable interest in the vehicle. The court held that this asserted ground was incorrect and held that the cancellation was invalid.

The court in *Motor Veh. Acc. Indem. Corp. v. American Country Ins. Co.*[45] held that by operation of Vehicle and Traffic Law § 313(1)(a) (VTL), *subsequent coverage terminates prior coverage* as of the effective date and hour of the new coverage, irrespective of whether the initial insurer otherwise complied with the cancellation requirements of the VTL.

Workers' Compensation Defense

In *Hauber-Malota v. Philadelphia Ins. Cos.*,[46] deciding a "matter of first impression," the court held that an employee, injured in an accident while in the course of her employment, and who was barred by the exclusive remedy provisions in the Workers' Compensation Law from suing a co-employee based upon negligence, was not entitled to SUM benefits under her employer's automobile liability insurance policy.

In this case, the plaintiff was a passenger in a vehicle operated by her co-employee and owned by their common employer, when that vehicle was rear-ended by another vehicle operated by another co-employee. All involved were within the scope of their employment at the time of the accident. The plaintiff's action against the owner/operator of the second vehicle was dismissed on the ground that her remedy against her co-employee was limited to the recovery of Workers' Compensation benefits (Workers' Comp. Law § 29(6)). The plaintiff subsequently commenced an action seeking SUM benefits from the insurer of the host vehicle owned by her employer. The SUM insurer moved for summary judgment on the ground, *inter alia*, that the plaintiff's exclusive remedy was the recovery of Workers' Compensation benefits. In reversing the trial court's denial of that motion, the Fourth Department first observed that

> plaintiff correctly contends that the exclusive remedy provision in Workers' Compensation Law §29(6) does not bar all actions by injured employees against any employer's insurer for SUM benefits. Although workers' compensation benefits generally are "exclusive and in place of any other liability whatsoever" (§11), the statute "cannot be read to bar all suits to enforce contractual liabilities" (citation omitted). Because an action to recover uninsured motorist benefits "is predicated on [the] insurer's contractual obligation to assume the risk of loss associated with an uninsured motorist" (citation omitted), the Workers' Compensation Law does not categorically bar such an action against an employer's insurer (citation omitted).[47]

However, the court noted that the critical distinction in this case was that the subject motor vehicle accident involved two vehicles operated by co-employees.

As noted by the Court, the Uninsured Motorist Statute, Ins. Law § 3420(f)(1), requires the payment of benefits in the amount that the claimant "shall be entitled to recover" as damages from an owner or operator of an uninsured motor vehicle. Similarly, the SUM endorsement, promulgated pursuant to Ins. Law § 3420(f)(2), requires the payment of "all sums that the insured . . . shall be *legally entitled to recover* as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured (emphasis added)." As explained by the court, "Defendants' contractual liability to provide SUM benefits is therefore 'premised in part' upon the contingency of a third party's tort liability."[48] Insofar as, pursuant to the plain language of the SUM endorsement, the plaintiff was not "legally entitled to recover damages" from the owner and operator of the offending vehicle because of the status of its operator as a co-employee, the plaintiff was not entitled to recover SUM benefits under the policy.

UNDERINSURED MOTORIST ISSUES

Trigger of Coverage

In *Governmemt Employees Ins. Co. v. Lee*,[49] the claimant was a passenger in a vehicle insured by Government Employees Ins. Co. (GEICO), with bodily injury and SUM limits of $300,000 per person/$300,000 per accident. The alleged offending vehicle was insured by Allstate under an Allstate "split limit" policy, with bodily injury lim-

its of $100,000 per person/$300,000 per accident. After receiving the full $100,000 available limits of the Allstate policy, the plaintiff demanded arbitration of a SUM claim against GEICO, arguing that the per-person liability coverage afforded under the Allstate policy was less than the per person liability coverage afforded under the GEICO policy. GEICO sought to stay arbitration on the ground that its SUM coverage was not triggered because both the GEICO and the Allstate policy provided for aggregate liability limits of $300,000 per accident, and, therefore, the tortfeasor was not an underinsured motorist.

After noting that "the essential purpose of the [SUM] statute [is] to provide the insured with the same level of protection he or she would provide to others were the insured a tortfeasor in a bodily injury accident (citation omitted)," and that "[t]he necessary analytical step, then, is to place the insured in the shoes of the tortfeasor and ask whether the insured would have greater bodily injury coverage under the circumstances than the tortfeasor actually has (id.)" and "[t]he determination of whether SUM benefits are available 'requires a comparison of each policy's bodily injury liability coverage as it in fact operates under the policy terms applicable to that particular coverage' (id. at 688)," the court concluded that

> a comparison of the two policies at issue, in light of the particular circumstances of this case, demonstrates that an individual such as Lee would be afforded greater per-person bodily injury liability coverage under the GEICO policy than under the Allstate policy. Under the Allstate policy, Lee was limited to the recovery, in tort, of $100,000. The GEICO policy – a single limit policy – provided $300,000 of liability coverage for bodily injury to any one injured person. Since the per person bodily injury liability insurance limits of coverage provided by the Allstate policy are in a lesser amount than the per-person bodily injury liability insurance limits of coverage provided by the GEICO policy, the SUM provision of the GEICO policy was triggered (citations omitted).[50]

A proper notice of denial or disclaimer must apprise with a high degree of specificity of the ground or grounds on which it is predicated.

In *Unitrin Direct/Warner Ins. Co. v. Brand*,[51] the tortfeasor had bodily injury liability coverage limits of $100,000/$300,000, and the injured claimant also had bodily injury liability limits of $100,000/$300,000. Insofar as SUM coverage is only triggered where the bodily injury liability insurance limits of the policy covering the tortfeasor's vehicle are less than the liability limits of the policy under which a party is seeking SUM benefits, and, here, the tortfeasor's limits were identical to the claimant's, the tortfeasor did not qualify as an underinsured driver, and underinsured motorist coverage was not triggered.

Consent to Settle

The mandatory uninsured motorist endorsement provides that coverage does not apply if the insured or person entitled to payment under such coverage "shall without written consent of the company, make any settlement with . . . any person or organization who may be legally liable therefor." The SUM endorsement mandated by Regulation 35-D (11 N.Y.C.R.R. § 60-2.3(e)) contains a specific exclusion for settlement without consent, as well as a provision that states "an insured shall not otherwise settle with any negligent party, without our written consent, such that our rights would be impaired."

In *Progressive Northeastern Ins. Co. v. Cipolla*,[52] the court noted that pursuant to Condition 10 of the SUM endorsement, the claimant/insured was required to give notice of any settlement to Progressive so that Progressive could "advance such settlement amounts to the insured in return for the cooperation of the insured" in a subrogation action, and forbidden from settling his claim against the tortfeasor "such that [Progressive's] rights would be impaired." It was undisputed that the claimant/insured settled his claim against the tortfeasor for the full amount of the tortfeasor's policy limits, but did not give Progressive timely notice of the settlement. When, thereafter, he made a claim for SUM benefits under Progressive's policy, Progressive denied the claim based upon his unauthorized settlement.

In challenging the denial of coverage, the claimant/insured argued that his unauthorized settlement did not impair Progressive's subrogation rights because he had not provided a release to the tortfeasor. He did not dispute, however, that he discontinued his action against the tortfeasor without Progressive's consent and that, under the terms of the settlement, the discontinuance was to be "with prejudice." He also did not dispute that he was required to provide the tortfeasor with a release. Under those circumstances, the court held that he failed to demonstrate that he did not impair Progressive's subrogation rights, and, accordingly, granted Progressive's petition to stay arbitration.

In *Ducz v. Progressive Northeastern Ins. Co.*,[53] the insured/claimant sent correspondence to the SUM insurer advising that a high-low arbitration was being offered by the tortfeasor's insurer, and advising of a potential claim under the SUM endorsement in the event that the arbitration award exceeded the tortfeasor's policy limits. The insured/claimant requested the SUM carrier's consent to proceed with the high-low arbitration, and the SUM carrier declined to consent because it did not want to waive its right to subrogation against the tortfeasor. Thereafter, the insured/claimant commenced a proceeding to compel the SUM carrier to consent to the high-low arbitration and to proceed with SUM arbitration. The court denied the insured/claimant's application because: (1) she failed to establish that she exhausted the tortfeasor's policy through settlement; and (2) the compelling

of consent to the high-low agreement was not relief that could be sought nor granted in a CPLR art. 75 proceeding.

Offset/Reduction in Coverage

In *Government Employees Ins. Co. v. Terrelonge*,[54] the court held that the provision in the SUM endorsement that limited SUM payments to the difference between the limits of SUM coverage and the insurance payments received by the claimant from any person legally liable for the claimant's bodily injuries was not ambiguous, and must, therefore, be enforced. Thus, where the tortfeasor's coverage of $25,000 was tendered, and the difference between the SUM policy limit of $25,000 and the amount offered by the tortfeasor – also $25,000 – was zero, the petition to stay was granted.

In *Santoro v. GEICO*,[55] the court held that where the defendant's policy included "Supplementary Uninsured/Underinsured Motorist" (SUM) coverage in the amount of $300,000, the plaintiff's alleged damages in an action for breach of contract against the SUM carrier were limited to $275,000 because the plaintiff had previously received the sum of $25,000 from the tortfeasor's insurer.

The court also noted that while "'consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting' (citation omitted),[56] the only consequential damages asserted by the plaintiff are an attorney's fee and costs and disbursements resulting from this affirmative litigation, which are not recoverable."[57]

1. Insurance Law § 3420(d)(2) (Ins. Law).
2. 23 N.Y.3d 583, 590, 992 N.Y.S.2d 185 (2014).
3. 116 A.D.3d 647, 647, 984 N.Y.S.2d 366 (1st Dep't 2014).
4. *See Matter of Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185, 189–90, 712 N.Y.S.2d 433 (2000); *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 136–37, 447 N.Y.S.2d 911 (1982).
5. 22 N.Y.3d 571, 575–76, 983 N.Y.S.2d 460 (2014).
6. 122 A.D.3d 974, 975, 996 N.Y.S.2d 747 (3d Dep't 2014).
7. 23 N.Y.3d 583, 590–91, 992 N.Y.S.2d 185 (2014).
8. 127 A.D.3d 622, 5 N.Y.S.3d 872 (1st Dep't 2015).
9. 120 A.D.3d 1366, 993 N.Y.S.2d 121 (2d Dep't 2014).
10. 120 A.D.3d 1195, 922 N.Y.S.2d 327 (2d Dep't 2014), *motion for lv. to appeal denied*, 25 N.Y.3d 905, 10 N.Y.S.3d 524 (2015).
11. 130 A.D.3d 497, 498, 14 N.Y.S.3d 415 (1st Dep't 2015).
12. 102 A.D.3d 508, 959 N.Y.S.2d 19 (1st Dep't 2013), *aff'd*, 22 N.Y.3d 1105, 983 N.Y.S.2d 465 (2014).
13. *See* Dachs, N. and Dachs, J., Court of Appeals Decisions: "Jinx-Proof" and "Reservation of Rights Letters," N.Y.L.J., May 13, 2014, p. 3, col. 1. *See also Vermont Mut. Ins. Co., Inc. v. Mowery Constr. Inc.*, 122 A.D.3d 974, 996 N.Y.S.2d 747 (3d Dep't 2014).
14. 124 A.D.3d 876, 878–79, 3 N.Y.S.3d 58 (2d Dep't 2015).
15. 22 N.Y.3d 571, 983 N.Y.S.2d 460 (2014).
16. *Id.* at 572. *See* Dachs, N. and Dachs, J., Court of Appeals Clarifies Timeliness of Non-Cooperation Disclaimer, N.Y.L.J., Mar. 11, 2014, p. 3, vol. 1.
17. *See General Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512 (1979).
18. 124 A.D.3d 551, 998 N.Y.S.2d 632 (1st Dep't 2015).
19. *Id.* at *1. *See also JLS Industries, Inc. v. Delos Ins. Co.*, 127 A.D.3d 645, 9 N.Y.S.3d 19 (1st Dep't 2015).
20. 101 A.D.3d 983, 957 N.Y.S.2d 219 (2d Dep't 2012), aff'd, 24 N.Y.3d 514, 2 N.Y.S.3d 8 (2014).
21. *Id.* at 985.
22. *Sierra*, 24 N.Y.3d at 518–19.
23. 262 A.D.2d 124, 693 N.Y.S.2d 100 (1st Dep't 1999).
24. 51 A.D.3d 1365, 856 N.Y.S.2d 800 (4th Dep't 2008).
25. *Id.* at 519.
26. *State Farm Ins. Co. v. Walker-Pinckney*, 118 A.D.3d 712, 986 N.Y.S.2d 626 (2d Dep't 2014).
27. 120 A.D.3d 1117, 992 N.Y.S.2d 411 (1st Dep't 2014).
28. 128 A.D.3d 569, 10 N.Y.S.3d 51 (1st Dep't 2015).
29. 114 A.D.3d 526, 980 N.Y.S.2d 425 (1st Dep't 2014).
30. *Id.* at 527.
31. *Id.*
32. 118 A.D.3d 712, 986 N.Y.S.2d 626 (2d Dep't 2014).
33. *Id.* at 714.
34. 123 A.D.3d 932, 932, 999 N.Y.S.2d 442 (2d Dep't 2014).
35. See Allstate Ins. Co. v. Carraro, 130 A.D.3d 1021, 13 N.Y.S.3d 843 (2d Dep't 2015). See also Merchants Preferred Ins. Co. v. Waldo, 125 A.D.3d 864, 4 N.Y.S.3d 246 (2d Dep't 2015).
36. 125 A.D.3d 864.
37. 114 A.D.3d 614, 980 N.Y.S.2d 765 (1st Dep't 2014).
38. *State Farm Mut. Auto. Ins. Co. v. Watson*, 128 A.D.3d 841, 842, 7 N.Y.S.3d 910 (2d Dep't 2015); *see also GEICO v. Selin*, 119 A.D.3d 568, 987 N.Y.S.2d 898 (2d Dep't 2014); *AutoOne Ins. Co. v. Fernandez*, 119 A.D.3d 677, 989 N.Y.S.2d 619 (2d Dep't 2014) (insured has the burden of establishing by a fair preponderance of the evidence that there was a hit-and-run accident with an uninsured vehicle, including all the elements of a hit-and-run).
39. 128 A.D.3d 525, 525, 9 N.Y.S.3d 53 (1st Dep't 2015).
40. 127 A.D.3d 585, 586, 7 N.Y.S.3d 135 (1st Dep't 2015).
41. 127 A.D.3d 1193, 10 N.Y.S.3d 92 (2d Dep't 2015).
42. 121 A.D.3d 1003, 996 N.Y.S.2d 57 (2d Dep't 2014).
43. 122 A.D.3d 525, 997 N.Y.S.2d 384 (1st Dep't 2014).
44. 122 A.D.3d 745, 996 N.Y.S.2d 173 (2d Dep't 2014).
45. 126 A.D.3d 657, 4 N.Y.S.3d 487 (1st Dep't 2015).
46. 121 A.D.3d 327, 991 N.Y.S.2d 190 (4th Dep't 2014).
47. *Id.* at 329.
48. *Id.* at 330.
49. 120 A.D.3d 497, 991 N.Y.S.2d 105 (2d Dep't 2014).
50. *Id.* at 499.
51. 120 A.D.3d 698, 993 N.Y.S.2d 37 (2d Dep't 2014).
52. 119 A.D.3d 946, 946–47, 990 N.Y.S.2d 569 (2d Dep't 2014).
53. 113 A.D.3d 849, 978 N.Y.S.2d 906 (2d Dep't 2014).
54. 126 A.D.3d 792, 5 N.Y.S.3d 288 (2d Dep't 2015).
55. 117 A.D.3d 1026, 1027, 986 N.Y.S.2d 572 (2d Dep't 2014).
56. *See Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y.3d 200, 203, 856 N.Y.S.2d 513 (2008).
57. See New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 324, 639 N.Y.S.2d 283 (1995); *Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21, 416 N.Y.S.2d 559 (1979); *Stein, LLC v. Lawyers Tit. Ins. Corp.*, 100 A.D.3d 622, 953 N.Y.S.2d 303 (2d Dep't 2012).