

INSURANCE LAW

Recent Legislative, Regulatory Amendments Pertaining to Auto Insurance: Part I

The early days of Summer 2017 have seen a spate of activity involving important changes to the statutes and regulations governing automobile insurance, of which practitioners should take note. The recent legislative and regulatory amendments pertaining to "transportation network companies," such as Uber, Lyft, Gett, and the like, which include amendments to the SUM Endorsement set forth in Regulation 35-D, are described below.

In the next installment of this article, I will discuss another set of amendments to the SUM Endorsement, expected to go into effect on Aug. 1, 2017, as well as an update on the SUM Limits bill recently passed by both houses of the New York State Legislature, and presently awaiting Gov. Andrew Cuomo's signature.

VTL Article 44-B

By the Laws of 2017, Chapter 59, part AAA, §2, effective June 29, 2017, the New York Vehicle and Traffic Law was amended to add a new Article 44-B, titled Transportation Network Company Services, to deal with the proliferating phenomenon of such services as Uber, Lyft, Gett and the like. Although these services have several different models, the most typical model utilizes drivers that are not professional livery drivers and who use their own personal vehicles to provide prearranged rides. Article 44-B, which consists of 11 subsections, VTL §§1691-1700, containing legal requirements applicable to "transportation network companies" (or TNC as they are referred to throughout the new statutes), TNC vehicles and TNC drivers, includes, as pertinent hereto, several provisions dealing with the

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financial responsibility/insurance for such vehicles.

Definitions

At the outset, the new statute defines a transportation network company, or TNC, as

a person, corporation, partnership, sole proprietorship, or other entity that is licensed pursuant to this article and is operating in New York state exclusively using a digital net-

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work to connect transportation network company passengers to transportation network company drivers who provide TNC prearranged trips.

See VTL §1691(3).

The new statute defines a transportation network company vehicle, or TNC vehicle, as

a vehicle that is: (a) used by a transportation network company driver to provide a TNC prearranged trip originating within the state of New York; and (b) owned, leased or otherwise authorized for use by the transportation network company driver.

VTL §1691(1)(a), (b).

The definition of a TNC vehicle, however, contains several specific exclusions: (a) a taxicab, as defined in VTL §148-a, and NYC Admin. Code §19-502, or other

local law; (b) a livery vehicle, as defined in VTL §121-E; (c) a black car, limousine, or luxury limousine, as defined in NYC Admin. Code §19-502, or other local law; (d) a for-hire vehicle, as defined in NYC Admin. Code §19-502, or other local law; (e) a bus, as defined in VTL §104; (f) any motor vehicle weighing more than 6,500 pounds unloaded; (g) any motor vehicle having a seating capacity of more than seven passengers; and (h) any motor vehicle subject to VTL §370 (Indemnity Bonds or Insurance Policies on Vehicles Transporting Passengers For Hire). See VTL §1691(c)(i)-(viii).

The new statute defines a TNC driver as an individual who:

(a) Receives connections to potential passengers and related services from a transportation network company in exchange for the payment of a fee to the transportation network company; and (b) Uses a TNC vehicle to offer or provide a TNC prearranged trip to transportation network passengers upon connection through a digital network controlled by a transportation network company in exchange for compensation or payment of a fee.

See VTL §1691(4)(a), (b).

The new statute also defines a TNC prearranged trip as the provision of transportation by a transportation network company driver to a passenger provided through the use of a TNC's digital network: (i) beginning when a transportation network company driver accepts a passenger's request for a trip through a digital network controlled by a transportation network company; (ii) continuing while the transportation network company driver transports the requesting passenger in a TNC vehicle; and (iii) ending when the last requesting passenger departs from the TNC vehicle.

See VTL §1691(6)(a)(i)-(ii). The term TNC prearranged trip, however, does not include transportation provided through any

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of the following: (i) shared expense carpool or vanpool arrangements, including those as defined in VTL §158-B; and (ii) use of a taxicab, livery, luxury limousine, or other for-hire vehicle, as defined in NYC Admin. Code 19-502, or other local law. See VTL §1691(6)(b)(i)-(ii).

Insurance Requirements

With respect to the issue of financial responsibility, the new statute requires a TNC driver or TNC on the driver's behalf through a group policy, to "maintain insurance that recognizes that the driver is a TNC driver and provides financial responsibility coverage: (a) while the TNC driver is logged onto the TNC's digital network; and (b) while the TNC driver is engaged in a TNC prearranged trip." See VTL §1693(1)(a)(6). The new statute then sets forth the specific automobile financial responsibility insurance requirements that apply: (a) while a TNC driver is logged onto the TNC's digital network but is not engaged in a TNC prearranged trip; and (b) while a TNC driver is engaged in a TNC prearranged trip.

Pursuant to VTL §1693(2)(a), the following insurance requirements apply while the TNC driver is not engaged in a TNC prearranged trip: liability insurance for damages, including damages for care and loss of services, because of bodily injury or death, and/or property damage, arising out of the use of a vehicle in New York or elsewhere in the U.S. or Canada; with limits of coverage (exclusive of interests and costs) of at least \$75,000 for bodily injury or death of one person/\$150,000 for bodily injury or death of two or more persons, and \$25,000 for property damage. In addition, insurance coverage in satisfaction of the requirements set forth in Ins. L. §3420 (UM) and Article 51 (No-Fault) must be provided.

Pursuant to VTL §1693(3)(a), the following insurance requirements apply while the TNC driver is engaged in a TNC prearranged trip: liability insurance for damages, including damages for care and loss of services, because of bodily injury or death, and/or property damage arising out of the use of a vehicle in New York or elsewhere in the United States or Canada, with limits of coverage (exclusive of interest and costs) of at least \$1,250,000 for bodily injury, death and/or property damage (single limit). In addition, supplementary uninsured/underinsured motorist coverage in the amount of \$1,250,000 must also be provided for bodily insurance or death of

"any person in any one accident," as well as coverage in satisfaction of Ins. L. §3420 (UM) and Article 41 (No-Fault).

In both situations, these coverage requirements may be satisfied by: (a) insurance maintained by the TNC driver; (b) insurance provided through a group policy maintained by for TNC; or (c) a combination of the above.

The new statute further provides, in §1693(5); that, if insurance maintained by a TNC driver pursuant to the above-described requirements "has lapsed or does not provide the required coverage," then "the group policy maintained by a TNC shall provide the coverage required by this section beginning with the first dollar of a claim and have the duty to defend such claim." Moreover, "[c]overage under a group policy maintained by the TNC shall not be dependent on the denial of a claim by the insurer that issued the insurance policy used to register the TNC vehicle, nor shall that insurer be required to first deny a claim." See VTL §1693(6). The TNC driver is required to carry proof of coverage satisfying both types of coverage described above. See VTL §1693(9).

The new statute, in §1694, requires the TNC to disclose, in writing, to TNC drivers before they are allowed to accept a request for a TNC prearranged trip on the TNC's digital network, the following: (a) the insurance coverage, including the types of coverage and the limits for each coverage, that the TNC provides while the TNC driver uses a TNC vehicle in connection with TNC's digital network; (b) that the TNC driver's own automobile insurance policy might not provide any coverage while the TNC driver is logged on to the TNC's digital network or is engaged in a TNC prearranged trip, depending on its terms; and (c) that if a TNC vehicle has a lien against it, then the continued use of such TNC vehicle by its TNC driver without physical damage coverage may violate the terms of the contract with the lienholder." See VTL §1694(1)-(3).

The new statute, in §1695, specifically provides that New York state insurers may "exclude any and all coverage afforded under the policy insured to an owner or operator of a TNC vehicle for any loss or injury that occurs while a TNC driver is logged on to a TNC's digital network or while a driver provides a TNC prearranged trip," and this exclusion may include liability coverage for bodily injury and property damage, No-Fault, UM, SUM and motor vehicle physical damage coverage. See VTL §1695(1)(a)-(d). On the other hand, "nothing shall be deemed to preclude an insurer from providing primary, excess,

or umbrella coverage for the TNC driver's TNC vehicle, if it chose to do so by contract or endorsement." See VTL §1695(3). The statute goes on to note that although insurers that exclude TNC coverage "shall have no duty to defend or indemnify any claim expressly excluded" (VTL §1695(4)), an insurer that defends or indemnifies a claim against a TNC driver that is excluded under the terms of its policy "shall have a right of contribution against other insurers that provide motor vehicle insurance to the same driver in satisfaction of the coverage requirements of this article." See VTL §1695(5).

Finally, the new statute, at VTL §1695(6) provides that "in a claims coverage investigation, a TNC and any insurer providing coverage under this article shall, within 15 days after a claim has been filed, facilitate the exchange of relevant information with directly involved parties and any insurer of the TNC

to Regulation 35-D). For example, in the preamble section of that regulation, at 11 NYCRR §60-2.0(a), reference has now been made to the requirement contained in new VTL §1693(3) for minimum SUM coverage on all policies satisfying the financial responsibility requirements of that section applicable to TNCs, TNC vehicles and TNC drivers, as defined in VTL §1691.

Section 60-2.1 (Basics of SUM Coverage) now has a new subsection (f), which sets forth the specific SUM coverage requirements in policies issued in satisfaction of the financial responsibility requirements of VTL Article 44-B, discussed above.

Section 60-2.2 (Notice about SUM coverage) now has, inter alia, new subsection (2)(a)-(d), which sets forth notices that are required to be given by insurers writing motor vehicle liability policies providing liability coverage in satisfaction of the requirements of VTL Article

The Emergency Regulation includes significant amendments to the regulation governing supplementary uninsured/underinsured motorist coverage.

driver if applicable, including the precise times that a TNC driver logged on and off of the TNC's digital network in the 12-hour period immediately preceding and in the 12-hour period immediately following the accident and disclose to one another a clear description of the coverage, exclusions and limits provided under any motor vehicle insurance maintained under this article."

Emergency Regulation

In order to ensure compliance by insurers with the new statutes governing TNCs, the New York State Department of Financial Services promulgated, as an Emergency Regulation, several amendments to Title 11 of the New York Codes, Rules and Regulations (Insurance), also to take effect on June 29, 2017. These include amendments to the regulations pertaining to mandatory provisions in an "owner's policy of liability insurance" (11 NYCRR §60-1.2); rental vehicle coverage (11 NYCRR §60-1.5); liability limits (11 NYCRR §60-1.7); and a new section pertaining to other coverages while using a vehicle as a TNC vehicle (11 NYCRR §60-1.8).

'Seventh Amendment'

In addition, the Emergency Regulation includes significant amendments to the regulation governing supplementary uninsured/underinsured motorist coverage—Regulation 35-D (the Seventh Amendment

44-B, including notices advising, where applicable, that SUM coverage is being provided while a driver provides a prearranged trip, and SUM coverage is available while the driver is logged onto a transportation network company's digital network but is not engaged in a transportation network company prearranged trip, as well as the SUM limits offered for purchase.

In addition to the foregoing, the Emergency Regulation has amended the SUM coverage period, exclusions and conditions provisions contained in the Regulation 35-D Supplementary Uninsured/Underinsured Motorists Endorsement—New York, set forth at §60-2.3(f).

With regard to the SUM coverage period, the amendment adds a footnote to the SUM Endorsement that offers alternative provisions for policies issued pursuant to VTL §1693(3) (while the TNC driver is providing a TNC prearranged trip), policies issued pursuant to §1693(2) (while the TNC driver is logged onto a TNC digital network but not providing a TNC prearranged trip), or policies issued pursuant to VTL §1693(2) and (3) (while the TNC driver is logged onto a TNC digital network but not providing a TNC prearranged trip or while providing a TNC prearranged trip).

The new amendment adds a fourth exclusion from SUM coverage for "bodily injury to an insured incurred while the insured motor vehicle is used by a transportation network company driver

who is logged onto a transportation network company's digital network but is not engaged in a transportation network company prearranged trip or while the driver provides a transportation network company prearranged trip pursuant to article 44-B of the Vehicle and Traffic Law." In a new footnote, the Emergency Regulation states that this fourth exclusion may be deleted by the insurer, or the insurer may use alternative exclusions for situations where the insured motor vehicle is used by a TNC driver "who is logged onto a [TNC]'s digital network but is not engaged in a prearranged trip," or the insured motor vehicle is used by a TNC driver while the driver provides a TNC prearranged trip—whichever is applicable.

In the Priority of Coverage Condition of the SUM Endorsement—Condition 8—the Emergency Regulation contains a new footnote that provides for an alternative definition of the first-in-priority policy in cases involving a group policy issued in satisfaction of the financial responsibility requirements of VTL article 44-B, which adds to the existing language of "a policy covering a motor vehicle occupied by the injured person at the time of the accident," the following caveat: "provided that if other insurance provides for SUM coverage in satisfaction of the financial requirements of article 44-B of the Vehicle and Traffic Law, then coverage under that policy shall be a higher priority over this policy."

And in the Arbitration Condition of the SUM Endorsement—Condition 12—the Emergency Regulation notes, by way of a new footnote, that the second paragraph of that condition, which provides that where the maximum amount of SUM coverage equals the amount of coverage required by Ins. L. §3420(f)(1), i.e., uninsured motorist coverage, any disagreements as to the claimant's legal entitlement to recover damages and/or the amount of payment owed under the SUM coverage "shall be settled" by arbitration (and not litigation), "shall not be included in any policy issued in satisfaction of the financial responsibility requirements of article 44-B of the Vehicle and Traffic Law."

Other Amendments

In addition to the foregoing, the Emergency Regulation contains an entirely new subpart, 11 NYCRR §60-3, known as Regulation 35E, which is titled Transportation Network Companies: Minimum Provisions for Policies and Other Requirements, which establishes the minimum policy provisions and other requirements with respect to any policy issued in satisfac-

tion of the financial responsibility requirements of VTL article 44-B, and a group policy issued pursuant to Ins. L. §3455 (Transportation Network Company group insurance policies). This new regulation contains general provisions applicable to every article 44-B policy (§60-3.2), mandatory liability provisions (§60-3.3), exclusions (§60-3.4), discretionary provisions (§60-3.5), payments to insured (§60-3.6), group policy requirements (§60-3.7), excess line policies (§60-3.8), and notice by motor vehicle insurers (§60-3.9).

Finally, the new amendments contain relatively minor changes to the No-Fault Regulations (Regulation 68-A), and the Mandatory Personal Injury Protection Endorsement and Additional Personal Injury Protection Endorsements (11 NYCRR §65-1), as well as Regulation 68-C (11 NYCRR §65-3), Regulation 68-D (11 NYCRR §65-4), and Regulation 100 (11 NYCRR §169) (Non-Commercial Motor Vehicle Insurance Rating Plans), and Regulation 64 (11 NYCRR §216) (Unfair Claims Settlement Practices).

As noted above, additional amendments to the SUM Endorsement have been proposed and are expected to be enacted on Aug. 1, 2017. Those additional amendments, and other legislative/regulatory activities will be discussed in the next installment of this article.