

**A GUIDE TO UNINSURED AND UNDERINSURED
MOTORIST COVERAGE IN NEW YORK STATE**

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INTRODUCTION

In recent years the areas of uninsured motorist (“UM”), underinsured motorist (“UIM”) and supplementary uninsured motorist (“SUM”) coverage have been becoming increasingly complex as the law has evolved.¹ Accordingly, this paper provides an overview of these areas of New York law and provides illustrative examples from reported decisions as to how the law in these areas play out in practice.

I. UNINSURED MOTORIST COVERAGE

Uninsured motorist coverage, codified in N.Y. Insurance Law (“Insurance Law”) Article 52, was enacted by the state legislature in 1939, and amended in 1958.² The legislature’s impetus to enact UM coverage was the recognition of the limitations of the financial security and compulsory insurance requirements in the state as well as the public concern over the problems arising from injuries inflicted by negligent motorists who were uninsured, financially irresponsible, or simply unknown.³

Uninsured motorist coverage was intended “to further close the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation” and to “within fixed limits, compensate innocent persons who receive injuries, and the dependants of those who are killed, through the wrongful conduct of motorists who because they are uninsured and not financially responsible or unknown, cannot be made to respond in

¹ See Jonathan A. Dachs, 2002 Update on Issues Affecting Accidents Involving Uninsured and/or Underinsured Motorists, 75-JUN N.Y. ST. B.J. 32, 32 (2003).

² INSURANCE LAW § 5201, Historical and Statutory Notes (McKinney 2000).

³ See INSURANCE LAW § 5201(b).

damages.”⁴

The creation of the Motor Vehicle Accident Indemnification Corporation (“MVAIC”) is the main feature of Article 52 of the Insurance Law. Among other things, pursuant to § 5206 of the Insurance Law, MVAIC was empowered:

- (1) to prescribe, subject to the approval of the superintendent, the policy or endorsement form to be issued by the members embodying the coverage required by Insurance Law § 3420(f);
- (2) to provide for the investigation of any claim asserted by a qualified person against a financially irresponsible motorist;
- (3) to settle and pay any claim or judgment asserted by a qualified person against a financially irresponsible motorist;
- (4) to appear and defend, through attorneys representing the corporation, on behalf of the financially irresponsible motorist or on behalf of the corporation in any action brought against him or it as provided in Insurance Law § 5209; and
- (5) to levy and collect assessments against its members for any operating deficits of the corporation and for any funds required for its operation and to enforce payment by legal proceedings.

Article 52 of the Insurance Law proscribes two categories of eligible claimants thereunder: (1) insured claimants and (2) qualified persons. These two groups are mutually exclusive and their rights and obligations differ.⁵

An “insured claimant” must recover under the relevant UM endorsement required in all insurance policies, or, lacking such status, resort to a suit against MVAIC pursuant to

⁴ 70 N.Y. JUR.2D INSURANCE § 1516.

⁵ In re St. John, 105 A.D.2d 530, 531-532, 481 N.Y.S.2d 787, 789 (3d Dep’t 1984) (citations omitted). See 70 N.Y. JUR.2D INSURANCE § 1517.

Article 52.⁶ Significantly, an injured motorist's UM endorsement does not operate unless and until it has been established that there is no insurance coverage covering the tortfeasor or offending vehicle on the date of the accident.⁷

In contrast to insured claimants, qualified persons derive their rights solely from Article 52 of the Insurance Law.

Pursuant to Insurance Law § 5201(b), both insured claimants and qualified persons are protected against motor vehicle accidents caused by:

- (1) uninsured motor vehicles registered in a state other than New York,
- (2) unidentified motor vehicles which leave the scene of the accident,
- (3) motor vehicles registered in this state as to which at the time of the accident there was not in effect a policy of liability insurance;
- (4) stolen motor vehicles,
- (5) motor vehicles operated without the permission of the owner,
- (6) insured motor vehicles where the insurer disclaims liability or denies coverage, and
- (7) unregistered motor vehicles.

The mandatory required amounts of UM coverage in New York are as follows: \$25,000 for injuries and \$50,000 for death of one person, in any one accident. For more than one person in a single accident, the limits are \$50,000 for injuries and \$100,000 for

⁶ In re St. John, 105 A.D.2d at 531-532, 481 N.Y.S.2d at 789. See N.Y. Insurance Law § 3420(f)(1).

⁷ New York Central Mutual Fire Ins. Co. v. Julien, 298 A.D.2d 587, 587, 749 N.Y.S.2d 73, 74 (2d Dep't 2002).

deaths.⁸

A. INSURED CLAIMANTS

The term “insured claimant” is defined within the automobile policy endorsement. “Typically, an automobile liability policy issued in New York insures the named insured, his or her spouse (if residents of the same household), and any other person using the motor vehicle with permission of the named insured.”⁹ Insured claimants can only proceed against their insurance carrier as permitted by the terms of the UM provision for damages incurred as a result of the insured’s accident with an uninsured vehicle. The intent is to provide the same protection to the person injured by an uninsured motorist as he or she would have had if they were injured in an accident by a motorist who was covered by a standard automobile liability insurance policy.

Procedurally, the insured must look to the terms of his or her policy to determine the time within which he or she must file a notice of claim. The typical uninsured motorist endorsement requires written notice within 90 days, or “as soon as practicable.” Absent a valid excuse, an insured’s failure to satisfy the notice requirements vitiates coverage.

⁸ John Nonna, Michael Pilarz, Christopher W. Healy, and Irene A. Sullivan, Insurance Law Practice, 341 (N.Y.S. Bar Association, 2003) (hereafter, “Insurance Law Practice”), citing Insurance Law §3420(f)(1).

⁹ Insurance Law Practice, 340.

Example:

Insured's Non-Satisfaction of a Condition Precedent for Uninsured Motorist Coverage

In Nationwide Mutual Insurance Company v. Charles,¹⁰ the appellate court reversed the lower court's decision which denied the request for a permanent stay of arbitration. The Appellate Division, Second Department observed that the petitioner's insured, Leonard Charles, did not forward to the petitioner a copy of the summons and complaint in his pending action against the uninsured motorists until nine months after he demanded arbitration of his UM claim. The court found that the insured's delay in forwarding a copy of this pleading to the insurer violated a condition precedent to obtaining UM coverage and, as such, mandated a permanent stay of arbitration.

Insured's Ignorance of Insurer is no Excuse to Providing Notice

In Eagle Insurance Company v. Garcia,¹¹ the insurer appealed the denial of its petition to permanently stay arbitration. The appellate court noted the well-established rule that absent a valid excuse, the insured's failure to satisfy the notice requirement of their insurance policy vitiates coverage. In this matter, Ms. Garcia claimed that she was misled by the insurance code in the police accident report which indicated that her insurance carrier was Atlanta International Insurance Company, and not Eagle Insurance Carrier, which was her actual insurer. The court held that an insured's ignorance of his or her own insurance carrier "constitutes gross negligence and is not a valid excuse for the failure to provide the carrier with timely notice of claim." As such, the court ruled that Ms. Garcia "failed to proffer a valid excuse, and arbitration should be permanently stayed."

Once the proper initial notice is given to the insurer, the insurance company then requires the insured to submit written proof of claim, stating the full particulars of the accident, the nature and extent of the injuries incurred, treatment received, and any other relevant information. The insured also may be required to submit to examinations under oath and to physical examinations. If the insured and insurer do not settle the claim, either party may demand arbitration of the issues outstanding.¹²

¹⁰ 275 A.D.2d 324, 712 N.Y.S.2d 578 (2d Dep't 2000).

¹¹ 280 A.D.2d 476, 720 N.Y.S.2d 172 (2d Dep't 2001).

¹² See Insurance Law Practice, 340.

Typically, insurance carriers that issue UM policies have, with the approval of the N.Y.S. Department of Insurance, included compulsory arbitration provisions therein.¹³ However, a party will not be compelled to arbitrate, and thus surrender the right to litigate a dispute in court, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. An agreement to arbitrate must be express, direct and unequivocal as to the issues or disputes that are to be submitted to arbitration.¹⁴

Example:

In State Farm Mutual Automobile Insurance Company v. Torcivia, Mr. Glen Torcivia was involved in an accident in New York when the vehicle he was driving was struck in the rear by another vehicle which fled the scene. Mr. Torcivia was insured by State Farm under an insurance policy issued in South Carolina. Mr. Torcivia's vehicle had South Carolina license plates. Mr. Torcivia served a demand for arbitration of an uninsured motorist claim. This lawsuit was commenced to permanently stay arbitration on the ground that Mr. Torcivia's insurance policy did not contain a provision for the arbitration of uninsured motorist claims. The court held that as Mr. Torcivia concedes that the insurance policy at issue does not provide for the arbitration of uninsured motorist claims, the insurer cannot be compelled to arbitrate.

Whether or not a given party falls within the scope of the UM provision is an issue to be determined by a court and not an arbitrator.¹⁵ If it is determined that a claimant is insured and the tortfeasor vehicle is uninsured, the claimant's method of recovery (as stated within the endorsement), is limited to arbitration against his or her own insurance carrier.

A claim based upon an UM endorsement, whether in the form of a demand for arbitration or the institution of a court action, is governed by the six year statute of

¹³ 70 N.Y. JUR.2D INSURANCE § 1517.

¹⁴ State Farm Mutual Automobile Insurance Company v. Torcivia, 277 A.D.2d 321, 715 N.Y.S.2d 75 (2d Dep't 2000).

¹⁵ See Insurance Law Practice, 340 (observing that "[a]n arbitrator has power to resolve issues of liability and damages, including the 'serious injury' threshold issue" while "[c]overage and procedural issues are the province of the courts.") (footnotes omitted); 70 N.Y. Jur.2d Insurance § 1522.

limitations applicable to contract actions, in contrast to the three year period governing tort actions.¹⁶ The six year statute of limitations to demand arbitration of an uninsured motorist's claim runs from the date of the accident or from the time when subsequent events render the offending vehicle "uninsured."

Examples:

In Allstate Insurance Company v. Venezia,¹⁷ the appellate court upheld the lower court's ruling permanently staying the arbitration of the uninsured motorist claim based upon the expiration of the six-year statute of limitations

In Allstate Insurance Company v. Morrison,¹⁸ the appellant, Christopher Morrison, was injured on August 27, 1991, while riding as a passenger in his wife's vehicle. After Mr. Morrison obtained a judgment on default against the driver of the offending vehicle, Mr. Morrison demanded payment from the alleged insurance carrier of the offending vehicle, Allcity Insurance Company. Allcity disclaimed liability on the ground that no policy existed on the date of the accident. On July 2, 1998, Mr. Morrison served a demand for arbitration upon Allstate which insured his wife's vehicle claiming uninsured motorist benefits. The appellate court concluded that since Mr. Morrison's claim was filed more than six years after the accident, Mr. Morrison was required to come forward with legally sufficient proof that a later accrual date applies than the date of the accident. The appellate court concluded that Mr. Morrison did not tender sufficient proof that a later accrual date applied than the date of the accident, or that he exercised due diligence in ascertaining the insurance status of the offending vehicle. As such, Allstate was entitled to a permanent stay of arbitration.

1. Who is an "insured"?

A great deal of litigation has arisen over the question of whether or not a person is an "insured" under the relevant UM endorsement. The reason for this is because the coverage afforded by the UM endorsement is not operative unless the damages flow from an accident caused by an uninsured motor vehicle as that term is defined in Insurance Law

¹⁶ 70 N.Y. JUR.2D INSURANCE § 1517.

¹⁷ 305 A.D.2d 405, 758 N.Y.S.2d 500 (2d Dep't 2003).

¹⁸ 267 A.D.2d 381, 700 N.Y.S.2d 74 (2d Dep't 1999).

§ 5202(d).¹⁹ As such, if a claimant's insurer can establish that the tortfeasor is insured, the claimant must first look to that person's insurance policy for relief.²⁰ Once the claimant's insurer establishes a *prima facie* case that the tortfeasor's vehicle was insured at the time of the accident, the burden shifts to the tortfeasor's insurer to establish that it did not insure the tortfeasor *at the time of the accident*.²¹

Insurance Law 5202(i) defines an insured person as a person defined under the coverage required by Insurance Law 3420(f). Section 3420(f)(1) provides as follows with respect to requiring uninsured motorist coverage in insurance policies issued in New York:

No policy insuring against loss resulting from liability . . . for bodily injury or death . . . arising out of the ownership, maintenance and use of a motor vehicle by the insured shall be issued . . . unless it contains a provision whereby the insurer agrees that it will pay to the insured . . . all sums . . . which the insured or his legal representative shall be entitled to recover as damages from an owner or operator of an uninsured motor vehicle . . . [or] an insured motor vehicle where the insurer disclaims liability or denies coverage.

Examples:

Acceptable Evidence to Establish That Offending Vehicle is Insured

In Government Employees Insurance Company v. Williams-Staley, the appellate court noted that as GEICO was the one seeking a stay of the arbitration demanded by Ms. Williams-Staley under the uninsured motorist endorsement of her policy, it bore the burden of coming forward with evidence establishing that the alleged offending vehicle was insured by another insurance carrier at the time of the accident. The court observed that GEICO could have met this burden by

¹⁹ 70 N.Y. JUR.2D INSURANCE § 1520. See New York Central Mutual Fire Ins. Co. v. Julien, 298 A.D.2d 587, 587, 749 N.Y.S.2d 73, 74 (2d Dep't 2002).

²⁰ See Government Employees Insurance Company v. Williams-Staley, 288 A.D.2d 471, 733 N.Y.S.2d 74 (2d Dep't 2001).

²¹ See Eagle Insurance Company v. Villegas, 764 N.Y.S.2d 15, 16 (1st Dep't 2003); CGU Ins. Co. v. Greatheart, 301 A.D.2d 649, 753 N.Y.S.2d 883 (2d Dep't 2003); Lumbermen's Mutual Casualty Company v. Quintero, 305 A.D.2d 684, 685, 762 N.Y.S.2d 82, 83 (2d Dep't 2003); InAmerican Casualty Insurance Company v. Walcott, 300 A.D.2d 478, 478-479, 751 N.Y.S.2d 560, 561 (2d Dep't 2002).

presenting, among other things, a copy of the police accident report noting the insurance code of the offending vehicle's insurer. However, as the police report did not identify Lumbermens Mutual Casualty Company as the insurer of the offending 1988 Chevrolet, GEICO failed to make a prima facie showing that the offending vehicle was insured by another insurer at the time of the accident.

In Eagle Insurance Company v. Pusey,²² the proof submitted, a letter from the offending vehicle's alleged insurance carrier, failed to establish prima facie that the offending vehicle was insured on the date of the accident.

Contrary to the courts in GEICO and Eagle Insurance Company, the court in Nationwide Insurance Company v. Sillman,²³ found that a police accident report which contained the offending vehicles's insurance code designation "established a prima facie case with respect to the existence of insurance coverage."

The court in Schlesinger v. Nationwide Mutual Insurance Company,²⁴ stated unequivocally that one was entitled to rely upon the insurance code and policy number in a police report as presumptive proof that the offending vehicle was insured.

Similarly, in State Farm Mutual Automobile Insurance Company v. Youngblood,²⁵ the court found that "State Farm established a prima facie case as to the existence of insurance coverage for the offending vehicle by presenting a copy of the police accident report, which contained the identification code for the Assigned Risk Plan for the offending vehicle, and a 'registration record expansion' from the Department of Motor Vehicles . . . which indicated that the offending vehicle was insured by Allstate."

Uninsured Motorist Coverage Does not Apply to Automobile After Title is Transferred

In In re Feliciano,²⁶ Ms. Joan Paul traded in her 1975 Oldsmobile ("Olds") with a Mr. Joseph Bholer, a used car salesman, for a 1977 Ford Thunderbird. Ms. Paul signed and tendered the certificate of title for the Olds' on or about March 31, 1984. She thereafter took possession of the Thunderbird on April 1, 1984. As a courtesy to Mr. Bholer, Ms. Paul left her license plates on the 'Olds and got new ones for the Thunderbird. On April 2nd, the Olds', then in Mr. Bholer's possession, was being

²² 271 A.D.2d 445, 706 N.Y.S.2d 123 (2d Dep't 2000).

²³ 266 A.D.2d 551, 699 N.Y.S.2d 98 (2d Dep't 1999).

²⁴ 294 A.D.2d 41, 742 N.Y.S.2d 352 (2d Dep't 2002).

²⁵ 270 A.D.2d 493, 705 N.Y.S.2d 619 (2d Dep't 2000).

²⁶ 140 A.D.2d 607, 528 N.Y.S.2d 653 (2d Dep't 1988).

driven by a Mr. Robert Reidel without Mr. Bholer's permission or authority and was involved in an accident with Mr. Crispin Felciano. On that same day, the very first business day after the transaction, Nationwide Insurance Company was notified of the transfer of the Olds' and commenced the necessary paperwork to cancel coverage for the Olds' and institute coverage for the Ford. Mr. Felciano demanded arbitration under the uninsured motorist endorsement of the policy issued by Hanover Insurance Company. Hanover sought a stay of arbitration which was granted by the lower court. On appeal, the Second Department reversed and stated that the rule is "well settled that an insurance company's coverage of an insured automobile terminates upon the transfer of title by its insured to another less the insurer is notified and consents to continued coverage." Moreover, if the license plates are not removed, although the seller may be estopped from denying ownership if the vehicle is involved in an accident, the insurer, however, will not be estopped from denying coverage on the vehicle which its insured no longer owns. As such, based on these principles, the appellate court ruled that title had passed and thus coverage for the Olds' terminated on March 31, 1984, and replacement coverage for the Thunderbird commenced on April 1, 1984. That Nationwide was not notified of the transfer until April 2nd is of no consequence. Accordingly, Nationwide did not insure the Olds' on April 2, 1984.

2. Timeliness Issues For Disclaiming

Disputes often arise as to whether the insurance carrier for the offending vehicle has timely disclaimed. Insurance Law § 3420(d) requires liability insurers to "give written notice as soon as is reasonably possible of . . . disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." Whether an insurer has disclaimed "as soon as is reasonably possible" is an issue of fact that depends on all of the particular facts and circumstances of the matter, but especially the length of and reason for the delay.²⁷ Failure to comply with Insurance Law § 3420(d) renders the insurer's denial ineffective.²⁸

"The notice of disclaimer must promptly apprise the claimant with a high degree of

²⁷ Osterreicher v. Home Mutual Insurance Company of Binghamton, New York, 272 A.D.2d 926, 927, 707 N.Y.S.2d 742, 743 (4th Dep't 2000).

²⁸ See Heiss v. Nationwide Mutual Insurance Company, 273 A.D.2d 689, 690, 709 N.Y.S.2d 701, 703 (3d Dep't 2000).

specificity of the ground or grounds on which the disclaimer is predicated.”²⁹

Examples:

Unreasonable Delay in Disclaiming

In Wasserheit v. New York Central Mutual Fire Insurance Company,³⁰ New York Central Mutual Fire Insurance Company appealed the lower court’s ruling that its disclaimer of liability was invalid. The appellate court concluded that the disclaimer was invalid despite the fact that the insured failed to provide the insurer with a timely notice of claim in the first instance. The court found that the insurer’s delay of four months after being notified of the plaintiff’s request for uninsured motorist benefits was unreasonable given that the grounds for disclaimer was that the claim was untimely filed. Furthermore, no explanation was given to explain the four month delay in disclaiming. As such, the Appellate Division, Second Department, held that as “the primary reason for disclaiming coverage was readily apparent upon receipt of notice of the claim, New York Central’s unexplained delay in disclaiming coverage was unreasonable.”

In McGinnis v. Mandracchia,³¹ an infant named Raul Poupart, Jr., was allegedly injured on August 17, 1992, while riding in a vehicle operated by his father and owned by a third-party. This vehicle was insured by Allstate Insurance Company. On February 25, 1993, the infant’s guardian notified Allstate of the accident. Upon receipt of the notification, Allstate undertook an investigation as to whether an accident actually occurred on August 17th. Three months later, on May 20, 1993, Allstate attempted to disclaim coverage on the grounds that it had received late notice of the accident and that the infant’s injuries did not result as a result of an automobile accident. The appellate court eventually found that “Allstate’s 85-day delay in disclaiming coverage was unreasonable as a matter of law, as the basis alleged for the disclaimer was obvious on the face of the plaintiff’s notification. Allstate’s attempt to justify its delay on the ground that it had to investigate whether the infant was injured in an automobile accident is, in this instance, an insufficient excuse as a matter of law, as that investigation was unrelated to the reason for the disclaimer based on late notice and could have been asserted at any time.”

Similar to McGinnis, in Allstate Insurance Company v. Machado,³² the Appellate Division, Second Department, found that Allstate’s one-year delay in disclaiming coverage of Mr. Machado’s uninsured motorist claim was unreasonable as a matter

²⁹ State Farm Mutual Automobile Insurance Company v. Joseph, 287 A.D.2d 724, 725, 732 N.Y.S.2d 66, 67 (2d Dep’t 2001) (citations omitted).

³⁰ 271 A.D.2d 439, 705 N.Y.S.2d 638 (2d Dep’t 2000).

³¹ 291 A.D.2d 484, 739 N.Y.S.2d 160 (2d Dep’t 2002).

³² 210 A.D.2d 274, 274-275, 620 N.Y.S.2d 10, 10 (2d Dep’t 1994) (citations omitted).

of law. The appellate court found that Allstate's explanation that its delay was due to Mr. Machado's failure to cooperate was meritless. The court found that "[a]ll of the facts necessary for Allstate to disclaim coverage were available as soon as the claim was made. It is, therefore, no consequence that the appellant failed to notify Allstate of his claim until approximately two years after the accident. Accordingly, Allstate is estopped from denying uninsured motorist coverage."

In Cosgriff v. Progressive Insurance Company, Mr. Cosgriff notified Allstate Insurance Company of his January 26, 1999, accident by letter dated February 16, 1999. Allstate responded in a letter dated May 7, 1999, advising Mr. Cosgriff's counsel that it was "confident" that Mr. Cosgriff's "claim could be resolved in the near future." Subsequently, in a letter dated June 15, 2000, Allstate issued a disclaimer of coverage. The appellate court found that Allstate "failed to provide any explanation for its 17 month delay in issuing a disclaimer. As such, the delay by Allstate was unreasonable as a matter of law, and the disclaimer was properly found to be invalid and of no effect. The parties were thereupon ordered to proceed with the arbitration of the uninsured motorist claim.

Delay in Disclaiming Upheld

In In re Prudential Property & Casualty Insurance Company,³³ the appellate court found that "slightly more than two months elapsed between Prudential's receipt of the insured's claim and the issuance of the disclaimer on the ground that the driver's license of the insured was under suspension at the time of the alleged accident. However, the claim letter and accompanying document submitted to Prudential by the insured's attorney did not on their face immediately alert Prudential to possible grounds for a disclaimer. Moreover, Prudential came forward with adequate evidence establishing that, during the period in question, it engaged in a reasonably prompt, thorough, and diligent investigation of the claim and repeatedly and unsuccessfully attempted to have the insured made available for the purpose of providing a written statement in accordance with the requirements of the policy." As such, the Appellate Division, Second Department found no basis to reverse the hearing court's conclusion to permanently stay the claim for uninsured motorist benefits.

"Although an insurer will be estopped from disclaiming coverage based on an exclusion in a policy where it has delayed unreasonably in issuing its disclaimer, an insurer has no obligation to timely disclaim in those situations in which coverage does not exist."³⁴

³³ 213 A.D.2d 408, 623 N.Y.S.2d 336 (2d Dep't 1995).

³⁴ Nationwide Insurance Company, 266 A.D.2d at 552, 699 N.Y.S.2d at 99 (citations omitted).

Example:

In Nationwide Insurance Company v. Sillman,³⁵ the court stated that the insurer was not required to timely disclaim as the uninsured motorist coverage under its issued insurance policy would not attach unless and until it was established that the offending vehicle was uninsured on the date of the accident.

3. Arbitration

When insured persons demand arbitration of their claims with their insurer under their UM provision, the insurer can obtain a stay of arbitration only upon tendering an issue which the court must determine prior to the holding of arbitration.³⁶ The party seeking the stay has the initial burden to present sufficient evidentiary facts to establish a genuine outstanding issue in order to justify a stay.

Pursuant to CPLR 7503(c), an application to stay arbitration must be made within 20 days after service of the demand for arbitration, or the person seeking the stay *shall be precluded* from seeking such relief. In this regard, CPLR 7503(c) requires the following steps be taken to stay arbitration:

An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. . . .

Courts have been firm in abiding by this statutory mandated 20-day time period and

³⁵ 266 A.D.2d 551, 699 N.Y.S.2d 98 (2d Dep't 1999).

³⁶ See Travelers Insurance Company v. Lombardo, 30 A.D.2d 1047, 1047, 295 N.Y.S.2d 251, 252 (4th Dep't 1968).

have interpreted it as being a strict statute of limitations.³⁷

Examples:

Insurer's Failure to Timely Move for stay of Arbitration Mandates Dismissal

In Allstate Insurance Company v. Bonilla,³⁸ Mr. Edwardo Bonilla was involved in an accident with a vehicle operated by Mayline Copper and owned by Curtis Mondesir on February 16, 1982. On January 9, 1984, Allstate Insurance Company received a demand for arbitration based upon the uninsured motorist endorsement in the policy it had issued to Mr. Bonilla. By notice of petition dated February 21, 1984, Allstate moved pursuant to CPLR 7503(c) to stay the arbitration on the grounds that Mr. Bonilla's insurance policy had been cancelled on September 16, 1981, and that the Mondesir vehicle was covered by insurance. The trial court had ruled that there was valid insurance coverage on the Mondesir vehicle and stayed arbitration. The Second Department reversed. The appellate court noted that Allstate did not timely move for a stay in response to the demand for arbitration, and thus, the proceeding must be dismissed.

Insufficient Evidentiary Showing Made by Insurer to Justify Stay

In the matter of Commercial Union Insurance Companies,³⁹ Commercial Union sought a stay of arbitration. Here, Ms. Alice Pouncy was injured when the motor vehicle within which she was a passenger collided with a Fiat bearing Connecticut license plates. While the Police Accident Report covering the incident indicated that the Fiat was allegedly owned by a Robert A. Torielli and operated by Ivans Jean, that part of the report concerning the Fiat which is entitled "Ins. Code" contained no information other than a stroke through the space. Several unsuccessful attempts were made to obtain a definitive statement from the DMV in Connecticut as to the insurance status of the Fiat. Meanwhile, all indications were that the Fiat was uninsured at the time of the accident and subsequently, a Demand for Arbitration was sent to Commercial Union under the uninsured motorist provisions of its policy covering the motor vehicle within which Ms. Pouncy was a passenger. Commercial Union then sought to stay arbitration "based upon a bare conclusory allegation" that there was no proof that the Fiat was uninsured at the time of the accident. The appellate court found that this "wholly unsupported allegation was insufficient to create a triable issue and the motion for a stay should have been summarily denied" by the lower court. The Appellate Division, First Department, stated that Commercial Union's "conclusory allegations" were insufficient to justify a stay of

³⁷ See Allstate Insurance Company v. Miles, 280 A.D.2d 472, 472, 719 N.Y.S.2d 717, 718 (2d Dep't 2001); Nelson v. Queens Surface Corp., 283 A.D.2d 577, 724 N.Y.S.2d 895 (2d Dep't 2001); Worldwide Insurance Group v. Wing, 202 A.D.2d 682, 683, 609 N.Y.S.2d 331, 332 (2d Dep't 1994).

³⁸ 116 A.D.2d 571, 497 N.Y.S.2d 427 (2d Dep't 1986).

³⁹ 120 A.D.2d 382, 502 N.Y.S.2d 22 (1st Dep't 1986).

arbitration.

4. Insolvency of Insurer

The New York Court of Appeals has held that in the event that “insolvency renders an insurer incapable of satisfying its insurance obligations to a tortfeasor, the tort victim is not entitled to receive UM benefits from his or her own insurer.”⁴⁰ The reasoning for the Court of Appeals “was that under the compulsory uninsured motorist scheme: (1) the offending vehicle whose domestic insurer became insolvent did not meet the ‘uninsured motor vehicle’ definition in the then-applicable Insurance Law provision; and, (2) the Insurance Law established the Motor Vehicle Liability Security Fund to provide protection for accident victims where the domestic insurer was insolvent.”⁴¹ As such, it has been held that a motorist carrying liability insurance with an insurer who has become insolvent is not an uninsured motorist since this Security Fund can be used to pay claims against the insolvent’s insurer. Where an insolvent insurer was not authorized to do business in New York the insured of that insolvent insurer are considered to be “uninsured” and the tort victim can proceed against MVAIC for recovery pursuant to the UM endorsement within their policy.

5. “Hit and run” Situations

“Hit and run” claims are dealt with separately in Insurance Law § 5217. Part of the reason why hit and run causes of action were dealt with separately is because of the unique procedural requirements pertaining therewith.

⁴⁰ Eagle Insurance Company v. St. Julian, 297 A.D.2d 737, 738, 747 N.Y.S.2d 773, 774 (2d Dep’t 2002) (citations omitted).

⁴¹ Country-Wide Insurance Company v. Rashed, 2003 WL 22207634 (Sup. Ct. Queens County) (citations omitted).

An action may be brought directly against ones own insurer pursuant to their UM endorsement “when a person has been injured by an automobile and the identity of the motor vehicle and the operator and owner of the motor vehicle cannot be ascertained or the motor vehicle was used without the owner’s consent by a person whose identity cannot be ascertained.”⁴²

In order to deter fictitious claims, the claimant must provide proof of physical contact to recover on a hit-and-run case.⁴³ In Government Employees Insurance Company (GEICO) v. Yarmoluk,⁴⁴ the Appellate Division, Second Department, noted that “[p]hysical contact occurs when the accident originates in collision with an uninsured vehicle, or an integral part of an uninsured vehicle. In addition, the burden of proving a claim when only a part of a vehicle is involved is substantial, and to establish that the claim originated in collision . . . the claimant must prove that the detached part, in an unbroken chain of events, caused the accident.”⁴⁵

One appellate court has observed that “[w]hile direct contact between the insured and the unidentified vehicle is not required, the physical contact, as contemplated by Insurance Law § 5217, must involve the continued transmission of force indirectly or simultaneously through an intermediate agency, and the initial impact must be that of a

⁴² Rogers v. Motor Vehicle Accident Indemnification Corporation, 300 A.D.2d 1000, 1001, 752 N.Y.S.2d 773, 774 (4th Dep’t 2002) (holding that Insurance Law § 5218 does not apply as both the identities of the owner and operator were known).

⁴³ Insurance Law Practice, 340.

⁴⁴ 262 A.D.2d 561, 692 N.Y.S.2d 433 (2d Dep’t 1999).

⁴⁵ 262 A.D.2d at 561-562, 692 N.Y.S.2d at 434 (citations and internal quotation marks omitted). See General Accident Insurance Company, 260 A.D.2d 855, 856, 687 N.Y.S.2d 830, 830, 831 (3d Dep’t 1999) (noting that “the court has been unswerving in its requirement that the contact ‘at least originate in collision’”) (citations omitted).

collision between the unidentified vehicle with the complainant, the vehicle occupied by him, an obstruction, or other object causing the bodily injury.”⁴⁶ Section 5217 provides that the protection provided by Article 52:

shall not apply to any cause of action by a qualified person arising out of a motor vehicle accident occurring in this state against a person whose identity is unascertainable, unless the bodily injury to the qualified person arose out of physical contact of the motor vehicle causing the injury with the qualified person or with a motor vehicle which the qualified person was occupying (meaning in or upon or entering into or alighting from) at the time of the accident.

“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 the arbitration pending a hearing on that issue.”⁴⁷

Examples:

No Proof of Physical Contact

In Countrywide Insurance Company v. Colon,⁴⁸ the respondent claimed that his accident “was caused when his vehicle was ‘cut off’ by another vehicle as a result of which he lost control and his vehicle left the road striking a building. At a subsequent hearing, the investigating officer testified that there was no second vehicle involved in the accident.” The court observed that the uninsured motorist endorsement in the respondent’s insurance policy mirrored the requirements of N.Y. Insurance Law § 5217. The appellate court reiterated that “[p]hysical contact is a condition precedent to an arbitration based on a ‘hit and run’ accident and the burden of proof to demonstrate physical contract is upon the insured.” The court held that “[i]n the absence of any proof of physical contact between either respondent or his vehicle and the motor vehicle which respondent claims cut him off, arbitration was properly stayed.”

⁴⁶ Great Northern Insurance Company v. Ballinger, 303 A.D.2d 503, 504, 757 N.Y.S.2d 309, 310 (2d Dep’t 2003) (citations omitted).

⁴⁷ New York Central Mutual Fire Insurance Company v. Paredes, 289 A.D.2d 495, 496, 735 N.Y.S.2d 179, 180 (2d Dep’t 2001) (citation omitted).

⁴⁸ 720 N.Y.S.2d 71, 279 A.D.2d 427 (1st Dep’t 2001).

In Government Employees Insurance Company (GEICO) v. Yarmoluk,⁴⁹ GEICO moved to stay arbitration of an uninsured motorist claim. Here, Kimberly J. Yarmoluk was driving on Route 55 in Poughkeepsie, New York, when her car struck an automobile muffler that was lying in the roadway. This collision caused Ms. Yarmoluk to lose control of her car and swerve into a guardrail, resulting in her sustaining physical injuries. The appellate court agreed with the lower court's finding that there was no physical contact with an uninsured motor vehicle in this case to support a claim for uninsured motorist coverage. The appellate court found that Ms. Yarmoluk failed to meet the physical contact requirement as no one witnessed the muffler actually fall off a vehicle and due to the absence of any proof as to how long the muffler had been in the roadway.

In Nationwide Mutual Insurance Company v. McMillan,⁵⁰ the court found that the lower court properly granted to permanently stay arbitration as the court could consider Mr. McMillan's admission contained in the police accident report and hospital records. Mr. McMillan apparently described to a police officer and to an attendant at a hospital how the accident occurred and this established that there had been no physical contact between Mr. McMillan's vehicle and a hit-and-run vehicle. As such, without this physical contact, there was sufficient grounds to permanently stay arbitration.

⁴⁹ 262 A.D.2d 561, 692 N.Y.S.2d 433 (2d Dep't 1999).

⁵⁰ 732 N.Y.S.2d 431 (2d Dep't 2001).

Issue of Fact as to Physical Contact

In New York Central Mutual Fire Insurance Company v. Paredes,⁵¹ N.Y. Central Mutual Fire Insurance Co., in support of its petition for a temporary stay pending a hearing, “submitted a police accident report and the respondent’s sworn supplementary uninsured motorist claim form, in which she claimed that she lost control of her vehicle after another unidentified vehicle ‘cut her off.’” In opposition to the petition, Ms. Elverlene Paredes offered her sworn testimony given at a related claim against the City of New York. Ms. Paredes “testified at that hearing that she lost control of her car after the alleged hit-and-run vehicle entered her lane while coming around a sharp curve and struck her car.” The Appellate Division, Second Department held that “[u]nder these circumstances, there is an issue of fact with respect to physical contract, and the matter is remitted to the Supreme Court, Kings County, for a hearing.”

In Aetna Casualty & Surety Company v. Loy,⁵² the First Department found the requisite physical contact to be present. In this case, the Respondent-Appellant, Michael J. Loy, was injured while working for the New York State Department of Transportation on a construction project on the Long Island Expressway. According to the First Department, as Mr. Loy bent down to light a propane burner on the [asphalt-heating machine he was working with,] a car swerved, hit a cone that was marking off the lane where he was working, and then hit the wooden two-by-four that had been placed against the asphalt-heating machine (aka an “inferay”), to keep the propane flame from going out. The wooden two-by-four then struck Mr. Loy in the eye, causing him to sustain a laceration which required treatment at a hospital. The vehicle did not stop. Although Mr. Loy did not report this incident to the police, he did make a claim under the uninsured motorist endorsement of his automobile insurance policy. The First Department, reversed a finding of the Supreme Court, New York County, and found that there was in fact the requisite physical contact present finding that the physical contact occurred when the inert two-by-four was propelled into Mr. Loy’s eye as a result of either having been struck by the unidentified vehicle or the cone into which the vehicle had initially swerved. The force of the collision was transmitted through either or both of these objects to Mr. Loy.

⁵¹ 289 A.D.2d 495, 735 N.Y.S.2d 179 (2d Dep’t 2001).

⁵² 108 A.D.2d 809, 485 N.Y.S.2d 1018 (1st Dep’t 1985).

Questions Over Identification of Offending Vehicle in hit-and-run

In AIU Insurance Company v. Cabreja,⁵³ a dispute arose as to whether the offending vehicle was uninsured. The Appellate Division, First Department, stated that “[t]he party seeking a stay of arbitration has the burden of showing sufficient facts to establish justification for the stay. Where, however, ‘there is a genuine triable issue . . . the appropriate procedure is to stay arbitration pending a trial of the threshold issue.’” Here, the owner of the offending vehicle denied any involvement in the hit-and-run accident to the claimant. The claimant had noted down the license plate number of the offending vehicle. Due to the conflicting positions as to whether the offending vehicle was properly identified, the appellate court remanded the matter for a judicial determination as to this threshold issue.

Pedestrians Required to Comply With Notice Requirements

In Canty v. Motor Vehicle Accident Indemnification Corporation,⁵⁴ Dan Canty sought no-fault benefits from MVAIC after he was struck by an automobile while crossing an intersection in Brooklyn, New York. The appellate court noted that there apparently were no witnesses to this incident and the police were not called to the scene. Mr. Canty claimed that later in the day after being struck by the hit-and-run vehicle, he went to the emergency room at Kings County Hospital and received treatment. Mr. Canty claimed that while at the hospital “he made an oral report of the accident to an unnamed and unspecified police officer. . . . [Mr. Canty] did not file a written report until approximately one week thereafter.” MVAIC denied Mr. Canty’s application for no-fault benefits on the basis that he did not report the accident “to the proper authorities within 24 hours of its occurrence.” Mr. Canty brought suit against MVAIC seeking a declaration that he was entitled to no-fault benefits. As an affirmative defense, MVAIC asserted that Mr. Canty had failed to timely report his accident, as required by statute. Although Mr. Canty had not presented an “acceptable excuse for failing to file a formal accident report within the 24-hour time frame, his claim that he made a report to a patrolman at Kings County Hospital could, if established, constitute sufficient compliance with statutory requisites.” Accordingly, the appellate court remitted the matter to the Supreme Court for an evidentiary hearing on this issue of notice to the unidentified patrolman.

Multiple vehicle accidents in hit-and-run situations often present interesting fact-patterns as it becomes more complicated to establish the proof of physical contact between the claimant’s vehicle and the uninsured vehicle.

⁵³ 301 A.D.2d 448, 754 N.Y.S.2d 253 (1st Dep’t 2003).

⁵⁴ 95 A.D.2d 509, 467 N.Y.S.2d 50 (2d Dep’t 1983).

Examples:

Multiple Vehicle Accidents

In Allstate Insurance Company v. Basdeo,⁵⁵ the Supreme Court, Nassau County granted the petition of Allstate Insurance Company to stay the arbitration of an uninsured motorist claim. The Appellate Division, Second Department, reversed the lower court's ruling, and directed the parties to proceed with arbitration. The appellate court noted that pursuant to N.Y. Insurance Law § 5217, "physical contact is a condition precedent to an arbitration based upon a hit-and-run accident which involved an unidentified vehicle." However, "direct contract between the respondent's vehicle and the unidentified vehicle is not necessary to satisfy the physical contact requirement where, as here, the collision involved multiple vehicles, and the accident originated from a collision with the unidentified vehicle."

In State Farm Mutual Automobile Insurance Company v. Johnson,⁵⁶ the Appellate Division, Second Department elaborated on the showing a claimant must make in a multiple car accident. The court observed that: "While direct contact between the insured's vehicle and the unidentified vehicle is not required where the collision involves multiple vehicles, the underlying accident must originate from a 'collision with an unidentified vehicle, or an integral part of an unidentified vehicle.'" In this matter, the court found that there was "a triable issue of fact as to whether the accident originated from a collision with the unidentified vehicle." As such, the Second Department held that the Supreme Court, Nassau County, "erred in dismissing the proceeding to stay arbitration without conducting a hearing on the issue."

B. QUALIFIED PERSONS

Qualified persons can only proceed against MVIAC for damages as permitted by statute.⁵⁷ Insurance Law § 5202(b) defines a "qualified person" as being: (i) a resident of New York, other than an insured or the owner of an uninsured motor vehicle and his spouse when a passenger in such vehicle, or his legal representative, or (ii) a resident of another state, territory or federal district of the United States or province of the Dominion of Canada, or foreign country, in which recourse is afforded, to residents of New York, of substantially

⁵⁵ 273 A.D.2d 466, 710 N.Y.S.2d 111 (2d Dep't 2000).

⁵⁶ 287 A.D.2d 640, 732 N.Y.S.2d 21 (2d Dep't 2001).

⁵⁷ See Insurance Law Practice, 341.

similar character to that provided for by this article, or his legal representative. It does not include any operator of or passenger on a snowmobile. In this subsection, “operator” means every person who operates or is in actual physical control of a snowmobile, whether or not it is under way. No action lies against MVAIC where the driver of the automobile which collided with plaintiff’s automobile was insured at the time of the accident, and coverage has not been disclaimed or otherwise denied.⁵⁸

_____“MVAIC must provide payment of first-party benefits to qualified persons for basic economic loss arising out of an uninsured motor vehicle accident in New York. These benefits are defined in Insurance Law section 5102, which is part of article 51, the Comprehensive Motor Vehicle Insurance Reparations Act, commonly known as ‘no-fault.’”⁵⁹

1. Recovery by the Qualified Claimant

Insurance Law § 5208, entitled, “Notice of claim”, sets forth the steps a qualified person must take to make a claim with MVAIC for benefits. In short, “as a condition precedent to the right to apply for payment from the corporation, an affidavit” must be filed by the qualified claimant stating that: (1) the person has a cause of action for damages arising out of the accident and setting forth the facts in support; (2) the cause of action is against the owner or operator of a designated uninsured motor vehicle, and (3) the person is making a claim for such damages.⁶⁰

Significantly, if a claim is being made out of an accident where the identity of a party is unknown or unascertainable, as per Insurance Law § 5208, an additional requirement is

⁵⁸ See 70 N.Y. JUR.2D INSURANCE § 1520.

⁵⁹ Insurance Law Practice, 342.

⁶⁰ Insurance Law § 5208(a)(1).

imposed. Specifically, the incident must be “reported within twenty-four hours after the occurrence to a police, peace or judicial officer in the vicinity or to the commissioner. . .”⁶¹ However, failing to report such an incident is not necessarily fatal to making a claim “if it is shown that it was not reasonably possible to make such a report or that it was made as soon as was reasonably possible.”⁶² This type of situation is discussed in greater detail herein in the section dealing with hit-and-runs.

2. Disclaiming Coverage

In some instances the insurance carrier for the offending vehicle has disclaimed liability or denies coverage to its insured. If this happens, the qualified person must file an affidavit with MVAIC setting forth the following pursuant to Insurance Law § 5208(a)(3)(A):

(1) that the person has a cause of action for damages arising out of the accident for damages and setting forth the supporting facts,

(2) the insurers of the person alleged to be liable for the damages have disclaimed liability or denied coverage because of some act or omission of the person alleged to be liable including the denial of coverage based upon the lack of a policy of insurance in effect at the time the cause of action arose; provided, however, that in the case of a denial of coverage based upon the lack of a policy of insurance in effect at the time the cause of action arose, timely reasonable efforts had been made to ascertain insurance coverage, and

(3) the person is making a claim for those damages.

3. Qualified Persons Involved in “Hit and run” Situations

⁶¹ Insurance Law § 5208(a)(2)(A). See Government Employees Insurance Company v. Snell, 286 A.D.2d 682, 683, 729 N.Y.S.2d 779, 780 (2d Dep’t 2001) (“Since the appellant failed to report the alleged hit-and-run to the police within 24 hours or as soon as reasonably possible as required by the policy at issue, she is precluded from recovering the policy’s uninsured motorist benefits”).

⁶² Insurance Law § 5208(a)(2)(B).

The procedure to be taken by a qualified person in a hit-and-run case is specified in Insurance Law § 5218. In short, in such a case the qualified person must apply to the court for an order permitting an action against MVAIC. Pursuant to subsection (b) of this section:

[t]he court may proceed upon the application in a summary manner and may make an order permitting the action when after a hearing it is satisfied that:

- (1) the applicant has complied with the requirements of § 5208 of this article;
- (2) the applicant is a qualified person;
- (3) the injured or deceased person was not at the time of the accident operating an uninsured motor vehicle or operating a motor vehicle in violation of an order of suspension or revocation;
- (4) the applicant has a cause of action against the operator or owner of the motor vehicle;
- (5) all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator and either the identity of the motor vehicle and the owner and operator cannot be established, or the identity of the operator, who was operating the motor vehicle without the owner's consent, cannot be established; and
- (6) the application is not made by or on behalf of an insurer or surety under circumstances described in paragraph six of subsection (a) of § 5211 of this article.

This is just a brief overview of the myriad of steps a qualified person must take to proceed with an action to be compensated in a hit and run situation.

II. UNDERINSURANCE MOTORIST COVERAGE

A. GENERAL CHARACTERISTICS

Underinsurance motorist coverage (“UIM”) is designed to increase the level of protection afforded to policyholders injured by negligent drivers who lack adequate liability insurance. Typically, an underinsurance claim arises when a tortfeasor has insurance that satisfies the minimum legal requirements but is insufficient to provide full compensation to the injured claimant.

Insurance Law § 3420(f)(2) was enacted to allow policyholders to acquire the same level of protection for themselves and their passengers as they purchased to protect themselves against liability to others. Unlike UM coverage, UIM coverage is not mandatory but must be purchased.

By purchasing supplemental underinsurance motorist coverage (SUM), the policyholder and any insured under the policy can: (1) be protected for bodily injury to themselves, up to the limit of the SUM coverage purchased; and (2) receive from the policy holder’s own insurer payment for bodily injury sustained due to the negligence of another motor vehicle’s owner or operator.

A frequently litigated issue in New York is determining who actually is an “insured” under the SUM policy. Similar to UM coverage, the definition of an “insured” under a SUM endorsement typically includes a relative of the named insured, and, while residents of the same household, the spouse and relatives of either the name insured or spouse. New York Courts have in particular grappled with the question of whether a particular relative should be considered a resident of the insured’s household and therefore be considered an insured as well.

Examples:

Litigation Interpreting Whether Person is a Resident of Insured's Household to be Eligible For Coverage

In New York Central Mutual Fire Ins. Co. v. Bonilla,⁶³ the Second Department explained that “establishing whether a person is a resident of a household for insurance purposes generally requires a showing of something more than temporary or physical presence and requires at least some degree of permanence and intention to remain. There Bonilla admitted that, within a two-year period, he lived at three different addresses, including the premises of the insured. Thus, the court held that the Bonilla was not a resident of the insured's household within the meaning of the insurance policy.

In Hartford Ins. Co. of the Midwest v. Casella,⁶⁴ Casella was struck by a motor vehicle. At the time, Hartford insured Casella's brother under a policy which insured her brother and any relatives living in his household for bodily injuries arising from accidents with uninsured motorists. Casella owned a two-family house and resided in the ground floor apartment. She rented the upstairs apartment to her brother's daughter, but her brother and his wife resided in that apartment for part of each year. The apartments shared a common heating system, though they had separate electric meters. The occupants shared the household expenses and ate meals together in the first floor apartment. The house had one exterior door to the street with access to the upstairs apartment provided by an interior stairway. While each apartment had a separate entrance area, there were no locked doors restricting access to any part of the house. The second department concluded that Casella was not a member of her brother's household within the meaning of the policy and therefore was not entitled to coverage.

In Fiore v. Excelsior Insurance,⁶⁵ Robert Roth was injured at his sister's house while removing snow from the roof of their home. His sister notified her insurance company, Excelsior Insurance, who disclaimed coverage on the ground that Roth was an additional insured under their home owner's policy in that Roth was a relative living in his sister's home and the policy did not provide coverage for bodily injury to an insured. The third department explained that where the term residency is not defined in the subject home owner's policy, it requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain. In this case, the Roths had sold their home in Florida and moved to New York two months before the accident, the Roths had accepted their sister's offer to stay in their home until they found a new home for themselves. They slept in a bed in the dining room where they kept their clothing in boxes, as the other

⁶³ 269 A.D.2d 599 (2d Dep't 2000).

⁶⁴ 278 A.D.2d 417 (2d Dep't 2000).

⁶⁵ 276 A.D.2d 895 (2d Dep't 2000).

bedrooms were occupied by family. Their belongings were stored in the attic and basement, as well as in other relative's homes. Lastly, although they used their sister's address for certain purposes, they had a post office box where they received their mail. Thus the court concluded that the Roths' stay was only temporary and they never intended to make plaintiffs' home their permanent residence, and therefore the policy exclusions for bodily injury to the insured were inapplicable.

In Nationwide Ins. Co v. Smaller,⁶⁶ the Second Department held that Ms. Smaller was not a covered person entitled to SUM benefits under her former's husband's insurance policy. Although she stored some belongings in her then estranged husband's home, had a key, and would visit to obtain clothing, she was not a resident of the household. Her husband had made sworn statements that she had been living separate and apart from him at the time of the accident and that her resident address was not the marital address.

In Harris v. American Protection Ins. Co.,⁶⁷ Harris was injured in an accident while a passenger in a vehicle. He sought underinsured motorist coverage under his father's policy with American Protection. At the time of his injury, Harris resided with his mother in Clinton County, whereas his father resided in Maryland and had an additional residence in Vermont. Although Harris had previously resided with his father, a sentence of probation required that he leave his father's residence and reside with his mother. While in the ten months preceding the accident, Harris was temporarily at his father's home in Vermont he had no degree of permanency or intent to remain there. Moreover, at the time of the accident his father had moved to Maryland. Thus, the third department ruled that at the time of the accident Harris was not residing with his father and was therefore not entitled to underinsured motorist coverage under his father's policy.

B. INSURER REQUIREMENTS

Under the statute, an insurer shall offer: (1) SUM limits, in a motor vehicle liability insurance policy with split limits up to \$250,000 per person per accident and, subject to such limit for one person, \$500,000 per accident; or (2) a SUM limit in a motor vehicle liability insurance policy with a combined single limit, up to \$500,000 per accident. There are no minimum requirements.

As a general rule, insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of their inability to do

⁶⁶ 271 A.D.2d 537 (2d Dep't 2000).

⁶⁷ 277 A.D.2d 772 (3d Dep't 2000).

so.

Example:

In Santaniello v Interboro Mutual Indemnity Insurance Co.,⁶⁸ the Second Department explained that an agent may be held liable for neglect in failing to procure the requested insurance. In order to hold an agent liable, the insured must establish that the agent failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction.

There are two ways for an insurance carrier to issue SUM coverage. Either: (1) by including the underinsured driver within its definition of an uninsured motorist; or (2) by a separate endorsement.

In the former scenario, the insured might be able to exercise an option to purchase underinsured coverage by purchasing uninsured coverage beyond the basic statutory requirements of \$10,000.

A frequently litigated issue in New York with regard to SUM coverage is whether or not the insured has actually purchased such coverage.

Example:

In Nationwide v. Miscione,⁶⁹ for example the policy at issue contained an endorsement for UM coverage that defined an uninsured motor vehicle as including one for which the sum of all liability bonds or policies at the time of the accident provides at least the amounts required by the applicable law where a covered auto is principally garaged but their limits are less than the limits of their insurance. The Second Department held that the language in this policy provided for UIM coverage.

When UIM coverage is created by separate endorsement, UM and UIM coverage are considered separate forms of coverage. Not much litigation has ensued regarding this particular type of procured coverage.

⁶⁸ 267 A.D.2d 372 (2d Dep't 1999).

⁶⁹ 267 A.D.2d 312 (2d Dep't 1999).

C. WHEN IS SUM COVERAGE IS TRIGGERED?

The most litigated issue regarding SUM coverage is what triggers it. There are three prerequisites that need to be satisfied before and insured can recover under his or her SUM coverage. Namely, (1) the tortfeasor must have offered his full policy limits, (2) the plaintiff must obtain the SUM carrier's consent prior to settling, and (3) plaintiff's policy limits must exceed defendant's bodily injury limits. Each will be examined independently.

Example #1:

Insurer's Bodily Injury Damages	\$300,000
Insured's Liability Limit	\$500,000
Insured's SUM Limit	\$250,000
Other Motor Vehicle Liability Limit	\$ 25,000

Result:

In this example, the insured has purchased the maximum amount of SUM coverage that must be offered by the insurer, provided that the insured has purchased bodily injury liability limits of at least \$250,000. Insured recovers \$25,000 from the negligent owner or operator of the other motor vehicle, and \$225,000 (\$250,000 - \$25,000) under the SUM coverage, for a total recovery of \$250,000. However, in the event that the negligent owner or operator of the other motor vehicle had no liability insurance at all, the insured would collect \$250,000 in SUM coverage from the insured's own insurer. But if the owner or operator of the other vehicle was not negligent, the insured would receive no SUM payments.

Example #2:

Insured's Bodily Injury Damages:	\$100,000
Insured's Liability Limit	\$ 25,000
Insured's SUM Limit	\$ 25,000
Other Motor Vehicle Liability Limit	\$ 25,000

Result:

Insured recovers \$25,000 from the negligent motor vehicle owner or operator. But the insured receives nothing under the SUM coverage, which equals the mandatory uninsured motorists coverage, since the other owner or operator's vehicle did not have less liability insurance than the insured's vehicle. If the insured's liability and SUM limits were both \$50,000, the insured would collect another \$25,000 in SUM coverage from the insured's own insurer.

Example #3:

Insured's Bodily Injury Damages:	\$ 60,000
Insured's Liability Limit	\$100,000
Insured's SUM Limit	\$100,000
Other Motor Vehicle Liability Limit	\$ 50,000

Result:

Insured recovers \$50,000 from the other negligent motor vehicle owner or operator and \$10,000 SUM coverage, which is the difference between the amount of the insured's SUM coverage and the liability coverage available from the other motor vehicle owner or operator, limited by the amount of the insured's bodily injury damages.

Example #4:

Insured's Bodily Injury Damages:	\$150,000
Insured's Liability Limit	\$100,000
Insured's SUM Limit	\$100,000
Other Motor Vehicle Liability Limit	\$ 25,000

Result:

Suppose the insured and the other motor vehicle owner or operator were each 50 percent at fault for the accident, then the insured's total recovery would be \$75,000, in light of comparative negligence of the parties involved in the accident. The insured would recover \$25,000 from the other negligent motor vehicle owner or operator and \$50,000 under the SUM coverage.

On the other hand, if the other motor vehicle owner or operator was totally at fault for the accident, the insured would recover \$25,000 from the negligent motor vehicle owner or operator and would then receive \$75,000 in SUM coverage from the insured's own insurer. Had the insured purchased liability and SUM limits of \$150,000 or more, the SUM recovery would then be \$125,000.

1. A Tortfeasor Must Offer his Full Policy Limits

Under Insurance Law section 3420(f)(2)(A) the limits of liability of bodily injury bonds or insurance policies applicable at the time the accident shall be exhausted by payment of judgments or settlements before the insurer must pay under the SUM coverage. If a plaintiff accepts anything less than the policy limits, no claim can be made for SUM coverage.

Examples:

In Continental Ins. Co. v Richt,⁷⁰ a car driven by Paul Strohrmann collided with a car driven by Paul Oliva. Danielle Richt, a passenger in Strohrmann's car was injured in the collision. Strohrmann's insurance policy had a limit of \$10,000/\$20,000, and Oliva's insurance policy had a limit of \$250,000/\$300,000. Richt was covered by her parent's insurance policy which included uninsured/underinsured motorist coverage with a limit of \$500,000. Richt's right to payment under the underinsurance coverage with Continental did not accrue until after payment of the policy limits of the underinsured vehicle, which did not occur until after a judgment was obtained against Strohrmann. Unlike an uninsured motorist situation, which does not contain an exhaustion requirement such as that contained in Insurance Law §§ 3420 (f) (former [2]), an insured's right to payment pursuant to an underinsurance claim does not accrue until after the underinsured motorist's insurance has been exhausted by payment.

Andriaccio v Borg and Borg, Inc.⁷¹: Joseph Andriaccio was injured when his automobile was struck by a vehicle operated by Elisenia Demoliano. At the time of the accident, Demoliano's vehicle was insured by a policy which provided coverage in the amount of \$15,000 per person in the event of an accident. Following the accident, the injured plaintiff settled his claim against Demoliano for \$14,500 and the plaintiffs thereafter commenced an action against the defendant insurance broker alleging that the broker had negligently failed to obtain supplemental uninsured motorist coverage. The defendant broker then moved for summary judgment, contending that the plaintiffs failure to exhaust the insurance policy covering the Demoliano vehicle precluded the plaintiffs from recovery. In this case it was undisputed that the injured plaintiff settled his claim for personal injuries against the other motorist involved in the accident for an amount less than the motorist's available insurance coverage. Thus, even had the defendant procured supplemental uninsured motorist insurance on behalf of the plaintiffs, as it allegedly

⁷⁰ 253 A.D.2d 818 (2d Dep't 1998).

⁷¹ 198 A.D.2d 253, 603 N.Y.S.2d 528 (2d Dep't 1993).

fraudulently or negligently failed to do, the plaintiffs would have been precluded from recovering under such policy. For that reason, plaintiff's action against the defendant broker was dismissed

Federal Insurance Co. v. Watnick⁷² : Jay and Marianna Watnick were driving through Agathe, Quebec, when their automobile was struck by a vehicle operated by Jay Anderson. The Watnicks were severely injured. When the accident occurred, the Watnicks were insured under a motor vehicle liability policy issued by Federal. The policy contained an uninsured motorist endorsement and an optional supplementary uninsured motorist endorsement which provided protection to a covered person for bodily injury sustained in an automobile accident where the applicable bodily injury liability policy provided coverage that was less than the limit of the subject policy. Anderson's vehicle was insured for bodily injury liability for \$20,000. Jay Watnick was awarded \$82.12 for suffering and loss of enjoyment of life. Marianna Watnick's claim was denied after she was found 100% at fault for the accident. The Watnicks filed claims under the uninsured and underinsured motorist endorsements of the motor vehicle liability policy. Federal denied coverage. The clear language of both the policy and the statute require the Watnicks to exhaust by payment the limits of all applicable bodily injury insurance policies before Federal is required to pay pursuant to the underinsured endorsement. Jay Watnick was awarded \$82.12, out of a possible \$20,000, for the injuries he sustained in the automobile accident, and Marianna Watnick's claim was dismissed. Thus, neither Jay nor Marianna Watnick had exhausted by payment the limits of the applicable bodily insurance policies as required.

Metropolitan Property and Liability Ins. Co. v. Traphagen⁷³: Traphagen was injured when the car owned by her husband, which she was driving, was struck by another vehicle, hereinafter the offending vehicle. The liability coverage limits on Traphagen's policy were \$50,000 for each accident plus underinsured motorist coverage of \$10,000 for each person and \$20,000 for each accident. The liability coverage limit on the offending vehicle was \$50,000 per person for bodily injuries. Traphagen settled her damage claim against the offending vehicle for the entire policy limit of \$50,000. Traphagen, however, claimed bodily injury damages totaling over \$60,000 and filed a claim against Metropolitan for the excess. Traphagen's underinsurance coverage was not applicable because the offending vehicle coverage was equal to but not less than the bodily injury liability limit.

⁷² 80 N.Y.2d 539, 592 N.Y.S.2d 624 (1992).

⁷³ 199 A.D.2d 915, 606 N.Y.S.2d 62 (3d Dep't 1993).

2. Consent to Settle

As a general rule, the plaintiff must obtain SUM carrier's consent prior to settling his or her claim. Where an insurance policy expressly requires the insurer's prior consent to any settlement by the insured with a tortfeasor, failure to do so constitutes a breach of a condition of the insurance contract and disqualifies the insured from availing himself of the pertinent benefits of the policy, unless the insured can demonstrate that the insurer, by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced in the settlement. This requirement has given rise to significant litigation in recent years in New York.

Examples:

Litigation Involving Consent to Settle Issues:

In USSA Casualty Insurance Co. v Kaufman,⁷⁴ Marlene Kaufman did not notify USSA Casualty that she had been injured by an automobile and had commenced an action against the driver thereof until three days after she had settled the action for the full amount of the driver's policy and gave the driver a general release. Furthermore, the notice she did provide to USSA did not even mention settlement negotiations or that Kaufman had already executed a release, nor did the notice request permission to execute a release, which is a condition precedent to underinsurance coverage. While a letter two weeks later did mention a settlement offer by the driver's carrier for the full amount of his policy, it did not request permission to execute a release. Thus, the underinsured coverage was not triggered.

In Friedman v Allstate Ins. Co.,⁷⁵ it was undisputed here that Friedman failed to obtain the written consent of their insurance carrier, Allstate before settling the underlying negligence action. That consent was required by the underinsurance motorist coverage provisions of the Allstate policy. As a result, Friedman was precluded from asserting a claim for benefits under the underinsurance motorist provisions of the policy.

⁷⁴ 261 A.D.2d 275 (1st Dep't 1999).

⁷⁵ 268 A.D.2d 558 (2d Dep't 2000).

In Transportation Ins co v Pecoraro,⁷⁶ Pecoraro settled his personal injury action and executed a release without first obtaining the consent of his carrier Transportation. Although Pecoraro sent a letter advising Transportation of his intention to make an underinsurance claim, it did not apprise petitioner of the pendency and settlement of the action and therefore Pecoraro was precluded from making a claim for underinsured motorist coverage. In addition, the subsequent oral communications did not constitute proper notice under the policy.

3. Plaintiff's Policy Limits Must Exceed the Defendant's Bodily Injury Limits

Insurance Law section 3420(f)(2)(A) requires that SUM insurance shall provide coverage if the limits of liability under all bodily injury liability bonds and insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by such policy. SUM endorsements in the past had focused on two different comparisons between plaintiff's coverage and defendant's coverage, which has led to much confusion and litigation. The two different comparisons are: [1] plaintiff's bodily injury limits relative to a defendant's bodily injury limits; and [2] plaintiff's SUM limits relative to a defendant's bodily injury limits. Depending on which comparison was used, plaintiff may or may not have had the right to pursue underinsurance benefits. The following illustration demonstrates how using the first comparison is helpful for plaintiff's causes of action:

Assume that plaintiff has \$100,000 bodily injury limits and \$25,000 SUM limits while the defendant has \$50,000 bodily injury limits. Under these circumstances, SUM coverage is triggered under the first standard as plaintiff's \$100,000 bodily injury limits exceeds defendant's \$50,000 bodily injury limits, but not triggered under the second standard as plaintiff's \$25,000 SUM coverage does not exceed defendant's \$50,000 bodily injury limits.

⁷⁶ 270 A.D.2d 851 (4th Dep't 2000).

With the first standard plaintiffs get the benefit of SUM coverage without the burden of having to purchase a higher limit.

The particular language used in SUM endorsements however continues to create confusion and litigation over which standard to use:

Examples:

In New York Central Mutual Fire Ins. Co. v White,⁷⁷ Dayle White was a passenger in a car owned by Beverly Turci, who was insured by New York Central with a single limit liability insurance of \$300,000 per accident and supplemental uninsured motorist insurance of \$300,000 per accident for both bodily injury and property damage. Turci's vehicle was involved in an accident with a vehicle which was insured by State Farm with split liability limits of \$100,000 per person and \$300,000 per accident for bodily injuries. State Farm paid \$100,000 to White and \$5,000 each to two other passengers also in the vehicle with White. White sought benefits under the supplemental uninsured motorist endorsement policy by New York Central. The second department concluded that the \$10,000 paid to the other two passengers must be deducted from the available \$300,000 policy limit, leaving only available coverage of \$290,000. Since \$290,000 is less than the \$300,000 provided under Turci's policy, White was entitled to supplementary uninsured motorist benefits.

Maurizzio v Lumbermens Mut. Ins. Co.⁷⁸ Plaintiff had purchased an automobile insurance policy with a policy limit of \$10,000 for bodily injury for any one person injured in an accident involving plaintiff's automobile. In addition, plaintiff paid a *** premium for an endorsement that permitted recovery in the event that plaintiff was injured in an accident with an underinsured motor vehicle. Plaintiff filed a claim under this underinsured motorist endorsement after having allegedly sustained injuries in excess of \$20,000 in an accident with another vehicle, which had an insurance policy with a \$10,000 limit for bodily injury. The terms of plaintiff's endorsement provided that "...insurance will provide coverage if the limits of liability under all bodily injury liability bonds and insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by such policy". The Court of Appeals confirmed that the coverage provided by that endorsement is definitionally not available where, as here, the policy limits of the insured's vehicle do not exceed the policy limits of the other vehicle or vehicles involved in the injury-causing accident.

⁷⁷ 262 A.D.2d 415 (2d Dep't 1999).

⁷⁸ 73 N.Y.2d 951 (1989).

Gullo v Hartford Ins. Co.⁷⁹: Plaintiff's automobile was covered by a policy of insurance issued by Hartford Insurance providing for liability coverage in the amount of \$100,000/\$300,000. Plaintiffs also purchased supplementary uninsured motorist rider coverage in the amount of \$50,000/\$100,000. Plaintiff was injured due to the negligence of Robert A. Bowman, who had liability insurance in the amount of \$50,000/\$100,000. Bowman's insured offered the entire policy amount to plaintiff and he accepted. Plaintiff claimed that since his injuries result in damages in excess of \$100,000, and that he received only \$50,000 from Bowman's policy, he is entitled to the full amount under his underinsured coverage. When insured's policy limits, \$100,000/\$300,000 are compared to the policy limits of the tortfeasor, \$50,000/\$100,000, the tortfeasor is definitionally an underinsured motorist under insurance law, and the coverage applies.

In the Matter of Allstate Ins. Co. v DeMorato⁸⁰: The claimant had supplementary uninsured motorist coverage under two primary policies. The policy with the limit of \$100,000 exceeded the tortfeasor's policy limit of \$25,000. Since the determination as to whether a vehicle is underinsured is made by comparing the bodily injury limits of the claimant's insurance policy with the bodily injury limits of the tortfeasor's policy, the tortfeasor was considered to be underinsured and claimant was entitled to underinsurance benefits.

Allstate Ins. Co. v Hager⁸¹: The claimant and two friends were walking along a road when an automobile struck and injured them. Allstate had insured the claimant's father under an automobile policy having bodily injury coverage limits of \$250,000 per person and \$500,000 per accident. In contrast, the tortfeasor-driver had a single limit policy of \$300,000 with Covenant Insurance Company. The tortfeasor offered to settle a case, providing \$95,000 to the claimant and \$95,000 and \$110,000 to his two friends respectively. Thereafter the claimant claimed underinsurance benefits under his father's Allstate policy. Allstate rejected the claim on the ground that the tortfeasor's combined policy limit of \$300,000 exceeded the Allstate's policy limit of \$250,000. The Supreme Court found, and the Appellate Division affirmed, that claimant was entitled to SUM benefits because the \$500,000 per accident limit in the Allstate policy exceeded the tortfeasor's policy limit of \$300,000 therefore leaving the tortfeasor underinsured.

⁷⁹ 145 Misc.2d 330, 547 N.Y.S.2d 187 (Erie Cty. 1989).

⁸⁰ 262 A.D.2d 67, 691 N.Y.S.2d 134 (2d Dep't 1999).

⁸¹ 199 A.D.2d 383, 605 N.Y.S.2d 310 (2d Dep't 1993).

Federal Ins. Co. v Reingold⁸²: Caryn Reingold was riding as a passenger in a vehicle owned and operated by Lauren Adwar and insured by Allstate. Adwar's vehicle was hit from behind by a vehicle owned and operated by Christou Paraskevas and insured by State Farm. Allstate provided Adwar with liability coverage of \$50,000 per person and \$100,000 per accident and \$10,000 of underinsurance coverage. State Farm provided Paraskevas with liability coverage of \$100,000 per person, not to exceed \$300,000 per accident. Reingold was covered issued by Federal which provided \$500,000 in bodily injury liability coverage and \$300,000 worth of underinsurance coverage. Reingold recovered the full \$100,000 available under the State Farm policy and then sought compensation from Federal pursuant to the underinsurance coverage. The Supreme Court held and the Second Department affirmed that since Allstate's bodily injury limits (\$50,000/\$100,000) were less than the limits of bodily injury on the offending vehicle (\$100,000/\$300,000), Allstate's underinsurance endorsement was not triggered. The Second Department rejected Federal's argument that since the offending vehicle's liability are less than the combined liability coverage of Allstate and Federal, Allstate's underinsurance benefits are triggered and must be exhausted before Reingold can collect from Federal. Neither the case law nor the applicable statute authorizes an injured party to combine her liability coverage from several policies, to determine whether or not the underinsurance benefits of one of the individual policies is triggered.

In Conklin v St Paul Fire and Marine Ins. Co.,⁸³ the limit of the alleged tortfeasor's insurance policy for bodily injury resulting in death was equal to the amount provided to the plaintiff in his policy with the defendant. Thus, the alleged tortfeasor's vehicle was not underinsured, and the defendant was not obligated to pay underinsured motorist benefits.

In addition to the trend in New York Courts that establishes as the appropriate standard the comparison of plaintiff's bodily injury limits with defendant's bodily injury limits, the proposed standard endorsement issued by the Insurance Department also states that SUM coverage is triggered when a plaintiff's bodily injury limits are greater than defendant's bodily injury limits.

⁸² 181 A.D.2d 249, 581 N.Y.S.2d 249 (2d Dep't 1992).

⁸³ 260 A.D.2d 529 (2d Dep't 1999).

4. SUM Coverage and Multiple Tortfeasors

As previously stated, the general rule is that SUM coverage is triggered when the bodily injury limits of another vehicle are less than the plaintiff's bodily injury limits. When there are multiple tortfeasors however, the issue becomes whether plaintiff's bodily injury limits have to exceed the aggregate of all tortfeasor's limits before triggering SUM coverage. The statutory language of 3420(f)(2) provides again: "as a condition precedent to the obligation of the insurer to pay under the supplementary uninsured motorists insurance coverage, the limits of liability of all bodily injury bonds or insurance policies at the time of the accident shall be exhausted by payment of judgments or settlements". Much litigation has ensued over whether the deletion of a phrase such as "applicable to the other vehicle" reflects the intention of the Legislature to require exhaustion of the total proceeds of the underlying insurance policies of all vehicles involved in the accident as a predicate to being eligible for underinsured benefits.

The Supreme Court, Queens County held in 1985, and the Second Department affirmed, that when this section is read in conjunction with the obligation to pay language in the preceding clause the legislative intent to require the exhaustion of only "another motor vehicle" is clear. Read together, the clauses requiring payment of underinsured benefits and the exhaustion of coverage show an intent that the claimant is not barred from obtaining underinsured motorist benefits so long as any tortfeasor's liability policy limits are less than the uninsured/underinsured motorist coverage and are fully exhausted by the injured party.

The legislature is presumed to have intended that the limits of the underinsured motorist coverage be compared only to the vehicle or vehicles which the claimant has

turned into underinsureds by exhausting the applicable policy limits, regardless of the available coverage from the other offending vehicle or vehicles. Moreover, Regulation 35-D permits a SUM claim as long as at least one insured motor vehicle offers its policy limits and those limits are lower than the plaintiff's limits, and by requiring exhaustion of the limits available "for any one person who may be legally liable for the bodily injury sustained by the insured". It follows therefore, that exhaustion of any tortfeasor's policy is generally enough to trigger underinsured coverage, plaintiff does not need to exhaust policies of all tortfeasors. It is worth noting however, that while most courts maintain that a plaintiff need only exhaust one tortfeasor's policy liability limits in order to trigger underinsurance coverage, others continue to require plaintiff to exhaust the aggregate of policies available at the time of the accident.

Examples:

In S'Dao v National Grange Mutual Ins. Co.,⁸⁴ the Court of Appeals held that the exhaustion requirement relates back to the statute's reference to "another motor vehicle" and indicates that the proper focus is on the underinsured status of each individual tortfeasor. Nothing in the statutory language or the policy providing underinsurance at issue here notifies the insured plaintiff that aggregation of the limits of liability held by multiple tortfeasors was a prerequisite to recovery of underinsurance. There plaintiff was injured in a two-car accident. The bodily injury coverage of one of the vehicles was exhausted, but the bodily injury coverage of the other vehicle was not. Plaintiff was entitled to seek underinsurance payments under the policy issued to her father by National Grange Mutual Ins. Co.

General Accident Ins. Co. v Gobetz⁸⁵: James and Caroline Gobetz sustained injuries when the vehicle in which they were passengers was struck by another vehicle. They and four other injured persons reached a settlement with the two carriers insuring those vehicles. The bodily injury coverage of the other vehicle was exhausted, but the bodily injury coverage of the host vehicle was not. Thereafter, the Gobetz's filed a claim under the supplemental uninsured motorist endorsement

⁸⁴ 87 N.Y.2d 853 (1995).

⁸⁵ 234 A.D.2d 599, 651 N.Y.S.2d 623 (2d Dep't 1996).

of their policy with General Accident Insurance Company. The Gobetz's failure to exhaust the limits of the host vehicle's bodily injury liability coverage did not defeat their claim for underinsurance based on the underinsured status of the other vehicle.

Polesky v Geico Ins. Co.⁸⁶: The Poleskys were injured when their vehicle, which was insured by GEICO was involved in an accident with three other motor vehicles. They obtained a settlement offer from one of the offending vehicles' insurers (whose policy limits were concededly less than those in GEICO's policy), and they sought to arbitrate an underinsurance claim before they accepted the offer. The Poleskys were not required to first exhaust the aggregate of the liability policies covering all three of the offending vehicles before proceeding with their underinsurance claim. However, pursuant to Insurance Law § 3420(f)(2), as well as the policy GEICO issued to the Poleskys, the Poleskys were required to exhaust by payment the limits of the particular tortfeasor's policy that they were using as a comparison in support of their underinsurance claim.

Passaro v Metropolitan Property and Liability Ins. Co.⁸⁷: Kilo Smith and Dean Passaro were passengers in a motor vehicle owned by Robert Jewell and operated with the knowledge, permission and consent of the owner by his son. The Jewell vehicle, on the date of the accident, was covered by a policy of automobile liability insurance with single limit automobile liability coverage of \$300,000. Said policy of insurance provided for qualified insureds underinsured motorist coverage in the amount of \$100,000 per person and \$300,000 per occurrence. The Jewell vehicle was involved in an accident owned and operated by Mark Patchin. The Patchin vehicle was insured by a policy of automobile liability insurance with applicable policy limits of \$10,000 per person and \$20,000 per occurrence. Thus, the aggregate limit of the Jewell coverage and the Patchin coverage was \$320,000 which exceeds the \$100,000-\$300,000 underinsured coverage of the Jewell vehicle. The collision of the two vehicles was due to the fault of the operators of both vehicles. As passengers in the Jewell vehicle, the plaintiffs contended that because of the limits of the uninsured/underinsured motorist coverage afforded the Jewells are greater than the \$10,000/\$20,000 limits of tortfeasor Patchin's liability insurance, which were fully exhausted, the Patchin vehicle was underinsured and the supplementary uninsured motorist clause applied. Judgment was granted in favor of the plaintiffs against the defendant declaring that the underinsured coverage provided for in the policy issued to Jewell be applied to the benefit of the plaintiffs to the extent the amount thus far obtained by plaintiffs from the other sources is less than the full value of compensator damages to which plaintiffs may actually be entitled.

Garcia v Mercado⁸⁸: The infant plaintiff, a passenger in defendant Mercado's

⁸⁶ 241 A.D.2d 551, 661 N.Y.S.2d 639 (2d Dep't 1997).

⁸⁷ 128 Misc.2d 21, 487 N.Y.S.2d 1009 (Queens Cty. 1985).

⁸⁸ 194 A.D.2d 334, 598 N.Y.S.2d 259 (1st Dept. 1993).

vehicle, sought to recover damages for personal injuries allegedly sustained in a June 18, 1988 car two-car automobile accident. Mercado's automobile had policy liability limits of \$100,000/\$300,000 and \$100,000 underinsurance coverage. The owner and operator of the other vehicle, the defendants Nieves, had \$10,000/\$20,000 liability coverage; their insurer had offered its policy limit of \$10,000 in settlement of plaintiff's claim. The First Department concluded that there was \$110,000 of insurance available, which had to be exhausted before the underinsured motorist provision was triggered. That \$110,000 was comprised of the aggregate of Mercado's liability limits (\$100,000) and Nieve's liability limits (\$10,000).

CONCLUSION

Although this report provides a mere synopsis of the relevant law, as apparent herein, there are many pitfalls for the unalert insured and insurer in the areas of uninsured motorist coverage, underinsured motorist coverage and supplemental underinsurance coverage. Specifically, there are many timing and procedural requirements for both insureds and insurers to make a claim or to deny a claim. The cases cited above provide just a tiny sampling of the massive amounts of litigation that have occurred in these areas and of the variety of issues that can arise.⁸⁹ Therefore, those handling claims in these areas of auto insurance must be vigilant in complying with both the requirements of New York's Insurance Law as well as with the specific terms of the relevant policy endorsement.

⁸⁹ See 55-MAY DSP.RESOL. J. 4 (noting with respect to cases before the American Arbitration Association, "[t]he insurance caseload continued its unrelenting growth, constituting the bulk of the 1999 caseload, with 51,622 no-fault cases and 6,818 uninsured-motorist cases" out of an all-time high of 140,188 cases).

