

2002 UPDATE ON ISSUES AFFECTING VICTIMS OF ACCIDENTS WITH UNINSURED AND/OR UNDERINSURED MOTORISTS

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For the tenth year in a row,¹ it is my pleasure and privilege to present on the pages that follow a review of the most significant court decisions and legislative enactments during the previous calendar year in the ever-changing, increasingly complex areas of uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) coverage.

GENERAL ISSUES

Self-Insurance

In People ex rel. Spitzer v. Elrac, Inc.,² the court, following up on the Court of Appeals' 2001 decision in Elrac, Inc. v. Ward,³ to the effect that a self-insured rental car company must provide the statutory minimum liability coverage to "inure to the benefit" of any permissive user of the vehicle, and a rental car company cannot seek indemnification from its lessee "where the damage falls below the minimum insurance that the rental company is required to provide" by VTL §370(1), held that "[t]he self-insurance coverage amount is the legal minimum statutorily-required personal injury liability coverage amount, including uninsured motorist coverage," as well as property damage liability coverage up to \$10,000. See L. 2002, Ch. 20, effective March 26, 2002, amending VTL §370[1][b]. "If a renter wishes coverage above the statutory limits, a renter may pay an optional daily charge and receive 'supplemental liability protection,' often referred to as 'SLP.'"

In addition, the court reiterated the general rule that the duty to defend cannot be terminated upon payment of a settlement or damages prior to the complete resolution of any litigation or claim – i.e., "automobile insurers must pay all defense costs until a case ends . . . and automobile insurers cannot be excused from providing a full defense by tendering the policy amount." This same rule applies to self-insurers as well as insurers.

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Named Insured

The term “named insured” applies only to those persons or entities listed on the declarations page of the policy. Where a policy is taken out on a corporate or government-owned vehicle, and the policyholder is a legal entity, rather than an individual, a question may arise as to who is the “named insured.”

In Coregis Ins. Co. v. Miceli,⁴ the court held that a firefighter employed by the City of New Rochelle was not covered under the insurance policy issued by Coregis to a firetruck owned by the City when not occupying that truck because he was not an insured as that term was defined in the policy.⁵

Resident

The definition of an “insured” under the SUM endorsement includes a relative of the named insured, and, while residents of the same household, the spouse and relatives of either the named insured or spouse.

In New York Central Mut. Fire Ins. Co. v. Peckey,⁶ where the defendant established that two days before the accident he had moved back to the U.S. following a military tour of duty in Guam; his active military duty was to end nearly two weeks after the accident, and he planned to leave the military and reside at his mother’s home for an indefinite period of time while he sought employment; he had a key to his mother’s home and his driver’s license listed his mother’s home as his address; he maintained his voter’s registration in New York State during his entire military service, and he had returned to his mother’s home for periods of up to 30 days while on military leave, the court held that he was a resident of his mother’s household on the date of the accident and, thus, an “insured” under his mother’s policy. The fact that the defendant may have had other residences during his military service was not dispositive.

Occupant

“Occupancy” insureds comprise the second category of “insured persons.”

In Coregis Ins. Co. v. Micelli, supra, the court held that a firefighter who was struck by a car while directing traffic as the fire truck was being garaged was not occupying the firetruck and, therefore, not entitled to SUM benefits under the firetruck’s policy.

In Martinez v. MVAIC,⁷ the court held that a tow truck driver was no longer occupying the tow truck when he was struck by a hit-and-run vehicle while he was walking towards the disabled vehicle he had been dispatched to assist, and, thus, he was not entitled to coverage under the uninsured motorist policy insuring the tow truck. While he intended eventually to return to the truck, his absence from the truck was not intended to

be brief and his immediate purpose was to attend to the disabled vehicle as necessary incident to his employment, which distinguished this case from those cases where “a mere temporary happenstance interrupted the operator’s connection with the vehicle.” But see, American Alliance Ins. Co. v. Verdi,⁸ (tow truck operator injured in the course of directing traffic so as to allow co-worker to safely drive truck onto highway, and who intended to re-enter and drive truck thereafter, was an “occupant” of the tow truck for purposes of SUM coverage).

“Covered Auto”

In Jones v. St. Paul Fire & Marine Ins. Co.,⁹ the court held that a “road roller” being utilized by the claimant, which was struck by an underinsured automobile was not a “covered auto” under the employer’s SUM policy because it was specifically defined in the policy as “mobile equipment,” which was expressly excluded from the policy definition of “auto.” Since claimant could not establish that she was operating a “covered auto,” she was not entitled to SUM benefits under the policy.

“Use or Operation”/ Accidents

The UM/SUM endorsements provide for benefits to “insured persons” who sustain injury caused by “accidents” “arising out of the ownership, maintenance or use” of an uninsured motor vehicle.

In Metro Medical Diagnostics, P.C. v. Eagle Ins. Co.,¹⁰ the court held that if a collision is actually “a deliberate event caused in the furtherance of an insurance fraud scheme,” it would not be “a covered accident.”

In Progressive Cas. Ins. Co. v. Baker,¹¹ the court held that loading logs onto a logging truck constituted “use or operation”.

In Elite Ambulette Corp. v. All City Ins. Co.,¹² the insured, an ambulette service, sued the insurer of its vehicle for a judgment declaring that the insurer was obligated to defend and indemnify it for a transportee’s injury caused when the temporary wheelchair in which he had been placed rolled down a flight of stairs as a result of a defect in the wheelchair and the carelessness of the attendant. In affirming the grant of summary judgment to the insurer, the court held that the insured ambulette, which was parked outside the patient’s home, was not involved in the accident, in any way. Because the accident occurred away from, and incidental to, the covered vehicle, it could not be said that the accident occurred in the “use and operation”/loading and unloading of the vehicle. In the words of the court, “Where coverage is provided for use and operation of a vehicle, to invoke an insurer’s duty to defend and/or indemnify, the use of the motor vehicle must be more closely related to the injury.”

Claimant/Insured's Duty to Provide Timely Notice of Claim

_____ UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the new mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." A failure to satisfy the notice requirement vitiates the policy and the insurer need not demonstrate any prejudice before it can assert the defense of noncompliance with the notice provisions. The interpretation of the phrase "as soon as practicable" was, as always, a hot topic last year.

In Nationwide Mutual Ins. Co. v. DiGregorio,¹³ the court reiterated that the proper standard for timely written notice of an underinsured motorist claim is "as soon as possible" from the date that the claimant knew or should have known that the tortfeasor was underinsured, and that the claimant is obligated to demonstrate that he or she acted with due diligence in ascertaining the insurance status of the vehicles involved in the accident.¹⁴ Factors to consider include the seriousness and nature of the claimant's injuries and the extent of the tortfeasor's coverage. In that case, the court held that notice was untimely when the claimant waited more than ten (10) months after learning that she had sustained a herniated disc that required surgery and a pinched nerve before notifying the insurer of a claim for underinsured motorist benefits; claimant did not exercise due diligence in attempting to ascertain the insurance coverage of the tortfeasor's vehicle.¹⁵

In State Farm Mut. Auto. Ins. Co. v. Proper,¹⁶ the court held that notice given nearly two (2) years after the accident was untimely where "[t]he nature and extent of the claimant's injury did not change from the time of the accident until the time when the claimant provided petitioner with notice of the SUM claim." In Nationwide Ins. Co. v. Sawbridge,¹⁷ the court held that notification by the insured of an intention to make claim nine (9) months after the accident was "as soon as reasonable practicable" where for several months after the accident she received conservative treatment for relatively minor injuries, was released from treatment by her orthopedist seven (7) months after the accident and she thereafter sought evaluation and care from a neurosurgical clinic, which recommended and performed a cervical discectomy and fusion eighteen (18) months after the accident.

In Sayed v. Macari,¹⁸ the court held that where an insurance policy, such as the homeowner's policy involved in that case, requires an insured to provide notice of an accident or loss as soon as practicable, "such notice must be provided within a reasonable time in view of the facts and circumstances." In that case, the court held that an almost three-month delay in notifying an excess insurer of a claim was unreasonable as a matter of law.

In Interboro Mutual Indemnity Ins. Co. v. Brown,¹⁹ the court held that a more than four-month delay in providing notice of an uninsured motorist claim was not reasonable.

Where notice is provided directly by the injured party, the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party and the insured. However, where the insured is the first to notify the insurer, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer.²⁰

Notice of Legal Action

In addition to the basic notice requirement, the UM and SUM endorsements also require, as a condition precedent to coverage, that the insured or his/her legal representative “immediately” forward to the insurer a copy of the summons and complaint and/or other legal papers served in connection with the underlying lawsuit against the tortfeasor.

In Brandon v. Nationwide Mutual Ins. Co.,²¹ the Court of Appeals held, for the first time, that the insurer must prove that it has been prejudiced by the breach of the Notice of Legal Action condition. This new rule is in contradistinction to the “no prejudice” rule applicable to other types of required notice.²²

Discovery

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

In Phoenix Ins. Co. v. Amereno,²³ the court held that the Supreme Court providently exercised its discretion in temporarily staying arbitration and directing the claimant to comply with all outstanding discovery demands.

In Allstate Ins. Co. v. Moshevev,²⁴ the court held that the claimants had no right to be present at each others’ examinations under oath since those examinations were requested pursuant to an insurance policy rather than as part of a legal action.

Petitions to Stay Arbitration

Arbitration v. Litigation

In Cacciatore v. New York Central Mutual Fire Ins. Co.,²⁵ the court, in a matter of “first impression,” held that under the terms of the SUM endorsement, “if the limits are

\$25,000/\$50,000, then any disagreement with respect to the value of the claim 'shall' be settled by arbitration, which may be requested by the insurer as well as the insured." However, where the policy limits exceed \$25,000/\$50,000, arbitration is not mandatory.

Venue

In GEICO v. Fabien,²⁶ the court was faced with four cases in which venue of special proceedings to stay arbitration was placed in Nassau County instead of the counties in which the claimant resided, as required by CPLR 7502, as amended (eff. August 16, 2000).

Describing the issue as "a problem which has plagued this court before and after the amendment to CPLR 7502," and characterizing the petitioning insurer's conduct as "the Sisyphean persistence with which GEICO and other uninsured carriers have attempted to utilize Nassau County as a forum conveniens," the court rejected GEICO's contention that the claimants/respondents had waived their right to challenge venue; held that CPLR 509 does not govern such cases, but, instead, is supplanted by CPLR 7502; and opined that GEICO's continued filing of "non-resident Petitions" in Nassau County even after Allstate v. Timmer, supra, and the amendment of CPLR 7502 was "frivolous" (although it withheld an actual finding of frivolousness worthy of sanctions until GEICO had the opportunity to defend itself against that charge).

Timeliness -- Exceptions to the 20-Day Rule

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." It is, of course, well-established that the failure to make a timely application to stay arbitration will result in the denial of the application as untimely and constitutes a bar to judicial intrusion into the arbitration proceeding. One exception to the 20-day rule is that where the application to stay is based upon the ground that no agreement to arbitrate exists, it may be entertained even if made after the 20-day period had expired.²⁷

In New Hampshire Indemnity Co. v. Vranica,²⁸ the court held that the insured was not assisted by the fact that the insurer did not seek to stay arbitration within twenty (20) days because the Demand for Arbitration lacked the language advising the insurer of its right to seek a stay of arbitration within twenty (20) days after service of the demand, as required by CPLR 7503(c), and, thus, the 20-day period for seeking a stay never began.

Filing and Service

In American Home Assurance Co. v. Dubuisson,²⁹ the court held that the service of the notice of petition and petition before the filing of those papers and the purchase of an index number was a nullity and did not constitute proper commencement of the special proceeding.³⁰

Effective November 21, 2001, the commencement statutes were amended to provide that a special proceeding, such as a proceeding to stay arbitration, “is commenced by filing a petition”[only].³¹

NOTE: The legislation amending CPLR 304, 306-a and 306-b did not contain a corresponding amendment to CPLR 203(c)(1). That section still provided, in effect, that the statute of limitations is not tolled until the notice of petition or order to show cause is filed with the petition. As one respected commentator noted, “Until this oversight is corrected/or the appellate courts provide some creative remedy), practitioners who, because of exigent circumstances, must commence a special proceeding on the eve of expiration of the statute of limitations are urged to proceed with extreme caution. Insofar as the statute of limitations is concerned, they can take no comfort whatsoever in the amended version of CPLR 304.”³²

Effective August 6, 2002, and retroactive to November 21, 2001, CPLR 203(c) was, in fact, amended to provide that the claim is interposed “when the action is commenced” (this includes a “Special Proceeding” [see CPLR 105(b)], rather than when the pleading and process are filed.

CPLR 304 provides that in a special proceeding, “commencement” occurs when the petition is filed. Process does not have to be filed at the same time, only served, along with the petition, within the 15-day period allowed by CPLR 306-b.³³

In Mendon Ponds Neighborhood Association v. Dehm,³⁴ the Court of Appeals held that for purposes of commencing a special proceeding, the county clerk is the clerk to whom the petition has to be delivered in order to be deemed properly filed. Thus, a petition submitted to the office of the supreme and county court clerk, but not to the county clerk, was not properly filed.

Burden of Proof

An insurer seeking to stay arbitration of an uninsured motorist claim has the burden of establishing that the offending vehicle was insured at the time of the accident. Once a prima facie case of coverage is established, the burden shifts to the opposing party to come forward with evidence to the contrary.³⁵

In Insurance Company of the State of Pennsylvania v. Ginty,³⁶ the petitioner submitted in support of its petition a temporary insurance card issued to the offending driver and a police report listing the Additional Respondent insurer's insurance code. Although those documents were apparently sufficient to warrant the court to set the matter down for a framed issue hearing on the issue of coverage for the offending vehicle, none of the documents was offered into evidence at the hearing itself. Accordingly, the hearing court did not consider those documents. After the Additional Respondent insurer, through the testimony of its employee, denied that it ever insured the offending vehicle or its driver, the hearing court denied the petition. On appeal, the First Department affirmed, noting, first of all, that the hearing court was "not obliged to notice documents not offered into evidence." In any event, the court noted that even if the documents were to be considered and found to have satisfied Petitioner's initial burden of showing the existence of insurance, the testimony of the Additional Respondent insurer's employee concerning her exhaustive searches of its records for the existence of a policy sufficed to shift the burden back to Petitioner, which offered no further evidence in that regard.³⁷

In Centennial Ins. Co. v. Casilla,³⁸ the court held that the SUM insurer's introduction into evidence of two DMV registration records indicating that another insurer covered the offending vehicle on the date of the accident was sufficient to establish its prima facie case. The testimony of the other insurer's underwriter, who did not search under reverse name for the offending owner or the VIN number or plate number of his vehicle, and did not introduce the records of her searches into evidence, was held to be insufficient to overcome the SUM insurer's showing.

In Eagle Ins. Co. v. Beauvil,³⁹ the court held that the petitioner established a prima facie case as to the existence of insurance coverage for the subject vehicle by producing the police accident report which contained the offending vehicle's insurance code. The offending vehicle's alleged insurer's letter stating in conclusory fashion that it did not insure the vehicle was held to be insufficient to overcome petitioner's prima facie case.

In Wausau Ins. Co. v. Ogochukwu,⁴⁰ the evidence tending to show the existence of insurance coverage for the offending vehicle was the police report which indicated the identity of the vehicle's owner and insurer. The purported insurer submitted the affidavit of its Vice President of Underwriting, which stated that the company did not write policies for personal automobile insurance and that another company was the insurer for all vehicles owned by that owner. The second company, in turn, submitted affidavits of a claims representative and a professional investigator stating that the vehicle owner did not own, operate or lease any vehicles with the plate number identified in the petition, never leased a vehicle to the person identified as the offending driver, had correspondence addressed to that person returned as undeliverable, and was unable to locate that individual. Under these circumstances, the court affirmed the denial of the petition to stay, on the ground that "No issues of fact exist as to whether the offending vehicle . . . was insured on the date of the accident."

Waiver of Right to Stay Arbitration

In North River Ins. Co. v. Morgan,⁴¹ the court held that the insurer participated in arbitration for more than two years before it commenced an Article 75 proceeding to stay arbitration, by, at a minimum: agreeing with respondent's counsel that New York arbitration rules would be applied; agreeing that the third arbitrator would be selected by the AAA; designating an arbitrator; receiving medical reports and records; and agreeing to reschedule the hearing to a particular date. Thus, the insurer waived any objection that there was no agreement to arbitrate.

In McCarthy v. Commercial Union Ins. Co.,⁴² the court held that there was no evidence of any demand for arbitration by either party, and "in view of defendant's active participation in this litigation for nearly two years, including, inter alia, its role in procuring the examinations before trial of plaintiff, his wife and his insurance agent, the [defendant] must be deemed to have waived its right (if any) to demand that the matter [the SUM claim] be resolved through arbitration."

Arbitration Awards

Issues for the Arbitrator

In New York Central Mut. Fire Ins. Co. v. Guarino,⁴³ the court held that "The issue of timeliness is for the court, not the arbitrator, to decide."

Scope of Review

In Allcity Ins. Co. v. Eagle Ins. Co.,⁴⁴ the court held that it was arbitrary and capricious for the arbitrator to disregard settled law pertaining to the statute of limitations.

In D'Amato v. Leffler,⁴⁵ the court reminded that a refusal to hear pertinent material evidence may constitute misconduct under CPLR 7511(b)(1).

In Cabbad v. TIG Insurance Co.,⁴⁶ the court held that where the evidence was clear and convincing that several instances of this conduct had taken place, including ex parte communications between the case administrator, the arbitrator, and counsel for the insurer without the knowledge of the claimant's counsel, and the submission of evidence by the insurer's counsel after the hearing had concluded, this misconduct required vacatur of the arbitrator's award so as to safeguard the integrity of the arbitration process."

Res Judicata/Collateral Estoppel

In Atlantic Mutual Ins. Co. v. Lauria,⁴⁷ the court granted the SUM insurer's Petition to Stay Arbitration "for two reasons" – (1) the AAA was not the proper forum in which to seek arbitration, and (2) "it does not appear" that the tortfeasor's policy limits had been exhausted. No appeal was taken from that Order. Claimants thereafter demanded arbitration in accordance with the policy provisions (3-person common law arbitration) and the insurer again sought to stay arbitration. The Supreme Court granted the Petition to Stay on the ground of collateral estoppel, *i.e.*, the initial Order's determination that "it [did] not appear" that the underlying policy limits has been exhausted.

The Appellate Division reversed, holding the lower court's determination that "it [did] not appear" that the underlying limits were exhausted "was merely an alternate ground for granting a permanent stay of the first demand for arbitration, and, thus, it was error to apply the doctrine of collateral estoppel to that finding. After the Supreme Court determined that the claimants had demanded arbitration in the wrong forum, it was unnecessary to reach the issue of whether the tortfeasor's limits were exhausted. Moreover, it was unclear from the wording of the Order whether the Supreme Court fully considered the exhaustion issue, and, thus, it could not be said that the issue was "actually litigated and specifically decided."

Trial De Novo

In Calisi v. CNA Insurance Company,⁴⁸ the court held that the insurer waived its right to a trial *de novo* of an underinsured motorist claim by silently acquiescing in the arbitration forum's rules and by failing to advise the forum that the dispute was to be arbitrated in accordance with the terms of the policy and not the rules of the forum.

Appeals

In One Beacon v. Bloch,⁴⁹ the court reiterated the 1997 holding of the Court of Appeals in Commerce & Industry Ins. Co. v. Nester,⁵⁰ to the effect that a party that participates in an arbitration following the denial of a petition to stay arbitration forfeits the right to appellate review of that denial. "Once a party participates in an arbitration proceeding, without availing itself of all its reasonable judicial remedies, it should not be allowed thereafter to upset the remedy emanating from that alternative resolution forum."

In this case, the insurer fully participated in the arbitration by appearing at the hearing, and fully cross-examining the claimant. At no time did the insurer ever seek a stay of the hearing pending its appeal from the denial of its Petition to Stay Arbitration. Finding that the insurer and its attorneys "should have known better than to pursue this appeal in abject disregard of controlling authority squarely on point compelling the dismissal of the appeal," and that the arguments on the appeal were, in any event, frivolous, the court

imposed monetary sanctions upon the insurer and its counsel, including a sanction payable to the Lawyers Security Fund and attorneys fees, costs and disbursements payable to claimant and his counsel.

In Progressive Northeastern Ins. Co. v. Jorge,⁵¹ the claimants failed to appear at the framed issue hearing to determine whether the alleged offending vehicle was insured at the time of the accident, and the court, therefore, granted the petition to stay arbitration. Since no appeal lies from an order entered upon default, the Appellate Division dismissed claimants' appeal.

Action Against Insurance Agents/Brokers

In Baseball Office of the Commissioner v. Marsh & McLennan, Inc.,⁵² an action for malpractice against an insurance broker for failure to procure insurance and failure to provide proper notice of claim, etc., the court noted that "A broker who agrees to place insurance for a customer must exercise reasonable diligence to do so and if unable to make such a placement must timely notify the customer to afford it the opportunity to procure the insurance elsewhere." Moreover, in a malpractice action against a broker for exposing the client to an uninsured loss, "the broker ultimately 'stands in the shoes of the insurer as concerns liability to the insured.'"

In New York Health & Racquet Club, Inc. v. NIA Kornreich, LLC,⁵³ the court noted that although an insurance broker had a continuing duty to monitor a carrier's financial condition for the duration of the policy it procured, that duty does not extend beyond the policy's expiration.

NOTE: Regulation 35-D provides that automobile liability insurers must now take affirmative action to advise their insureds of the availability and desirability of SUM coverage. See 11 NYCRR §§ 60-2.1(e), 60-2.2a; Ins. L. §3420(f)(2)(B).

UNINSURED MOTORIST ISSUES

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. L. §3420(d))

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." The statute applies when an accident occurs in the State of New York.

In Transportation Ins. Co. v. Cafaro,⁵⁴ the court held that since the subject accident occurred in Aruba, Ins. L. §3420(d) was inapplicable and, thus, the insurer was not precluded from disclaiming coverage despite an untimely disclaimer.

In Bluestein & Sander v. Chicago Ins. Co.,⁵⁵ the Federal Court, applying New York law, noted that the reasonableness of any delay in providing notice of disclaimer is “judged from the time that the insurer is aware of sufficient facts to issue a disclaimer.” Thus, where the insurer disclaimed in September 1999 based upon interrogatory responses from December 1998, the court held that this 9-month delay was “plainly unreasonable.”⁵⁶

In West 16th Street Tenants Corp. v. Public Service Mutual Ins. Co.,⁵⁷ the court held that a 30-day delay in disclaiming for late notice was unreasonable as a matter of law. The delay in giving notice to the insurer – the only ground on which the disclaimer was based – was obvious from the face of the notice of claim and the accompanying complaint, and the insurer had no need to conduct any investigation before determining whether to disclaim.

In McGinnis v. Mandracchia,⁵⁸ the court held that an 85-day delay in disclaiming on the ground of late notice was unreasonable as a matter of law. The court noted that “the basis alleged for the disclaimer was obvious on the face of plaintiff’s notification. The court rejected the insurer’s attempt to excuse its delay on the ground that it had to investigate whether the claimant was actually injured in an automobile accident because that investigation “was unrelated to the reason for the disclaimer based on late notice and could have been asserted at any time.”⁵⁹

On the other hand, in Mount Vernon Fire Ins. Co. v. Harris,⁶⁰ the court held that a delay of 50 days was reasonable where the insurer promptly commenced an investigation as to when the insured first became aware of the fire).⁶¹

The New York courts have repeatedly held that for the purpose of determining whether a liability insurer has a duty to promptly disclaim in accordance with Insurance Law 3420(d), a distinction must be made between (a) policies that contain no provisions extending coverage to the subject loss, and (b) policies that do contain provisions extending coverage to the subject loss, and which would thus cover the loss but for the existence, elsewhere in the policy, of an exclusionary clause. It is only in the former case that compliance with Insurance Law 3420 (d) may be dispensed with.⁶²

In Abreu v. Huang,⁶³ the court noted that a notice of disclaimer “must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated (see, General Accident Ins. Group v. Cirucci, 46 N.Y.2d 862 (1979).” Thus, “an insurer which has denied liability on a specific ground may not thereafter shift the basis for its disclaimer to another ground known to it at the time of its original repudiation.”⁶⁴

In Aull v. Progressive Casualty Ins. Co., *supra*, the court held that a notice of petition to stay arbitration could constitute a written notice of disclaimer.

In Gonzalez v. American Transit Ins. Co.,⁶⁵ the court held that defendant's amended answer, which was served upon the insured and which pleaded, as an affirmative defense, that the insured and the injured plaintiff failed to timely notify defendant of the underlying action, in breach of the insurance policy, constituted a sufficiently specific disclaimer of coverage under CPLR 3420(d). (This was the case even though the insured was not a party to the lawsuit in which the answer was served).

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order effectively to cancel an owner's policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes rules and regulations governing notices of cancellation and termination of insurance, which differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan, and/or was paid for under premium financing contract.

In Nationwide Ins. Co. v. Edwards,⁶⁶ the court held that an Assigned Risk policy billing notice that failed to advise the insured of the option to send payment of premiums to the insurer or broker did not strictly comply with the rules of the New York Automobile Insurance Plan, §14(E)(b)(2) and, therefore, the purported cancellation was a nullity.

In Crump v. Unigard Ins. Co.,⁶⁷ the court held that a cancellation in accordance with Banking Law §576 occurred when the notice of cancellation sent by a premium finance agency was actually received by the insurer, and not on the date stated in the notice of cancellation. The court specifically concluded that Banking Law §576, as amended in 1978 (L. 1978, Ch. 565), did not abrogate the common-law rule requiring that an insurer actually receive the notice before the cancellation becomes effective [citing Savino v. Merchants Mut. Ins. Co., 44 N.Y.2d 625, 628-629, 407 N.Y.S.2d 468, and relying upon the rationale underlying the statute and the common law rule, which is "to protect the insured and third parties by preventing gaps in coverage."]

In Merchants & Businessmen's Mut. Ins. Co. v. Williams,⁶⁸ the court reiterated the rule that in order for a cancellation to be effective against third parties, it must be filed with the DMV.

In Elrac, Inc. v. White,⁶⁹ the court noted that "The law is well settled that, where premiums are financed through a premium finance agency and the premium finance agency sends out cancellation notices, failure to comply with Banking Law § 576(1) is fatal."

The court also noted that “Since there are separate statutory schemes relating to cancellation by a premium finance agency on behalf of the insured on one hand, and cancellation by the insurance carrier on the other, ‘the two statutory schemes are complementary rather than in conflict and must be construed harmoniously’ [citations omitted]. Accordingly, the cancellation provision applicable to insurance carriers do not apply to cancellation by the premium finance agency acting on behalf of the insured [citations omitted].”

In Allstate Ins. Co. v. Perrine,⁷⁰ the court held that a notice of cancellation that gave only fourteen days’ notice was void and of no effect. The court noted that “Pursuant to Veh. & Traf. L. §313(1)(a), the ‘[t]ime of the effective date and hour of termination stated in the notice [of cancellation] shall become the end of the policy’ period.”

In American Transit Ins. Co. v. Wilfred,⁷¹ the Empire Mutual had issued a policy that was effective from midnight February 28, 1997 to midnight February 28, 1998. American Transit has issued a policy to be effective from February 28, 1998 midnight to February 28, 1999 midnight. An accident involving the insured under these policies took place on February 28, 1998 at 9:50 p.m. Each insurer claimed its policy was not applicable to this accident. Noting that General Construction Law §19 defines a calendar day as “the time from midnight to midnight” and that several courts have noted that the definition of a day is commonly considered to be the 24-hour period running from midnight to midnight, the court held that the use of the word “midnight” by both insurers was ambiguous, and that such ambiguity should be construed against both of them, thus resulting in a finding that the policies overlap and that both insurers must defend and indemnify the insured.

In American Casualty Ins. Co. v. Walcott,⁷² the court held that “To cancel a policy of insurance or delete a vehicle from the policy, the insurer is not required to send a notice of cancellation to an additional driver listed in the policy. However, where the insurer either knows or should know that such additional driver was actually the owner of the deleted vehicle, it is obligated to notify him of the deletion of the vehicle from the policy.

In Eagle Ins. Co. v. Peguero,⁷³ the court rejected Eagle’s argument that the word “OVER” on the first page of a Notice of Cancellation, which referred to the back of the notice, where the 12-point type warning notice appeared, was not printed in at least 12 point type and was, therefore, invalid under VTL §313 because it was not supported with expert opinion or other competent evidence of type size. “Absent a prima facie showing that the type is less than 12-point, the issue should not be framed for hearing.”⁷⁴ The clear implication of this decision is that if the word “OVER” is in less than 12-point type, the notice of cancellation is invalid.

In Integon Ins. Co. v Goldson,⁷⁵ the court noted that “The law is settled that a purported ab initio or retroactive cancellation of automobile insurance based upon fraud by the insured is not permitted in New York, unless the claimant was a participant in the fraud.”

In Pioneer Ins. Co. v. Hallen,⁷⁶ the court noted that “A fact is material so as to void ab initio an insurance contract if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only at a higher premium.” In this case, the court held that the alleged misrepresentation – the failure to disclose that a resident driver previously had been convicted of driving while impaired – was immaterial. The insurer’s application only required disclosure of accidents and convictions within 39 months of the date thereof, and the conviction at issue took place more than four (4) years previously. Thus, there was no evidence that the insurer’s underwriting practices would have dictated rejection of the application.

Superceding Coverage

In Integon Ins. Co. v. Goldson, *supra*, the court noted that supervening coverage releases an insurer from any obligation to provide coverage regardless of its failure to properly cancel the policy at issue.

Stolen Vehicles

Another of the statutory categories of an “uninsured motor vehicle” is a vehicle that has been stolen and/or operated without the permission of its owner.

In New York Central Mutual Fire Ins. Co. v. Accardo,⁷⁷ the testimony at a framed issue hearing on the issue of whether the offending driver had the permission of the vehicle’s owner to drive the car at the time of the accident was to the effect that although the driver was the sister of the owner, she was staying with the owner while attempting to rehabilitate from a drug problem, she had been given strict instructions not to use the car and she took the car keys and the owner’s wallet while the owner was in the shower. Moreover, the owner reported the theft of her vehicle by her sister to the police as soon as she discovered that it was missing. Under these circumstances, the trial court found that the vehicle was used without the permission of the owner and the Appellate Division affirmed, finding that “The Supreme Court’s determination that the presumption of permissive use was overcome was supported by substantial evidence.”

In Travelers Property Casualty Corp. v. Maxwell-Singleton,⁷⁸ the owner of the offending vehicle testified at a framed issue hearing that he never gave anyone permission to operate the vehicle, but he conceded that he left his car keys with the assistant manager of his business since they were attached to his shop keys. On the basis of that concession, the court held that the owner effectively gave his employee control over the vehicle in his absence, and, thus, that the owner’s testimony failed to rebut the strong presumption of permissive use under VTL § 388(1).

In New York Central Mutual Fire Ins. Co. v. Julien,⁷⁹ involving a rental vehicle, the court held that in order for the vehicle’s insurer to successfully rely upon a claim that the

vehicle was used without permission, it must produce a copy of its insurance policy in order to establish that the alleged non-permissive use of the rental vehicle either fell under an exclusion to its policy (for which it issued a timely disclaimer), or that the non-permissive use was not within the ambit of its policy. “It is insufficient to establish the uninsured status of the offending vehicle in this CPLR article 75 proceeding simply by alleging that the unauthorized use of the rental vehicle violated the terms of the rental agreement. Only after it is determined that the policy contained a provision stating that coverage is not afforded for use of the vehicle without permission of the owner . . . should the court confront the question of whether the restrictions in the rental agreement are enforceable such that [the operator’s] use of the vehicle can be considered nonpermissive . . . and the question of whether the additional respondents have submitted substantial evidence that the use of the rental car was without the permission of the lessee”

Hit-and-Run

_____ One of the requirements for a valid uninsured motorist claim based upon a hit-and-run is “physical contact” between an unidentified vehicle and the person or motor vehicle of the claimant.⁸⁰

In State Farm Mutual Auto. Ins. Co. v. Allston,⁸¹ the claimants contended in a personal injury lawsuit that their vehicle was struck in the rear by a particular, identified vehicle. The court, however, granted the motion for summary judgment by the owner/operator of that vehicle based, inter alia, on evidence that that vehicle did not make contact with claimants’ vehicle. Thereafter, claimants demanded arbitration of an uninsured motorist claim, asserting that his vehicle was struck by an unidentified, hit-and-run driver. The SUM carrier’s contention that the arbitration was precluded by the doctrine of inconsistent positions was rejected by the court. The “doctrine of judicial estoppel precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding. However, the doctrine will be applied only ‘where a party to an action has secured a judgment in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his [or her] interests have changed.’” Here, the claimants “never obtained a favorable judgment as a result of their inconsistent position in the personal injury action. Accordingly, the doctrine of judicial estoppel is inapplicable.”

Insurer Insolvency

The SUM endorsement under Regulation 35-D includes within the definition of an “uninsured” motor vehicle a vehicle whose insurer “is or becomes insolvent.”

In American Manufacturers Mut. Ins. Co. v. Morgan,⁸² the court held that, under Regulation 35-D, any situation wherein the tortfeasor’s carrier has become insolvent (in liquidation) – whether covered by the Security Fund or not; whether the Fund has money

or not – is an uninsured motorist situation and the Claimant is entitled to pursue UM benefits under his or her policy.

In its decision, the court held that this issue was not governed by the Court of Appeals' 1977 decision in State-Wide v. Curry⁸³ – which had made the distinction between covered and non-covered insolvencies – and expressly rejected the holding in the only reported post Regulation 35-D case on the issue to date – GEICO v. Silber, 178 Misc.2d 451, 679 N.Y.S.2d 552 (Sup. Ct. Nassau Co. 1998).

Pursuant to Morgan, supra, in a Regulation 35-D case involving insurer insolvency, the Claimant can proceed to SUM arbitration. If the SUM carrier wishes to pursue a subrogation claim against the tortfeasor and the insolvent insurer, it would then have to pursue a claim from the Security Fund, with its attendant delays and risks of non-payment. As stated by the Court, quoting the Superintendent of Insurance, "The individual insured for supplementary uninsured motorists coverage should not be required to wait for a recovery from the Security Fund on behalf of the insolvent insurer. Since the SUM insurer has a subrogation right against the insolvent insurer, the Security Fund would still remain liable, but the insured would be provided a more prompt recovery from his or her own insurer."

NOTE: Certain language in the decision seems to distinguish the 35-D SUM rule from the rule applicable in cases involving basic, mandatory UM coverage under 3420(f)(1). In non-Regulation 35-D SUM cases, the old rule still applies.⁸⁴

UNDERINSURED MOTORIST ISSUES

Definition of Underinsured Motorist Coverage

In Kemper Ins. Co. v. Azayeva,⁸⁵ the court noted that in an accident involving only one motor vehicle, there can be no claim for supplementary uninsured/underinsured motorist benefits under that vehicle's policy because, by definition, SUM coverage applies only when another, offending vehicle is inadequately insured to cover an injured claimant's loss.

Regulation 35-D provides within the definition of uninsured or underinsured motor vehicle, a vehicle for which there was a bodily injury liability insurance policy or bond applicable at the time of the accident but "the amount of such insurance coverage or bond has been reduced, by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of the policy." In State Farm Mutual Auto. Ins. Co. v. Sparacio,⁸⁶ the court held that "Although both policies were for the same amount, State Farm was required by the terms of its own umbrella policy to subtract the amounts paid to other injured parties by the tortfeasor before making a comparison of the policy limits to determine whether the tortfeasor's vehicle was underinsured."

Subrogation Action

In Liberty Mutual Ins. Co. v. Clark,⁸⁷ the court noted that since the nature of subrogation is derivative of the underlying tort action, a cause of action for subrogation accrues from the date of the accident, not the date of payment.

Consent to Settle/Violation of Subrogation Rights

It is well-recognized that in effecting a settlement of a personal injury action against a tortfeasor, the claimant will be held to have prejudiced the subrogation rights of the SUM carrier unless he/she can establish by express provision in the release executed to the third party or by necessary implication arising from the circumstances of the execution of the release that the settling parties reserved the rights of the insurer against the third-party tortfeasor or otherwise limited the extent of their settlement to achieve that result.⁸⁸ The failure to protect the subrogation rights of the SUM carrier and/or the settlement of the underlying action without the consent of the SUM carrier constitute breaches of the SUM policy which can vitiate the coverage thereunder.

In New York Central Mutual Fire Ins. Co. v. Danaher,⁸⁹ the claimant settled the action against the tortfeasor and issued a general release which did not preserve by express limitation the SUM carrier's subrogation rights. When the SUM carrier was notified of the settlement, it immediately disclaimed because its prior written consent to the settlement had not been obtained as required by the policy. In upholding the disclaimer of SUM coverage, the court stated that "By breaching condition 10 of the SUM coverage portion of the subject insurance policy, defendant is disqualified from availing herself of the benefits of the underinsured coverage provided under that policy unless she can demonstrate that [the SUM carrier] by its conduct, waived the requirement of consent or acquiesced in the settlement [citations omitted]." The court held that the fact that the claimant's counsel's repeated telephonic requests for a copy of the insurance policy, made prior to the settlement, went unanswered, and the SUM carrier's knowledge that an SUM claim had been asserted, did not suffice to raise a question of fact as to the waiver of Condition 10. Moreover, the court noted that the SUM carrier was "not required to demonstrate prejudice to assert a defense of non-compliance" with Condition 10 of the policy.⁹⁰

In D'Angiolillo v. Singh,⁹¹ the court held that the failure to timely commence a personal injury action against the tortfeasor within the applicable statute of limitations will constitute a violation of the SUM insurer's subrogation rights and will vitiate the SUM coverage. The statute of limitations for commencing a personal injury action against the tortfeasor is not tolled during the time in which an uninsured motorist issue is being arbitrated.

Reduction in Coverage

In Wick v. Encompass Ins. Co.,⁹² the Declarations Page of the policy indicated that the insured had paid a premium for and received both “Uninsured Motorist” coverage in the sum of \$25,000/\$50,000 and “Supplemental Un/Underinsured Motorist” coverage in the single limit sum of \$50,000. In addition, the Declarations Page did not contain the “plain language” offset provision required by Regulation 35-D, 11 NYCRR §60-2.3(a)(2). Finding that “This case, as opposed to Allstate [v. Stolarz], 81 N.Y.2d 219, 597 N.Y.S.2d 904 (1993)] does not involve a single limit uninsured/underinsurance coverage situation with a single payment,” but, rather, “the insured made two payments for, presumably, two distinct coverages,” the court held that the reduction-in-coverage/offset provision was unenforceable.

Priority of Coverage

The “Priority of Coverage” provision of the SUM endorsement provides that where an insured may be covered for uninsured or supplementary uninsured motorist coverage under more than one policy, the maximum amount recoverable may not exceed the highest limit of coverage for any one vehicle under any one policy. In such cases, the following order of priority applies: (1) the policy covering the vehicle occupied by the claimant; (2) the policy identifying the claimant as a named insured; and (3) any other policy covering the claimant.⁹³

ENDNOTES

1. See Jonathan A. Dachs, “A Review of Uninsured Motorist and Supplementary Uninsured Motorist Cases Decided in 2001,” N.Y.St.B.J. Vol. 74, No. 6, at 20 (July/August 2002); Actions by Courts and Legislature in 2000 Addresses Issues Affecting Uninsured and Underinsured Drivers, N.Y.St.B.J. Vol. 73, No. 7, at 26 (Sept. 2001); Jonathan A. Dachs, Summing Up 1999 “SUM” Decision: Courts Provide New Guidance on Coverage Issues for Motorists, N.Y.St.B.J. Vol. 72, No. 6, at 18 (July/Aug. 2000); Jonathan A. Dachs, Decisions in 1998 Clarified Issues Affecting Coverage for Uninsured and Underinsured Motorists, N.Y.St.B.J. Vol. 71, No. 5, at 8 (May/June 1999); Jonathan A. Dachs, Legislative and Case Law Developments in UM/UIM/SUM Law – 1997, N.Y.St.B.J. Vol. 70, No. 6, at 46 (Sept./Oct. 1998); Jonathan A. Dachs, Developments in Uninsured and Underinsured Motorist Coverage, N.Y.St.B.J. Vol. 69, No. 6 at 18 (Sept./Oct. 1997); The Parts of the SUM: Uninsured and Underinsured Motorist Coverage in 1995, N.Y.St.B.J. Vol. 68, No. 5, at 42 (July/Aug. 1996); Jonathan A. Dachs, Uninsured and Underinsured Motorist Cases in 1994, N.Y.St.B.J., Vol. 67, No. 7 at 24 (Nov. 1995); Jonathan A. Dachs, Uninsured and Underinsured . . . But Not Underlitigated: 1993: An Important Year for UM/UIM Coverage, N.Y.St.B.J. Vol. 66, No. 6, at 13 (Sept./Oct. 1994).
2. 192 Misc.2d 78, 745 N.Y.S.2d 671 (Sup. Ct. N.Y. Co. 2002).
3. 96 N.Y.2d 58, 724 N.Y.S.2d 692 (2001).
4. 295 A.D.2d 511, 744 N.Y.S.2d 677 (2d Dept. 2002).
5. See also, Buckner v. MVAIC, 66 NY2d 211, 495 N.Y.S.2d 952 (1985); Royal Ins. Co. v. Bennett, 226 A.D.2d 1084 (4th Dept. 1976); Hogan v. Cigna Prop. & Cas. Co., 216 A.D.2d 442 (2d Dept. 1995).
6. 298 A.D.2d 970, 747 N.Y.S.2d 878 (4th Dept. 2002).
7. 295 A.D.2d 277, 744 N.Y.S.2d 176 (1st Dept. 2002).
8. N.O.R., Index No.: 013437/01, Sup. Ct. Nassau County 2002.
9. 295 A.D.2d 569, 745 N.Y.S.2d 47 (2d Dept. 2002).
10. 293 A.D.2d 751, 741 N.Y.S.2d 284 (2d Dept. 2002).
11. 290 A.D.2d 676, 736 N.Y.S.2d 447 (3d Dept. 2002).
12. 293 A.D.2d 643, 740 N.Y.S.2d 442 (2d Dept. 2002).
13. 294 A.D.2d 579, 742 N.Y.S.2d 577 (2d Dept. 2002).

14. See Metropolitan Property & Casualty Ins. Co. v. Mancuso, 93 N.Y.2d 487, 693 N.Y.S.2d 81 (1999).
15. See also, Schlesinger v. Nationwide Mutual Ins. Co., 294 A.D.2d 421, 742 N.Y.S.2d 352 (2d Dept. 2002) (insurer provided notice of an uninsured motorist claim as soon as practicable when he promptly notified the insurer of his claim after learning that the offending driver could not be located and that the offending vehicle might not have had insurance. The insured was entitled to rely on the insurance code and policy number provided for the offending vehicle in the police report as presumptive proof that the vehicle was insured – at least until he learned to the contrary). See also, State Farm Mutual Auto. Ins. Co. v. Sparacio, 297 A.D.2d 284, 746 N.Y.S.2d 167 (2d Dept. 2002).
16. 300 A.D.2d 1095, 751 N.Y.S.2d 810 (4th Dept. 2002).
17. 300 A.D.2d 1063, 751 N.Y.S.2d 802 (4th Dept. 2002).
18. 296 A.D.2d 396, 744 N.Y.S.2d 509 (2d Dept. 2002).
19. 300 A.D.2d 660, 753 N.Y.S.2d 102 (2d Dept. 2002).
20. See Ringel v. Blue Ridge Ins. Co., 293 A.D.2d 460, 740 N.Y.S.2d 109 (2d Dept. 2002). See also Mount Vernon Fire Ins. Co. v. Harris, 193 F.Supp 674 (E.D.N.Y. 2002).
21. 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).
22. See Dachs, N. and Dachs, J., “Notice of Legal Action and the Requirement of Prejudice,” N.Y.L.J., July 9, 2002, p. 3, col. 1; U.S. Underwriters Ins. Co. v. 203-211 West 145th Street Realty Corp., 237 Fed. Appx. 575 (2d Cir. 2002); State Farm Mut. Auto. Ins. Co. v. Sparacio, 297 A.D.2d 284, 746 N.Y.S.2d 167 (2d Dept. 2002).
23. 297 A.D.2d 381, 746 N.Y.S.2d 605 (2d Dept. 2002).
24. 291 A.D.2d 401, 737 N.Y.S.2d 118 (2d Dept. 2002).
25. 301 A.D.2d 253, 750 N.Y.S.2d 712 (4th Dept. 2002).
26. ___ Misc.2d ___, ___ N.Y.S.2d ___ (Sup. Ct. Nassau Co. 2002) (N.Y.L.J., April 9, 2002, p. 22, col. 3).
27. See Matarasso v. Continental Casualty Co., 56 N.Y.2d 264, 451 N.Y.S.2d 703 (1982); Eagle Ins. Co. v. Perez, 299 A.D.2d 544, 750 N.Y.S.2d 640 (2d Dept. 2002); Seneca Ins. Co., Inc. v. Secure-Southwest Brokerage, Ltd., 294 A.D.2d 211, 741 N.Y.S.2d 690 (1st Dept. 2002).
28. 294 A.D.2d 287, 743 N.Y.S.2d 270 (1st Dept. 2002).

29. 291 A.D.2d 402, 736 N.Y.S.2d 889 (2d Dept. 2002).
30. See also Ins. Co. of the State of Pennsylvania v. Michel, N.O.R., N.Y.L.J., June 7, 2002, p. 24, col. 2 (Sup. Ct. Westchester Co.).
31. See L.2001, Ch. 473, Senate Bill No. 77, effective November 21, 2001, amending CPLR 304, 306-a, and 306-b.
32. Vincent C. Alexander, "Special Proceedings: New Commencement Amendment Is Incomplete," N.Y.L.J., Feb. 14, 2002, p. 3, col. 1.
33. See, e.g., Boschetti v. Mackay, 297 A.D.2d 392, 746 N.Y.S.2d 616 (2d Dept. 2002), lv. to appeal denied, 98 N.Y.2d 610, 749 N.Y.S.2d 1 (2002) (decided after the statutory amendment but without noting or applying it – petition dismissed for failure to file process along with the petition).
34. 98 N.Y.2d 745, 751 N.Y.S.2d 819 (2002).
35. See American Casualty Ins. Co. v. Walcott, 300 A.D.2d 478, 751 N.Y.S.2d 560 (2d Dept. 2002).
36. 295 A.D.2d 136, 742 N.Y.S.2d 831 (1st Dept. 2002).
37. See also Wausau Ins. Co. v. Ogochukwu, 295 A.D.2d 280, 744 N.Y.S.2d 175 (1st Dept. 2002) (evidence submitted by Respondents sufficed to establish the absence of coverage).
38. 298 A.D.2d 292, 748 N.Y.S.2d 491 (1st Dept. 2002).
39. 297 A.D.2d 736, 747 N.Y.S.2d 774 (2d Dept. 2002).
40. 295 A.D.2d 280 744 N.Y.S.2d 175 (1st Dept. 2002).
41. 291 A.D.2d 230, 737 N.Y.S.2d 355 (1st Dept. 2002).
42. 194 Misc.2d 295, 752 N.Y.S.2d 209 (Sup. Ct. Richmond County 2002).
43. 283 A.D.2d 982, 723 N.Y.S.2d 924 (4th Dept. 2001).
44. ___ Misc.2d ___, ___ N.Y.S.2d ___, 2002 WL 554328 (App. Term, 2002).
45. 290 A.D.2d 475, 736 N.Y.S.2d 689 (2d Dept. 2002).
46. 300 A.D.2d 584, 751 N.Y.S.2d 871 (2d Dept. 2002).
47. 291 A.D.2d 492, 739 N.Y.S.2d 394 (2d Dept. 2002).

48. 295 A.D.2d 219, 744 N.Y.S.2d 22 (1st Dept. 2002).
49. 298 A.D.2d 522, 748 N.Y.S.2d 783 (2d Dept. 2002).
50. 90 N.Y.2d 255, 660 N.Y.S.2d 366 (1997).
51. 298 A.D.2d 395, 751 N.Y.S.3d 297 (2d Dept. 2002).
52. 295 A.D.2d 73, 742 N.Y.S.2d 40 (1st Dept. 2002).
53. 290 A.D.2d 348, 736 N.Y.S.2d 369 (1st Dept. 2002).
54. 295 A.D.2d 618, 744 N.Y.S.2d 700 (2d Dept. 2002).
55. 276 F.3d 119 (2d Cir. 2002).
56. See also, Aull v. Progressive Casualty Ins. Co., 300 A.D.2d 302, 751 N.Y.S.2d 292 (2d Dept. 2002); Federal Ins. Co. v. Provenzano, 300 A.D.2d 485, 751 N.Y.S.2d 567 (2d Dept. 2002).
57. 290 A.D.2d 278, 736 N.Y.S.2d 34 (1st Dept. 2002), lv. to appeal denied, 98 N.Y.2d 605, 746 N.Y.S.2d 279 (2002).
58. 291 A.D.2d 484, 739 N.Y.S.2d 273 (2d Dept. 2002).
59. See also Buttenschon v. State Farm Mut. Auto. Ins. Co., 291 A.D.2d 864, 737 N.Y.S.2d 190 (4th Dept. 2002) (79-day delay); Aull v. Progressive Casualty Ins. Co., supra (delay of nearly 4 months); Federal Ins. Co. v. Provenzano, supra (almost 3 month delay).
60. 193 F.Supp.2d 674 (E.D.N.Y. 2002).
61. See also, McEachron v. State Farm Ins. Co., 295 A.D.2d 685, 742 N.Y.S.2d 925 (3d Dept. 2002).
62. See Continental Ins. Co. v. Luhrs, 299 A.D.2d 357, 749 N.Y.S.2d 175 (2d Dept. 2002); Metro Medical Diagnostics, P.C. v. Eagle Ins. Co., 293 A.D.2d 751, 741 N.Y.S.2d 284 (2d Dept. 2002); Great American Ins. Co. v. Tomaino, 293 A.D.2d 944, 741 N.Y.S.2d 315 (3d Dept. 2002); Squires v. Robert Marini Builders, Inc., 293 A.D.2d 808, 739 N.Y.S.2d 777 (3d Dept. 2002).
63. 300 A.D.2d 420, 751 N.Y.S.2d 583 (2d Dept. 2002).
64. See also, Great American Ins. Co. v. Tomaino, 293 A.D.2d 944, 741 N.Y.S.2d 315 (3d Dept. 2002); Mount Vernon Fire Ins. Co. v. Harris, 193 F.Supp.2d 674 (EDNY 2002); Merchants Mutual Ins. Co. v. Falisi, 293 A.D.2d 678, 741 N.Y.S.2d 273 (2d Dept. 2002), revd. on other grounds, 99 N.Y.2d 568, 755 N.Y.S.2d 703 (2003).

65. ___ Misc.2d ___, ___ N.Y.S.2d ___ (App. Term, 2d & 11th Dists., 2002).
66. 292 A.D.2d 389, 738 N.Y.S.2d 95 (2d Dept. 2002).
67. 291 A.D.2d 692, 738 N.Y.S.2d 425 (3d Dept. 2002).
68. 295 A.D.2d 614, 744 N.Y.S.2d 698 (2d Dept. 2002).
69. 299 A.D.2d 546, 750 N.Y.S.2d 641 (2d Dept. 2002).
70. 300 A.D.2d 1065, 752 N.Y.S.2d 494 (4th Dept. 2002).
71. 296 A.D.2d 360, 745 N.Y.S.2d 171 (1st Dept. 2002).
72. 300 A.D.2d 478, 751 N.Y.S.2d 560 (2d Dept. 2002).
73. 299 A.D.2d 294, 750 N.Y.S.2d 601 (1st Dept. 2002).
74. See also, Utica Mutual Ins. Co. v. Bodie, 100 A.D.2d 592, 473 N.Y.S.2d 539 (2d Dept. 1984).
75. 300 A.D.2d 396, 751 N.Y.S.2d 527 (2d Dept. 2002).
76. 298 A.D.2d 725, 749 N.Y.S.2d 295 (3d Dept. 2002).
77. 298 A.D.2d 459, 748 N.Y.S.2d 270 (2d Dept. 2002).
78. 300 A.D.2d 225, 751 N.Y.S.2d 367 (1st Dept. 2002).
79. 298 A.D.2d 587, 749 N.Y.S.2d 73 (2d Dept. 2002).
80. See Allstate Ins. Co. v. Moshevey, 291 A.D.2d 401, 737 N.Y.S.2d 118 (2d Dept. 2002).
81. 300 A.D.2d 669, 751 N.Y.S.2d 795 (2d Dept. 2002).
82. 296 A.D.2d 491, 746 N.Y.S.2d 726 (2d Dept. 2002).
83. 43 NY2d 298, 401 N.Y.S.2d 1 (1977).
84. See Eagle Ins. Co. v. St. Julian, 297 A.D.2d 737, 747 N.Y.S.2d 773 (2d Dept. 2002).
85. 291 A.D.2d 406, 736 N.Y.S.2d 893 (2d Dept. 2002).
86. 297 A.D.2d 284, 746 N.Y.S.2d 167 (2d Dept. 2002).
87. 296 A.D.2d 442, 745 N.Y.S.2d 64 (2d Dept. 2002).

88. See Weinberg v. Transamerica Ins. Co., 62 N.Y.2d 379, 381-82.
89. 290 A.D.2d 783, 736 N.Y.S.2d 195 (3d Dept. 2002).
90. See also, Integon Ins. Co. v. Battaglia, 292 A.D.2d 527, 739 N.Y.S.2d 590 (2d Dept. 2002).
91. ___ Misc.2d ___, ___ N.Y.S.2d ___, 2002 WL 31940753 (App. Term, 2d Dept. 2002).
92. 191 Misc.2d 449, 742 N.Y.S.2d 813 (Sup. Ct. N.Y. Co. 2002).
93. See Warren v. Allstate Ins. Co., 300 A.D.2d 517, 752 N.Y.S.2d 689 (2d Dept. 2002).