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SERIOUS INJURY: 2015-2016

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INSURANCE LAW 5102(a)

Notwithstanding any other law, in any action by or on behalf of a covered person against
another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss except in the case of a serious injury, or for basic economic loss

INSURANCE LAW § 5102(d)

"Serious injury" means a personal injury which results in death; dismemberment, significant disfigurement; a fracture; loss of a fetus; permanent loss of use of body organ, member, function or system; permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Vidal v. Maldonado
23 Misc.3d 186, 873 N.Y.S.2d 842 (Sup. Ct. Bronx Co. 2008) (Victor, J.)

From the perspective of one who reviews the abundant decisions on a weekly basis, the following observation, under the caption "Great Expenditure of limited Judicial Resources," is quite apt: "Trial courts are then presented with the "serious injury" issue on a motion made by a D for summary judgment; and the court must then use its "powers" to discern whether the minimum legal requirements have been met to send the case to a trial by jury. The motions and papers submitted by both sides are usually copious, and thus, a thorough review of the record and current appellate decisions requires a great expenditure of limited judicial time. In any event, the decision rendered is usually challenged and refuted by the losing side; and thus many (too many) of these cares are appealed, and many of those appeals result in non-unanimous (and sometimes acrimonious) decisions which are often difficult to reconcile with prior precedent." **COMMENT:** 6 years later, observations are still valid.

McNeil v. Hockey
2012 N.Y. Slip Op. 52252(U) (Sup. Ct. Clinton Co.) (Muller, J.)

"This Court is called upon, yet again, to embrace the Sisyphean challenge of whether a P's evidence of personal injury meets the statutory threshold set by Insurance Law §5102(d), 'an elusive standard that all too frequently escapes facile and final resolution'. (*Brown v. Acky*, 9 A.D.3d 30, 31, 776 N.Y.S.2d 56 (1st Dep't 2004).

I. GENERALLY

A. Threshold Requirement

1. Use or Operation

Ocasio v. New York City Transit Auth.
134 A.D.3d 789, 20 N.Y.S.3d 655 (2d Dep't 2015)

P claimed he fell while attempting to board a bus when his foot slipped off the edge of the entrance platform of the bus. He alleged that the platform was too high for him to safely step onto the bus, and that the bus driver was negligent in failing to lower the bus into a kneeling position so that he could board. Court held Supreme Court properly determined that he was required to establish that he had sustained a serious injury "since it is clear that the accident arose out of the " 'use or operation' of the bus. (*see, Walton v. Lumbermens Mut. Cas. Co.*, 88 N.Y.2d 211, 213, 644 N.Y.S.2d 133; *cf. Cividanes v. City of New York*, 20 N.Y.3d 925, 926, 957 N.Y.S.2d 685)."

B. SUM Coverage

State Farm Mutual v. Fitzgerald
25 N.Y.3d 799, 16 N.Y.S. 3d 796 (2015)

P insurer of driver filed petition to stay arbitration of respondent passenger's claim for SUM benefits. The respondent and driver were police officers and the police car they were in involved in an accident with another vehicle which was underinsured. Court held 4-3 that a police car was not a motor vehicle for purposes of SUM coverage.

Allstate Ins. Co v. Caldharry
130 A.D.3d 814, 13 N.Y.S.3d 523 (2d Dep't 2015)

Court affirmed denial of P's petition to stay arbitration of a claim for UM benefits. It deserved that generally under governing NY law a court may address three threshold questions on a motion to compel or to stay arbitration: (1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time would be time-barred if it were asserted in State court. Here, P did not allege, pursuant to CPLR 7503(b), that the parties did not have an agreement to arbitrate or that the respondents' claim was time-barred. Further, while P alleged that the respondents failed to comply with the terms of the uninsured motorist provisions of the subject policy, it did not submit a copy of the portions of the policy which allegedly contained those terms. Accordingly, P failed to demonstrate that it was entitled to a permanent stay of arbitration based upon the respondents' alleged failure to comply with the terms of the subject policy.

Encompass Indemnity Co. v. Rich
131 A.D.3d 476, 14 N.Y.S.3d 491 (2d Dep't 2015)

Goodman was driving his car and speeding when he lost control of it and crashed it into a utility pole. When respondent Rich, a fireman, responded, Goodman was trapped inside his vehicle, bleeding, drifting in and out of consciousness, and, when awake, moaning in pain. In order to extract Goodman from the vehicle, the firefighters used the "jaws of life" to cut the vehicle's roof, and Rich and three other firefighters lifted the roof off of the vehicle. In the process thereof, Rich sustained injuries. Rich sought SUM coverage from P, his insurer and P sought permanent stay of arbitration of claim. Court held P failed to establish that Rich was not entitled to coverage under the SUM endorsement. The evidence in the record established that Goodman's negligent use of his vehicle directly caused the accident that led to him being trapped and in obvious need of intervention and resulting injuries. It cannot be said, as a matter of law, that Goodman's negligent use of his vehicle was not a proximate cause of Rich's injuries under the danger invites rescues doctrine. **COMMENT:** Court cited in support *Kesich v. New York Cent. Mut.*, 146 A.D.3d 1219 [3d Dep't 2013]).

Redege v. Progressive Ins. Co
133 A.D.3d 1261, 19 N.Y.S.3d 645 (4th Dep't 2015)

P, a pedestrian, was struck by a car driver by AH, an alleged drunk driver. AH was issued by GEICO with a $25,000/$50,000 policy and P had his own MV policy with Progressive with bodily injury and SUM limits of $50,000/$100,000. P commenced action against AH alleging negligence and a local fire department alleging a dram shop violation for selling alcohol to AH. GEICO offered its entire per accident policy limit of $50,000 to plaintiff and the other two pedestrians injured as a result of AH's negligence- to be equally divided among them (i.e., $16,666.66 each). In addition, Selective Insurance Co., the fire department's commercial general insurer, offered $170,000 to P to settle the case against the department. P received Progressive's consent to both settlements, and then proceeded to file an SUM claim with Progressive for the amount of $33,333.34, reflecting the difference between the $50,000 in SUM coverage he purchased and the $16,666.66 he received as payment from the motor vehicle policy covering the motor vehicle tortfeasor. Progressive denied any obligation to compensate P under its SUM endorsement because it was entitled to an offset or reduction in coverage for not only the $16,666.66 P received from GEICO, but also the $170,000 he received from Selective- which effectively reduced the available SUM coverage to zero. Supreme Court agreed with Progressive, relying upon *Weiss v. Tri-State Consumer Ins. Co.* 98 AD3d 1107, 951 NYS3d 191 (2d Dep't. 2012). Court affirmed. It cited to the policy's non-duplication provision and held that the payment P received for the fire company's insurer was for bodily injury damages, and thus the amount of SUM benefits available to P was properly reduced by that amount citing *Weiss*. The Court further held that the policy was not ambiguous, and that Condition 11 did not conflict with Condition 6, noting that Condition 6 does not state that the difference between the SUM limit and any payments received from a motor vehicle bodily injury liability policy is "the" SUM payment that is to be given to the P, but, rather, that the difference is the "maximum" payment, "which the average insured would understand to mean that it could be further reduced."

GEICO v. Sherlock
140 A.D.3d 872, 32 N.Y.S. 3d 635 (2d Dep't 2016)

Claimant's decedent car, insured by GEICO, was struck by a car owned and operated by JM, who was insured by New York Central Mutual Ins. Co. At the time of the accident, JM's vehicle was being followed by an Old Brookville police officer, who had observed him speeding. JM's vehicle carried bodily injury

liability coverage of $25,000/$50,000, which expanded to $50,000/$100,000 in the case of death, and decedent's vehicle carried bodily injury and SUM limits of $250,000/$500,000. New York Central paid its entire $50,000 limit to settle the action against JM. U.S. Specialty Ins. Co., the insurer for the Village of Old Brookville and other municipal defendants, paid $425,000 from its public risk professional policy to settle the action against its insureds, apparently with GEICO's consent. Subsequently, the estate representative filed a claim with GEICO for $200,000 in SUM benefits (representing its $250,000 SIUM limits less the $50,000 received from the tortfeasor's insurer). In response, GEICO petitioned to stay arbitration on the ground that, pursuant to *Weiss*, the $425,000 received from or on behalf of the municipal defendants must be taken into account and included in the offset or reduction in coverage, and, therefore, its SUM policy limits were reduced to zero. Supreme Court, citing *Weiss*, agreed with GEICO. Court reversed. As to *Weiss*, it observed: "To the extent that *Weiss* can be interpreted to require that the amount of SUM coverage be reduced without regard to the actual amount of bodily injury damages suffered, it should no longer be followed." As the full amount of the insured's bodily injury damages from the collision has not as yet been determined, claimant was held to be entitled to proceed to arbitration. **COMMENT:** (1) Dan Kohane, has commented as follows on this case in "Coverage Pointers," June 17, 2016 Issue: "This is a sea change. In the *Weiss* case the same court had held that money received from a dram shop carrier would considered when determining whether or not SUM benefits would be recoverable. Why? Because of the language in the policy providing that SUM benefits should not duplicate "any amounts recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds." (2) Jonathan Dacks in "SUM Offsets." NYLJ, 7/20/16, p.3, has commented: "One of the more interesting, and significant, insurance law questions that has been posed to the courts in recent years involves the issue of whether an "SUM" carrier is entitled to an offset or reduction in coverage for the amount(s) received from a non-motor vehicle tortfeasors, such as municipalities, bars, and/or medical providers, in addition to amounts received by the insured/claimant from the motor vehicle tortfeasor involved in the accident. Although the initial decisions on that issue were consistent in expansively reading the SUM endorsement to maximize the number of potential offsets or reductions in the SUM insurer's policy limits (thereby minimizing the SUM coverage), a more recent decision by the Appellate Division, Second Department, in which that court, in a rare move, effectively overruled an earlier holding, had created a division of authority that leaves the question somewhat unsettled."

Matter of Ameriprise Auto v. Savio
137 A.D.3d 1272 28 NYS3d 410 (2d Dep't. 2016)

Savio's minor daughter was a passenger in a vehicle that was involved in an accident resulting in her death. Savio was insured by Ameriprise. Her bodily injury policy limits were $100,000 per person and $300,000 per accident. She also carried SUM with a policy limit of $50,000 per person and $100,000 per accident. The vehicle driven by the negligent tortfeasor, which struck the vehicle in which the daughter was a passenger, had a bodily insurance policy limit of $25,000 per person and $50,000 per accident. Pursuant to Insurance Law § 3420 (f) (1), since a death was involved, the minimum $25,000 per person limit was increased to $50,000. The tortfeasor's insurer tendered $50,000 to the appellant in settlement of the claim of her daughter's estate. Ameriprise argued that SUM benefits were not available because the difference between the SUM policy limit for one person ($50,000) and the amount paid by the tortfeasor's insurer (also $50,000) was zero. Court held Supreme Court properly found that the $50,000 recovered from the tortfeasor was equivalent to the maximum SUM limit provided for in the policy and thus Savio had no possibility of an additional recovery, which rendered her SUM claim academic.

C. First-Party Benefits

Viviane Etienne Medical Care, P.C. v. Countywide Ins.
25 N.Y.3d 498, 4 N.Y.S.3d 283 (2015)

Court held a P medical provider demonstrates *prima facie* entitlement to S/J in action to recover no-fault benefits by submitting evidence that payment of no-fault benefits are overdue, and proof of its claim, using the statutory billing form was mailed to and received by D insurer through admissible evidence.

Compas Medical, P.C. v. Fiduciary Ins. Co.,
51 Misc.3d 66, 31 N.Y.S.3d 734 (App. T. 2d Dep't 2016)

In this action by provider to recover assigned first-party benefits, Court held that mailing written notice of the accident to the insurer on or before the 30th day after the accident will satisfy the 30-day notice requirement of 11 NYCRR 65-11. It noted that while the regulation did not define what it means for a written notice to be "given," and the Court of Appeals did not elaborate when it stated that a claimant must "submit" a notice of claim (*Hospital for Joint Diseases*, 9 N.Y.3d at 317, 849 N.Y.S.2d 473), 11 NYCRR 65-3.4 requires no-fault insurers to "forward

to the applicant the prescribed application for motor vehicle no-fault benefits (N.Y.S. Form [NF-2])," accompanied by the prescribed cover letter (N.Y.S. Form [NF-1])," and the prescribed cover letter included in Appendix 13 to Regulation 68 states that the NF-2 application for No-Fault Benefits (which satisfies the written notice requirement [*see* 11 NYCRR 65-3.3(d)]) "must be sent to [the insurer] within 30 days of the accident date if your original notice to [the insurer] was not in writing."

Martin v. Lancer Ins. Co.
133 A.D.3d 1219, 19 N.Y.S.3d 638 (4th Dep't 2015)

P sued D for no fault benefits allegedly due him under insurance policy D issued to D & M, a car dealership, the alleged owner of the car in which P was injured. P had a business relationship with D & M and using D & M's credentials purchased the subject vehicle. When P paid for the vehicle, the "Retail Certificate of Title" issued in conjunction with the sale identified D & M as the buyer. Two months later P agreed to sell vehicle to Hardy but title could not pass until vehicle passed inspection and vehicle could not pass until its computer codes had been cleared. At time of accident title had not yet been transferred to Hardy. Court held a triable issue of ownership of the vehicle was present. It noted the evidence submitted by D in support of its motion failed to eliminate all issues of fact whether D & M owned the subject vehicle at the time of the accident. The vehicle was purchased with D & M's dealer credentials and, at the time of the accident, D & M had title to the vehicle, and its dealer plates were on the vehicle. Although D presented additional evidence seeking to rebut the presumption of D & M's ownership arising from those circumstances, the court properly concluded that it failed to do so.

II. THRESHOLD CATEGORIES

A. Significant Disfigurement

Giuffre v. Bulgues
134 A.D.3d 477, 22 N.Y.S.3d 14 (1st Dep't 2015)

As to this category, Court held Ds on their S/J motion submitted report of a plastic surgeon who found no disfiguring scars, thereby meeting their burden; and P submitted no evidence to refute the showing that his scarring was disfiguring. **COMMENT:** What, no photographs?

Stamps v. Pudetti
137 A.D.3d 1755, 28 N.Y.S.3d 539 (4th Dep't 2016)

Court held claim of significant disfigurement was not cognizable as P had improperly asserted it as a "new injury" in their supplemental BOP; and as well the claim was raised for the first time in opposition to S/J.

B. Fracture

Bagan v. Tomer
139 A.D.3d 577, 30 N.Y.S.3d 816 (1st Dep't 2016)

Court held Supreme Court providently exercised its discretion in granting P's cross motion for leave to amend the bill of particulars. Although P failed to offer a reasonable excuse for her delay in seeking leave to amend, she demonstrated that the proposed amendment has potential merit by pointing to the medical records submitted by D, which show that two doctors who examined P after the accident noted the existence of a nasal fracture. D cannot claim surprise or prejudice given such proof, and given that his own expert raised the issue of the fracture.

Eisenberg v. Cope Bestway Express, Inc.
131 A.D.3d 1198, 17 N.Y.S.3d 457 (2d Dep't 2015)

Court granted P's S/J motion on issue of S/I as she showed the accident caused her to sustain a fracture (not identified) and Ds did not oppose that showing.

Uribe v. Jimenez
133 A.D.3d 844, 20 N.Y.S.3d 55 (2d Dep't 2015)

Court held D met his burden on his S/J motion by submitting hospital x-ray that did not reveal a rib fracture. It then held P raised a triable issue of fact through her submission of certified medical records, wherein her treating physician documented a plan of treatment for P's rib fracture that had been revealed in an x-ray taken shortly after the subject accident but subsequent to the x-ray submitted by Ds, along with an affirmation from another treating physician who concluded that P's injuries, including her rib fracture were caused by the subject accident.

Crutchfield v. Jones
132 A.D.3d 1311, 17 N.Y.S.3d 525 (4th Dep't 2015)

Court held P's motion for S/J was properly denied. It noted that although P met his initial burden with respect to the fracture category by submitting the affirmation of his physician, who examined an x-ray of P's neck and opined that P sustained an anterior compression fracture of his C6 vertebra, Ds raised a triable issue of fact concerning that category by submitting, *inter alia*, the affirmed report of their medical expert concluding that there was no evidence of such a fracture.

C. Permanent Loss of Use

Oberly v. Bangs Ambulance
96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001)

The claimed loss of use must be a "total" loss of use. Thus, P's claimed mere limitation of use of his arm, although permanent in nature does not establish a serious injury under this category.

Williams v. Jones
139 A.D.3d 1346, 31 N.Y.S.3d 348 (4th Dep't 2016)

Court held P's claim of serious injury was "without merit as the record established he did not sustain a "total" loss of use of his cervical spine.

D. Permanent Consequential Limitation of Use/Significant Limitation of Use

1. Court of Appeals

Toure v. Avis Rent A Car Systems, Inc.
98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002)

Toure v. Avis Rent A Car Systems, Inc.

P's physician averred that MRI and CT scan revealed bulging and herniated discs after the accident and that upon examination P had muscle spasms in lumbrosacral area and decreased range of motion in lumbar area. He opined that the disc pathology was caused by accident and his injuries were permanent and "resulted in restriction of use and activity of the injured areas and permanent limitation of his

spine and peripheral nervous system;" and related this assessment to his complaints of difficulty in sitting, standing and walking for extended periods of time, which limitations are "a natural and expected medical consequence of his injuries." Court held this proof was sufficient to establish a serious injury as it sufficiently described the "qualitative nature" of P's limitations and was supported by objective medical evidence.

Manzano v. O'Neil

P testified that as a result of the accident she could not do any heavy lifting, could not shovel snow off the driveway or clean the house as she used to do, and cannot pick up her children. Her physician opined that she had suffered two herniated cervical discs as a result of the accident, which was supported by the MRI films he interpreted; and correlated that condition to her inability to perform those normal, daily tasks. Court held this proof was sufficient to establish a serious injury.

Nitti v. Clerrico

In this 90/180 days category case, Court held P's expert's opinion offered to support her limitations as a result of an injury was insufficient as the expert's notation of detection of spasm was not fully explained; his range of motion findings were not based on any objective finding but rather, as he conceded, based on P's complaints of pain; and there was no admissible proof regarding the existence of any disc pathology as the MRI report was not introduced into evidence and the expert did not testify that the MRI films supported a finding of discs pathology.

Ramkumar v. Grand Style Trans. Enter.
22 N.Y.3d 905, 976 N.Y.S.2d 1 (2013)

In holding P's proof was sufficient to defeat S/J, Court noted the "qualitative assessment of . . . P's condition" rendered by the physician who performed arthroscopic surgery on P's knee was that P's meniscal tear injury as causally related to the car accident, and that the meniscus has permanently lost its stability with onset of scar tissue, instability, loss of range of motion, and pain, which P will have for the rest of his life.

2. First Department

Walker v. Whitney
132 A.D.3d 478, 18 N.Y.S.3d 27 (1st Dep't 2015)

In finding the affirmation of P's orthopedic surgeon insufficient, Court noted that while he indicated that following surgery P had a "decreased ROM in his left shoulder," he did not provide measurements of the actual ROM or a normal value for comparison.

Adu v. Kirby
132 A.D.3d 517, 18 N.Y.S.3d 376 (1st Dep't 2015)

Court held P raised a triable issue as to S/I with respect to his left shoulder by submitting affirmed report by a diagnostic radiologist who opined that an MRI showed injuries to the shoulder; and by his orthopedic surgeon, who examined P on numerous occasions and found limitations in ROM, who gave opinion as to causation and permanence, based on his examinations, coupled with the radiologist's MRI report that P sustained a partial thickness undersurface tear of the supraspinatus tendon.

Castillo v. Abreu
132 A.D.3d 520, 18 N.Y.S.3d 378 (1st Dep't 2015)

Court held P raised a triable issue of fact as to S/I as to his lumbar spine and cervical spine by submitting the affirmed MRI report of a radiologist, who found multiple disc herniations in the lumbar spine and bulging discs in the cervical spine, and the report of his chiropractor, who measured significant limitations in spinal ROM both shortly after the accident and recently. Court also noted that Ds' orthopedic expert did not dispute that any spinal injuries were causally related to the accident, and P's chiropractor opined that there was a causal relationship since P was only 19 years old and had no prior symptoms.

Stevens v. Bolton
135 A.D.3d 647, 24 N.Y.S.3d 269 (1st Dep't 2016)

Court held P (1) failed to raise a triable issue of fact as to a "permanent consequential limitation" of her shoulder, since the slight limitation in range of motion in one plane found recently by her orthopedic surgeon was minor; (2) P raised a triable issue of fact as to a "significant limitation" of use of her shoulder

by submitting evidence of limitations in range of contemporaneous with the accident, and her surgeon's report opining that there was a tear in the shoulder that was causally related to the accident, contrary to an earlier MRI that did not reveal that condition; (3) P failed to raise a triable issue of fact as to her claimed elbow injury since she did not submit any objective evidence of injuries to the elbow, the unaffirmed medical reports failed to compare the measurements recorded in range of motion testing to normal values, and her orthopedic surgeon found a normal range of motion during his recent examination.

Echevarria v. Ocasio
135 A.D.3d 661, 24 N.Y.S.3d 272 (1st Dep't 2016)

Court held P failed to provide medical evidence reconciling the current findings of limitations in her spine's range of motion and the earlier findings of normal range of motion in the spine and thus the motion court correctly dismissed her claims of injuries involving "permanent consequential" limitations to the spine. However, P's medical evidence was sufficient to raise an issue of fact as to whether she suffered injuries involving significant limitation in use of her spine.
COMMENT: Explanation?

Torres v. Etile Taxi, Inc.
136 A.D.3d 437, 24 N.Y.S.3d 617 (1st Dep't 2016)

Court held: (1) Ds established the absence of any serious injury to P's cervical spine, lumbar spine or right shoulder by submitting the affirmed reports of a neurologist, orthopedic surgeon, and radiologist who found no evidence of acute traumatic injury in those body parts, that P had a full range of motion in those body parts, and that the bulging discs in P's spine were the result of a longstanding degeneration; (2) Ds demonstrated that P did not suffer a serious injury to his lower jaw through the affirmation of a dentist who found no evidence of acute traumatic injury, no pain in the temporomandibular joints, clicking, crepitus, or deviation, and opined that there was nothing to suggest that the accident caused any injury to P's lower jaw; (3) P raised an issue of fact as to his claim of serious injury to his cervical and lumbar spine by his submission of an affirmation of his treating doctor who observed substantial limitations in P's cervical and lumbar range of motion, both shortly after the accident and persisting after treatment, personally reviewed the MRIs of those parts, and opined that the injuries were traumatically induced by the accident, especially in light of P's age and lack of prior complaints of pain in those body parts; (4) P failed to raise an issue of fact as to his alleged serious injuries to his right shoulder and lower jaw, as his doctor

found only tendinosis and slight limitations in range of motion in plaintiff's right shoulder, which are insufficient; (5) as to the lower jaw claim, P failed to provide objective evidence to raise an issue as to whether his jaw sustained any injury as his doctor found a minimal limitation in the opening of the jaw, and his expert dentist failed to provide normal range of motion measurements to compare with P's observed range of motion, and did not find any qualitative limitation in use of the jaw.

Dingle v. New York city Transit Auth.
139 A.D.3d 513, 31 N.Y.S.3d 497 (1st Dep't 2016)

Court held D met his burden by submitting the affirmations of a radiologist who found that the MRI's of the claimed injured body parts showed degenerative changes unrelated to the accident, and of an orthopedist who found full ranges of motion in all planes as to each claimed body part; and in opposition P raised a triable issue of fact as to whether she sustained a serious injury to her right knee through the affirmed report of her treating surgeon, who set forth limitations in right knee range of motion found on recent examination, and opined that plaintiff's right knee injuries, including a torn medical meniscus and a partial tear of the ACL, observed by him during arthroscopic surgery, were caused by the accident.

Aftalo v. Alvarez
140 A.D.3d 434, 31 N.Y.S.3d 866 (1st Dep't 2016)

P alleged that she suffered a left knee injury and exacerbation of a right knee condition as a result of a motor vehicle accident. Court held D established, *prima facie*, that P did not sustain serious injury to either knee by submitting the affirmed report of an orthopedist, who found normal ranges of motion and negative test results, and diagnosed resolved sprains in both knees, and P failed in response to raise a triable issue of fact.

Anthony P. v. Abdou
140 A.D.3d 441, 33 N.Y.S.3d 48 (1st Dep't 2016)

Court held: (1) P1 raised a triable issue of fact as to whether he sustained a serious injury to his right knee and cervical spine as he submitted MRI findings showing right knee ligament tears, which were confirmed by his surgeon, who viewed the tears during arthroscopic surgery, opined that the injury was causally related to the accident, and found persisting limitations in use. He also submitted a cervical spine MRI showing disc bulges, and his physicians found limitations in range of motion

and related these injuries to the subject accident; (2) P2's claim of injury to her ankle should be dismissed, because she failed to raise an issue of fact in opposition to Ds' expert's opinion that her ankle condition was a congenital condition that could not have been caused by the accident. The expert also noted that a radiologist found that the foot and ankle MRI's taken after the accident were normal; her own medical records reflect that she had "congenital anomalies" in her foot and ankle, which diagnosis was not explained by the physician who saw her three years after the accident and opined that she had sustained an injury to her ankle that was causally related to the accident; (3) P2, who was 11 years old at the time of the accident, raised a triable issue of fact as to whether she sustained a serious injury to her lumbar spine. She submitted MRI reports providing objective medical evidence of injury to the lumbar spine, and her treating physician found limitations in range of motion that were causally related to the accident.

3. Second Department

Terranova v. Acosta
136 A.D.3d 710, 24 N.Y.S.3d 697 (2d Dep't 2016)

In affirming S/J to D, Court held P failed to raise a triable issue of fact as the affirmed report by the P's expert failed to raise a triable issue of fact because, while the expert opined that the P suffered significant limitations in the range of motion of the cervical spine, he failed to adequately quantify or qualify those restrictions.

McEachin v. City of New York
137 A.D.3d 753, 25 N.Y.S.3d 676 (2d Dep't 2016)

Court affirmed jury verdict for P, concluding P's evidence was sufficient to establish a serious injury under both categories. It noted P presented the testimony of an orthopedic surgeon who treated him for injuries to his lumbar spine approximately two months after the accident. Among other things, this physician testified that P reported severe pain in his lower back, his straight-leg raising test was positive, and he walked with an antalgic gate and a limp favoring his left side. Moreover, the results of a discogram of P's lumbar spine were not normal, because there were fissures in server of the discs. He diagnosed P's with low back pain secondary to low lumbar post-traumatic pathology, and lower radiculopathy. After the surgeon administered epidural steroid injections, he eventually implanted a spinal cord stimulator in the P's back to block pain reception. P also presented the testimony of another orthopedic surgeon, who performed arthroscopic surgery on

his left knee approximately two months after the accident. Relying on photographs of the inside of the knee taken during the surgery, this physician identified a "whole lot" of cartilage damage throughout the knee, and diagnosed the plaintiff with tri-compartment degenerative arthritis with grade four chondromalacia. Further, he offered testimony that these injuries were caused by the subject accident. Although the physician did not write down measurements for the loss of motion with respect to the knee, his examination showed "positive tenderness over the condyles and [a] gross loss of motion." Further, this physician opined that, without a doubt, P would need at least one total knee replacement in the future. He recommended that P live with his knee pain as long as he "can take it" before undergoing knee replacement surgery. P testified, among other things, that he used crutches or a cane for three weeks after his arthroscopic knee surgery, and his ability to bend the knee did not improve much after the surgery. Moreover, at the time of trial, he could not walk for long periods and he was constantly feeling pain in his left knee. **COMMENT:** P put in a strong case, covering everything. Does establishment of consequential limitation also establish significant limitation?

Jeong v. Denike
137 A.D.3d 1189. 28 N.Y.S.3d 393 (2d Dep't 2016)

Court denied D's S/J motion. It noted that P's treating physicians opined in an affirmation, based on both his contemporaneous and most recent examinations of P, that there were limitations in the P's cervical spine range of motion, and that the P's cervical spine limitations and injuries were significant, permanent, and causally related to the subject accident. Thus, P raised a triable issue of fact as to whether he sustained a serious injury under both categories.

4. Third Department

Shea v. Ives
137 A.D.3d 1404, 26 N.Y.S.3d 816 (3d Dep't 2016)

P claimed he sustained a serious injury based on an injury to his knee. Court affirmed S/J to D, noting that an orthopedic surgeon averred that, based on multiple observations, including that P could bend her knee beyond 90 degrees, the knee was "objectively normal." It held this proof satisfied D's burden by establishing that there was no comparative loss of the normal function, purpose and use of Shea's knee; and P failed to raise a triable issue of fact. As her proof, an affidavit from an orthopedist, did not provide a quantitative or qualitative comparison of P's knee to the normal function purpose and use of a knee.

5. Fourth Department

Clark v. Boorman
132 A.D.3d 1323, 17 N.Y.S.3d 255 (4th Dep't 2015)

Court affirmed S/J to P on his motion, noting that his proof established *prima facie* a significant limitation and D failed to raise an issue of fact sufficient to defeat the motion with the conclusory opinion of the IME physician that the MRI studies were "unremarkable." Court added: "Indeed, the IME physician recorded that P's ROM "remained impaired" and furthermore, as noted above, the measurements set forth in his own report specifically quantify significant limitations in P's ROM."

Barron v. Northtown World Auto
137 A.D.3d 1708, 28 N.Y.S.3d 753 (4th Dep't 2016)

Court denied D's S/J motion, noting that P raised issues of fact concerning the nature, extent and cause of the alleged pain and limitations in her shoulder, to which she underwent surgery within about three months of the accident.

E. 90/180 Days

1. Defendant's Burden on Summary Judgment

Smith v. Roberts
131 A.D.3d 423, 13 N.Y.S.3d 896 (1st Dep't 2015)

Court held Ds met their burden via P's testimony that he missed three days of work following the accident. It also noted that P "subsequently missed approximately a year of work following surgery that was conducted several months after the accident is not determinative of a 90/180 day injury."

Adu v. Kirby
132 A.D.3d 517, 18 N.Y.S.3d 376 (1st Dep't 2015)

Court held D met his burden by submitting P's deposition testimony wherein he said he did not miss any work after the accident.

Rabb v. Mohammed
132 A.D.3d 527, 18 N.Y.S.3d 35 (1st Dep't 2015)

Court held D "failed to establish that P did not sustain an injury within the 90/180 day category since they neither disputed P's evidence that he did not return to work for more than three months following the accident nor provided evidence that he was able to perform his usual and customary activities during the relevant period."

Balducci v. Carrasco
134 A.D.3d 640, 21 N.Y.S.3d 616 (1st Dep't 2015)

Court held Ds satisfied their burden by relying on P's own admissions showing that he was not prevented from completing substantially all of the acts making up his usual and customary daily activities. P had admitted that he only missed about 2 weeks of work and was in bed for approximately 10 non-consecutive days. In opposition, P failed to present medical evidence sufficient to raise an issue of fact as to this claimed injury.

Thornton v. Husted Dairy
134 A.D.3d 1402, 23 N.Y.S.3d 760 (4th Dep't 2015)

Court held D established a *prima facie* case of no S/I under this category through its submission of P's medical records, which showed that P's treating physician cleared P to work less than 90 days after the accident. Thus: "We conclude that D thereby established that P's activities were not curtailed to a great extent." In response, P failed to raise a triable issue of fact.

Cregg- Fandalas v. Brokaw
135 A.D.3d 894, 23 N.Y.S.3d 581 (2d Dep't 2016)

Court held D's S/J motion was properly denied as the motion failed to adequately address P's 90-180 claim as set forth in her BOP.

2. Substantially All

Adu v. Kirby
132 A.D.3d 517, 18 N.Y.S.3d 376 (1st Dep't 2015)

Court held P's EBT testimony that he was unable to jump rope, play soccer, and lift heavy baggage with his left hand failed to raise an issue of fact whether his claimed injuries prevent him from "performing substantially all of the material acts.

Blocker v. Sung
135 A.D.3d 494, 25 N.Y.S.3d 16 (1st Dep't 2016)

Court held D met his burden by submitting P's own deposition testimony and affidavit, in which she admitted that's he was only confined to her home for one week following surgery and did not miss any work until some 99 days after the accident.

DaCosta v. Gibbs
139 A.D.3d 487, 33 N.Y.S.3d 160 (1st Dep't 2016)

Court held that P's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" was fatal to her claim.

Lee v. Lippman
136 A.D.3d 411, 24 N.Y.S.3d 277 (1st Dep't 2016)

In affirming S/J to D, Court noted that P's allegations in her bill of particulars that she was confined to bed and home for no more than three days, and her testimony that she was able to resume doing household chores within three months refuted her claim.

Nakamura v. Montalvo
137 A.D.3d 695, 29 N.Y.S.3d 285 (1st Dep't 2016)

Court held Ds met their burden by relying on P's bill of particulars stating that she was confined to bed for one day following the accident and was confined to home for one week following the accident, her testimony that she missed less than two

weeks of work, and her chiropractor's certification that she was ready to return to regular duty one week after the accident.

Nyhlen v. Giles
138 A.D.3d 1428, 31 N.Y.S.3d 706 (4th Dep't 2016)

Court held D's proof was insufficient on his S/J motion. D had submitted P's medical records stating that his level of disability varied from between 50% and 100% for 18 months following the accident. Based upon the physician reports and medical records, together with P's deposition testimony, Court concluded that D failed to eliminate all issues of fact concerning this category.

3. Medically Connected

Seepersaud v. L&M Bus Corp.
140 A.D.3d 579, 33 N.Y.S.3d 692 (1st Dep't 2016)

Court held Ds failed to meet their burden. It noted Ds' experts did not examine P until over three years after the accident and did not offer an opinion concerning her condition during the relevant period. Nor did Ds submit other evidence, such as medical records or deposition testimony, to disprove P's claim that she was confined to home and disabled from work during the relevant 180-day period.

Shea v. Ives
137 A.D.3d 1404, 26 N.Y.S.3d 816 (3d Dep't 2016)

Court affirmed S/J dismissing claim. It noted treatment records from after the accident reveal that P was discharged from the hospital on the day of the accident with instructions to take Tylenol; P's treatment records following the accident did not impose any restrictions on work or other activities; P's physical therapy evaluations reflect that within approximately two months of the accident, P reported playing golf. This evidence satisfied D's burden and given that P was unable to provide objective medical evidence to support her self-serving assertions, S/J was proper.

Williams v. Jones
139 A.D.3d 1346, 31 N.Y.S.3d 348 (4th Dep't 2016)

Court held P sufficiently raised a triable issue of fact as to causal relationship between the subject accident and his claimed limitations during the ensuring 180

days. It noted one of his medical records from the period at issue stated that "[b]ased on P's reports and [his medical providers'] clinical findings," P was suffering from a temporary total disability and was to remain off work pending a further evaluation. Court stated: "We therefore conclude that this is not a case in which contemporaneous medical records contain no reference to any limitations on the plaintiff's daily activities. Moreover, P was 20 years old at the time of the accident, with no preexisting injuries, and, as noted above, the physician who treated P after the accident asserted that he had sustained a causally related cervical disc injury. In our view, when a P presents objective evidence of a medically determined injury along with evidence that a medical provider placed restrictions on his or her daily activities, and there is no apparent explanation unrelated to the accident for those restrictions, it cannot be said as a matter of law that causation is lacking or that the P's limitations are based solely on subjective pain.
COMMENT: Justices Carni and DeJoseph dissented, concluding that P's proof was insufficient.

4. Damages

Telesco v. Blackman
139 A.D.3d 709, 32 N.Y.S.3d 177 (2d Dep't 2016)

Court commented: "Considering that the jury found that P sustained a serious injury under only the 90/180-day category of the jury's award of zero damages for future pain and suffering did not deviate materially from what would be reasonable compensation."

F. Disc and Other Injuries

Green v. Domino's Pizza
140 A.D.3d 546, 33 N.Y.S.3d 260 (1st Dep't 2016)

Court held P's claim of serious injury based in a knee injury was insufficiently supported by his medical proof. It noted P's orthopedic surgeon stated only that he had performed arthroscopic surgery two years earlier, but provided no opinion as to causation and no findings of permanent or significant limitation of use. His unaffirmed reports, if considered, show that tears in the meniscus were found during surgery, but do not provide any opinion as to causal relationship or any findings of quantitative or qualitative limitation of use. Court noted that "tear of the meniscus, standing alone, without any evidence of limitations caused by the tear, is not sufficient to raise a triable issue of fact."

Clark v. Boorman
132 A.D.3d 1323, 17 N.Y.S.3d 255 (4th Dep't 2015)

Court noted that proof of a herniated disc caused by the subject accident is not sufficient to establish a S/I.

III. CAUSATION

A. Generally

1. Establishing Casual Connection

Perl v. Meher
18 N.Y.3d 208, 936 N.Y.S.2d 655 (2011)

Court notes that a "contemporaneous doctor's report is important proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident." **COMMENT:** Court cites with approval Morrissey. "Threshold Law: Is a Contemporaneous Exam By Court of Appeal in Order?", NYLJ, 1/17/121, p. 3, col. 1.

Giuffre v. Bulgues
134 A.D.3d 47, 22 N.Y.S.3d 14 (1st Dep't 2015)

Court held S/J was properly granted as to P's claimed cervical spine injury as she presented no competent evidence of any medical treatment contemporaneous with the accident to raise and issue as to a causal connection between the accident and her claimed injuries. **COMMENT:** Apparently, P submitted no medical proof at all and in essence agreed with D's argument.

Katherine L. v. Segura
138 A.D.3d 567, 30 N.Y.S.3d 70 (1st Dep't 2016)

In denying D's S/J motion, Court noted that although P did not submit reports by the doctor who treated her shortly after the accident, her current doctor averred that P had been examined and treated at the same facility by another doctor, who referred her for MRIs, which were taken one month after the accident and revealed her disc injuries. This evidence of contemporaneous treatment and symptoms is sufficient to "reliably connect" P's spinal injuries to the accident.

Burgos v. Diop
140 A.D.3d 521, 33 N.Y.S.3d 257 (1st Dep't 2015)

Court held P's orthopedic surgeon sufficiently addressed the causation issue, as his opinion that there was a causal relationship was based on his own treatment of P, review of P's MRI records, and observations during the surgeries, as well as the history provided by P.

Santana v. Centeno
140 A.D.3d 437, 33 N.Y.S.3d 230 (1st Dep't 2016)

Court held: "Given that P was 20 years old and had no prior knee or back symptoms, his doctor's opinion that the injuries were directly caused by the accident was sufficient to raise an issue of fact as to causation.

Hernandez v. Cespedes
141 A.D.3d 483, 35 N.Y.S.3d 651 (1st Dep't 2016)

Court held, noting the absence of evidence of limitations which itself was fatal to P's case, the P's orthopedist's conclusory opinion that the accident cause P's knee injury as also insufficient.

Harris v. Campbell
132 A.D.3d 1270, 17 N.Y.S.3d 219 (4th Dep't 2015)

In denying P's motion for S/J, Court noted the mere fact that P underwent post-accident fusion surgery did not establish the causation between the accident and the surgery, particularly in light of the report of D's examining physician submitted by Ps in support of their motion, which noted that P did not suffer a S/I as a result of the accident. **COMMENT:** Yes, P submitted the IME report.

2. "Pommells" Rules

a. Generally

Pommells v. Perez, Brown v. Dunlap, Carrasco v. Mendez
4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005):

Pommells

"P failed to address the effect of his kidney disorder on his claimed accident injuries. Dr. Rose's report - the only competent evident supporting P's response to the summary judgment motion - in fact noted the kidney surgery in P's medical history and then relied on that medical history in opining as to causation. Ps submission left wholly unanswered the question whether the claimed symptoms diagnosed by Dr. Rose were caused by the accident."

Brown

"As to an alleged pre-existing condition, there is only Dr. Berkowitz's [expert] conclusory notation, itself insufficient to establish that P's pain might be chronic and unrelated to the accident. As opposed to the undisputed proof of P's contemporaneous, causally relevant kidney condition in *Pommells*, here even two of Ds' other doctors acknowledged that Ps (relatively minor) injuries were caused by the car accident. On this record, P was not obliged to do more to overcome Ds' summary judgment motions."

Carrasco

"While P provided Dr. Lambrakis's expert's report of specific losses of range of motion in Ps spine, opining that P suffered serious and permanent injuries which were casually related to the accident, P did not refute D's evidence of a pre-existing degenerative condition. To the contrary, the Lambrakis report supplied by P explained that the pain and loss of range of motion in the cervical spine was entirely consistent with those formations identified by the MJU and set forth by Drs. Miloradovich and Orlandi [expert] as related to a degenerative condition. In this case, with persuasive evidence that P's alleged pain and injuries were related to pre-existing condition, P had the burden to come forward with evidence addressing D's claimed lack of causation. In the absence of any such evidence, we conclude—as did the trial court and Appellate Division—that D was entitled to summary dismissal of the complaint."

Rivera v. Fernandez & Ulloa Auto Group
25 N.Y.3d 1222, 16 N.Y.S.3d 515 (2015)

Court affirmed First Department's affirmance of award of S/J to Ds dismissing complaint which was by a 3-2 decision. (123 A.D.3d 509, 999 N.Y.S.2d 37 [1st Dep't 2014]). The majority had concluded Ds made a *prima facie* showing that P did not suffer a permanent consequential or significant limitation of use of his left knee based on expert reports from a radiologist and orthopedist, and P's own medical records. The majority further concluded that, in opposition, P failed to raise a triable issue of fact based on his orthopedic surgeon's opinion, which failed to address or contest the opinion of Ds' medical experts that any condition was chronic and unrelated to the accident, and failed to address or contest the finding of degenerative changes in the MRI report in P's own medical records.

b. Defendant's Burden

Green v. Jones
133 A.D.3d 472, 19 N.Y.S.3d 514 (1st Dep't 2015)

Court held D established *prima facie* that P's claimed S/I as to her shoulder and lumbar spine was not caused by the subject accident. D's radiologist opined that the MRI of the shoulder revealed only degenerative conditions unrelated to any acute trauma, and that the MRI of the lumbar spine revealed degenerative disc disease and osteophyte formation - none of which could have occurred in the time between the accident and the relevant MRIs. Court also noted D submitted P's own medical records, including radiography reports prepared at the hospital after the accident, which included findings of degeneration and no findings of traumatic injury.

Walker v. Whitney
132 A.D.3d 478, 18 N.Y.S.3d 27 (1st Dep't 2015)

Court held Ds' medical proof was sufficient to meet their burden. Ds had submitted the affirmed reports of an orthopedist and neurologist who found full ROM in all parts, and of a radiologist who found that the MRI films showed degenerative disc disease in the spine, mild acromioclavicular (AC) joint osteoarthritis in the shoulder, and no evidence of causally related injury.

Rabb v. Mohammed
132 A.D.3d 527, 18 N.Y.S.3d 35 (1st Dep't 2015)

Court held Ds established *prima facie* that P did not suffer and S/I as a result of the subject accident by submitting an affirmed report by a radiologist who found that the MRI of the left knee showed no injury and opined that the MRI of the lumbar spine showed only a disc bulge of degenerative origin unrelated to any trauma; and an affirmed report by an orthopedic surgeon who opined that the conditions purportedly found by P's orthopedic surgeon could not have been causally related to the accident.

Acosta v. Traore
136 A.D.3d 533, 24 N.Y.S.3d 652 (1st Dep't 2016)

Court held D's met their burden by submitting the affirmed report of an orthopedic surgeon who opined that the condition of P's left knee was degenerative in nature, and by relying on P's medical records, which contained similar findings of arthritis and degeneration.

Murray v. Helderberg Ambulance Service Squad
133 A.D.3d 1000, 19 N.Y.S.3d 143 (3d Dep't 2015)

D moved for S/J relying on affirmation of a neurologist. He opined that there was no objective medical evidence indicating that the subject November 2009 accident caused P to develop thoracic outlet syndrome. He explained that the timing of the October 2010 incident (moving a heavy object) with the accompanying onset of complaints of pain by November 2010, together with the exacerbating incident of March 2011 (snowboard accident), revealed that such incidents caused the onset of P's condition. He further stated that his opinion regarding a lack of causation was supported by the fact that there was nearly a one-year delay from the accident to P seeking treatment for her subjective complaints of pain. Court held this proof was sufficient to establish lack of causation relative to the subject accident.

Sobieraj v. Summers
137 A.D.3d 1738. 28 N.Y.S.3d 221 (4th Dep't 2016)

Court held D's expert's opined wherein he opined that P's condition was the result of degenerative changes was insufficient as it failed to take into account that P had no complaints of pain prior to the accident.

c. Plaintiff's Burden

Perl v. Meher
18 N.Y.3d 208, 936 N.Y.S.2d 655 (2011)

D submitted a radiologist's sworn report based on a MRI that P's injuries were "degenerative in etiology and longstanding in nature, preexisting the accident. Court held P's responding proof was sufficient to raise a triable issue of fact. Such proof consisted of: (1) a radiologist's affidavit stating that while some findings from the MRI "are consistent with degenerative disease," a single MRI cannot rule out the possibility that "the patient's soft tissue findings are . . . a result of a specific trauma." That question, this radiologist said, can best be judged "by the patient's treating physician in conjunction with exam, history and any previous tests;" and (2) opinion of P's treating physician, who found under the quantitative prong of *Toure* ROM limitations; and that since P "had not suffered any similar symptoms before the accident nor had any prior injury/medical conditions that would result in these findings," the findings were causally related to the accident. The Court then added the following: "A factfinder could of course reject this opinion: It is certainly not implausible that a man of 82 would have suffered significant degenerative changes. We cannot say as a matter of law on this record, however, that such changes were the sole cause of P's injuries." **COMMENT:** Is Court backing away from its position in *Carrasco* that P's opposition must directly address D's showing and explain why that conclusion of degenerative condition as source of pain etc. is not sound?

Walker v. Whitney
132 A.D.3d 478, 18 N.Y.S.3d 27 (1st Dep't 2015)

Court held P's proof was insufficient to raise a triable issue of causation in response to Ds' proof. It noted that P's orthopedic surgeon did not provide evidentiary support for his conclusory statement that P's shoulder condition is related to the accident, nor did he address the opinions of D's experts that any shoulder injury was due to ongoing pathology and degenerative changes. Although the unaffirmed MRI report of P's radiologist, like that of D's expert radiologist, found "mild" hypertrophic changes of the AC joint, P's expert failed to address those findings and explain why they were not the cause of the injury.

Rabb v. Mohammed
132 A.D.3d 527, 118 N.Y.S.3d 35 (1st Dep't 2015)

Court held P raised a triable issue of fact by submitting an affirmation by his treating orthopedist, who reviewed the MRI films, and concluded, based on his examinations and observations during surgery, that P suffered permanent injuries to his knee and lumbar spine; found limitations in ROM shortly after the accident and persisting after treatment and arthroscopic surgery; opined that the injuries were traumatically induced by the accident, noting that the MRI films showed no evidence of degeneration and that P was just 27 years old at the time of the accident.

Green v. Jones
133 A.D.3d 472, 19 N.Y.S.3d 514 (1st Dep't 2015)

Court held P failed to demonstrate why degeneration was not the cause of the injuries to P's left shoulder and lumbar spine.

Giuffre v. Bulgues
134 A.D.3d 47, 22 N.Y.S.3d 14 (1st Dep't 2015)

In response to Ds pre-existing injury report, Court held P raised an issue of fact relating to his lumbar spine claims by submitting the reports of his orthopedic surgeon, who found severe limitations in ROM and averred that a lumbar spine MRI performed in 2012 and surgery revealed a herniated disc, which he opined was causally related to the accident. Court noted: "Particularly in light of P's relatively young age at the time of the accident, that was sufficient to raise an issue of fact." Notably, the Court stated that, although the surgeon did not examine P until over a year after the accident, P submitted evidence corroborating his testimony that he received PT during the year following the accident and an MRI report prepared about one month after the accident also showed a lumbar herniations. Thus, P provided sufficient evidence to raise an issue of fact as to a causal connection between the accident and his lumbar spine injury.

Jallow v. Siri
133 A.D.3d 1391, 20 N.Y.S.3d 20 (1st Dep't 2015)

P's treating psychiatrist and expert, Dr. Goldenberg, and his expert orthopedic surgeon, Dr. McMahon, opined that P's injuries were traumatically induced as a result of the accident, directly controverting D's experts' opinions that P's injuries

were degenerative in origin and/or resolved. Dr. Goldenberg opined that "[t]he fact that P continues to suffer from pain and limitation in motion after lengthy PT indicates that his injuries and limitations are permanent." Dr. McMahon concurred that "[t]he fact that P remains symptomatic to the point where he continues taking oral analgesics and wears a left knee brace, even after receiving ongoing PT for a year, supports my opinion that his injuries are permanent." By ascribing P's lumbar spine and left knee injuries to a different, yet equally plausible cause, the affirmations of P's experts sufficed to raise an issue of triable fact.

Mayo v. Kim
135 A.D.3d 624, 24 N.Y.S.3d 58 (1st Dep't 2016)

Court held P failed to raise a triable issue of fact as her rehabilitation physician provided only a conclusory opinion that the lumbar spine condition was caused or aggravated by the accident, without addressing the preexisting degenerative conditions documented in P's own medical records or explaining why her current reported symptoms were not related to the preexisting condition.

Franklin v. Gareyua
136 A.D.3d 464 24 N.Y.S.3d 304 (1st Dep't 2016)

Court held P failed to raise a triable issue of fact as his treating orthopedist, Dr. Rose, did not refute or address the findings of preexisting degeneration and lack of traumatic injury, set forth in the reports by Dr. Lang and Dr. Lyons contained in P's own medical records, nor did Dr. Rose explain why degeneration was not the cause of the left shoulder injury. "Given that Dr. Lang and Dr. Lyons plainly reported that no evidence of traumatic injury was found in the X ray and MRI of the left shoulder, it is immaterial that their reports did not use the word "preexisting" to describe the degenerative conditions that were detected."

Katherine L. v. Segeura
138 A.D.3d 567, 30 N.Y.S.3d 70 (1st Dep't 2016)

Court held P raised an issue of fact by submitting affirmed reports by her radiologist, who found bulging and herniated discs and did not note any degeneration, and her treating doctor, who measured continuing range of motion limitations and opined that the spinal injuries were caused by the accident, in light of the 27-year-old P's lack of history of injuries or complaints and the MRI findings.

Birch v. 31 Northern Blvd. Inc.
138 A.D.3d 580, 32 N.Y.S.3d 142 (1st Dep't 2016)

Court held P raised a triable issue of fact as to serious injury to his cervical and lumbar spine, noting his treating physician, who reviewed the MRI films, testified that they showed disc herniation and bulges at multiple levels in the cervical and lumbar spine, with no evidence of desiccation or other degenerative condition. The physician also reviewed results of electrodiagnostic testing showing radiculopathy and neuropathy, and detected spasms at several examinations. He opined that, given P's lack of symptoms before the accident and the history of the accident, the conditions were caused by the accident, thus presenting an opinion different from that of D's experts but equally plausible, which is sufficient to raise an issue of fact as to causation. The physician, who was not aware that P was bringing a lawsuit, did not record quantified limitations in range of motion after his examinations of plaintiff, and plaintiff was not required to present such evidence to raise an issue of fact.
COMMENT: Why no need?

Dacosta v. Gibbs
139 A.D.3d 487, 33 N.Y.S.3d 160 (1st Dep't 2016)

Court held in concluding that P's spinal injuries were causally related to the accident, P's physician adequately addressed P's previous treatment for scoliosis, in light of P's claim that she was asymptomatic before the accident and the absence of any medical records showing otherwise.

Molesky v. Marra
130 A.D.3d 1274, 14 N.Y.S.3d 207 (3d Dep't 2015)

Court held as to P1 that his physician failed to sufficiently and objectively distinguish the purported recent injury from his prior injury or adequately indicate that the accident exacerbated a preexisting condition; and as to P2 that her physicians failed to submit sufficient objective evidence of a S/I related to the subject accident. As to the latter one physician noted that less than two weeks before the accident, she had undergone multiple rhizotomy procedures to treat her back, leg and neck pain. Another physician believed that her subjective complaints resulted from the accident.

Gatti v. Schwab
140 A.D.3d 1640, 33 N.Y.S.3d 618 (4th Dep't 2016)

Court held P raised an issue of fact by affirmation of his surgeon who opined the accident was the sole cause of P's disc injury, and the cause of an aggravation of previously sustained neck and lower back injuries. Surgeon also set forth the medical evidence which supported his evolving opinion of causation. He had testified at WCB hearing that injuries were 100% related to a prior accident.

B. Aggravation and Exacerbation

Green v. Jones
133 A.D.3d 472, 19 N.Y.S.3d 514 (1st Dep't 2015)

Court held branch of Ds' S/J motion relating to lack of causation as to S/I to cervical spine was properly denied as D's experts disagreed as to whether disc injuries were degenerative, one said degenerative, other said accident exacerbated or aggravated the condition.

Lee v. All City Van Lines
131 A.D.3d 454, 13 N.Y.S.3d 908 (2d Dep't 2015)

Court held trial court properly denied P's request to charge the jury regarding the exacerbation of a preexisting injury to his lumbar spine pursuant to PJI 2:282, and regarding his left shoulder's increased susceptibility to injury pursuant to PJI 2:283 since P failed to properly plead either issue in his BOP.

Armella v. Olson
134 A.D.3d 1412, 22 N.Y.S.3d 722 (4th Dep't 2015)

Court held P raised triable issues of fact as to S/I under the limitations categories. P had submitted the affidavit of his treating physician, who reviewed P's cervical MRI and opined that P sustained a cervical whiplash superimposed on a degenerative cervical spine and at least two levels of cervical herniations; his physical examination of P revealed muscle spasms, which constitute objective evidence of injury, and P's ROM was limited to a moderate or marked degree and he opined that, given P's absence of any prior neck pain, stiffness, or radiculopathy prior to the accident, the accident was a substantial factor in causing previously asymptomatic degenerative conditions

in P's spine to become symptomatic, and in causing P's neck pain, stiffness, spasms, and restricted ROM. As then noted by the Court: "It is well settled that the aggravation of an asymptomatic condition can constitute a S/I."

Boroszkov. Zylinski
140 A.D.3d 1742, 32 N.Y.S.3d 424 (4th Dep't 2016)

Court held P failed to raise a triable issue of fact. It noted that although P's orthopedist, who first examined P 10 months after the second accident and provided an affirmation on her behalf, opined that P had measurable limitations in her range of motion, he failed to refute the opinion of the D's examining physician that P had not sustained any additional limitation causally related to the January 2011 accident by, for example, "comparing plaintiff's pre- and post-accident range of motion restrictions". To the extent that the orthopedist's opinion that the two accidents activated, aggravated, and/or exacerbated certain preexisting conditions is responsive to the S/J motion, the orthopedist "failed to provide any basis for determining the extent of any exacerbation of P's prior injuries." Although the orthopedist reviewed an April 2009 MRI, he failed to explain how the January 2011 accident aggravated the alleged injuries sustained in the January 2009 accident.

IV. DAMAGES

A. Generally

Adu v. Kirby
132 A.D.3d 517, 18 N.Y.S.3d 376 (1st Dep't 2015)

After finding that P failed to raise triable issue of S/I as to his spine and left knee, but did raise an issue of S/I as to his shoulder, Court noted that if P at trial establishes a S/I as to his shoulder, he may recover for all injuries causally related to the accident, even those that do not meet the S/I threshold.

Santana v. Centeno
140 A.D.3d 437, 33 N.Y.S.3d 230 (1st Dep't 2016)

Court noted that at trial if P establishes a serious injury to his right knee and lumbar spine, he may recover for all injuries causally related to the accident, even those that do not meet the serious injury threshold.

Lariviere v. New York City Transit Auth.
131 A.D.3d 1130, 17 N.Y.S.3d 153 (2d Dep't 2015)

With S/J on liability being previously granted, action proceeded to trial on issues of S/I and damages. The jury found a S/I on 90/180 days category but not permanent consequential limitation of use category and, among other damages awards, made awards for P's future pain and suffering and future medical expenses. Court set aside all damages awards on ground that P was denied a fair trial due to defense counsel's conduct. Court reversed and reinstated the verdict on the ground the conduct was not that inflammatory so as to deprive P of a fair trial. **COMMENT:** Are awards for future pain and suffering and medical expenses consistent with jury's S/I findings?

B. Recovery of Basic Economic Loss

Crewe v. Pisanova
124 A.D.3d 1264, 3 N.Y.S.3d 798 (4th Dep't 2015)

Court rejected D's contention on his S/J motion concerning P's alleged failure to sustain economic loss in excess of basic economic loss. It noted P correctly contended that she need not await the full $50,000 payout for basic economic losses before making a claim for those additional economic losses that exceed the basic economic loss threshold. Here, the three-year period in which plaintiff may accrue economic loss in excess of basic economic loss commenced on the date of the accident and had not yet elapsed when the motion was decided. Therefore, on this ground the motion was premature.

V. SUMMARY JUDGMENT MOTIONS

A. Generally

1. *"Licari"*

Licari v. Elliott
57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982)

Whether the P has sustained a serious injury is an issue law for the court to decide in the first instance. As such, whether P has established *prima facie* or as a matter of law a serious injury is an issue that can be decided on a S/J motion.

2. Burdens

Goldstein v. Baez
132 A.D.3d 631, 17 N.Y.S.3d 313 (2d Dep't 2015)

Court denied Ds' S/J motion concluding that Ds failed to meet their *prima facie* burden for showing that P did not sustain a S/I; and failed to establish *prima facie* a lack of causation, as their expert opined that there was a probably causal relationship between the subject accident and the injured P's injuries.

Boettcher v. Ryder Truck Rental
133 A.D.3d 625, 19 N.Y.S.3d 86 (2d Dep't 2015)

Court held that as P did not allege in his BOP that he sustained a significant disfigurement as a result of the subject accident, Ds were not required to address this category of S/I in their motion.

Kim v. Franco
137 A.D.3d 991, 26 N.Y.S.3d 792 (2d Dep't 2016)

In affirming S/J to D, court rejected P's argument that D was required to address any alleged injuries to the lumbar region of P's spine, since the plaintiff failed to allege in his bill of particulars that he sustained a serious injury to that area under the limitation of use categories.

3. Timeliness and Submissions

Cracchiola v. Sausner
133 A.D.3d 1355, 19 N.Y.S.3d 834 (4th Dep't 2015)

After D moved for S/J dismissing complaint for lack of S/I, Ps cross-moved for partial S/J on liability. Court granted cross-motion and denied motion in part. Court held P's cross-motion was untimely as it was made more than 120 days after the NOI was filed, and Ps did not seek leave to file a late motion or show good cause for their delay pursuant to CPLR 3212(a). Contrary to Ps' argument, the cross motion was not made on nearly identical grounds as Ds' timely motion and thus the cross-motion was not properly before the court.

4. Objections

Cracchiola v. Sausner
133 A.D.3d 1355, 19 N.Y.S.3d 834 (4th Dep't 2015)

Court held: "By failing to object to D's submissions at the motion court, Ps failed to preserve for our review their contention that Ds improperly submitted unsworn medical records."

B. Sufficiency of Defendant's Moving Papers

TEACHINGS: (1) Courts will scrutinize D's moving papers to determine if D has affirmatively shown that P has not sustained a serious injury or subject automobile accident did not cause complained of injury; and a D cannot meet his/her burden by stating that P cannot establish that he/she sustained a serious injury or that the subject automobile accident did not cause complained of injury; (2) Ds must address all serious injury claims in a bill of particulars to obtain dismissal of complaint; otherwise, the threshold categories alleged survive the motion.

Murphy v. Hurdle
132 A.D.3d 646, 17 N.Y.S.3d 742 (2d Dep't 2015)

On her S/J motion, D sought to establish that the significant limitations in the cervical regions of P's spine had not been caused by the subject accident. To support that contention, D submitted an affirmed report of an orthopedist who had examined P on her behalf. The orthopedist stated that he saw no proof as to what had caused the significant limitations he found in the cervical region of P's spine. He did not, however, state affirmatively that the subject accident had not caused those limitations. Thus, the orthopedist's report was insufficient to satisfy D's *prima facie* burden.

Richard v. Thomas
136 A.D.3d 779, 24 N.Y.S.3d 411 (2d Dep't 2016)

Court affirmed denial of D's S/J motion on ground D did not meet his burden. It noted D submitted, among other things, the affirmed report of a physician who measured the P's range of motion and found significant deficits, and concluded that P's spine and right knee injuries were caused by the accident. D's submissions failed to eliminate triable issues of fact as to whether P sustained serious injuries to the cervical and lumbar regions of her spine, and to her right knee.

C. Permissible Proof

1. Affidavits/Affirmations/Sworn Reports/Certified Records

Walker v. Whitney
132 A.D.3d 478, 18 N.Y.S.3d 27 (1st Dep't 2015)

In finding P failed to raise a triable issue as to S/I, Court noted P submitted no admissible medical evidence in support of his claim of S/I to his cervical and lumbar spine, and the records did not become admissible merely because Ds' experts reviewed them.

Green v. Domino's Pizza
140 A.D.3d 546, 33 N.Y.S.3d 260 (1st Dep't 2016)

Court noted that P could not rely upon his orthopedic surgeon's medical records as they were uncertified and unaffirmed and thus inadmissible.

Uribe v. Jimenez
133 A.D.3d 844, 20 N.Y.S.3d 555 (2d Dep't 2015)

In support of his S/J motion, D submitted Ps medical records from Elmhurst Hospital, which indicated that a chest x-ray did not reveal any rib fractures. While these medical records were not certified, D could rely on them in order to demonstrate a lack of S/I, as they were the records of P's treating physicians.

Aughtmon v. Ward
133 A.D.3d 1270, 18 N.Y.S.3d 905 (4th Dep't 2015)

Court held P's motion for S/J was properly denied as P relied upon the affirmed report of D's IME physician who had concluded that P had "extensive congenital variation and degenerative disease of the lumbar spine that was not caused by the accident of record" and that P's injuries were caused by those preexisting "anatomical elements." **COMMENT:** Proper case for court to search record and grant S/J to D?

O'Gorman v. Pros
47 Misc. 3d 1069, 10 N.Y.S.3d 830 (Sup. Ct. Westchester Co. 2015) (DiBella, J.)

Court noted in granting S/J to D that as the medical records and reports submitted by P were not certified and were unsworn and unaffirmed, they had no probative value and were insufficient to defeat the motion.

2. Unsworn Medical Records/Reports and Uncertified Records

Jallow v. Siri
133 A.D.3d 1391, 20 N.Y.S.3d 20 (1st Dep't 2015)

Court held unsworn MRI reports submitted by P could be considered as they were reviewed by Ds' experts in preparing their reports and submitted by Ds in support of their motion.

Blocker v. Sung
135 A.D.3d 494, 25 N.Y.S.3d 16 (1st Dep't 2016)

Could held P's chiropractor could rely upon unsworn MRI reports as they were relied upon and not disputed by D's expert in preparing his report.

Hazel v. Colon
136 A.D.3d 483, 24 N.Y.S.3d 307 (1st Dep't 2016)

In opposing D's S/J motion, Court held P was entitled to rely upon the surgeon's postoperative report, because the report was referenced and relied upon by D's experts.

Hernandez v. Cespedes
141 A.D.3d 483, 35 N.Y.S.3d 651 (1st Dep't 2016)

Court held the unaffirmed MRI reports submitted by P, which were the only objective evidence submitted by her concerning her claims of spinal injury, are inadmissible because they are unsworn, and were not relied upon by D's experts.

Cracchiola v. Sausner
133 A.D.3d 1355, 19 N.Y.S.3d 834 (4th Dep't 2015)

Court held Ds on their S/J motion could rely upon unsworn medical records that were obtained pursuant to authorizations rather than from P's attorney.

D. Competent Medical Proof

1. Generally

Jallow v. Siri
133 A.D.3d 1391, 20 N.Y.S.3d 20 (1st Dep't 2015)

Court held affirmed reports of P's expert were admissible concerning the injuries to the left knee and lumbar spine, even though relying in part on unsworn contemporaneous MRI reports.

Miller v. Ebrahim
134 A.D.3d 915, 20 N.Y.S.3d 538 (2d Dep't 2015)

Court denied Ds' S/J motion, noting that Ds' medical expert failed to adequately explain and substantiate his belief that the limitations he found were self-imposed.

Gatti v. Schwab
140 A.D.3d 1640, 33 N.Y.S.3d 618 (4th Dep't 2016)

Court held D met his burden by submission of the testimony of P's treating orthopedic surgeon before the Workers' Compensation Board. That testimony was to the effect that plaintiff's cervical and lumbar injuries were 100% attributable to the November 30, 2012 accident and thus were preexisting.

2. Objective Medical Findings

a. Need

Wong v. Cruz
140 A.D.3d. 860, 32 N.Y.S.3d 841 (2d Dep't 2016)

Court granted D's post trial motion dismissing action upon the basis that P's expert provided no objective evidence as to the extent of claimed limitation.

Salvemini v. Twins Supply Corp.
140 A.D.3d 941, 32 N.Y.S.3d 510 (2d Dep't 2016)

Court rejected D's medical expert's opinion that P's limitations were "self-imposed" as he did not adequately explain that opinion or substantiate with objective medical evidence.

Murray v. Helderberg Ambulance Squad
133 A.D.3d 1001, 19 N.Y.S.3d 143 (3d Dep't 2015)

Court rejected P's physician's opinion that P's thoracic outlet syndrome, for which he performed two surgeries, resulted from the subject November 2009 accident. It noted, he did not address P's pre-accident left shoulder problems or the impact of the two post-accident incidents in which she injured her left shoulder and/or neck; the November 2009 accident was not distinguished from or put in medical context with the other relevant injuries; and the opinion regarding causation rested upon P's subjective complaints.

b. Specify/Describe Tests

Durand v. Urick
131 A.D.3d 920, 15 N.Y.S.3d 475 (2d Dep't 2015)

On D's S/J motion, Court held P failed to raise a triable issue as to S/I. It noted that while P submitted reports from treating physicians who concluded that she suffered from ROM limitations as a result of the subject accident, the reports did not identify any objective tests or tests which were utilized to measure ROM, and thus do not support the limitation conclusion.

Schilling v. Labrador
136 A.D.3d 884, 25 N.Y.S.3d 331 (2d Dep't 2016)

Court rejected P's treating physician's ROM limitations as to P's hips as his affirmation did not identify the objective tests which were utilized to measure ROM.

c. What Constitutes Objective Medical Findings

Perl v. Meher
18 N.Y.3d 208, 936 N.Y.S.2d 655 (2011)

(1) *In dicta*, Court commented as to P's physician's opinion under the qualitative prong of *Toure* as follows: "While his observations at his initial examinations were detailed, it is debatable whether they have an "objective basis," or are simply a recording of the patients' subjective complaints." **COMMENT:** *Dictum* should be viewed as a warning to physicians/chiropractors to show why their observations have an objective basis. (2) Court also stated *in dictum*: "Under the "quantitative " prong of *Toure*, numerical measurements are sufficient to create an issue of fact as to the seriousness of P's injuries." **COMMENT:** Court does not state or otherwise describe the ROM testing utilized and why they rest on objective findings. (3) The Court noted specifically the affidavit of D's physician was sufficient as based on objective findings, which affidavit stated: "The fact that he sits, yet presents with a show of only 10 degrees flexion of the lumbar spine is contradictory. His 'give-away' strength is contradictory with his ambulation. This individual's show of such decreased range of motion is totally contradicted by the fact that he followed me about, rotating the cervical spine 60 degrees and flexing at least 30 degrees. I do not believe that this individual presents with any true findings at this time." **COMMENT:** All of these findings are based upon observations. Court seemingly is saying that these findings together create an objective basis as they reveal false inputs. (4) It must be kept in mind that in *Toure* the Court held a physician's opinion that, where a disc pathology was noted and P alleged that she could not do certain things, such limitations are the medical sequallae of the diagnosed condition, the opined limitation of use based on a qualitative assessment was based upon objective findings.

Orellama v. Roboris Cab Corp.
135 A.D.3d 607, 23 N.Y.S.3d 234 (1st Dep't 2016)

Court rejected P's argument that the discrepancies in the experts' findings on her straight leg raising test are of no significance, since both experts opined that the results were normal.

Hazel v. Colon
136 A.D.3d 483, 24 N.Y.S.3d 307 (1st Dep't 2016)

In response to D's proof that P's right knee injury was degenerative and not traumatic in nature, Court held P raised a triable issue of fact, through report of her treating orthopedic surgeon who observed injuries to her right knee that were traumatically induced and causally related to accident.

Burgos v. Diop
140 A.D.3d 521, 33 N.Y.S.3d 257 (1st Dep't 2016)

Court commented that positive impingement signs observed by physician in months preceding P's surgery were objective findings.

3. Need for Further Explanation/Inconsistencies

St. Clair v. Giroux
132 A.D.3d 1199, 19 N.Y.S.3d 129 (3d Dep't 2015)

Court held that P's expert's attribution of current limitations of cervical spine ROM to the accident was insufficient to raise a material issue of fact to rebut D's *prima facie* case, given that the expert failed to address the previous finding that, approximately a year after the accident, P had full ROM in his neck.

E. Medical Examinations/Treatment

1. Findings "Contemporaneous" With Accident

Perl v. Meher
18 N.Y.3d 208, 936 N.Y.S.2d 655 (2011)

Court rejected the rule developed by and consistently applied in the Appellate Divisions that contemporaneous measurements are a prerequisite to recovery. **COMMENT:** The same conclusion should be reached as to the need for contemporaneous findings of a qualitative assessment.

Michels v. Marton
130 A.D.3d 476, 13 N.Y.S.3d 407 (1st Dep't 2015)

Court held P failed to submit any evidence of contemporaneous injury or treatment to her right knee as the MRI study performed 10 months after the accident was insufficient to demonstrate any causal relationship between the injury and the accident. **COMMENT:** ?

2. Recent

Balducci v. Carrasco
134 A.D.3d 640, 21 N.Y.S.3d 616 (1st Dep't 2015)

Court held P raised a triable issue of fact through his submission of an affirmed report by a physician who, upon examination not long after the accident and recently, found limitations in ROM and positive results on straight leg raising tests.

Schilling v. Labrador
136 A.D.3d 884, 25 N.Y.S.3d 331 (2d Dep't 2016)

Court held P's proof that his alleged injury to his spine constituted a limitation of use was insufficient as he did not offer any objective medical findings from a recent examination of the spine. **COMMENT:** Court did not state that was date of prior examination.

Sukalic v. Ozone
136 A.D.3d 1018, 26 N.Y.S.3d 188 (2d Dep't 2016)

Court held P's examining physician's affirmation was insufficient as he failed to set forth any objective medical findings from a recent examination.

3. "Gap In Treatment"

Pommells v. Perez, Brown v. Dunlap, Carrasco v. Mendez
4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005):

In soft-tissue injury cases involving complaints of pain and P's attempt to establish a serious injury under the limitation of use categories and 90/180 days category, court notes the "vexing" task courts confront and that the courts have approached them with a "well-deserved skepticism." Court then holds that "even where there is

objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a pre-existing condition—summary dismissal of the complaint may be appropriate."

Pommells

"We first address the "gap in treatment" noted by the trial court and Appellate Division—the period of time between the end of P's physical therapy in 1998 and his visit to Dr. Rose to obtain an expert medical report in 2002. Ds argue that the "gap" both renders the medical expert's later opinion on causation speculative and places into question the seriousness of the injuries themselves. "In the present case, the so-called gap in treatment was, in reality, a cessation of all treatment. P ended his physical therapy six months after the accident and sought no other treatment until years, later, when he visited Dr. Rose in connection with this case. While a cessation of treatment is not dispositive—the law surely does not require a record of needless treatment in order to survive summary judgment—a P who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so. Here, P provided no explanation whatever as to why he failed to pursue any treatment for his injuries after the initial six-month period, no did his doctors."

Brown

"Neither of the dispositive grounds in *Pommells* applies here. First, as to the so-called gap in treatment—the two and one-half years when P's injuries received no outside attention—Dr. Melamed explained that, once he determined further medical therapy would "be only palliative in nature," he terminated treatment and instructed P to continue exercises at home. A P need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or casual relation of his injury. Unlike *Pommells* P's cessation of treatment was explained sufficiently to raise an issue of fact and survive summary judgment." **COMMENT/QUAERE:** Can a D prevail on a summary judgment motion solely on a "gap claim?

Ramkumar v. Grand Style Trans. Enter.
22 N.Y.3d 905, 978 N.Y.S.2d 36 (2013)

To rebut Ds' gap defense, P submitted his deposition transcript where he testified "they cut me off." Court held that "while it would have been preferable for P to submit an affidavit in opposition to S/J explaining why the no-fault insurer terminated his benefits and that he did not have medical insurance to pay for further treatment, P has come forward with the bare minimum required to raise an issue regarding some reasonable explanation for the cessation of physician therapy." **COMMENT:** Thus, a P does not have to offer specific documentary evidence of the termination in coverage, explain why his benefits were terminated, or even submit an affidavit to substantiate his bare explanation. It would also appear unnecessary for a P to show he cannot pay for treatment on his own.

Green v. Domino's Pizza
134 A.D.3d 640, 21 N.Y.S.3d 616 (1st Dep't 2016)

In affirming S/J to D, court noted P failed to explain his cessation of treatment about nine months after the accident, until the examination by his surgeon two years later, since he acknowledged that Medicaid would have covered additional physical therapy after his no-fault benefits ended.

Santana v. Centeno
134 A.D.3d 640, 21 N.Y.S.3d 616 (1st Dep't 2016)

Court held P adequately addressed the gap in his treatment by submitting his deposition testimony and an affidavit in which he attested that he stopped treatment because he could not afford to pay for it after his no-fault benefits had expired, and later resumed treatment when a payment arrangement was made with his doctor.

Cook v. Peterson
137 A.D.3d 1594, 28 N.Y.S.3d 501 (4th Dep't 2016)

Court rejected Ds' argument that the gaps in P's treatment were fatal to his S/I claim. It stated: "With respect to the 14-month gap in treatment following the July 2009 medical appointments, medical records submitted by Ds in support of their cross-motions provided the unrebutted explanation that P's treating orthopedist had provided P with medication and an exercise regimene that was to be performed "in a self-managed fashion." In opposition to the cross-motions P contended that he

experienced only mild relief from that course of treatment and, as a result, "sought a second opinion." We thus conclude the P provided a reasonable explanation for the gap in treatment that is substantiated by the record. With respect to two other alleged gaps in treatment, we conclude that "the record fails to establish that P in fact ceased all therapeutic treatment" during those purported gaps inasmuch as P was still under the care of physician who had provided nerve block injections, he had received referrals for other physicians and he was exploring alternative treatments to combat the pain caused by the occipital neuralgia."

Pastuszynski v. Lofaso
140 A.D.3d 1710, 33 N.Y.S.3d 635 (4th Dep't 2016)

Court held P raised an issue of fact whether there was a gap in his treatment by submitting the affirmation of his treating physician stating that the physician continuously treated P from the date of the accident until the present date.

VI. MISCELLANEOUS

A. Renewal

Green v. Canada Dry Bottling Co.
133 A.D.3d 566, 20 N.Y.S.3d 94 (2d Dep't 2015)

Supreme Court granted S/J to Ds, finding the affirmation from her treating orthopedist submitted in opposition was deficient under CPLR 2106. It then denied P's motion to renew on which she submitted a supplemental affirmation from the orthopedist which complied with CPLR 2106. Court reversed and held Supreme Court improvidently exercised its discretion in denying the motion.

Defina v. Samuel
140 A.D.3d 825, 33 N.Y.S.3d 421 (2d Dep't 2016)

Motion court granted S/J to D, finding that P had submitted and relied upon an unnotarized statement of a chiropractor. P moved to renew upon basis that her attorney submitted by mistake the unnotarized statement and not the notarized affidavit. Motion Court denied motion, but Court reversed as mistake was tantamount to low office failure and constituted a reasonable justification for the initial failure.

B. Trial

Lee v. Barnett
134 A.D.3d 908, 22 N.Y.S.3d 122(2d Dep't 2015)

In this action, P was precluded from testifying at trial due to her failure to appear for her deposition when conditional order became absolute. D's S/J motion was then granted. Court held S/J was improperly granted as Ds did not demonstrate that P was precluded from offering other evidence with respect to the issue of liability or her injuries. Ds failed to establish that without P's testimony, she would be unable to make out a *prima facie* case. Thus, under the circumstances of this case, Ds were granted more relief than warranted.

St. Hiliare v. BKO Express, LLC
134 A.D.3d 923, 20 N.Y.S.3d 904 (2d Dep't 2015)

On Ds' appeal from a judgment entered upon jury verdict awarding P $495,000, Court held D's sole appellate argument that the jury's finding that P sustained a S/I was not based on legally sufficient evidence was unpreserved as Ds had not raised that issue before the trial court.

C. Appeal

Garbutt v. United Parcel Services
131 A.D.3d 444, 13 N.Y.S.2d 897 (2d Dep't 2015)

Supreme Court granted Ds' S/J motion dismissing the complaint upon the ground that P1 and P2 did not sustain a S/I under the relied upon S/I categories. Court reversed and denied S/J. Court held as to P1 that Ds did not meet their burden of establishing *prima facie* of the absence of a S/I under the limitations and 90/180 categories. As to P2, Court held that P raised a triable issue of fact as to a S/I with respect to his claimed cervical spine injury and lumbar spine injury.

Rivera v. Ramos
132 A.D.3d 655, 17 N.Y.S.3d 739 (2d Dep't 2015)

Supreme Court granted S/J to D dismissing the complaint as it found that P failed to establish *prima facie* a S/I under the two relied upon injuries. Court reversed and denied the S/J motion. It found P did establish *prima facie* a S/I with respect to his claimed injury to his cervical spine. Upon so finding, Court then refused to

address the dismissal as to the other injury, finding it "unnecessary" to address it. **COMMENT:** Why unnecessary? Is P then unable at trial to pursue a S/I as to the other injury? What's the effect in that regard to the denial of S/J?

D. Collateral Estoppel

Reyes v. Ruiz
132 A.D.3d 834, 18 N.Y.S.3d 408 (2d Dep't 2015)

P's car was involved in an accident with two other cars, D1 and D2. Court granted D1's S/J motion. D2's subsequent S/J motion was denied on ground D2 failed to meet his burden of showing that P did not sustain a S/I. D2 then moved to dismiss the complaint pursuant to CPLR 3211(a)(5) as barred by rules of collateral estoppel and *res judicata*. Court affirmed denial of that motion on ground those rules "cannot be used in a single action in the manner proffered by D2." **COMMENT:** Why? Court did not explain why D1's S/J motion was granted and D2's S/J motion was not. Also, why didn't D2 rely on D1's proof on his S/J motion?

UM/SUM COVERAGE UPDATE - 2016*

Presented for the Suffolk Academy of Law Seminar

"2016 AUTO LIABILITY UPDATE"

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*Including cases reported through July 31, 2016.

I. GENERAL ISSUES

A. Policy Construction and Interpretation

In *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 N.Y.3d 799, 16 N.Y.S.3d 796 (2015), the Court of Appeals observed that in interpreting the provisions of the UM and SUM endorsements, the general rule of construction of ambiguities against the drafter (insurer) ("*contra preferentem*") will not hold because the insurers did not choose the terms of these endorsements of their own accord, but, rather, were required to include them in compliance with the statutes (Ins. L. Sections 3420[f][1] and [f][2]) and the Regulations (11 NYCRR 60-2.3[f]). Policy provisions mandated by statute "must be interpreted in a neutral manner consistent with the intent of the legislative and administrative sources of the legislation."

See Dachs, J., "Insurance Law Lessons My Father Taught Me," N.Y.L.J., Feb. 22, 2016, p. 3, col. 1, annexed.

B. Purpose of SUM Coverage

In *Nafash v. Allstate Ins. Co.*, 137 A.D.3d 1088, 28 N.Y.S.3d 381 (2d Dept. 2016), the court stated that, "When a policyholder purchases SUM coverage in New York, he or she is insuring against the risk that a tortfeasor (1) may have no insurance whatsoever; or (2) even if insured, is only insured for third-party bodily injury at relatively low liability limits, in comparison to the policyholder's own liability limits for bodily injury sustained by third parties."

C. Covered Persons

In *Progressive Cas. Ins. Co. v. Beardsley*, 133 A.D.3d 1273, 19 N.Y.S.3d 845 (4th Dept. 2015), the court observed, as follows: "'Where an automobile insurance policy contains a SUM provision and is issued to an individual, that individual and others in his or her family may be afforded SUM coverage under the policy when such person is injured in

any vehicle, including a vehicle owned and insured by a third party' (*Roebuck v. State Farm Mut. Auto. Ins. Co.*, 80 A.D.3d 1126, 1127). 'Where such policy is issued to a corporation, however, the SUM provision does not follow any particular individual, but instead 'covers any person [injured] while occupying an automobile owned by the corporation or while being operated on behalf of the corporation' (*id.*, quoting *Buckner v. Motor Veh. Acc. Indem. Corp.*, 66 N.Y.2d 211, 215.'"

See also, Dachs, N. and Dachs, J., "Individual Coverage Under Corporate, Partnership, LLC and d/b/a Policies," N.Y.L.J., July 18, 2014, p. 3, col. 1; "Individual Coverage Under Policies Issued To A Trade Name or 'd/b/a'," N.Y.L.J, September 9, 2014, p. 3, col. 1, annexed.

D. Residents

The definition of an "insured" under the UM and SUM Endorsements includes a resident relative of the named insured or spouse.

In *Progressive Northern Ins. Co. v. Pedone*, 139 A.D.3d 958, 31 N.Y.S.3d 586 (2d Dept. 2016), the court observed that "While a person can have more than one residence for purposes of insurance coverage [citations omitted], a person's status as a resident of an insured's household 'requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain' [citations omitted]." Generally speaking, the issue of residency is a question of fact to be determined at a hearing.

In that case, the court found that the evidence supported the Supreme Court's determination that the claimant, an "itinerant musician," resided in his parents' household in Staten Island at the time of the subject accident. The proof in the record included the presence of the claimant's personal belongings and professional equipment at his parents' house, numerous official documents that listed his parents' address as his residence, and testimony adduced at the framed issue hearing – all of which sufficed to establish residency in his parents' household within the meaning of the insurance policy.

E. Occupancy

Among the definitions of an "insured" under the UM and SUM Endorsements is a person "occupying" a motor vehicle covered by those endorsements. The term "occupying" is defined as "in, upon, entering into, or exiting from a motor vehicle."

In *Government Employees Ins. Co. v. Nakhla*, 140 A.D.3d 762, 32 N.Y.S.3d 614 (2d Dept. 2016), the claimant was driving a taxicab insured by American Transit when it was struck in the rear by another vehicle. When he exited the taxicab to look for damage, the offending vehicle drove away and struck him, while was standing outside the cab. Claimant filed a claim for uninsured motorist benefits with GEICO, the insurer for his own personal vehicle, as a result of injuries he sustained from the second impact, contending that he was a pedestrian, rather than an occupant of the cab at that time.

As noted by the Court, GEICO's policy defined "occupying" as "in, upon, entering into or exiting from a motor vehicle" -- a definition taken from Ins. L. §3420(f)(3), which similarly defines that term. The essential question was whether "'a departure from a vehicle is occasioned by or is incident to some temporary interruption of the journey and the occupant remains in the immediate vicinity of the vehicle and, upon completion of the objective occasioned by the brief interruption, he intends to resume his place in the vehicle (*Matter of Rice v. Allstate Ins. Co.*, 32 N.Y.2d 6, 10-11)." The court held that GEICO established that the claimant was an occupant of the taxicab at the time of the second impact (on the authority of such earlier decisions as *Matter of Nassau Ins. Co. [Maylou]*, 103 A.D.2d 780; *Estate of Cepeda v. USF&G*, 37 A.D.2d 454, 455; and *State-Wide Ins. Co. v. Murdock*, 31 A.D.2d 978, aff'd. 25 N.Y.2d 674).

F. Accidents v. Intentional Collisions

In *Progressive Advanced Ins. Co. v. McAdam*, 139 A.D.3d 691, 32 N.Y.S.3d 191 (2d Dept. 2011), an action for a judgment declaring that the plaintiff insurer was not obligated to pay certain No-Fault claims submitted by the Defendants, the insurer sought to deny

coverage based upon its contention that the "accidents" were "intentionally staged and fraudulent." Although the court observed that "'[A]n intentional and staged collision caused in furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance [citations omitted]," it went on to find that the insurer failed to meet its *prima facie* burden on the motion because the uncertified police accident reports they submitted were not admissible, and the affidavit of the insurer's medical representative was based largely upon inadmissible evidence and not upon personal knowledge of the facts surrounding the two collisions.

G. Use or Operation

In *Encompass Indemnity Co. v. Rich*, 131 A.D.3d 476, 14 N.Y.S.3d 491 (2d Dept. 2015), an individual named Kenneth Goodman was driving his vehicle and speeding when he lost control and crashed into a utility pole. When firefighter Kevin Rich's engine company responded to the scene of the accident, Goodman was trapped inside his vehicle. In order to extract Goodman from the vehicle, the firefighters used the "jaws of life" to cut the vehicle's roof, and Rich and three other firefighters lifted the roof off of the vehicle. In the process of doing so, Rich sustained injuries to his right shoulder.

After receiving a settlement offer of the full available limits of Goodman's auto insurance policy, Rich sought coverage under the SUM endorsement contained in his own policy, issued by Encompass. Encompass denied coverage on the ground that Goodman's use of his vehicle was not the proximate cause of Rich's injuries, and subsequently sought to stay arbitration on that ground.

In reversing the Supreme Court's grant of Encompass' petition for a permanent stay of arbitration, the court noted that "SUM endorsements provide coverage only when the injuries are 'caused by an accident arising out of such underinsured motor vehicle's ownership, maintenance or use' (11 NYCRR 60-2.3[f][II]; see *Matter of Allstate Ins. Co. v. Reyes*, 109 A.D.3d 468; *Matter of Liberty Mut. Fire Ins. Co. [Malatino]*, 75 A.D.3d 967,

968). Factors to be considered in determining whether an accident arose out of the use of a motor vehicle include whether the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produces the injury rather than merely contributes to cause the condition which produces the injury (see *Matter of Allstate Ins. Co. v. Reyes*, 109 A.D.3d at 469; *Zaccari v. Progressive Northwestern Ins. Co.*, 35 A.D.3d 597, 599; see *Eagle Ins. Co. v. Butts*, 269 A.D.2d 558, 558-559). '[T]he [vehicle] itself need not be the proximate cause of the injury "but negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury"' [id.]. 'To be a cause of the injury, the use of the motor vehicle must be closely related to the injury' [id.].' '[T]he use of the underinsured vehicle must be a proximate cause of the injuries for which coverage is sought' [citations omitted]."

Rich invoked the doctrine of "danger invites rescue" to establish that Goodman's negligent use of the underinsured vehicle proximately caused his injuries. As explained by the court, that doctrine "imposes liability upon a party who, 'by his [or her] culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his [or her] aid' (*Provenzo v. Sam*, 23 N.Y.2d 256, 260; see *Wagner v. International Ry Co.*, 232 N.Y. 176, 180; *Flederbach v. Lennett*, 65 A.D.3d 1011, 1012)." The doctrine also applies "'where the culpable party has placed himself [or herself] in a perilous position which invites rescue' (*Provenzo v. Sam*, 23 N.Y.2d at 260 [emphasis omitted]; see *Finnocchiaro v. Napolitano*, 52 A.D.3d 463, 465). 'In order for the doctrine to apply, the rescuer must have had a reasonable belief that the person being rescued was in peril' (*Kesick v. New York Cent. Mut. Fire Ins. Co.*, 106 A.D.3d at 1221 . . .)."

Here, the court held that Encompass failed to establish that Rich was not entitled to coverage under the SUM endorsement because "[t]he evidence in the record establishes that Goodman's negligent use of his vehicle directly caused the accident that led to him being trapped and in obvious need of medical attention, which, in turn, led to Rich's intervention and resulting injuries." Specifically, the court held that "It cannot be said, as a matter of law, that Goodman's negligent use of his vehicle was not a proximate cause of Rich's injuries

under the doctrine of danger invites rescue." See also *Pierre v. Olshever*, 137 A.D.3d 1243, 29 N.Y.S.3d 392 (2d Dept. 2016) (doctrine of "danger invites rescue" inapplicable to facts of case – nothing in record suggest that owner was a culpable party who voluntarily placed himself in imminent, life-threatening peril which invited rescue).

See Dachs, J., "'Use or Operation' and the 'Danger Invites Rescue Doctrine,'" N.Y.L.J., September 21, 2016, p. 3, col. 1, annexed.

In *Guevara v. Ortega*, 136 A.D.3d 508, 26 N.Y.S.3d 12 (1st Dept. 2016), the court held that a New York City Police Department traffic van being driven by a car wash attendant was a police vehicle even though it was not being driven by the police department at the time of the accident, interpreting the word "operated" as broader than "to cause to function" or "to drive" and including the meaning "to exact power or influence."

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

In *Kraemer Building Corp. v. Scottsdale Ins. Co.*, 136 A.D.3d 1205, 25 N.Y.S.3d 718 (3d Dept. 2016), *motion for leave to appeal denied*, 27 N.Y.3d 908, 36 N.Y.S.3d 622 (2016), the court noted that the insurer's receipt of prompt notice of an occurrence is "a condition precedent to its liability under the policy," and "a failure to prove that notice 'may allow an insurer to disclaim its duty to provide coverage' [citations omitted]."

In *Spoleta Construction, LLC v. Aspen Ins. UK Limited*, 27 N.Y.3d 933, 30 N.Y.S.3d 598 (2016), the Court of Appeals held that a letter sent by the plaintiff's insurer to its subcontractor about an injury claim against it by an employee of the subcontractor seeking information about its insurance coverage, and requesting it to place its insurer on notice of the claim, which was forwarded by the subcontractor's broker to the defendant insurer along with a general liability notice of occurrence/claim describing the employee's injury, was sufficient to constitute proper notice of an "occurrence" under the policy despite the insurer's contention that in that letter, the plaintiff "framed" itself only as a claimant against the subcontractor, not as an additional insured under the insured's policy, and coverage had been

denied to the subcontractor for unrelated reasons. As noted by the court, the letter requested that the subcontractor "place [its] insurance carrier on notice of *this claim* (emphasis added), and provided information about the identity of the injured employee, as well as the date" - - i.e., it "provided the details that the policy required to be included by an insured in notice of an occurrence."

In *Osorio v. Bowne Realty Assoc., LLC.*, 140 A.D.3d 1136, 35 N.Y.S.3d 213 (2d Dept. 2016), the court noted that "circumstances may exist that will excuse or explain the insured's delay in giving notice, such as lack of knowledge that an accident has occurred [citations omitted]. It is the insured's burden to show the reasonableness of such excuse [citations omitted]." In this case, although the insured did not provide notice of the accident until three years after it occurred, it raised a triable issue of fact as to whether that delay was reasonable via the affidavits of its manager and director of operations, both of whom stated that they did not know about the accident until they received the Summons and Complaint.

In *Kleinberg v. Nevele Hotel*, 128 A.D.3d 1126, 8 N.Y.S.3d 484 (3d Dept. 2015), the court reiterated the well-known principle that "Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time." The court also noted that because an injured party is allowed by law to provide notice to an insurance company (see Ins. L. 3420[a][3]), he or she is generally held to any prompt notice condition precedent of the policy, but such an injured party can overcome an insurance company's failure to receive timely notice – which would otherwise vitiate coverage – by a demonstration that he or she did not know the insurer's identity despite his or her reasonably diligent efforts to obtain such information. See also, *Aspen Ins. UK Limited v. Nieto*, 137 A.D.3d 720, 27 N.Y.S.3d 52 (2d Dept. 2016); *24 Fifth Owners, Inc. v. Sirius Am. Ins. Co.*, 124 A.D.3d 551, 998 N.Y.S.2d 632 (1st Dept. 2015).

As further explained by the court in *Mt. Hawley Ins. Co. v. Seville Electronics Trading Corp.*, 139 A.D.3d 921, 33 N.Y.S.3d 314 (2d Dept. 2016), "Insurance Law

§3420(a)(3) requires the injured party to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer and thereafter expeditiously notified the insurer [citation omitted]. 'In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insured[ ]' [citations omitted]. 'The injured person's rights must be judged by the prospects for giving notice that were afforded him, not by those available to the insured [citation omitted]'. 'What is reasonably possible for the insured may not be reasonably possible for the person he has injured. The passage of time does not of itself make delay unreasonable' [citation omitted]."

In *Freeway Company, LLC v. Technology Ins. Co.*, 138 A.D.3d 623, 31 N.Y.S.3d 467 (1st Dept. 2016), and *Aspen Ins. UK Limited v. Nieto*, 137 A.D.3d 720, 27 N.Y.S.3d 52 (2d Dept. 2016), the courts reminded that the amendment to the "no prejudice" rule for late notice may not be applied to cases involving policies issued before January 17, 2009; in such cases, the old common law rules apply.

In *Kraemer Building Corp. v. Scottsdale Ins. Co.*, supra, a case that arose prior to the statutory amendment pertaining to the "no prejudice" rule, the court rejected the plaintiff's contention that the prejudice rule then applicable to uninsured and underinsured motorist claims, pursuant to *Matter of Brandon [Nationwide Mut. Ins. Co.]*, 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002), and *Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, 4 N.Y.3d 468, 796 N.Y.S.2d 13 (2005), should be applied in the context of a liability policy as well. As noted by the court, in the UM/UIM context, the "no-prejudice" rule had "less potency" "because an insurer was able to protect its interests due to its receipt of the separate No-Fault claim," while, in contrast, "'[t]he rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy,' as a liability insurer is unlikely to obtain pertinent information through other means, impairing its ability 'to take an active, early role in the litigation process and in any settlement discussions and to set reserves' [actions omitted]."

In *New York Schools Ins. Reciprocal v. Staines*, 132 A.D.3d 874, 17 N.Y.S.3d 895 (2d Dept. 2015), the court held that although the claimant did not comply with a provision of the subject policy requiring him to "immediately" forward to the insurer the Summons and Complaint in his action against the allegedly at fault motorist, the insurer failed to demonstrate that it suffered any prejudice resulting from his delay in doing so (*see Matter of Brandon [Nationwide Mut. Ins. Co.]*, 97 N.Y.2d 491, 498 [2002]).

In *Martin Associates, Inc. v. Illinois National Ins. Co.*, 137 A.D.3d 503, 27 N.Y.S.3d 21 (1st Dept. 2016), *motion for leave to appeal denied*, 27 N.Y.3d 910, ___ N.Y.S.3d ___ (2016), the court held, *inter alia*, that notice to an insurer provided by other insureds under the policy was not sufficient to meet the Plaintiff's own notice obligation, since its interests were at all times adverse to those of the other insureds.

In *Freeway Company, LLC v. Technology Ins. Co.*, 138 A.D.3d 623, 31 N.Y.S.3d 467 (1st Dept. 2016), the court held that the plaintiff failed to establish, *prima facie*, that its failure to give timely notice of the occurrence to the insurer should be excused on the ground that it had a reasonable belief in non-liability, where the record demonstrated that the plaintiff unreasonably failed to keep itself informed of potential claims for damages arising out of the incident.

In *Kraemer Building Corp. v. Scottsdale Ins. Co.*, 136 A.D.3d 1205, 25 N.Y.S.3d 718 (3d Dept. 2016), *motion for leave to appeal denied*, 27 N.Y.3d 908, 36 N.Y.S.3d 622 (2016), the court noted that the fact that the insured did not actually receive the Summons and Complaint in the underlying action, due to its failure to appoint a new registered agent for service to replace a defunct one that had been named decades earlier, did not excuse its noncompliance with the notice provisions of the insurance policy.

In *Karl v. North County Ins. Co.* 137 A.D.3d 865, 28 N.Y.S.3d 78 (2d Dept. 2016), the insurance policy required notice of the occurrence to be given to the carrier "as soon as practicable," and required legal papers to be forwarded "promptly." Although the Plaintiff commenced the underlying action against the defendant's insured in February 2008, and was

aware at that time of the identity of the insurer, it was not until June 27, 2008 that the insurer was notified for the first time of the lawsuit, when it received a copy of the Summons and Complaint from Plaintiff's counsel. The insurer disclaimed coverage six days later based upon plaintiff's failure to provide timely notice of the occurrence and of the lawsuit. On the basis of the record before it, the court held that the insurer's disclaimer was timely and proper based upon the plaintiff's failure to promptly forward the underlying pleadings to it.

I. Discovery

In *Encompass Indemnity Co. v. Rich*, 131 A.D.3d 476, 14 N.Y.S.3d 491 (2d Dept. 2015), an underinsured motorist claim (discussed above), the court held that the insurer was not entitled to a temporary stay of arbitration and an order directing the Respondent to provide pre-arbitration discovery because the insurer "had ample time to seek discovery before commencing this proceeding and unjustifiably failed to do so."

J. Proceedings to Stay Arbitration

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."

1. Filing and Service of Petition to Stay

In *Fay Da Realty Corp. v. Peerless Ins. Co.*, 140 A.D.3d 920, 33 N.Y.S.3d 450 (2d Dept. 2016), an action for breach of contract against an insurer for its refusal to provide coverage and defense of a personal injury action under the terms of its CGL policy, the court held that the insurer failed to produce a copy of the subject policy, and made no attempt to show that the plaintiff's conduct, as alleged in the complaint, was in breach of the notice requirements of the policy. "As the defendant failed to make this threshold showing, the

Supreme Court properly denied that branch of the motion which was to dismiss the complaint based on the plaintiff's allegedly late notice of claim."

In *Progressive Cas. Ins. Co. v. Garcia*, 140 A.D.3d 888, 33 N.Y.S.3d 385 (2d Dept. 2016), the court noted that Progressive's contention that arbitration should be stayed on the ground that the claimants' accident did not involve an adverse "motor vehicle," but, rather, an all-terrain vehicle (*see Progressive Northeastern Ins. Co. v. Scalamandre*, 51 A.D.3d 932, 933), does not relate to whether the parties had an agreement to arbitrate. Rather, that issue relates to whether certain conditions of the insurance contract were complied with so as to entitle the claimants to uninsured motorist benefits, and, therefore, had to be asserted within the 20-day time limit set forth in CPLR 7503(c).

The court also observed that Progressive failed to establish that the claimants' notices of intention to arbitrate were deceptive and intended to prevent it from timely commencing the proceeding. The notices of intention to arbitrate complied with the requirements of CPLR 7503(c), and the insurer failed to proffer an affidavit by someone with personal knowledge to support its contention that the claimants' service of the notices upon a certain post office address used by Progressive to process No-Fault claims prevented it from timely contesting the issue of arbitrability. Indeed, the record included a letter from Progressive's own claims representative to the insurer's counsel acknowledging receipt of the notices of intention well within the 20-day period.

In *Fiduciary Ins. Co. v. American Bankers Ins. Co. of Florida*, 132 A.D.3d 40, 14 N.Y.S.3d 427 (2d Dept. 2015), the court observed that "a party may not be bound to arbitrate a dispute by mere inaction (see *Matter of Commerce & Indus. Co. v. Nester*, 90 N.Y.2d 255, 202, 660 N.Y.S.2d 366). Therefore, American Bankers' failure to move to stay arbitration pursuant to CPLR 7503 did not render the dispute arbitrable, where, as here, no agreement to arbitrate was ever made [citations omitted], and where . . . American Bankers was not an insurer subject to the statutory requirement to submit to mandatory arbitration."

2. **Burden of Proof**

In *Allstate Ins. Co. v. Martinez*, 140 A.D.3d 743, 30 N.Y.S.3d 891 (2d Dept. 2016); and *Hertz Vehicles, LLC v. Monroe*, 138 A.D.3d 847, 30 N.Y.S.3d 643 (2d Dept. 2016), the courts noted that "'The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay' [citations omitted]. Thereafter, the burden shifts to the party opposing the stay to rebut the *prima facie* showing [citations omitted]."

In *Wynn v. Motor Veh. Acc. Indem. Corp.*, 137 A.D.3d 779, 26 N.Y.S.3d 558 (2d Dept. 2016), the court held that it was error to admit into evidence a police report without redacting the police officer's diagram of the accident. As stated by the court: "Information in a police accident report is 'admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties' [citations omitted]. Conversely, information in a police accident report is inadmissible where the information came from witnesses not engaged in the police business in the course of which the memorandum was made, and the information does not qualify under some other hearsay exception [citations omitted]." Thus, insofar as the diagram contained in the police accident report was not derived from the personal observations of the police officer, who did not witness the accident, and there was insufficient evidence as to the source of the information used to prepare the diagram, whether that person was under a duty to supply it, or whether some other hearsay exception would render the diagram admissible, the court held that the diagram should not have been admitted, and its admission into evidence constituted harmful error.

In *Hertz Vehicles, LLC v. Monroe*, supra, the host driver testified at a framed issue hearing that, at the scene of the accident, the driver of the alleged offending vehicle gave him the telephone number for his insurance carrier. The host driver wrote that information, as well as other information relating to the identity of the offending vehicle, on a piece of paper. The next day, he called the number he had been given and spoke with an insurance agent,

who provided the vehicle's insurance information, which he then also wrote on a separate piece of paper. Ten days after the accident, the host driver used the information he had previously recorded to prepare an MV-104 motor vehicle accident report. That report included the name and address of the driver of the alleged offending vehicle, but did not include any identifying information about the vehicle itself, such as its license plate number, state of registration, make, model, or year. Although the report indicated that the alleged offending vehicle was insured by Esurance, the policy number shown correlated, instead, to an Infinity policy. Over Infinity's objection, the court admitted an uncertified and unsworn copy of the MV-104 report into evidence for "limited purposes because some information is hearsay."

On the SUM carrier's appeal from the denial of its Petition to Stay Arbitration, the court held that the carrier "failed to make an evidentiary showing that the MV-104 accident report was admissible as a memorandum of a past recollection because the host driver did not have personal knowledge of the insurance information in the first instance, and the information on the report relating to the alleged offending vehicle and its insurance was derived from pieces of paper that were not produced at the hearing." "'[A] memorandum not in its nature original evidence of the facts recorded, and not verified by the party who made the report and knew the facts, would open the door to mistake, uncertainty and fraud'" [citations omitted]. Thus, the court held that since the MV-104 report did not meet the criteria for admissibility as a memorandum of the accident, the burden never shifted to the purported insurer of that vehicle to establish non-insurance or cancellation prior to the accident.

3. Arbitration Awards

a. Scope of Review

In *Allstate Ins. Co. v. Lubenska*, 132 A.D.3d 861, 17 N.Y.S.3d 883 (2d Dept. 2015), the court held that "Where, as here, review of a compulsory arbitration award is sought,

'decisional law imposes closer judicial scrutiny of the arbitrator's determination' that would be warranted when reviewing an award made after a consensual arbitration [citations omitted], and, to be upheld, the award 'must have evidentiary support and cannot be arbitrary and capricious [citations omitted];" *Fiduciary Ins. Co. v. American Bankers Ins. Co. of Florida*, 132 A.D.3d 40, 14 N.Y.S.3d 427 (2d Dept. 2015) ("in this proceeding pursuant to CPLR article 75 to vacate the arbitrator's award, our judicial review is limited"). See *also*, GEICO *Indemnity Ins. Co. v. Global Liberty Ins. Co. of N.Y.*, 51 Misc.3d 138(A) (App. Term, 2d, 11th, & 13th Jud. Dists. 2016) ("An arbitration award may be vacated pursuant to CPLR 7511 (b)(1)(iii) where an arbitrator 'exceeded his [or her] power,' which has been interpreted as including only three narrow grounds: if the award is clearly volatile of a strong public policy; if it is totally or completely irrational; or if it clearly exceeds a specifically enumerated limitation of the arbitrator's power [citations omitted]").

4. Appealability of Order Denying Stay of Arbitration

Although the right to take a direct appeal from an order denying a petition to stay and directing arbitration exists, such right may be illusory unless the petitioner obtains a stay of the arbitration pending the determination of the appeal.

In *State Farm Ins. Co. v. Banyan*, 131 A.D.3d 747, 13 N.Y.S.3d 915 (3d Dept. 2015), the Respondents filed a demand for SUM arbitration based on the allegation that a vehicle operated by Respondent Victor Banyan had been struck by an unidentified vehicle that left the scene of the accident. State Farm contested the claim that the accident was caused by physical contact with the other vehicle, and commenced a proceeding to stay arbitration.

After a hearing, the Supreme Court determined that physical contact had occurred and, among other things, denied petitioner's request for a permanent stay of arbitration. Although State Farm then filed a notice of appeal, it did not seek an interim stay, nor did it perfect the appeal within the requisite time period. Meanwhile, the parties proceeded to arbitration and Respondents were awarded the full value of the policy. Only thereafter did

State Farm move for an extension of time to perfect the appeal from Supreme Court's order finding physical contact. Although the court granted the motion, and allowed State Farm to perfect its appeal, it subsequently dismissed the appeal on the ground that State Farm "waived its right to appeal by proceeding to arbitration without seeking a stay pending determination of its appeal (see *Matter of Commerce & Indus. Ins. Co. v. Nester*, 90 NY2d 255, 264 [1997]; *Matter of One Beacon Ins. Co. v. Bloch*, 298 A.D.2d 522, 523 [2002])."

K. Arbitration

In *Fiduciary Ins. Co. v. American Bankers Ins. Co. of Florida*, 132 A.D.3d 40, 14 N.Y.S.3d 427 (2d Dept. 2015), the court noted that "An arbitrator's authority generally 'extends to only those issues that are actually presented by the parties' [citations omitted]. Therefore, an arbitrator is precluded from identifying and considering an affirmative defense that is not pleaded by a party to the arbitration."

L. Statute of Limitations

In *American Transit Ins. Co. v. Rosario*, 133 A.D.3d 503, 20 N.Y.S.3d 37 (1st Dept. 2015), the court stated that "[a] claim for UIM benefits is governed by the six-year statute of limitation applicable to contract actions," and that the claim accrues "either when the accident occurs or when subsequent events render the offending vehicle uninsured " [or underinsured]. When there is more than a six-year lapse between the accident and the demand for arbitration, the claimant must show that a later accrual date than the date of the accident is applicable, and that due diligence was used to determine whether the offending vehicle was insured on the date of the accident.

M. Actions Against Agents/Brokers

Generally, an insurance agent or broker has a common law duty to obtain requested coverage for a client within a reasonable amount of time, or to inform the client of the

inability to do so, however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage. Liability for failure to comply with this obligation may be based on either breach of contract or tort. An insured must show that the agent or broker 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. See *Freundlich v. Pacific Indemnity Co.*, 137 A.D.3d 967, 27 N.Y.S.3d 679 (2d Dept. 2016) ("situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law").

In recent cases, the courts have held that where a "special relationship" develops between the broker and client, the broker may be liable, even in the absence of a special request, for failing to advise or direct the client to obtain additional coverage. See e.g. *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 985 N.Y.S.2d 448 (2014); *Freundlich v. Pacific Indemnity Co.*, supra.

In *STB Investments Corp. v. Sterling & Sterling, Inc.*, 140 A.D.3d 449, 35 N.Y.S.3d 1 (1st Dept. 2016), the plaintiff real estate owners and managers sought indemnification from the defendant insurance broker in the event they were held liable in underlying negligence/wrongful death actions arising from the collapse of their building during demolition. Plaintiffs alleged that the defendant broker negligently failed to obtain umbrella insurance on the demolished building, and failed to advise the plaintiffs that no such coverage was in place. The broker sought to compel the plaintiffs to produce in discovery certain documents pertaining to plaintiff's communication with third-party insurance brokers. In rejecting that request, the court noted that those communications were not "material and necessary" in the defense of action, including the allegation that the parties has a "special relationship" justifying insurance broker liability. As noted by the court, "plaintiffs do not base their claim of a special relationship on a 'course of dealing over an extended period of time;' they base it on a particular interaction regarding a question of coverage, namely,

insurance for the demolition project." Accordingly, communications with other brokers were not relevant unless they concerned the demolition project.

N. **Collateral Estoppel**

In *Tower Ins. Co. of New York v. Einhorn*, 133 A.D.3d 841, 21 N.Y.S.3d 275 (2d Dept. 2016), the court held, in pertinent part, that "while a defendant who has defaulted in an action admits all traversable allegations set forth in the complaint, including the basic allegation of liability," in this case, where the insured moved for leave to enter a default judgment only against its insured (Einhorn), "any resulting judgment would bind only her, and may not be given preclusive effect to deprive the nondefaulting defendants of their right to litigate the issues pertaining to coverage as permitted by law in the appropriate forum [citations omitted]."

In *Liberty Mutual Ins. Co. v. Robles*, 139 A.D.3d 496, 32 N.Y.S.3d 90 (1st Dept. 2016), the Petitioner sought a permanent stay of arbitration of a hit-and-run claim. The Proposed Additional Respondents were the insurer and owners of the vehicle that allegedly fled the scene of the accident. In a prior property damage arbitration, the arbitrator determined that the proposed additional respondent's vehicle was the vehicle that fled the scene. Although the Petitioner did not raise the issue of collateral estoppel in support of its Petition, the Supreme Court granted the Petition based upon the doctrine of collateral estoppel. In reversing, the First Department noted that although the issue involved was addressed in the Claimant/Respondent's opposition papers and the Petitioner's reply, "those papers were served after the due date of the proposed additional respondent's opposition." Accordingly, the Proposed Additional Respondents had no obligation or opportunity to address the issue.

O. Bad Faith

In *Gutierrez v. Government Employees Ins. Co.*, 136 A.D.3d 975, 25 N.Y.S.3d 625 (2d Dept. 2016), the plaintiff brought an action against his SUM carrier for breach of the terms of the insurance policy and breach of the implied covenant of good faith and fair dealing, based upon the insurer's refusal to pay his claim after he exhausted the coverage of the tortfeasor. The first cause of action, sounding in breach of contract, demanded payment of the SUM benefits. The second cause of action sought damages in part for GEICO's alleged breach of "its duty to act in good faith" by unreasonably withholding payment of SUM benefits. The third cause of action alleged that GEICO "breached its contract and/or policy, and absolute duties and obligations to the plaintiff and its insureds."

GEICO moved pursuant to CPLR 3211(a)(7) to dismiss the second and third causes of action on the basis that if they sounded in breach of the implied covenant of good faith and fair dealing, "that covenant was implicit in every contract, and therefore those causes of action were duplicative of the cause of action sounding in breach of contract."

The Court found that the second cause of action alleged a failure to act in good faith, and noted that "Implicit in every contract is an implied covenant of good faith and fair dealing [citation omitted]," - - i.e., "a pledge that neither party to the contract shall do anything which will have the effect of destroying or impinging the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct [citations omitted]." Nevertheless, the court held that such a cause of action "is not necessarily duplicative of a cause of action alleging breach of contract." The court did, however, hold that the third cause of action sounded in breach of contract, and, thus, was duplicative of the first cause of action.

The court noted that "An insurance carrier has a duty to 'investigate in good faith and pay covered claims' (*Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 195). Damages for breach of that duty include both the value of the claim, and consequential damages, which may exceed the limits of the policy, for failure to pay the claim within a

reasonable time (see *Panasia Estates v. Hudson Ins. Co.*, 10 N.Y.3d 200, 203); *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d at 195). Such a cause of action is not duplicative of a cause of action sounding in breach of contract to recover the amount of the claim [citations omitted]. Such consequential damages may include loss of earnings not directly caused by the covered loss, but caused, instead, by the breach of the implied covenant of good faith and fair dealing [citations omitted]. The second cause of action states a claim for consequential damages for breach of the implied covenant of good faith and fair dealings."

II. UNINSURED MOTORIST ISSUES

A. Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. L. §3420[d][2])

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

Insurance Law §3420(d)(2) provides that if "an insurer shall disclaim liability or deny coverage for death or bodily injury . . . . it shall give written notice as soon as reasonably possible of such disclaimer or liability or denial of coverage to the insured and the injured person or any other claimant." As the Court of Appeals observed in *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, 23 N.Y.3d 583, 992 N.Y.S.2d 185 (2014), "The Legislature enacted section 3420(d)(2) to 'aid injured parties' by encouraging the expeditious resolution of liability claims [citations omitted]. To effect this goal, the statute 'establishe[s] an absolute rule that unduly delayed disclaimer of liability or denial of coverage violates the rights of the insured [or] the injured party' [citation omitted]. Compared to traditional common-law waiver and estoppel defenses, section 3420(d)(2) creates a heightened standard for disclaimer that 'depends merely on the passage of time rather than on the insurer's

manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel [citations omitted].'"

In *Tower Ins. Co. of New York v. United Founders Ltd.*, 126 A.D.3d 467, 5 N.Y.S.3d 396 (1st Dept. 2015), the court stated that "There is no bright line test for the timeliness of a disclaimer, as the purpose of Insurance Law 3420(d) is to protect the insured and other interested parties from being prejudiced by a belated denial of coverage, and it 'was not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for under the policy'."

In *Provencal, LLC v. Tower Ins. Co. of New York*, 138 A.D.3d 732, 30 N.Y.S.3d 138 (2d Dept. 2016), the court held that Ins. L. §3420(d)(2) is inapplicable to claims that are not based on "death or bodily injury." *See also Miller v. Allstate Indemnity Co.*, 132 A.D.3d 1306, 17 N.Y.S.3d 240 (4th Dept. 2015).

In *Carlson v. American International Group, Inc.*, 130 A.D.3d 1477, 16 N.Y.S.3d 637 (4th Dept. 2015), *lv. to appeal granted*, 26 N.Y.3d 918, 26 N.Y.S.3d 763 (2016), the court noted that the provisions of Ins. L. §3420 apply only to policies "issued or delivered in this state," and that the phrase "issued or delivered" is not to be conflated with the phrase "issued for delivery," which formerly appeared in the statute. Thus, where the policy involved was issued in New Jersey and delivered in Seattle, Washington, and then in Florida, it was not issued or delivered in New York, and, therefore, the statute (there, §3420[a][2], governing direct actions against the insurer to recover on a judgment against its insured) was inapplicable.

It is well-established that a proper notice of denial or disclaimer must apprise with a high degree of specificity of the ground or grounds on which it is predicated. See *General Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512 (1979).

In *Endurance American Specialty Ins. Co. v. Utica First Ins. Co.*, 132 A.D.3d 434, 17 N.Y.S.3d 407 (1st Dept. 2015), *motion for leave to appeal dismissed*, 27 N.Y.3d 1119, 36 N.Y.S.3d 874 (2016), the court held, *inter alia*, that Utica's disclaimer by its letter to its

named insured did not constitute notice to the additional insured, to whom the disclaimer was not sent, pursuant to Ins. L. §3420(d)(2).

In *Batista v. Global Liberty Ins. Co.*, 135 A.D.3d 797, 23 N.Y.S.3d 367 (2d Dept. 2016), the court observed that "An insurance company has an affirmative obligation to provide written notice of a disclaimer of coverage as soon as is reasonably possible, even where the policyholder's own notice of claim to the insurer is untimely" and that "Where there is a delay in providing the written notice of disclaimer, the burden rests on the insurance company to explain the delay."

In *Imperium Ins. Co. v. Utica First Ins. Co.*, 130 A.D.3d 574, 10 N.Y.S.3d 898 (2d Dept. 2015), *lv. to appeal denied*, 26 N.Y.3d 918, 26 N.Y.S.3d 763 (2016), the court held that the insurer sufficiently demonstrated that its delay in issuing its disclaimer "was reasonably related to a prompt, diligent, and necessary investigation to determine the relationship of the parties in the underlying action and whether an employee exclusion in the relevant insurance policy excluded coverage," and that the insurers' three-day delay in sending its notice of disclaimer after the completion of its investigation was not unreasonable.

In *Tower Ins. Co. of New York v. United Founders Ltd.*, 126 A.D.3d 467, 5 N.Y.S.3d 396 (1st Dept. 2015), the court held that insofar as the timeliness (or untimeliness) of the claim was not readily apparent from the face of the insured's notice, a two-week delay for management review, editing, and mailing the disclaimer letter was not unreasonable as a matter of law. *Cf. Matter of AIU Ins. Co. v. Veras*, 94 A.D.3d 642, 942 N.Y.S.2d 532 (1st Dept. 2012).

In *Martin Associates, Inc. v. Illinois Mutual Ins. Co.*, 137 A.D.3d 503, 27 N.Y.S.3d 21 (1st Dept. 2016), *motion for leave to appeal denied*, 27 N.Y.3d 910, ___ N.Y.S.3d ___ (2016), the court held, *inter alia*, that a disclaimer for late notice issued by the insurer 26 days after it received notice was timely as a matter of law.

In *Black Bull Contracting, LLC v. Indian Harbor Ins. Co.*, 135 A.D.3d 401, 23 N.Y.S.3d 59 (1st Dept. 2016), the court held that the insurer's disclaimers, "had they been subject to the timeliness requirement of Insurance Law §3420(d)(2)," would have been untimely as a matter of law because they were issued 79 days and 85 days after the insurer received notice of the claim, and the basis for the disclaimer was apparent from the face of the notice of claim and accompanying correspondence.

However, the court went on to note that whether the untimeliness of the disclaimer under Ins. L. §3420(d)(2) precluded the insurer from denying coverage depended on whether there was "a lack of coverage in the first instance" or "a lack of coverage based on an exclusion." As the Court of Appeals elaborated in *Matter of Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185, 188-189 (2000), "Disclaimer pursuant to section 3420[d] [now §3420(d)(2)] is unnecessary when a claim falls outside the scope of the policy's coverage. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. By contrast, disclaimer pursuant to section 3420(d) is necessary when denial of coverage is based upon a policy exclusion without which the claim would be covered." See also, *State Farm and Cas. Co. v. Guzman*, 138 A.D.3d 503, 28 N.Y.S.3d 310 (1st Dept. 2016) ("Since the policy never provided coverage for those circumstances in the first place, the untimeliness of Plaintiff's disclaimer is irrelevant"); *United Services Automobile Association v. Iannuzzi*, 138 A.D.3d 638, 28 N.Y.S.3d 878 (1st Dept. 2016) ("Since the acts at issue were outside the scope of coverage, timely disclaimer pursuant to Insurance Law §3420[d] was unnecessary"); *American Int'l Specialty Lines Ins. Co. v. Kagor Realty Co., LLC*, 125 A.D.3d 572, 5 N.Y.S.3d 32 (1st Dept. 2015). ("[B]ecause there is no coverage under the policy for such a claim, as opposed to an operative exclusionary clause, the motion court correctly found that [the insured] was not estopped pursuant to Insurance Law §3420[d] from enforcing the retroactive date [citation omitted]").

B. Hit-and-Run

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

When there is a genuine triable issue of fact with respect to whether a claimant's vehicle had any physical contact with an alleged hit-and-run vehicle, the appropriate procedure is to stay arbitration pending a hearing on that issue. *Government Employees Ins. Co. v. Huang*, 139 A.D.3d 950, 32 N.Y.S.3d 273 (2d Dept. 2016).

Where the matter is determined after a hearing, the appellate court's power to review the evidence is "as broad as that of the hearing court, taking into account in a close case the fact that the hearing court had the advantage of seeing the witnesses [citations omitted]." See also *American Transit Ins. Co. v. Caba*, 137 A.D.3d 1018, 27 N.Y.S.3d 603 (2d Dept. 2016).

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

For example, in *American Transit Ins. Co. v. Caba*, supra, the claimant was able to record the license plate number of the vehicle that hit his vehicle as it drove away from the scene, and he provided it to the police. Upon the claimant's presentation of his claim to the purported insurer for the offending vehicle, that insurer denied that its insured vehicle was involved in the accident. The claimant then presented an uninsured motorist claim to his own insurer. After a framed issue hearing, the court granted the SUM carrier's Petition to Stay Arbitration on the ground that the alleged offending vehicle was insured at the time of the accident.

On appeal, the court upheld the Supreme Court's determination that the claimant's vehicle was struck by the identified vehicle, which was insured, on the basis that it was supported by the record, which included the Police Accident Report, a New York registration search document, and testimony by the claimant as to the involvement of the subject vehicle in the accident, which was "credible and unrebutted."

III. UNDERINSURED and SUPPLEMENTARY UNINSURED MOTORIST ISSUES

A. Consent to Settle

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

In *Government Employees Ins. Co. v. Arciello*, 129 A.D.3d 1083, 12 N.Y.S.3d 228 (2d Dept. 2015), the insured's attorney, upon receipt of an offer to settle his action against the tortfeasor for the full amount of the tortfeasor's policy, wrote a letter to GEICO requesting it to either consent to the settlement or advance the settlement amount to the insured and then assume the prosecution of the action against the tortfeasor within 30 days, in accordance with the terms of GEICO's policy and Regulation 35-D's SUM Endorsement. Although GEICO timely prepared a letter in response, which requested additional documentation and directed the insured not to settle the action without its written consent in the interim, it did not send that letter to the insured's counsel, but, rather, to another law firm at a different address. At some point after the 30-day period expired, the insured settled with the tortfeasor for the full amount of his policy.

The court concluded that "the burden was on GEICO to come forward with sufficient facts to establish justification for a stay of arbitration" and that its submission of its letter, sent to the wrong attorney, failed to sustain that burden. Accordingly, the court denied GEICO's Petition to Stay Arbitration.

B. **Offset/Reduction in Coverage**

In *Ameriprise Auto & Home Ins. Co. v. Savio*, 137 A.D.3d 1272, 28 N.Y.S.3d 410 (2d Dept. 2016), where the Claimant's policy provided bodily injury liability coverage of $100,000/$300,000, but only $50,000/$100,000 in SUM coverage, the court held that insofar as the $50,000 recovered by the claimant from the tortfeasor (the applicable limits for death) were the same as the maximum SUM limit provided for by her policy, and, thus, the difference between the SUM policy limit for one person ($50,000) and the amount paid by the tortfeasor's insurer ($50,000) was zero, the claimant had no possibility of an additional recovery, and, thus, her SUM claim was rendered academic. Accordingly, the order granting a permanent stay of arbitration was affirmed.

In *Redeye v. Progressive Ins. Co.*, 133 A.D.3d 1261, 19 N.Y.S.3d 645 (4th Dept. 2015), *motion for leave to appeal denied*, 26 N.Y.3d 918, 26 N.Y.3d 918 (2016), the plaintiff, a pedestrian injured when a vehicle operated by a drunk driver collided with a parked car, which was propelled into him, recovered damages in a settlement from the driver of the vehicle, as well a fire company that allegedly sold the driver alcoholic beverages prior to the accident. He then made a claim for SUM benefits from his own motor vehicle insurer, which the insurer denied on the ground that the SUM coverage was exhausted by the recoveries the plaintiff already received. Although the plaintiff conceded that the amount of his SUM coverage was properly reduced by the amount he received from the driver's insurer, the argued that it was improper to reduce the SUM coverage by the amount he received from the fire company under its general liability insurance policy. The Fourth Department rejected that contention and granted the insurer's Petition to Stay Arbitration, finding that the payment from the fire company's insurer was for bodily injury damages, and, thus, constituted a proper reduction pursuant to the Non-Duplication provision of the SUM Endorsement.

However, in *Government Employees Ins. Co. v. Sherlock*, 140 A.D.3d 872, 32 N.Y.S.3d 635 (2d Dept. 2016), the Second Department, effectively overruling its earlier decision in *Weiss v. Tri-State Consumer Ins. Co.*, 98 A.D.3d 1107, 951 N.Y.S.2d 191 (2d

Dept. 2012), held that GEICO's insured, who maintained a policy with $250,000 in SUM coverage, and who settled her action against the automobile tortfeasor for the $50,000 limit of his policy, and then, after an arbitration, settled with the municipal (non-motor vehicle) defendants, i.e., town and town police department, for an additional $425,000, was entitled to proceed to SUM arbitration against GEICO for the total sum of $200,000, representing the $250,000 SUM limits reduced by the motor vehicle tortfeasor's $50,000 coverage, only. Essential to this decision was the court's finding, in agreement with the claimant, that the "Non-Duplication" provision of the SUM Endorsement (Condition 11) does not serve to reduce the SUM limits for recovery for non-motor vehicle defendants except to the extent that such recovery could be deemed duplicative of the SUM benefits claimed. As stated by the court, "The key to a proper understanding of Condition 11 is the recognition that 'shall not duplicate' is not aimed at preventing an insured from seeking full compensation by combining partial recoveries from several tortfeasors, but at preventing double recoveries for their bodily injuries." The claimant in this case alleged in her arbitration request that the bodily injury damages "are in the millions of dollars." The court thus noted that, presumably, if the motor vehicle policy contained the same $250,000 liability limit that the GEICO policy provided, the claimant would have been able to obtain $250,000 from the motor vehicle defendant's insurer, as well as the $425,000 from the municipality defendants' insurer. Insofar as the claimant seeks only, through her claim under the SUM endorsement, for which she paid a premium, to be in the same position she would have been in had the motor vehicle defendants not been underinsured relative to her, "[to] the extent that *Weiss* can be interpreted to require that the amount of SUM coverage be reduced without regard to the actual amount of bodily injury damages suffered, it should no longer be followed."

Thus, there is now a dispute between the Fourth and Second Departments on this issue.

See Dachs, J., "SUM Offsets: A Rare Reversal of 'Settled' Law," N.Y.L.J., July 20, 2016, p. 3, col. 1, annexed.

C. **Priority of Coverage**

In *Government Employees Ins. Co. v. Nakhla*, 140 A.D.3d 762, 32 N.Y.S.3d 614 (2d Dept. 2016), the court took note of the fact that the SUM policy at issue provided that if the Claimant was entitled to uninsured motorist or SUM benefits under more than one policy, "the maximum amount such insured may recover shall not exceed the highest limit of such coverage for any one vehicle under any one policy," and that the policy covering the vehicle "occupied by the insured person" would be applied first. In this case, GEICO, the insurer for the claimant's personal auto, successfully argued that the claimant, who was struck by a vehicle as he was standing outside of the taxicab he had been driving, while he was looking for damage by a hit in the rear to the taxicab, was an occupant of the taxicab at the time he was struck, and, thus, that the policy on the taxicab was primary to its policy. The only issue that remained was whether GEICO's policy limits exceeded the taxicab's policy limits -- an issue as to which the Court remanded the matter for determination.

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About the Author

Jonathan A. Dachs is a member of the firm of Shayne, Dachs, Sauer & Dachs LLP, in Mineola, New York. He has been actively involved in handling, litigating, writing and lecturing about uninsured and supplementary uninsured/underinsured motorist insurance law and practice for the past 30 years, and is widely regarded as one of the leading experts in New York on this topic.

Lawyer's Bookshelf

New York Uninsured and Underinsured Motorist Law & Practice

REVIEWED BY DAN D. KOHANE

By Jonathan Dachs, LexisNexis/Matthew Bender, approximately 500 pages. $99.

There is no lawyer more schooled and respected in the field of New York Uninsured and Underinsured Motorist coverage than Jonathan Dachs. Mr. Dachs offers a scholarly and practical treatise dedicated to two other brilliant lawyers, his late grandfather, New York Law School professor Louis E. Schwartz (author of the eight volume work, "Trial of Automobile Accident Cases"), and his late father and law partner, Norman H. Dachs, with whom he co-authored the Insurance Law column in the New York Law Journal for many years.

Dachs shares his exhaustive knowledge of both the academic and practitioner's side of this highly specialized area of practice, giving common-sense direction to those who may wander in its midst. He has produced the first, comprehensive handbook in the New York UM/UIM field. His treatise provides an historical overview, both legislative and regulatory, of the mandatory uninsured motorist scheme, with a needed focus on terms too often overlooked and misunderstood by lawyers, claims professionals and judges alike. From a discussion of the nuances between "automobile" and "motor vehicle," to a refined analysis of what constitutes an "uninsured motor vehicle," Dachs provides his readers with a comprehensive array and analysis of the development of case law in the area.

The book contains almost 6,000 citations to pertinent case law in 12 well organized chapters and my favorite, useful practice pointers for the practicing lawyer. So important to understanding this complex area of law is an understanding of how the courts define accident (Chapter 4), the scope of coverage (Chapter 9), and the exclusions (Chapter 8). Chapter 10 discusses conditions precedent to coverage, while Chapter 11 discusses protocols to claim resolution.

Having personally litigated offset issues in appellate courts, both in the Fourth Department and Court of Appeals, I was particularly interested in the author's handling of "other insurance," "stacking" and "offsets" questions. Chapter 9, I found, exhaustively covers the various questions of "reduction in coverage." Not only are the key Court of Appeals cases discussed (*United Community Ins. Co. v. Muscatel*, 69 NY 2d 777 (1987) and *Allstate Ins. Co. v. Stolarz*, 81 NY 2d 219 (1993) but the commentary and footnotes add hundreds of more appellate and miscellaneous cases that provide the necessary nuance. Dachs provide openings for exceptions and reconsideration of well-worn principles and cites to developing trends emanating from the lower courts. This kind of analysis is particularly useful for appellate practitioners who are arguing for subtle changes in existing precedent.

Most useful, but not quickly discovered, were the footnotes to the UIM regulatory endorsement, which directs the reader back to the chapter and verse where the regulation subdivision is discussed. This writer would recommend a separate index or clearer direction to find those footnotes, a minor stylistic suggestion to an excellent and necessary treatise.

Dachs is one of the most prolific writers and lecturers on these topics, and his role as an educator shines through in the pages. His focus on underinsured motorist coverage, both before and after the adoption of Regulation 35-D, provides exhaustive case authority for both the lawyer and the court. From trigger, to consent, to offsets, to stacking, it is all there for the taking, along with a chapter containing the forms, charts and regulations that practitioners need to be close at hand.

This will be a wonderful desktop "handbook" when a lawyer, claim professional or judge requires clear authority and practical direction.

DAN D. KOHANE *is a senior partner at Hurwitz & Fine in Buffalo and an adjunct professor of insurance law at the University at Buffalo School of Law.*

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Insurance Law Lessons My Father Taught Me

By Jonathan A. Dachs

This column, which has been co-authored for the past 28-plus years, now has a lone author. Conspicuous by its absence is the byline and smiling face of my long-time co-author, and even longer-time father, mentor, law partner, and friend, Norman H. Dachs, who passed away December 2014 following a brilliant 60-plus-year career in the law, which included 42 years as a New York Law Journal columnist. See Obituary, New York Law Journal, Dec. 11, 2014, at p. 2. It was a distinct privilege, and, indeed, a blessing, to have been able to work side by side with my father, and to learn from his sheer brilliance, ingenuity and skill how to practice law, and how to think, read and write like a lawyer, while at all times being and remaining a gentleman.

While at first, during my mourning period, I wondered how or whether I should continue to write this column without my dad, I have now come to the conclusion that to do so would be a meaningful way to maintain and preserve his wonderful legacy. I, therefore, lovingly dedicate this inaugural solo article to his memory.

I have a very distinct recollection of a meeting in my father's office just a few days after I began to work for and with him. He sat me down and offered three important insurance law lessons, which I have never forgotten, and which have served me well in the ensuing years.

Lesson No. 1: Read the Policy

The first lesson was that the careful practitioner should never assume anything at all about the contents of an insurance policy, and must, instead, be diligent in obtaining a copy of the policy and making sure to always read the actual policy provision. To illustrate this point, he told me about the then-recent case of *Maxwell v. State Farm Mut. Auto. Ins. Co.*, 92 AD2d 1049 (3d Dept. 1983), which involved a claim for no-fault benefits. Such benefits are statutorily excluded under Ins. L. §5103(b)(2) for a person injured as a result of operating a motor vehicle in an intoxicated condition or while his (or her) ability to operate such vehicle is impaired by the use of a drug.

In *Maxwell*, the particular endorsement used by the insurer set forth the exclusionary provisions in language different from that stated in the statute, i.e., it excluded persons in an intoxicated condition and impaired by drugs. Thus, the claimant, who was concededly intoxicated with alcohol, but did not consume any drugs, was held by the court to fall outside of the exclusion as written. Clearly, had the claimant's counsel not carefully read the actual endorsement, he would never have discovered the unusual [erroneous] provision, and, instead assumed that his client's condition precluded coverage.

> The first lesson was that the careful practitioner should never assume anything at all about the contents of an insurance policy.

Lesson No. 2: Zappone

The second critical insurance law lesson my father taught me was to read—and remember—the words and analysis of the Court of Appeals in the seminal case of *Zappone v. Home Ins. Co.*, 55 NY2d 131 (1982), because they contained a mini-course in insurance law in and of themselves.

Zappone was a declaratory judgment action brought by an insured against her automobile insurer seeking a judicial determination that the insurer's denial of coverage was invalid, and, therefore, the owner and driver of the automobile involved in a collision were entitled to excess coverage.

Judith Zappone, her brother, Michael, and her father, Dominick, all resided in the same household. Home Insurance Co. issued an automobile liability policy to Judith covering a 1970 MG. Judith also owned a 1966 Mercedes Benz, which was, however, not insured by Home, but, rather, by Aetna Ins. Co. Home also insured a 1963 Chevrolet owned by Dominick.

On July 20, 1975, Michael was involved in a collision while driving Judith's Mercedes Benz, with Judith's permission. Aetna defended the claim arising out of that accident, and even offered to pay up to its policy limits to settle that claim. Notice of the action and the accident was given by the Zappones to Home on Jan. 6, 1976. Home promptly advised that it was reserving its rights based essentially upon late notice, but it was not until April 14, 1977, that Home advised the Zappones in a written notice of disclaimer that because the Mercedes Benz was neither an owned nor a non-owned automobile under either Judith's or Dominick's policy, it would not provide coverage excess to the Aetna policy.

The declaratory judgment action ensued, in which the Zappones and Aetna argued that the Zappones were entitled to excess coverage under the two Home policies, and that Home's disclaimer was invalid by reason of the disclaimer statute (then Ins. L. §167 [8] (now Ins. L. §3420 [d][2]), which required, inter alia, a written notice of disclaimer to be sent "as soon as is reasonably possible" to the insured and the injured person or any other claimant.

In affirming the Appellate Division's declaration in favor of Home, finding that neither of Home's policies provided coverage for the subject accident, and that, under the circumstances, where no coverage existed in the first instance, Home was not required to give notice of its denial of coverage within any particular period of time, the Court of Appeals stated the following significant insurance law principles:

• The disclaimer statute applies whether the policy in

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question is primary or excess.

• If the disclaimer statute is applicable, it is the carrier's burden to explain its delay in notifying the insured, the injured party, and any other claimant of its disclaimer or denial.

• A reservation of rights letter does not constitute compliance with the requirements of the disclaimer statute.

• The Legislature did not intend by its use of the words 'deny coverage' to bring within the policy a liability incurred "neither by the person insured nor in the vehicle insured, for to do so would impose liability upon the carrier for which no premium had ever been received by it and to give no significance whatsoever to the fact that automobile insurance is a contract with a named person as to a specified vehicle."

• A distinction is to be made between situations in which the carrier is relying upon breaches of policy conditions or the application of exclusions, on the one hand, and situations in which the carrier made no contract of insurance with the person and for the vehicle involved, or even though there was such a policy at one time, it had been canceled or terminated prior to the accident, on the other hand.

As the court so clearly explained: In the first instance, the policy covers the driver, the vehicle and the accident and the carrier will be liable unless it disclaims liability because of the insured's breach. In the second, the policy covers the driver and the vehicle and the accident would be covered except for the specific policy exclusion and the carrier must deny coverage on the basis of the exclusion if it is not to mislead the insured and the injured persons to their detriment. In the third, though the carrier may have some other relationship with the owner or driver of the vehicle, it has no contract with that person with respect to the vehicle involved, and, there being no contractual relationship with respect to the vehicle, is not required to deny coverage or otherwise respond to a claim arising from an accident involving that vehicle except as statute mandates or courtesy suggests.

This important distinction between non-coverage by virtue of breach or exclusion, and non-coverage by virtue of "lack of inclusion" is also pertinent and determinative with regard to the issue of whether or not a carrier is obligated to move to stay arbitration within 20 days, pursuant to CPLR §7503(c).

Lesson 3: Contra Proferentem

The third crucial lesson dealt with an issue pertaining to insurance policy interpretation—the doctrine of contra proferentem.

It is well-known that insurance policies are contracts, and, thus, are subject to the general principles of contract interpretation.[2] One such important principle is that while unambiguous provisions of a policy must be given their plain and ordinary meaning,[3] and a court may not make or vary the insurance contract to accomplish its notions of abstract justice or moral obligation,[4] ambiguous provisions in insurance policies should be construed in favor of the insured and against the insurer—the drafter of the policy.[5] This rule of contract interpretation is known as the doctrine of contra proferentem (literally "against the offerer"). Indeed, it has been stated that the resolution of an ambiguity should result in affirming coverage to the fullest extent that any fair interpretation will allow.[6]

This doctrine, which is based upon the manifold rationale that (a) the proponent of a particular term or phrase is more likely aware of its possible ambiguities; (b) a disparity in sophistication and bargaining power generally exists between the insurer and the insured as a result of the adhesive nature of the insurance contract; and (c) equity dictates that the party that selected the language used in the policy should be answerable and responsible for any problems or issues caused by that language, is enforced even more strictly when the language in question appears in an exclusionary provision, which purports to limit the insurer's liability.[7]

Notwithstanding its common and frequent application by the New York courts, limitations and/or exceptions as to its applicability have been recognized over the years. See Epstein, Howard B. and Keyes, Theodore A., "Contra Proferentem: Sophisticated Entities Negotiating," N.Y.L.J. Aug. 30, 2006.

Question Re Applicability. One question that has always intrigued me (and which I can recall discussing with my father, without resolution), is whether the doctrine of contra proferentem can be applied in the context of an insurance policy or endorsement that was not, in fact, drafted by the insurer, but, instead, was drafted and prescribed by the Superintendent of Insurance, pursuant to statute, and mandated to be utilized by the insurer.

While several cases have addressed the situation where both parties participated in negotiating the terms of the policy, finding the doctrine to be inapplicable under those circumstances,[8] and, of course, many others have dealt with the more common situation where one of the parties (the insured) "had nothing to do with the preparation" of the policy, finding the doctrine there to apply,[9] the question of whether the doctrine is applicable where neither party was involved in or responsible for the policy's drafting has less commonly arisen.

Early Precedent. In *Country-Wide Ins. Co. v. Wagoner*, 45 NY2d 581, 586 (1978), an appeal from an order denying a petition to stay an uninsured motorist (UM) arbitration, the Court of Appeals was faced with what was essentially a dispute between two insurers—Country-Wide, the insurer of the motorcycle that the claimant/respondent Wagoner was operating, and Aetna, the insurer of a car owned by Wagoner's father, with whom he resided and under which policy he, therefore, also qualified as an "insured" for purposes of uninsured motorist coverage. The specific issue involved was whether the term "automobile," as it appeared in the basic, mandatory Motor Vehicle Accident Indemnification Endorsement then in effect, was intended to include "motor-

There is now no doubt that the doctrine of contra proferentem is inapplicable where the insurance policy provision at issue was mandated by statute or regulation, and was not drafted by the insurer.

cycles." In order to determine that issue, the court was required to analyze and construe the specific provisions contained in that prescribed endorsement.

In answering the question presented in the affirmative (and reversing the Appellate Division's decision and ruling in favor of Aetna and against Country-Wide), the court stated, as particularly pertinent to this discussion, as follows: "The endorsement itself, not unlike other provisions in contracts offered to the public by the government regulated insurance industry, is not the product of insurance company draftsmanship: The words of [the provision at issue] were chosen by the legislatively created Motor Vehicle Accident Indemnification Corporation with the approval of the State Superintendent of Insurance as part of the endorsement required by subdivision 2-a of section 167 of the Insurance Law [now §3420 (f)(1)]. We, therefore, hearken back to the neutral sources that brought it into being for clues about the intended scope of [the provision]." Notably absent from this discussion was any mention of the doctrine of contra proferentem.

Recent Enlightening Decision. Last year, in *State Farm Mutual Automobile Insurance Company v. Fitzgerald*, 25 NY3d 799 [2015], an appeal from an order granting a petition to stay a supplementary uninsured motorist (SUM) arbitration, the Court of Appeals, for the first time, addressed head on the question of the applicability of contra proferentem in the context of a prescribed and mandated policy endorsement.

There, answering in the negative the specific question of whether a police vehicle is a 'motor vehicle' under the SUM Endorsement prescribed in the Insurance Regulations, (11 NYCRR §60-2.3[f]), Justice Sheila Abdus-Salaam, writing for a 4-3 majority, stated, in pertinent part, as follows: "Although provisions of an insurance policy drafted by the insurer are generally construed against the insurer if ambiguous [citation omitted], a policy provision mandated by statute must be interpreted in a neutral manner consistently with the intent of the legislative and administrative sources of the legislation [citing *Country-Wide Ins. Co. v. Wagoner*, supra]. Since State Farm did not choose the terms of the SUM endorsement here of its own accord but, rather, was required to offer SUM coverage in compliance with the terms of Insurance Law §3420(f)(2)(A) and Department of Insurance regulations (see 11 NYCRR 60-2.3[f]), we must interpret the SUM endorsement and the language of the statute in the manner intended by the neutral sources of that enactment [citations omitted]."

There is now no doubt that the doctrine of contra proferentem is inapplicable where the insurance policy provision at issue was mandated by statute or regulation, and was not drafted by the insurer.

There is also no doubt that the lessons my father taught me were very valuable ones, indeed.

1. See Dachs, N. and Dachs, J., "The Importance of Reading the Policy," N.Y.L.J., July 19, 1995; Dachs, N. and Dachs, J., "Trial De Novo—Read Your Policy," N.Y.L.J., June 13, 1989. See also *Mostow v. State Farm Ins. Cos.*, 88 NY2d 321 (1996) (policy failed to make the "per accident" limit "subject to" the "per person" limit, as set forth in the statute).

2. See *Matter of Estates of Covert*, 97 NY2d 68 (2001).

3. See *P.J.P. Mechanical Corp. v. Commerce and Industry Ins. Co.*, 65 AD3d 195 (1st Dept. 2009).

4. *Bretton v. Mutual of Omaha Ins. Co.*, 110 AD2d 46 (1st Dept. 1985), affd. 66 NY2d 1020 (1985); *Breed v. Ins. Co. of North America*, 46 NY2d 351 (1978).

5. See *Dean v. Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 (2012); *Westview Associates v. Guaranty Natl. Ins. Co.*, 95 NY2d 334, 340 (2000); *Mostow v. State Farm Ins. Cos.*, supra; *Breed v. Ins. Co. of North America*, 46 NY2d 351 (1978).

6. See *U.S.F. & G. v. Annunziata*, 67 NY2d 229 (1986); *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 NY2d 663 (1981).

7. See *Bell Painting Corp. v. TIG Ins. Co.*, 100 NY2d 377 (2003); *Continental Cas. Co. v. Rapid-American Corp.*, 80 NY2d 640 (1993).

8. See *Citibank, N.A. v. 666 Fifth Avenue Ltd. Partnership*, 2 AD3d 331 (1st Dept. 2003); *Coliseum Towers Assoc. v. County of Nassau*, 2 AD3d 562, 565 (2d Dept. 2003), lv. denied, 2 NY3d 707 (2004); *Loblaw, Ins. v. Employer's Liab. Assur. Corp.*, 85 AD2d 880, 881 (1981), affd 57 NY2d 872 (1982); *Cummins, Inc. v. Atlantic Mutual Ins. Co.*, 56 AD3d 288 (1st Dept. 2008).

9. See *Matthews v. American Cent. Ins. Co.*, 154 NY 449, 456-457 (1897); *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 697-698 (2d Cir. 1998).

INSURANCE LAW

Individual Coverage Under Corporate, Partnership, LLC and d/b/a/ Policies

By Norman H. Dachs

And Jonathan A. Dachs

The recent decision of the U.S. Supreme Court in *Burwell v. Hobby Lobby Stores*, 573 US __ (June 30, 2014), in which the court ruminated and opined, inter alia, on the question of whether a corporation was a "person" within the meaning of the Religious Freedom Restoration Act of 1993 (RFRA), and whether corporations may have an existence separate and apart from the human beings who own, run, and are employed by them, brought to our mind longstanding issues and debates regarding the rights of individuals associated with a corporation to make claim under an insurance policy issued in the name of the corporation, as well as more recent questions about whether the same or similar rules apply when the named insured entity is not a corporation, but, rather a partnership, an LLC, or even a trade name ("d/b/a").

'Named Insured' Corporations

In *Buckner v. MVAIC*, 66 NY2d 211 (1985), the New York Court of Appeals held that a policy of insurance issued to a family-owned real estate corporation did not provide uninsured motorist coverage for Robert Buckner, the college-aged son of the officers and sole shareholders of the corporation, who resided with them, and who was injured when he was struck by a hit-and-run driver while he was riding his bicycle (and not engaged in any business of the corporation).

Focusing on the "Who is insured" provision of the subject policy, which included "you or any family member," and the policy's definition of "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household," the court concluded that the coverage under that policy could not be extended to cover Buckner, because "it is obvious, even to a casual reader, that the insured was to be a corporation which could not possibly have personal injuries or family" [citations omitted]. See also *Travelers Property Casualty Corp. v. Hershman*, 287 AD2d 412 (1st Dept. 2001).

Subsequent cases applied this narrow approach to the definition of "insured" in policies issued in the name of a corporation to preclude the claim of officers, directors and shareholders of the named insured corporation themselves while not engaged in corporate business (see *Continental Ins. Co. v. Velez*, 134 AD2d 348 [2d Dept. 1987]; *Royal Ins. Co. v. Bennett*, 226 AD2d 1074 [4th Dept. 1996]; *Travelers Indem. Co. v. Venito*, 303 AD2d 592 [2d Dept. 2003]). And, then, a line of cases extended this narrow approach even further, applying it even to individuals, particularly firefighters and members of volunteer fire companies, who were injured in the course and scope of their employment with and for the named corporation/entity while not occupying the corporate insured vehicle (see *Gallaher v. Republic Franklin Ins. Co.*, 70 AD3d 1359 [4th Dept. 2010]; lv. to appeal denied, 14 NY3d 711 [2010]; *American Alternative Ins. Corp. v. Pelszynski*, 85 AD3d 1157 [2d Dept. 2011], lv. to appeal denied, 18 NY3d 803 [2012]).

> What are the rights of individuals associated with a corporation to make claim under an insurance policy issued in the name of the corporation?

Notably, in both *Gallaher*, supra, and *Pelszynski*, supra, (in which the authors' firm represented the claimant, Christopher Pelszynski on appeal), as well as in *Roebuck v. State Farm Mut. Auto. Ins. Co.*, 80 AD3d 1126 (3d Dept. 2011), the courts rejected the arguments asserted by the claimants to the effect that the policy language defining an "insured" in the corporate policy context was, at the very least, ambiguous, i.e., the mere fact that the definitions of "insured" in the SUM Endorsement refer to spouses and/or relatives of the named insured would suggest to the average person applying common speech that the "named insured" or "you" referenced therein could include an individual who may suffer a bodily injury and can have a spouse or relative, rather than only a corporation, which cannot. That conclusion would only be strengthened by the Endorsement's reference to vehicles being operated by the "named insured" or "you," since, of course, only an individual, not a corporate entity, could drive a motor vehicle.

The courts have consistently held, as stated in *Roebuck*, supra, to the contrary: "The policy language is not rendered ambiguous by the inclusion of words such as 'you' or 'spouse' and 'relatives' when a corporation is the named insured, because it is obvious to the average reader, construing the language according to common speech, that a corporation cannot have family members; those portions of the mandatory policy language are merely inapplicable to the corporate insured...." See also *American Alternative Ins. Co. v. Pelszynski*, supra ("'You' in the definition refers to the company, which cannot have a spouse or relative").

Partial Statutory Remedy

As we reported in these pages on March 12, 2013,[1] a legislative remedy has been afforded only to a narrow segment of category of individuals injured in the course and scope of their employment with and for the named insured corporation, with the enactment, effective April 16, 2013, of the new §3420(f)(5), which now » Page 8

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requires that all policies under which a fire department, fire company, ambulance service or voluntary ambulance service is a "named insured" shall provide Supplementary Uninsured or Underinsured Motorist coverage to an individual employed by, or who is a member of such entities and was insured by an uninsured or underinsured motor vehicle while acting within the scope of his or her duties for the named insured entity" (except with respect to the use or operation by such individual of a motor vehicle not covered under the policy).

Unless and until further legislative action is forthcoming, all other claimants are relegated to the common-law rule precluding them from making claims under corporate policies unless they are occupants of the insured corporate vehicle at the time of the accident.

'Hobby Lobby'

In *Hobby Lobby*, supra, the majority opinion noted that Congress, in prohibiting the government from substantially burdening "a person's" exercise of religion, provided protection for closely held for-profit corporations "by employing a familiar legal fiction: It included corporations within RFRA's definition of 'persons'." The majority observed that "it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people." Further, the majority noted that "Corporations 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."

In view of 'Hobby Lobby's' explication of the relationship between corporations and the individuals that "own, run, and are employed by them," we wonder whether the courts might now be tempted to revisit the cases that outright reject the claims of individuals under corporate policies.

Similarly, as Justice Ruth Bader Ginsburg wrote in her dissenting opinion: "As Chief Justice Marshall observed nearly two centuries ago, a corporation is 'an artificial being, invisible, intangible, and existing only in contemplation of law.' *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819). Corporations, Justice Stevens more recently rendered, 'have no consciences, no beliefs, no feelings, no thoughts, no desires.' *Citizens United v. Federal Election Comm'n.*, 558 US 310, 466 (2010) (opinion concurring in part and dissenting in part).[2]

In view of *Hobby Lobby's* explication of the relationship between corporations and the individuals that "own, run, and are employed by them," we wonder whether the courts might now be tempted to revisit the cases that outright reject the claims of individuals under corporate policies. If, as *Hobby Lobby* states, corporations cannot act or function separate and apart from those individuals, can it not reasonably be argued that the corporation's policy is intended to protect at least such individuals to whom the insured vehicle is assigned for their regular use, when they are acting in the course and scope of their employment and for the benefit of the corporation?

We can only ask this question at this time, not answer it, but we can foresee the potential for litigation on this issue in the future.

'Named Insured' Partnerships

Notably, in rendering its seminal decision regarding corporate insurance policies in *Buckner*, supra, the Court of Appeals took pains to distinguish between corporations and partnerships, the latter "being a combination of individuals, who can suffer injuries and do have spouses, households and relatives." 66 NY2d at 214.

In *Aetna Casualty & Surety Co. v. Mantovani*, 240 AD2d 566 (2d Dept. 1997), the defendant (respondent) was injured in an auto accident and ultimately settled his claim with the tortfeasor for $100,000. He subsequently demanded arbitration of his claim for underinsured motorist benefits under three separate policies issued by Aetna, including a business automobile policy issued to his law partnership, with an underinsured motorist coverage limit of $300,000. The parties agreed that defendant was entitled to primary underinsured motorist coverage, and defendant, an individual, received an award under that policy, issued to the partnership. *Accord, Hartford Acc. & Indem. Co. v. Huddleston*, 574 SW2d 676 (Ct. of App. Ky. 1974) ("The uninsured motorist insurance contract plainly embraced the partners and their spouses and relatives living in the same household").

It thus appears that an individual partner may make a claim for UM/SUM benefits under a policy issued in the name of the partnership.

Limited Liability Companies

In *Morette v. Kemper, Unitrin Auto & Home Ins. Co.*, 35 Misc.3d 200 (Sup. Ct. Essex Co. 2012), the court held that the fact that a Limited Liability Company (LLC), of which the decedent killed in a hit and run accident was the sole member, was the named insured on a commercial auto policy did not preclude the decedent's wife from recovering SUM benefits under the policy; the decedent, as the sole member of the LLC, was an "insured" entitled to coverage under the policy.

The Morette court observed that "Only by employing a construction which allows for a member of the limited liability company who is a 'natural person' (Limited Liability Law §102[w]) to be an 'insured' under the policy" could the policy provisions defining "you" as "the named insured and, while residents of the same household, your spouse and the relative of either you or your spouse," affording "survivor rights" to "you or your spouse, if a resident of the same household," and offering "Supplemental Spousal Liability Insurance" coverage, be given an effect; "otherwise they are illusory."

Accordingly, the court held that Morette was an "insured" for whom SUM benefits were provided. "Reading the policy as a whole 'to determine its purpose and effect and the apparent intent of the parties [citations omitted], the fact that the LLC was the named 'insured' does not preclude Morette, as the sole member of that company, from being an 'insured' entitled to coverage."

The Morette court went on to distinguish that case from those cases, such as *Buckner*, supra and *Gallaher*, supra, in which the courts applied a different rule in the context of business auto policies issued to corporations to hold that such policies did not provide UM/UIM coverage to a family member of the sole shareholders of the corporation. As the court explained, "This rule does not apply to limited liability companies to the extent that its members are 'natural persons.' 'The LLC was designed as a hybrid of the corporate and limited partnership forms, offering the tax benefits and operating flexibility of a limited partnership with the limited liability protection of a corporation. See *Weber v. King*, 110 F.Supp.2d 124, 131 (E.D.N.Y. 2000); see also N.Y. Practice §1:2 (explaining that the NYLLCL drew upon the N.Y. Revised Limited Partnership Act and N.Y. Business Corporation Law)' (*Bischoff v. Boar's Head Provisions Co.*, 436 F.Supp.2d 626, 630 [S.D.N.Y. 2006]. Significantly, a limited liability company is 'an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business...' (italics added) (Limited Liability Company Law §102[m]). A limited liability company is more akin to a partnership (see Partnership Law §2, §10) since both entities are 'combination[s] of individuals, who can suffer injuries and do have spouses, households and relatives' (*Buckner v. Motor Vehicle Acc. Indemnification Corp.*, supra at 214. Notably, in *Matter of Aetna Casualty & Surety Co. v. Mantovani*, 240 AD2d 566, leave denied 90 NY2d 810, an arbitration award in favor of a partner for underinsured motorist benefits under a business automobile policy issued to the partnership was upheld."

Thus, the Morette court granted summary judgment in favor of the plaintiff, declaring that his representatives were entitled to SUM benefits for his injuries and death (without their ever having made a motion for summary judgment).

More recently, the Morette distinction between corporations and LLC's was picked up, adopted and applied by another court in another judicial department, as a matter of first impression therein. In *Global Liberty Ins. Co. of New York v. Khan*, Sup. Ct. Kings Co. Index No. 12870/13, decided Feb. 10, 2014, the court expressly rejected the contention that a policy issued in the name of an LLC should be treated the same as a policy issued to a corporation, for purposes of determining whether "household" coverage applied, and held that "unlike a corporation, a limited liability company is a partnership of individuals with spouses and children" and that "since partnerships are readily distinguishable from traditional corporations [citing *Buckner v. MVAIC*, 66 NY2d 211 (1985)], this Court shall follow *Morette v. Kemper*, 35 Misc.3d 200, 207, 941 NYS2d 440, 446 (N.Y. Sup. 2012) in this case of first impression in the Judicial District and Department." Thus, in that case, the court held that the son of a member of the named insured LLC, who resided with her and was injured while riding his bicycle, was an insured under the commercial policies issued to the LLC.

We are not presently aware of any reported cases that hold to the contrary and apply the same rule to LLCs as to corporations.

Trade Names

Another interesting question in this field is whether coverage may be applicable to a resident relative of an individual who has registered and insured a vehicle in the name of a trade name or "d/b/a." While the Buckner court may have unintentionally raised that issue (without fully addressing or answering it) by citing to a U.S. Court of Appeals for the Third Circuit case in which that issue was analyzed, the New York courts have been silent on this specific question over the years. In our next column, we will review case law from around the country dealing with resident relative coverage for UM/SUM claims under policies issued in the name of a "d/b/a," including the case of *O'Hanlon v. Hartford Accident & Indemnity Co.*, 639 F.2d 1019 (3d Cir. 1981), cited in *Buckner*, supra. From that discussion, we will seek to prognosticate on how the New York courts, when faced directly with that issue, will rule.

1. Dachs, N. and Dachs, J., "SUM Legislation—Good News/Bad News," NYLJ, March 12, 2013, p. 3. col. 1.

2. See also, *Reed v. Federal Ins. Co.*, 71 NY2d 581, 587 (1988) ("the corporate entity necessarily acts only through its agents"); *Standard Fruit and Steamship Company v. Waterfront Commissioner of New York Harbor*, 43 NY2d 11, 15-16 (1977) ("a corporation can only act through its officers and employees").

INSURANCE LAW

Individual Coverage Under Policies Issued to a Trade Name or 'd/b/a'

By Norman H. Dachs

And Jonathan A. Dachs

In our previous column,[1] we discussed the disparate ways in which the New York courts have determined the question of whether individuals are entitled to make claims under policies issued in the name of a corporation, on the one hand, and partnerships, and/or limited liability companies, on the other hand. As we noted, while the courts have consistently precluded individuals from making such claims under corporate policies, they have utilized a more expansive approach in the context of partnership and "LLC" policies, based on the fact that the latter entities, unlike corporations, consist of combinations of individuals, who can suffer injuries and have spouses, households and relatives. Compare *Buckner v. MVAIC*, 66 NY2d 211 (1985) with *Aetna Casualty & Surety v. Mantovani*, 240 AD2d 566 (2d Dept. 1997) and *Morette v. Kemper, Unitrin Auto & Home Ins.*, 35 Misc.3d 200 (Sup. Ct., Essex, 2012). Left for further discussion was the place in this realm of individuals (and their resident relatives) under policies issued in the name of a trade name or "d/b/a."

'O'Hanlon'

In *Buckner*, supra, in which the Court of Appeals held that a policy issued to a family-owned real estate corporation did not provide uninsured motorist coverage to the college-aged son of the officers and sole shareholders of the corporation, who resided with them, the court cited *O'Hanlon v. Hartford Accident & Indemnity*, 639 F.2d 1019 (3d Cir. 1981), as an example of a case where (as distinguished from the result in *Buckner*) coverage was applicable under the supplementary uninsured/underinsured motorist (SUM) endorsement to a commercial auto policy issued in the name of a trade name, pursuant to which the claimant's father conducted business, for injuries sustained by the claimant while occupying a vehicle that was not owned by the father or the business and not insured under the subject policy.

O'Hanlon involved a commercial auto liability policy that was issued in the name of "Coe Management Company," a trade name under which Patrick J. O'Hanlon conducted business, and written to cover a business vehicle, as distinguished from a private passenger automobile. The policy appeared to have been designed to cover business entities rather than natural persons, since in defining "persons insured," it referred to the named insured and "any partner or executive officer thereof." The District Court concluded that Patrick O'Hanlon never intended to protect his family and personal interests under this policy, but, rather, intended the policy to cover only his business-related risks.

> The Third Circuit in 'O'Hanlon' held that "where an insured purchases a policy in a trade name, the policy will be viewed as if issued in his given name."

However, on appeal, the U.S. Court of Appeals for the Third Circuit noted that the application indicated that the insured was an individual, and that the uninsured motorist (UM) endorsement to the policy read "as though it were designed for use with a policy that covered a natural person as named insured." Specifically, the Appellate Court noted that although the insurer knew that the trade name listed as the named insured was synonymous with Patrick O'Hanlon, the endorsement defined "persons insured," in part, as "the named insured...and, while residents of the same household, the spouse and relatives of...[the named insured]."

In analyzing this consideration, the court concluded that "if the description of named insured in the UM coverage endorsement of the policy as Coe Management Company is to be read as synonymous with Patrick J. O'Hanlon, then it is plain that Brian O'Hanlon (his son) did in fact achieve status as a person insured under the UM endorsement simply by being a relative of Patrick J. O'Hanlon residing in the same household." Indeed, the court concluded that "We are obliged to read the designation of the named insured in the UM endorsement as a synonym for Patrick J. O'Hanlon, or at least as though the UM endorsement had identified the named insured as 'Patrick J. O'Hanlon, trading as Coe Management Company."

The O'Hanlon court went on to refer to several cases that discussed the issue of whether a policy that insured an individual under a trade name insured the same person(s) as would a policy issued to that individual under his given name, in the somewhat different context of non-owned or temporary substitute automobile coverage. For example, it noted that the court in *Samples v. Georgia Mutual*, 138 S.E.2d 463 (Ga. App. 1964), observed that a trade name "is merely a name assumed or used by a person recognized as a legal entity," and that "a judgment against one in an assumed or trade name is a judgment against him as an individual," and concluded that "The fact that the plaintiff's husband purchased this automobile in the name that he used in doing business does not contradict the fact that he owned the automobile as an individual."

In *Gabrelcik v. National Indemnity*, 269 Minn. 445, 131 N.W.2d 534 (1964), the court stated "We fail to see how the fact that plaintiff's spouse is the owner of the vehicle in question is changed

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for insurance purposes by the manner in which it is registered with the state. Whether the vehicle is registered in the husband's name or in the name of the business which he owns and operates as a sole proprietorship, the result is the same; namely that the vehicle was owned by the insured's spouse who resided in the same household."

Persuaded by the logic of those cases, the court in *O'Hanlon* held that "where an insured purchases a policy in a trade name, the policy will be viewed as if issued in his given name." Thus, the court reversed the District Court's determination and held that Brian O'Hanlon (actually, his estate) was entitled to UM coverage under the policy issued to "Coe Management Company."

Other Out-Of-State Cases

Research has uncovered several other cases in jurisdictions throughout the country, that have taken a similar approach and reached similar conclusions with regard to policies issued in the name of a trade name. In *Purcell v. Allstate*, 168 Ga. App. 863, 310 S.E.2d 530 (Ga. Court of Appeals 1983), Perry Purcell was self-employed and did business as "Purcell Radiator Service." The "Business Auto Policy" issued by Allstate listed the named insured as "Purcell Radiator Serv.," an "individual" business. (Premiums were paid by checks drawn on the account of Purcell Radiator Service.)—

Purcell's wife, Behre Purcell, was struck as a pedestrian by an underinsured vehicle and sought to recover UM benefits under the Allstate policy. In rejecting Allstate's contention that no uninsured motorist coverage was afforded to Mrs. Purcell under the policy because the named insured was "Purcell Radiator Serv.," rather than Mr. Purcell personally, and Mrs. Purcell was clearly not related by marriage to the named insured, "Purcell Radiator Serv.," the court concluded that "'A trade name is merely a name assumed or used by a person recognized as a legal entity [cits.] A judgment against one in an assumed or trade name is a judgment against him as an individual [cits.].' 'An undertaking by an individual in a fictitious or trade name is the obligation of the individual [cit.].' The fact that [Mr. Purcell] purchased this automobile in the name that he used in doing business does not contradict the fact that he owned the automobile as an individual.... Accordingly, it would follow that Mr. Purcell, as the owner of the vehicle, the 'entity' to whom the uninsured motorist coverage was extended by Allstate's policy, was the true 'named insured' in that regard [citing *O'Hanlon*, supra]."

In *Trombley v. Allstate*, 640 So.2d 815 (La. App. 1994), the court analyzed the issue in the context of a "non-owned auto liability" provision in an auto policy. That case involved an accident between James Trombley and Christie Soileau. The vehicle Ms. Soileau was driving was registered in the name of her father, Richard A. Soileau, who was the sole proprietor of a business titled "The Medicine Shoppe," and the "named insured" under its policy was "Richard A. Soileau, d/b/a The Medicine Shoppe." At the time of the accident, Ms. Soileau was acting in the employ of "The Medicine Shoppe," delivering medication to a customer. There was no dispute that "The Medicine Shoppe" was not an incorporated entity.

The subject insurance policy excluded coverage for bodily injury or property damages "arising out of the ownership, maintenance, use or entrustment to others of any...'auto'...owned or operated by or rented to or loaned to any insured." The policy also contained a provision that included coverage for bodily injury or property damage "arising out of the use of any 'non-owned auto' in your business by any person other than you."

The trial court found that the vehicle registered to Richard A. Soileau was owned by the named insured, Richard A. Soileau d/b/a The Medicine Shoppe. The Appellate Court agreed, rejecting the plaintiff's contention that Richard A. Soileau was a separate legal entity from Richard A. Soileau d/b/a The Medicine Shoppe, thus making it impossible for Richard Soileau d/b/a The Medicine Shoppe to be the owner of the vehicle as envisioned by the exclusionary clause in the policy. In so holding, the court observed that "The plaintiff has cited no authority for the proposition that an individual doing business under a trade name is a separate legal entity from the individual. Further, our research indicates that just the opposite is true; a trade name has no separate existence apart from the individual doing business under that trade name."

The court thus concluded that "Richard A. Soileau d/b/a The Medicine Shoppe is not a juridical person separate and apart from the natural person, Richard A. Soileau. Rather, in law and in fact, they are the same entity. Therefore, the vehicle driven by Richard Soileau's daughter and registered in his name was not 'owned by another' as contemplated in the... policy. Since the vehicle was owned by the insured, the accident falls squarely within the exclusionary clause. For the same reason, the vehicle was not a 'hired auto,' nor a 'non-owned auto.'"

In *Bushey v. Northern Assurance*, 362 Md. 626, 766 A.2d 598 (Ct. of Appeals Maryland 2001), a declaratory judgment action involving the interpretation of an uninsured/underinsured motorist (UM/UIM) endorsement, an automobile accident resulted in the deaths of two young sisters and a claim on behalf of one of the decedents for UM/UIM

The Bushey court held that "the named insured ('you') was Bushey, an individual, and that the trade name was nothing more than the name under which he chose to do business as an individual." Accordingly, coverage was afforded under the policy to his daughter, with whom he resided at the time of the accident.

benefits under a commercial lines policy that their father, William Bushey, had purchased for his gasoline station and automotive repair business. The trial court initially held that there was no coverage under the policy because Bushey's sole proprietorship, the named insured under the commercial lines policy, was "a business entity, not an individual," so that a critical definition in the policy concerning "family members" did not apply. The trial court further and additionally relied upon the fact that the policy, by its terms, required that the motor vehicle at issue be a "covered auto" that was scheduled in the "Garage Declarations" of the "Commercial Auto Coverage Part" of the policy.

On appeal, however, the Appellate Court disagreed with the trial court's interpretation of the policy with respect to the coverage issue, and vacated its determination. In so holding, the court noted that the "named insured" under the policy was identified as "William B. Bushey t/a Bushey's Automotive." The form of business was identified on the policy as "Individual." The policy contained a provision that limited coverage to "owned autos subject to a compulsory uninsured motorists law," and listed in a "vehicle schedule" three vehicles (trucks), each of which was described as "Titled to Business." The policy also contained a provision that defined an "insured"—to whom benefits would be paid as damages from the owner or driver of an uninsured motor vehicle—to include "you" and, "If you are an individual, any 'family member.'" The term "family member" was defined as "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child."

After determining that the initial questions in the case were whether Bushey was "the insured" and whether his daughter was a "family member," as defined, the court focused upon the fact that "The 'you' of the policy is not a business entity separate from Bushey." Although the insurer did not dispute that "Bushey's Automotive Repair" was a sole proprietorship wholly owned by Bushey, it argued that the policy was a commercial policy issued for a business and that it did not cover Bushey as an individual. The court held, however, that this argument, "simply put, is wrong." 362 Md. at 636.

As explained by the Bushey court, "The sole proprietorship form of business provides 'complete identity of the business entity with the proprietor himself....' 1 Z. Cavitch, Business Organizations §1.04[1], at 1-23 (Matthew Bender 2000). 'Bushey's Automotive Repair' has no legal existence apart from its owner, Bushey...." "Numerous decisions recognize in the insurance context the identity of the sole proprietor with the trade name adopted by the sole proprietor" [citing, inter alia, *O'Hanlon*, supra; *Gabrelcik*, supra; *Trombley*, supra].[2]

Based upon the foregoing, the Bushey court held that "the named insured ('you') was Bushey, an individual, and that the trade name was nothing more than the name under which he chose to do business as an individual." Accordingly, coverage was afforded under the policy to his daughter, with whom he resided at the time of the accident.

In *Stoddard v. Citizens Ins.*, 249 Mich. App. 457 (Ct. of Appeals Mich. 2002), a claim for uninsured motorist coverage under plaintiff's husband's commercial auto policy, which identified the "named insured" as "Stoddard's Law Shapers, Tim Stoddard, DBA," a sole proprietorship, the court, citing and relying upon *Bushey*, supra, stated that "Even though the policy is a commercial automobile policy issued to a sole proprietorship, we conclude that the policy language defining an insured as a 'family member' is applicable and operates to provide coverage to plaintiff. 'Under Michigan law, the term "individual" is recognized as designating a natural person and not including business entities such as corporations.' [citation omitted]." The court also observed that "even if defendant's policy language were viewed as ambiguous, the provisions must be read in favor of the insured. The policy must thus be interpreted to include plaintiff, a family member, in the definition of an insured."[3]

New York Cases

New York law similarly recognizes that a trade name has no separate legal existence and is without capacity or status to sue or be sued. See *In re Milby*, 2003 Bankr. LEXIS 2368 (U.S. Bankruptcy Court, NDNY 2003); *Little Shoppe Around the Corner v. Carl*, 80 Misc.2d 717, 718 (County Ct. Rockland Co. 1975); *Marder v. Betty's Beauty Shoppe*, 38 Misc.2d 687 (App. Term, 2d Dept. 1962). Although we have not been able to locate a New York case directly on point involving an insurance policy issued in the name of a trade name, in our opinion, the New York courts would be most likely to follow the lead of the out-of-state cases cited above, and hold that coverage was available for individuals and their resident relatives thereunder.

1. See Dachs, Norman and Dachs, Jonathan, "Individual Coverage Under Corporate, Partnership, LLC and d/b/a Policies," NYLJ, July 18, 2014, p. 3, col.1.

2. See also, *Duval v. Midwest Auto City*, 425 F.Supp. 1381, 1387 (D. Neb. 1977), aff'd. 578 F.2d 721 (8th Cir. 1978) ("The designation "d/b/a" means "doing business as" but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business"); *Pinkerton's v. Superior Court of Orange County*, 49 Ca. App. 4th 1342, 57 Ca. Rptr.2d 356, 360 (1996) ("Use of a fictitious name does not create a separate legal entity"); *Providence Washington Ins. v. Valley Forge Ins.*, 42 Cal. App.4th 1194, 50 Cal. App. 4th 1104 (1996) ("The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner"); *Chmieleuskl v. Aetna*, 218 Conn. 646, 591 A.D.101, 113 (1991) ("We also agree that one who operates a business under a trade name is nonetheless an individual insured under a policy issued in that trade name"); *Georgantas v. Country Mut. Ins.*, 212 Ill. App.3d 1, 156 Ill. App. 311 (1991) ("The universal rule is that the sole proprietor is personally responsible for the activities of the business"); *Carlson v. Doekson Gross*, 372 N.W.2d 902, 905 (N.D. 1985) ("A sole proprietorship which is conducted under a trade name is not a separate legal entity"); *Recalde v. ITT Hartford*, 254 Va. 501, 492 S.E.2d 435, 438 (1997) ("The weight of authority in other jurisdictions has applied the concept that the individual owner and the proprietorship are a single entity in insurance contexts").

3. See also, *Reinbolt v. Gloor* 146 Ohio App.3d 661, 767 N.E.2d 1197 (2001) ("Inasmuch as Ohio law does not recognize a sole proprietorship as a separate legal entity, but as a single individual, no ambiguity arises when the declaration page is read in conjunction with the provisions contemplating coverage for an individual"); *Reinbolt v. Massey*, 2002 WL 1803069 (Ohio Ct. App. 2002) ("The *Reinbolt v. Gloor* holding was predicated upon the conclusion that where a named insured does business as some other name, that business name does not take on a separate legal identity but rather remains synonymous with the sole proprietor. When an insurance contract states that the named insured is John Smith d.b.a Smiths, the 'd.b.a' operates only to further identify John Smith. Thus, an ambiguity does not arise where an insured is defined as 'you.'").

Expert Analysis

INSURANCE LAW

'Use or Operation' and 'Danger Invites Rescue' Doctrine

By Jonathan A. Dachs

One of the principles of law that readers of this column may remember learning in law school, but probably thought they would never see or use in practice, is the "danger invites rescue" doctrine. Liability may be imposed in favor of a person who voluntarily places him or herself in a perilous position to prevent another person from imminent life-threatening peril against a party who, "by his [or her] culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his [or her] aid." See *Provenzo v. Sam*, 23 NY2d 256, 260 (1968); *Fiederbach v. Lennett*, 65 AD3d 1011 (2d Dept. 2009). As prosaically described by Judge Benjamin Cardozo in the landmark case of *Wagner v. International Ry. Co.*, 232 N.Y. 176, 180 (1921), "The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.... The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had." See also N.Y. Pattern Jury Instructions (Civil), 2:13; 2:41.

Although initially thought to apply to cases in which three (or more) persons are involved, as described above, the doctrine has expanded over time to encompass as well a two-party situation, where the culpable party has placed himself [or herself] in a perilous position, which invites rescue. See *Carney v. Buyea*, 271 App. Div. 338 (4th Dept. 1946), motion for leave to appeal denied, 296 N.Y. 1056 (1947); *Talbert v. Talbert*, 22 Misc.2d 782 (Sup. Ct. Schenectady Co. 1960).

Recent case law has made clear that the "danger invites rescue" doctrine is alive and well in New York—at least in the context of supplementary uninsured/underinsured motorist (SUM) coverage and the critical issue of whether it can be said that an injury to a rescuer arose out of the ownership, maintenance or use of a motor vehicle.

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'Kesick'

In *Kesick v. New York Central Mutual Fire Ins. Co.*, 106 AD3d 1219 (3d Dept. 2013), the plaintiff, Kevin Kesick, a state trooper, licensed registered nurse and paramedic, responded to a "911" call for assistance following a two-vehicle accident that occurred when a vehicle owned by Joseph Prindle struck a vehicle owned by Ralph Williams from behind, causing Williams' vehicle to flip over. When Kesick arrived at the scene, Williams was trapped inside his vehicle and complained of pain in the chest, hip and neck. Once the fire department arrived and removed the roof of the vehicle with the Jaws of Life, Kesick entered the vehicle and stabilized Williams' neck.

> Recent case law has made clear that the 'danger invites rescue' doctrine is alive and well in the context of supplementary uninsured/underinsured motorist (SUM) coverage.

While Kesick and two other individuals were lifting Williams out of the vehicle, Kesick injured his right shoulder. Kesick sued Williams and Prindle. The action against Williams was dismissed based upon the absence of his negligence, and Prindle settled the claim against him for the $25,000 limit of his automobile insurance policy. Kesick then sought SUM benefits under a policy he held with New York Central Mutual (NYCM), but that insurer denied coverage on the ground, inter alia, that Kesick was not injured as a result of a motor vehicle accident.

After noting that "[SUM] coverage policies, such as the one at issue herein, apply only when an insured's injuries are [proximately] 'caused by an accident arising out of [the underinsured] motor vehicle's ownership, maintenance or use,'" the Appellate Division, Third Department, ruled that there were questions of fact as to whether or not Kesick's injury was caused by the use of Prindle's underinsured vehicle. It rejected NYCM's view that the insured's injuries must be directly caused by an accident that arose out of the use of a vehicle and its related assertion that the "accident" in this case occurred only at the time of Kesick's injury.

Construing the language of the policy liberally, and resolving ambiguities in favor of the insured, the court concluded that the "use" of the underinsured vehicle was Prindle's negligent operation of his vehicle, and the "accident" occurred when he collided with Williams' vehicle.

The court then noted that Kesick invoked the "danger invites rescue" doctrine to establish the requisite causal connection between the motor vehicle accident and his injuries. Kesick's claims that Williams was injured as a result of the accident caused by Prindle's negligent operation of his vehicle and that Kesick, the first responder on the scene with medical training, was injured in the process of rescuing Williams, were uncontroverted. Thus, the court held that if the facts warranted application of the "danger invites rescue" doctrine, Kesick's injuries were not so remote in either time or space to the use of Prindle's automobile as to preclude a finding of proximate cause as a matter of law.

As explained by the court, "There is no dispute that Prindle's negligent use of his vehicle directly caused the accident that led to Williams' injuries which, in turn, led to plaintiff's intervention." Considering the open question of the applicability of the "danger

Doctrine

« Continued from page 3

invites rescue" doctrine and liberally construing the provisions of the SUM policy in Kesick's favor, the appellate court thus held that the Supreme Court properly denied NYCM's motion for summary judgment dismissing the complaint.

'Encompass v. Rich'

More recently, in *Encompass Indemnity v. Rich*, 131 AD3d 476 (2d Dept. 2015), Kenneth Goodman was driving his vehicle and speeding when he lost control and crashed into a utility pole. When firefighter Kevin Rich's engine company responded to the scene of the accident, Goodman was trapped inside his vehicle. In order to extract him from the vehicle, the firefighters used the Jaws of Life to cut the vehicle's roof, and Rich and three other firefighters lifted the roof off of the vehicle. In the process of doing so, Rich sustained injuries to his right shoulder.

After receiving a settlement offer of the full available limits of Goodman's auto insurance policy, Rich sought coverage under the SUM endorsement contained in his own policy, issued by Encompass. Encompass denied coverage on the ground that Goodman's use of his vehicle was not a proximate cause of Rich's injuries, and subsequently sought to stay arbitration on that ground.

In reversing the Supreme Court's grant of Encompass' petition for a permanent stay of arbitration, the Second Department noted that "SUM endorsements provide coverage only when the injuries are 'caused by an accident arising out of such underinsured motor vehicle's ownership, maintenance or use' (11 NYCRR 60-2.3[f][II]; see *Matter of Allstate Ins. v. Reyes*, 109 AD3d 468; *Matter of Liberty Mut. Fire Ins. Co. [Malatino]*, 75 AD3d 967, 968). Factors to be considered in determining whether an accident arose out of the use of a motor vehicle include whether the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produces the injury rather than merely contributes to cause the condition which produces the injury [citations omitted]. '[T]he [vehicle] itself need not be the proximate cause of the injury "but negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury"' [Id.]. 'To be a cause of the injury, the use of the motor vehicle must be closely related to the injury' [Id.]. '[T]he use of the underinsured vehicle must be a proximate cause of the injuries for which coverage is sought' [citations omitted]."

Like Kesick before him, Rich invoked the doctrine of "danger invites rescue" to establish that Goodman's negligent use of the underinsured vehicle proximately caused his injuries. The court held that Encompass failed to establish that Rich was not entitled to coverage under the SUM endorsement because "[t]he evidence in the record establishes that Goodman's negligent use of his vehicle directly caused the accident that led to him being trapped and in obvious need of medical attention, which, in turn, led to Rich's intervention and resulting injuries." Specifically, the court held that "It cannot be said, as a matter of law, that Goodman's negligent use of his vehicle was not a proximate cause of Rich's injuries under the doctrine of danger invites rescue."

It is notable that in rendering its decision, the Encompass court took pains to distinguish an earlier decision and order in a liability coverage case—*Zaccari v. Progressive Northwestern Ins.*, 35 AD3d 597 (2d Dept. 2006)—in which it found the doctrine of "danger invites rescue" to be inapplicable based upon the plaintiff rescuer's failure of proof as to the exact cause of his injury and when during the rescue the injury actually occurred.

In contrast, the proof proffered by Rich, which included his affidavit, "described in detail the scene of Goodman's accident, Goodman's physical condition following the accident, Rich's actions at the accident scene, and the exact cause of Rich's injury."

'Pierre'

Finally, and most recently, in *Pierre v. Olshever*, 137 AD3d 1243 (2d Dept. 2016), a case involving liability coverage, the Appellate Division, Second Department, rejected the plaintiff's claim of the applicability of the 'danger invites rescue' doctrine, and granted the initial driver's motion for summary judgment.

In 'Pierre v. Olshever,' a case involving liability coverage, the Second Department rejected the plaintiff's claim of the applicability of the 'danger invites rescue' doctrine, and granted the initial driver's motion for summary judgment.

While driving his car westbound on the service lane of the Long Island Expressway, the defendant, Joseph Aluto, lost control while trying to avoid debris in the roadway, left the roadway, and struck a tree, causing the vehicle to flip onto its driver's side and come to a rest in a portion of the right travel lane. Approximately 10 to 15 minutes later, after Aluto had already exited his vehicle, walked to the opposite side of the roadway, and stood on a grassy area of the shoulder, plaintiff's decedent stopped his truck in the right lane behind the Aluto vehicle, exited his truck, and began walking in the left lane toward the overturned vehicle, at which point he was struck by a vehicle traveling in the left lane.

In support of his motion for summary judgment, Aluto established, via evidentiary proof, that he was "not negligent in causing the accident" involving the decedent and the other vehicle, and that his conduct "merely furnished the condition for the accident involving the decedent, and was not a proximate cause of the decedent's injuries and resulting death." After noting that neither the plaintiff nor the owner and operator of the other vehicle raised a triable issue of fact, the court found that the "danger invites rescue" doctrine was inapplicable because "There is nothing in the record to suggest that Aluto was a culpable party who voluntarily placed himself in imminent life-threatening peril which invited rescue."

Moreover, although unstated by the court, there was nothing about the situation to suggest that the decedent could have reasonably believed that Aluto was "actually at risk of serious injury" or "in imminent peril" at the time, or, even to establish that the decedent was actually intending to rescue Aluto, rather than just take a look at the oddity of the upside down car. See *Tassone v. Johannemann*, 232 AD2d 627 (2d Dept. 1996).

Conclusion

The distinctions drawn and explanations offered in the above-cited cases provide the practitioner with important advice about how to establish a proper and valid "danger invites rescue" claim in the rare, but not extinct, circumstances in which it might apply.

INSURANCE LAW

SUM Offsets: a Rare Reversal of 'Settled' Law

By Jonathan A. Dachs

One of the more interesting, and significant, insurance law questions that has been posed to the courts in recent years involves the issue of whether an "SUM" carrier is entitled to an offset or reduction in coverage for the amount(s) received from non-motor vehicle tortfeasors, such as municipalities, bars, and/or medical providers, in addition to amounts received by the insured/claimant from the motor vehicle tortfeasor involved in the accident. Although the initial decisions on that issue were consistent in expansively reading the SUM endorsement to maximize the number of potential offsets or reductions in the SUM insurer's policy limits (thereby minimizing the SUM coverage), a more recent decision by the Appellate Division, Second Department, in which that court, in a rare move, effectively overruled an earlier holding, has created a division of authority that leaves the question somewhat "unsettled."

Pertinent Policy Provisions

The Supplementary Uninsured/Underinsured Motorists (SUM) Endorsement—New York[1] prescribed by the Insurance Department in 1993 as part of Regulation 35-D,[2] provides in its "Maximum SUM Payments" Condition (Condition 6), that "Regardless of the number of insureds, our maximum payment under this SUM endorsement shall be the difference between: (a) the SUM limits [stated in the Declarations] and (b) the *motor vehicle bodily injury liability insurance or bond payments* received by the insured or the insured's legal representative, from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured [emphasis added]."

That the specific reference to "motor vehicle bodily injury liability insurance or bond payments" was intended by the drafters of the regulation to distinguish recoveries from parties responsible for the use or operation of a motor vehicle covered under a motor vehicle liability policy from other, non-motor vehicle, tortfeasors, such as, for example, Dram Shop defendants (bars), municipalities responsible for a defective traffic light or stop sign, or doctors who committed medical malpractice, is apparent from the change in language noted above. It is also apparent from the numerous examples of SUM coverage set forth in the regulation and required to be set forth in written notices to new and renewal insureds in order to "illustrate the proper application of SUM coverage,"[3] all of which depict and demonstrate recoveries by the claimant from "the negligent owner or operator of the other motor vehicle" or the "other motor vehicle owner or operator."

> While the state of the law appeared well-settled following 'Weiss' and 'Redeye,' another similar case was winding its way to the Second Department.

While it appears clear from the above that only motor vehicle bodily injury insurance policies received by the insured are to be considered when arriving at the maximum amount available to the claimant, there is another provision in the same prescribed Endorsement, which, at least according to some, clouds the issue.

Condition 11, titled "Non-Duplication," provides, in pertinent part, as follows:

"This SUM coverage shall not duplicate any of the following:

* * *

(e) Any amounts recovered as bodily injury damages from sources *other than motor vehicle bodily injury liability insurance policies or bonds*" [emphasis added].

'Weiss v. Tri-State Consumer'

The first major case to deal with the interplay between Condition 6 and Condition 11 of the SUM endorsement was *Weiss v. Tri-State Consumer Ins. Co.*, 98 A.D.3d 1107, 951 N.Y.S.2d 191 (2d Dept. 2012). There, a vehicle owned and operated by Anton Goldenberg was struck by a vehicle owned by Christopher McGibbon and operated by Michael McGibbon, an off-duty New York City police officer, who was intoxicated. Goldenberg and his wife, a front-seat passenger, as well as Michael McGibbon, sustained fatal injuries in the accident. The McGibbon vehicle was insured by State Farm, with liability limits of $50,000/$100,000. The Goldenberg vehicle was insured by Tri-State, with liability and SUM limits of $250,000/$500,000.

The lawsuit brought against the McGibbons (negligence), as well as a bar and diner that served Michael McGibbon alcoholic beverages prior to the accident (Dram Shop liability), was settled, with Tri-State's consent, for a total of $355,000 settlement, consisting of the full $100,000 on the State Farm/McGibbon policy, plus $255,000 from the Dram Shop defendants. Plaintiffs' subsequent demand that Tri-State tender the $400,000 in SUM coverage available (i.e., the $500,000 per accident limit less the $100,000 received from the motor vehicle tortfeasor [McGibbon]) was rejected by Tri-State on the basis that, pursuant to the Non-Duplication provision of its SUM endorsement, any settlement money obtained from the Dram Shop defendants should be used to reduce its coverage, which in this case, would reduce the $500,000 available SUM coverage to $145,000.

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SUM Offsets

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Both parties moved for summary judgment in their favor. Plaintiffs argued, inter alia, that the SUM endorsement, as a whole, was clear in its intention to consider only motor vehicle insurance in the offset/reduction in coverage calculus, and that the Non-Duplication provision, and Tri-State's interpretation thereof, did not warrant an offset or reduction for the sums received from the non-motor vehicle defendants.

Tri-State, on the other hand, although effectively conceding that if the plaintiffs had elected not to pursue their Dram Shop action they would have been entitled to seek the full $400,000 in SUM coverage, argued that the Non-Duplication provision "clearly applies to the Dram Shop settlement proceeds inasmuch as the settlement compensates plaintiffs for the same bodily injury damages for which the SUM coverage is sought," and that provision had never been held to be vague, ambiguous, or in conflict with any other provision of the endorsement."

Justice Bert A. Bunyan, of the Supreme Court, Kings County, held in favor of plaintiffs and against Tri-State, finding, as pertinent hereto, that "nothing within the offset provision of the endorsement (i.e., paragraph 6 of the Conditions) indicates that proceeds from a Dram Shop lawsuit will offset the SUM coverage."

Notably, in what, as will be seen, would turn out to be a prescient statement, Justice Bunyan noted that "allowing Plaintiffs to retain the Dram Shop settlement without reducing the SUM limit by a like amount will not result in a duplicate recovery or windfall for Plaintiffs. In this regard, Plaintiffs must still prove damages before tapping into the $400,000 in available SUM coverage. As it is, given the underlying circumstances of this matter, it may well be that the damages are ultimately found to exceed the combined value of the SUM coverage, the Dram Shop settlement, and the $100,000 settlement paid by the offending vehicles' carrier."

Accordingly, Justice Bunyan granted plaintiffs' motion for summary judgment to the extent of determining that the available SUM coverage was $400,000.

On Tri-State's appeal, the Second Department reversed Justice Bunyan's order, and held that the amount of available SUM coverage was limited to $145,000 because the amount payable under the SUM endorsement was subject, by virtue of the Non-Duplication provision, to reduction for the amounts recovered from the Dram Shop defendants. The court held that the Dram Shop recovery constituted an "amount recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds" under Condition 11(e), which does not allow duplicate recovery of such damages.

The court further noted that plaintiffs were "not penalized" by the reduction of the amount payable under the SUM endorsement by the $255,000 received from the Dram Shop defendants "since they received the maximum amount for which they are covered under the SUM endorsement" (i.e., $500,000): $100,000 from the McGibbons' policy, $255,000 from or on behalf of the Dram Shop defendants, and $145,000 from Tri-State.

'Redeye v. Progressive'

Three years after, *Weiss*, supra, was decided by the Second Department, the case of *Redeye v. Progressive Ins. Co.*, 133 A.D.3d 1261, 19 N.Y.S.3d 645 (4th Dept. 2015), lv. to appeal denied, 26 N.Y.3d 918, 26 N.Y.S.3d 764 (2016), was presented as a "matter of first impression" to the Fourth Department. Although plaintiff's counsel therein acknowledged that the issue presented had, in fact, been decided by the Second Department in *Weiss*, supra, he argued that "the Weiss court wrongly decided the issue...."

Plaintiff, Daniel Redeye, was a pedestrian struck by a motor vehicle owned and operated by Andrew J. Hoffman, an alleged drunken driver, who collided with a parked car and bounced off into plaintiff (and two other pedestrians). Hoffman was insured by GEICO, with bodily injury liability limits of $25,000/$50,000. Plaintiff had his own motor vehicle insurance policy with Progressive, with bodily injury and SUM limits of $50,000/$100,000.

As a result of this accident, plaintiff commenced an action against Hoffman for negligence, and against the Cold Spring Volunteer Fire Department for negligence and Dram Shop law violations, for having served alcohol to Hoffman prior to the accident. During the course of that litigation, GEICO offered its entire per accident policy limit of $50,000 to plaintiff and the other two pedestrians injured as a result of Hoffman's negligence—to be equally divided among them (i.e., $16,666.66 each). In addition, Selective Insurance Co., Cold Spring's commercial general insurer, offered $170,000 to plaintiff to settle the case against Cold Spring.

Plaintiff received Progressive's consent to both settlements, and then proceeded to file an SUM claim with Progressive for the amount of $33,333.34, reflecting the difference between the $50,000 in SUM coverage he purchased

and the $16,666.66 he received as payment from the motor vehicle policy covering the motor vehicle tortfeasor.

Progressive denied any obligation to compensate plaintiff under its SUM endorsement because, pursuant to the Non-Duplication provision of its SUM endorsement, and consistent with *Weiss*, supra, it was entitled to an offset or reduction in coverage for not only the $16,666.66 plaintiff received from GEICO, but also the $170,000 he received from Selective—which effectively reduced the available SUM coverage to zero.

In opposing Progressive's motion for summary judgment dismissing plaintiff's complaint to recover SUM benefits in the amount of $33,333.34, plaintiff asserted many of the same arguments as did the plaintiff in *Weiss*, and argued that *Weiss*, which he conceded was "directly on point," was "wrongly decided" by the Second Department, and should not be followed in the Fourth Department.

The Supreme Court, Erie County (O'Donnell, J.), in reliance upon *Weiss*, ruled in favor of Progressive and dismissed plaintiff's complaint on the ground that "Under the clear terms of the SUM endorsement, the Plaintiff's receipt of the Dram Shop recovery reduces, by that same $170,000, the amount payable under the SUM endorsement."

It is interesting to note that on his appeal, plaintiff, in addition to repeating the arguments mentioned above, also argued, alternatively, that even assuming, arguendo, that Condition 11 applied and provided for a further reduction of the SUM policy limits, "the Defendant did not meet its burden of proving a duplication of benefits." Specifically, plaintiff argued that "The value of the Plaintiff's injuries would be well in excess of the settlement he received in his underlying case which was a compromised settlement given the inherent difficulties in ultimately proving a dram shop action."

Plaintiff further argued that "[t]he settlement received by the Plaintiff did not fully compensate him for the value of his injuries or the different types of damages claimed. Consequently, in this case, the Plaintiff's claim for SUM benefits would not, in fact, duplicate the amount he already received from the non-motor vehicle liability policy payment because he was not fully compensated," and, therefore, the moving defendant did not establish that there was any duplication of the amounts plaintiff "already recovered or what he would be entitled to."

In affirming the Supreme Court's decision, the Fourth Department pointed to the Non-Duplication provision, and held that "Here, the payment plaintiff received from the tire company's insurer was for bodily injury damages, and thus the amount of SUM benefits available to plaintiff was properly reduced by that amount [citing *Weiss*, supra]." The court further held that the policy was not ambiguous, and that Condition 11 did not conflict with Condition 6, noting that Condition 6 does not state that the difference between the SUM limit and any payments received from a motor vehicle bodily injury liability policy is "the" SUM payment that is to be given to the plaintiff, but, rather, that the difference is the "maximum" payment, "which the average insured would understand to mean that it could be further reduced."

> The Second Department in 'Sherlock' noted that "The key to a proper understanding of Condition 11 is the recognition that 'shall not duplicate' is not aimed at preventing an insured from seeking full compensation by combining partial recoveries from several tortfeasors, but at preventing double recoveries for their bodily injuries."

A Rare Reversal: 'Sherlock'

While the state of the law appeared well-settled following *Weiss* and *Redeye*, supra, another similar case was winding its way to the Second Department at around the same time that *Redeye* was proceeding to the Fourth Department.

In *Government Employees Ins. Co. v. Sherlock*, __ A.D.3d __ , 32 N.Y.S.3d 635 (2d Dept. 2016), the claimant's decedent was operating his GEICO-insured vehicle when it was struck head-on at a high rate of speed by a vehicle owned and operated by Jose Maldonado, which was insured by New York Central Mutual Ins. Co. At the time of the accident, the Maldonado vehicle was being followed by an Old Brookville police officer, who had observed him speeding. The Maldonado vehicle carried bodily injury liability coverage of $25,000/$50,000, which expanded to $50,000/$100,000 in the case of death. The decedent's vehicle carried bodily injury and SUM limits of $250,000/$500,000.

New York Central paid its entire $50,000 limit to settle the action against Maldonado. U.S. Specialty

Ins. Co., the insurer for the Village of Old Brookville and other municipal defendants, paid $425,000 from its public risk professional policy to settle the action against its insureds. Presumably, these settlements were reached with GEICO's consent.

Subsequently, the estate representative filed a claim with GEICO for $200,000 in SUM benefits (representing its $250,000 SUM limits less the $50,000 received from the tortfeasor's insurer). In response, GEICO petitioned to stay arbitration on the ground that, pursuant to *Weiss*, the $425,000 received from or on behalf of the municipal defendants must be taken into account and included in the offset or reduction in coverage, and, therefore, its SUM policy limits were reduced to zero.

In opposition to GEICO's Petition to Stay, the claimants contended that rather than permitting an offset of SUM coverage, the Non-Duplication provision ensures that the policyholder does not receive duplicative recovery, and that to the extent that Weiss holds otherwise, it should be overruled.

The Supreme Court, Nassau County (Feinman, J.), granted GEICO's Petition and issued a permanent stay on the ground that under *Weiss*, the payment by the public risk policy reduced the SUM coverage to zero. Indeed, the court stated that "the Weiss decision controls, is applicable and under the doctrine of stare decisis shall be followed."

Undaunted by the severe challenge imposed by the doctrine of stare decisis, the claimants boldly took an appeal from this decision in order to test "whether *Weiss v. Tri-State Consumers Ins. Co.*, should be overruled and whether the Non-Duplication Condition allows for an offset of coverage."

One of the major arguments made by claimants was that "the proof at the Sherlock arbitration will be that the pecuniary damages for loss of financial support, loss of household services and loss of nurture and guidance suffered by the claimants...far exceed the $425,000.00 paid by the municipal Defendants. From the Appellant's view, the total coverage here is woefully inadequate. There will be no duplication. In any event, it will be the arbitrator's role to determine the totality of the damages."

Claimants also argued that the legislative purpose of SUM coverage supports a ruling that payment from non-motor vehicle bodily injury liability insurance should not offset coverage, and that the Legislature's intent was to provide an insured with as much coverage as he or she provided to other motorists. As the court summarized the claimant's argument, "In essence, [the claimant] contends that the purpose of Condition 11(e) is to prevent insureds from receiving more in compensation than they have suffered in injury; it is not intended to prevent an insured from obtaining benefits that would bring them closer to full compensation for the injuries that they prove they have suffered. [Claimant] contends that *Weiss* was wrongly decided to the extent that it holds otherwise."

In a decision handed down on June 8, 2016, the Second Department, notwithstanding its earlier Weiss decision, reversed the order appealed from by claimants and denied GEICO's Petition to Stay Arbitration. The court noted that "The key to a proper understanding of Condition 11 is the recognition that 'shall not duplicate' is not aimed at preventing an insured from seeking full compensation by combining partial recoveries from several tortfeasors, but at preventing double recoveries for their bodily injuries."

The court further noted that the claimant alleged in her request for arbitration that the bodily injury damages were "in the millions of dollars," and that presumably, if the motor vehicle defendant's policy had contained the same $250,000 liability limit as GEICO's policy, claimant would have been able to obtain $250,000 from the motor vehicle tortfeasor's insurer, plus the $425,000 from the municipal defendant's insurer. Here, the claimant seeks only through her SUM claim "to be in the same position she would have been in had the Maldonado defendants not been underinsured relative to the GEICO policy."

Finally, the court stated that "to the extent that *Weiss* can be interpreted to require that the amount of SUM coverage be reduced without regard to the actual amount of bodily injury damages suffered, *it should no longer be followed*." (Emphasis added.) Accordingly, since the full (actual) amount of the bodily injury damages had not yet been determined, claimant was allowed to proceed to arbitration—the clear implication being that if the damages are found to exceed $475,000, she should be allowed to recover up to $200,000 under the SUM policy.

Conclusion

As things now stand, and at least until the Court of Appeals has occasion to speak on this issue, or the Department of Financial Services amends Regulation 35-D, the answer to the question posed at the beginning of the article depends upon the jurisdiction in which it is litigated.

1. See 11 NYCRR §60-2.3 (f).
2. See 11 NYCRR §60-2.3, et seq.
3. See 11 NYCRR §60-2.2(b)[1]-[4].

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EDUCATION

New York University Law School
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Columbia College
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ADMISSIONS AND LICENSES

New York State (1984)
United States Court of Appeals for the
Second Circuit (1990)
United States District Court for the
Eastern District of New York (1984)
United States District Court for the
Southern District of New York (1984)

LEGAL EXPERIENCE

1986-Present **Shayne, Dachs, Sauer & Dachs, LLP**
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Mineola, New York
Position: Associate, 1986 - 1989
Partner, 1990 - Present

1983-1986 **Chadbourne & Parke, Esqs.**
New York, New York
Position: Associate

HONORS

1995 Outstanding Young Lawyer Award,
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Negligence and Compensation Law Section)

MEMBERSHIPS

New York State Bar Association
Bar Association of Nassau County
New York State Trial Lawyers Association –
Member of Board of Directors (2001-2006)
Nassau-Suffolk Trial Lawyers Association

CHAIRMANSHIPS AND COMMITTEES

Bar Association of Nassau County:

Insurance Law Committee
(Vice-Chair, 1993-1994)
(Chair, 1994-1996)
Appellate Practice Committee
(Vice-Chair, 1999-2000)

SEMINARS AND LECTURES

NEW YORK STATE JUDICIAL SEMINAR

"Uninsured and Underinsured Motorist Insurance"
(July 1998)

NEW YORK STATE JUDICIAL INSTITUTE

Summer Regional Program, 9th Judicial District,
White Plains, N.Y. (July 2016)

UM/SUM Coverage Update: 2015-2016

ASSOCIATION OF SUPREME COURT JUSTICES / BOARD OF JUDGES OF THE CIVIL COURT

"Uninsured Motorists Insurance, Underinsured Motorists Insurance, UM/SUM" (May 1999)

APPELLATE DIVISION, FIRST AND SECOND DEPARTMENTS and OFFICE OF COURT ADMINISTRATION

"Insurance Law 2012-2013" (June 2013)

NEW YORK STATE ASSEMBLY

"Arbitration/Litigation of Uninsured/Underinsured/SUM Claims" (December 2003)

NEW YORK STATE BAR ASSOCIATION

"Uninsured Motorist Coverage -- Proposed Regulation 35-D," Committee on Tort Reparations (January 1991)

"Uninsured/Underinsured Motorist Coverage" (May 1992)

"MVAIC, Uninsured Motorist Law and Stacking" (March 1993)

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"Automobile Insurance Law and Practice: Uninsured and Underinsured Motorist Coverage" (April 1994)

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"Insurance Coverage Issues – With a Focus On Personal Lines" (October, November 1998)

"Insurance Issues in Personal Injury Cases for the Experienced Litigator" (May, June 2000) (Chairman/Speaker)

"A Primer on Automobile Litigation and Insurance Coverage Concerns" (November 2000)

"Automobile Liability 2003" (September 2003)

"Law School for Claims Professionals" – Automobile Liability (October 2009)

"Handling Tough Issues In A Plaintiff's Personal Injury Case" -- Uninsured and Underinsured Motorist Coverage (November 2009)

"Basic Tort and Insurance Law Practice" – Auto Insurance Issues (May 2010)

"Automobile Liability 2011: An Update" – Uninsured & Underinsured Motorist Coverage (March 2011)

"Law School for Insurance Professionals" – Auto Liability/Uninsured and Supplementary Uninsured Coverage (October 2011)

"Advanced Insurance Coverage: Emerging Issues, Developments and Strategy" – UM/SUM Coverage Update (May 2014)

NEW YORK STATE TRIAL LAWYERS INSTITUTE

"Automobile Liability and Insurance Coverage" (November 1988)

"Uninsured and Underinsured Motorist Coverage" (January 1994)

"Uninsured Motorist Practice" (February 1995)

"Automobile Insurance 1996" (January 1996)

"Automobile Insurance 1996" (April 1996)

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"Decisions 2003" (October 2003)

"Decisions 2004" (October 2004)

"Auto Insurance Issues 2005" (June 2005)

"Decisions 2005" (September 2005)

"Decisions 2006" (October and November 2006)

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"Decisions 2011" (September and November 2011)

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"Decisions 2013" (October and November 2013)

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NASSAU COUNTY BAR ASSOCIATION/NASSAU ACADEMY OF LAW

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"Uninsured and Underinsured Motorist Coverage" (May 1992)

"Uninsured/Underinsured Motorist Coverage -- The New 'SUM' Regulation" (March 1993)

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"Automobile Insurance Law Update 2000" (Chairman/Speaker) (March 2000)

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"Effective Legal Writing and Presentation of Arguments to the Court" (Chairman/Speaker) (February 2002)

"Auto Insurance Law Update 2002" (Chairman/Speaker) (May 2002)

"Auto Insurance Law Update 2003" (Moderator/Speaker) (March 2003)

"Auto Insurance Law Update 2004" (Moderator/Speaker) (May 2004)

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"Auto Insurance: Is It Working for You?" Sid Jacobson JCC (November 2009)

"Insurance Law Update 2010" (Moderator/Speaker) (April 2010)

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"Twentieth Annual Automobile Liability Update: SUM Coverage" (May 2011)

"Twenty-First Annual Automobile Liability Update: SUM Coverage" (June 2012)

"Twenty-Second Annual Automobile Liability Update: SUM Coverage" (June 2013)

"Twenty-Third Annual Automobile Liability Update: SUM Coverage" (June 2014)

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QUEENS BAR ASSOCIATION

"Advanced Insurance Issues – SUM Coverage" (March 2000)

"Automobile Insurance Update" (St. John's Law School) (October 2001)

"Litigation of Uninsured/Underinsured/SUM Claims" (November 2003)

"Litigation of Uninsured/Underinsured/SUM Claims" (November 2004)

"UM/SUM Update – Ask the Experts (With Norman H. Dachs) (December 2005)

"UM/SUM Update" (February 2007)

"UM/SUM Seminar" (December 2007)

ST. JOHN'S LAW SCHOOL

"No-Fault, Uninsured and Underinsured Motorist Insurance" (October 1993)

AMERICAN ARBITRATION ASSOCIATION

"Uninsured and Underinsured Motorist Coverage" (November 1990)

"SUM Seminar" (October 1999)

NATIONAL BUSINESS INSTITUTE

"Uninsured and Underinsured Motorist Law in New York", Long Island (May 2003)

"Uninsured and Underinsured Motorist Law in New York", Manhattan (February 2004)

"Uninsured and Underinsured Motorist Law in New York", Brooklyn (February 2004)

"Litigating the Uninsured & Underinsured Motorist Claim", Long Island (May 2008)

"Settling Uninsured & Underinsured Motorist Claims", Manhattan (July 2008)

MAPFRE INSURANCE COMPANY

"New York Legal Seminar" - Uninsured and Underinsured Motorist Law and Practice (September 2013)

NEW YORK CENTRAL MUTUAL INSURANCE COMPANY

"Uninsured and Underinsured Motorist Coverage" (June 1991)

NATIONWIDE INSURANCE COMPANY

"SUM Coverage Issues – Claims Handling" (September 1997)

"Disclaimers and Cancellations" (April 1999)

HARTFORD INSURANCE COMPANY

"Handling UM and SUM Claims" (May 2003)

GENERAL CASUALTY INSURANCE COMPANY

Litigation of UM/SUM Claims" (June 2005)

PUBLICATIONS

BOOKS

Author, "New York Uninsured and Underinsured Motorist Law & Practice," (LexisNexis/Matthew Bender, 2016) (518 pp.) (Supplemented annually)

Author, "Uninsured and Underinsured Motorist Protection," 2 New Appleman New York Insurance Law (LexisNexis), Chapter 28 (348 pp.) (Supplemented bi-annually)

Author, "Uninsured Motorist (UM), Underinsured Motorist (UIM) and Supplementary Uninsured Motorist (SUM) Coverage in New York -- Pre and Post Regulation 35-D," Weitz on Automobile Litigation: The No-Fault Handbook (Harvey Weitz and Richard Ancowitz, Eds., New York State Trial Lawyers Institute)

Advisory Board/Editor, New York Motor Vehicle Accidents (James Publishing)

JOURNALS

Co-Author, "Insurance and No-Fault Law," regular featured column in The New York Law Journal (September 1987 - Present) (with Norman H. Dachs)

Contributor, Trial Lawyers Section Digest, New York State Bar Association (1993 - Present)

Editor-in-Chief, New York Negligence Reporter (Matthew Bender & Co., Inc.) (1989-1992)

ARTICLES

TRIAL LAWYERS QUARTERLY
(New York State Trial Lawyers Institute)

"Of Experts and Superheroes: Protecting the Secret Identity of Medical Malpractice Experts" (Spring 1996)

"Back to the Future: Expanding Traditional Tort Concepts to Reach Preconception Torts" (Fall 1994)

"The Application of Labor Law §240(1)" (Summer 1991)

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"2014-2015 Review of UM/UIM/SUM Law and Practice - - Part II" (May 2016)

"2014-2015 Review of UM/UIM/SUM Law and Practice - - Part I" (March/April 2016)

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"2012 Review of UM, UIM and SUM Law" (July/August 2013)

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"2010 Review of Uninsured, Underinsured, and Supplementary Uninsured Motorist Insurance Law" (May 2011)

"2009 Review of Uninsured, Underinsured and Supplementary Uninsured Motorist Law" (July/August 2010)

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"Uninsured Motorist/Supplementary Uninsured and Underinsured Motorist Update – Part I" (June 2007)

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"The Contest of Multiple Tort Plaintiffs for Limited Insurance Policy Proceeds: Pro-Rata Distribution or First Come, First Served?" (December 1998)

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"Damages for Conscious Pain and Suffering Prior to Death -- An Update" (December 1993)

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(American Arbitration Association)

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PROFESSIONAL INSURANCE AGENTS MAGAZINE

"SUM Regulations Redux" (September 1992)

UNITY

"Chiropractors and the Law -- The No-Fault 'Serious Injury' Threshold" (August 1984)

NEW YORK NEGLIGENCE REPORTER

"The Police Officer Rule: Catching The Policeman in the Fireman's Net" (October 1990)

"Preconception Tort Actions: Are They Viable or Inconceivable?" (August, September 1990)

"For Whom the Doorman Toils: Service of Process Upon Doormen, Concierges and Other Defenders of the Dwelling Place" (June 1990)

"Lex, Spies & Videotapes" (February 1990)

"Negligent Entrustment of a Dangerous Instrumentality: Just Say No" (January 1990)

"Reaching for Higher Ground -- Is Labor Law §240(1) Applicable to 'Grounded' Workers?" (November 1989)

THE NASSAU LAWYER

"Operation of Law Expands Minimum Auto Policy Limits" (February 2004)

NEW YORK LAW JOURNAL
("Insurance and No-Fault Law"/ "Insurance Law" Column, 1987 to present)

"'Use or Operation' and 'Danger Invites Rescue' Doctrine" (September 2016)
"SUM Offsets: A Rare Reversal of 'Settled' Law" (July 2016)
"'Viking Pump': Allocation, Exhaustion, Policy Interpretation" (May 2016)
"Insurance Law Lessons My Father Taught Me" (February 2016)
"Individual Coverage Under Policies Issued To A Trade Name or 'd/b/a'" (September 2014)
"Individual Coverage Under Corporate, Partnership, LLC and 'd/b/a' Policies" (July 2014)
"Court of Appeals Decisions:'Jinx-Proof' and Reservation of Rights Letters" (May 2014);
"Court of Appeals Clarifies Timeliness of Non-Cooperation Disclaimer" (March 2014);
"No-Fault Miscellany: Arbitration, IMEs, Burden of Proof and Fraud Prevention" (January 2014);
"Recent Decisions (Other Than `K2') On An Insurer's Duty to Defend" (November 2013);
"When Is An Auto `Furnished or Available for Regular Use'?" (September 2013);
"The Importance of the Noncumulation Clause" (July 2013);
"The Insurance 'Top 68' and SUM Legislation Update" (May 2013)
"SUM Legislation – Good News/Bad News" (March 2013)
"Caveat Broker: Court of Appeals Classifies Insured's Duty to Read the Policy" (January 2013);
"'Sandy' Moratorium and SUM Trigger" (November 2012);
"Settlement With Non-Motor-Vehicle Tortfeasor Under SUM Endorsement" (July 2012);
"Insurers As 'Necessary' Additional Respondents" (May 2012)
"Actions Against Agents or Brokers" (March 2012);

"The Insurance 'Top 62': Annual Rankings" (January 2012);
"The SUM Offset/Reduction In Coverage Provision" (November 2011);
"Back to College: Still Covered?" (September 2011);
"Multiple Meanings of 'Direct Action' Against Insurer" (July 2011);
"Definition of 'Accident' Undergoes Significant Change" (May 2011);
"No-Fault Amendments – New and Proposed" (March 2011)
"The Insurance "Top 50"/Review of Arbitrators' Awards" January 2011);
"Updates: 'Operation' and Passengers, Reasonable Belief in Nonliability" (November 2010);
"Coverage in Context: Defining 'Use' of a Motor Vehicle" (September 2010);
"Proposed Amendments to the No-Fault Law, Take 2" (July 2010);
"Proposed Amendments to the No-Fault Law" (May 2010);
"Fine Line Between Exclusion and NonCoverage" (March 2010);
"'Top 10' Companies and Other Developments" (January 2010);
"Insurance Coverage? Don't Mention It" (November 2009);
"Importance of Providing The Policy to the Court-- Redux" (September 2009);
"Court of Appeals Addresses Uninsured, Underinsured Motorists Issues" (July 2009);
"Law In Flux On Coverage For Same-Sex Couples" (May 2009);
"Ranking the Auto Companies, And Loss of Fetus As A Serious Injury" (March 2009);
"Recovering 'Excess Economic Loss' In Litigation or SUM Arbitration" (January 2009);
"Belief in Nonliability As Excuse for Late Notice of Claim" (November 2008);
"Recent Evidentiary Rulings" (September 2008);
"Status of 'No Prejudice" and Direct Action Legislation" (July 2008);
"The Insurance 'Top 10,' Notice of Lawsuit Trigger" (May 2008)
"Schlott, Not" (March 2008)
"Raffellini: Status Quo Restored" (January 2008)
"Importance of Providing the Policy to the Court" (November 2007)
"Legislative Initiatives Regarding the 'No-Prejudice Rule'" (September 2007)
"Appellate Division: Recent Departmental Conflicts" (July 2007)
"The Top Ten/Insolvency and the PMV Fund" (May 2007)
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"Issue Preclusion and UM/UIM/SUM Cases) (January 2007)
"Insurance Office Failure: Reasonable Excuse for Default?" (November 2006)
"Court of Appeals: Deciding Not to Decide" (September 2006)
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"The Confluence of Vehicle & Traffic Law §388 and VTL §1210(a)" (May 2006)
"Rebutting the Presumption of Permissive Use" (March 2006)
"The 'Top 10' and the Insurance Case of the Year" (January 2006)
"More Proposed Regulatory Amendments" (November 2005)
"UM/SUM Coverage: Proposed Statutory, Regulatory Amendments" (September 2005)
"Civil Practice Law & Rules Section 4545: If It's Broke, Fix It" (July 2005)
"Chronological Exhaustion of Policy Limits" (May 2005)
"Thrasher Threshold Thriving" (March 2005)
"Rulings on Declaratory Judgment Actions; The "Top 10' (January 2005)
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"Participation in Arbitration, Recovery of Attorney's Fees" (September 2004)
"'Occupancy' and Uninsured Motorist Coverage" (July 2004)
"Tricks of the Trade: Let the 'Trickster' and 'Trickee' Beware" (May 2004)
"Blackouts, Blizzards and the '20-Day Rule' of CPLR § 7503(c)" (March 2004)
"On Significant Recent No-Fault Decisions and the 'Top 10'"(January 2004)
"'Serious Injury' Practice, Procedure: Subtle Differences Discerned" (November 2003)
"SUM Notice in the Context of Uncertain or Undeveloped Injuries" (September 2003)
"On Assault & Battery, Apportionment, 'All Future Benefits'' (July 2003)
"The Arbitrator's Obligations of Impartiality and Disclosure" (May 2003)
"On the 'Top 10', No-Fault Update, Insolvency and SUM Coverage" (March 2003)
"Shunning of Arbitration of No-Fault Disputes/Identity Theft" (January 2003)
"Supplemental Spousal Insurance" (November 2002);

"On Regulation 68 Effective Dates, No-Fault Arbitration Awards" (September 2002);
"Notice of Legal Action and the Requirement of Prejudice" (July 2002);
"On Supplementary Uninsured Motorist Practice" (May 2002);
"Remedies Available to Victims of Vehicular Assaults" (March 2002);
"Emergency Amendment to the No-Fault Regulations/The 'Top Ten'" (January 2002);
"Retroactive Cancellation/'IME' Malpractice" (November 2001);
"The 'New' No-Fault 'Regulation 68'" (September 2001);
"Recent Rulings on 'Serious Injury,' Liens and Actions Against Agents" (July 2001);
"Court '86s' Regulation 68/ Being Hit By One's Own Stolen Car" (May 2001);
"More on No-Fault Assignments; The 'Top Ten'" (March 2001);
"The New Venue Rule" (January 2001);
"Health Provider Assignments/Derivative Claims" (November 2000);
"No-Fault Regulations Update" (September 2000);
"More on No-Fault" (July 2000);
"Payment of No-Fault Benefits As Admission of Causal Relationship" (May 2000);
"No-Fault Update and the 'Top Ten'" (March 2000);
"The No-Fault 30-Day Rule" (January 2000);
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"Court of Appeals Addresses Underinsured Motorist Notice of Claim" (September 1999);
"Proposed Changes to No-Fault Regulations" (July 1999);
"Escape Clauses, Disclaimers and Added Protection" (May 1999);
"UM and SUM Coverage for Derivative Claims" (March 1999);
"Insolvency and UM Coverage; Top 10," (January 1999);
"More 'Residence" Issues and New Coverage Rules for Taxis" (November 1998)
"Residency Issues; Is Home Where the Heart Is?" (Sept. 1998)
"Stolen Vehicles and the 'Key in the Ignition' Law" (July 1998)
"Fraudulent Claims, Intentional Assault" (May 1998)
"Recent UM/SUM Decisions; The 'Top 10'" (March 1998)
"More New Legislation Affecting Motorists" (January 1998)
"Four New Laws for Motorists" (November 10, 1997)
"Petitions to Stay Arbitration: Special Proceedings" (July 8, 1997)
"Recent UM and SUM Decisions" (May 13, 1997)
"Regulatory and Statutory Amendments; Top 10" (March 11, 1997)

"Revised Uninsured Motorists Endorsement -- Part II" (January 14, 1997)
"The Revised Uninsured Motorists Endorsement" (December 9, 1996)
"Caveat Settlor" (September 10, 1996)
"Limits of Liability -- Taking Nothing for Granted" (July 29, 1996)
"`Steck': Issue Resolved, Questions Raised" (May 16, 1996)
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"De Novo's Demise and Exceptions to 'Stolarz'" (March 14, 1995)
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"SUM Coverage and Excess/Umbrella Coverage" (September 13, 1994)
"The Combined Single-Limit SUM Trigger" (July 25, 1994)
"A Question of Interest" (May 10, 1994)
"Consumer Choice on Managed Care" (March 8, 1994)
"The Uninsured Motorist; Top 10" (January 11, 1994)
"Beyond the Limits of Liability" (November 9, 1993)
"Regulation 35-D: A Reality At Last" (September 14, 1993)
"Combined Single-Limit Trigger, Resolved" (July 13, 1993)
"How UM and UIM Are Linked With Other Areas of the Law" (May 11, 1993)
"Uninsured Motorists Coverage for Out of State Accidents" (March 9, 1993)
"Serious Injury Submissions; `Top 25'"(February 9, 1993)
"Troublesome Recent Cases" (December 8, 1992)
"The Latest on Regulation 35-D" (November 10, 1992)
"New Rules on `SUM' Coverage and Lost Earnings" (September 8, 1992)
"Coverage for Emotional Injury" (August 11, 1992)
"SUM Regulation Redux" (June 9, 1992)
"Combined Single-Limit Policies and SUM Trigger" (May 12, 1992)
"Responsibility for Attorneys' Fees" (March 10, 1992)
"No-Fault Regulation Update" (February 11, 1992)
"Pinpointing Potential Pitfalls in Proposed Regulation 35-D" (December 10, 1991)
"Recent Legislation" (October 8, 1991)

"Excuses for Delayed Notice to Insurers" (September 10, 1991)
"Underinsured Motorist Coverage - Update" (July 9, 1991)
"The Catch in Underinsured Motorist Coverage" (June 11, 1991)
"'Hit and Run' Reporting Requirements" (April 9, 1991)
"Collateral Estoppel, Trial De Novo and the 'Top 25'" (February 21, 1991)
"The Underinsured Motorist" (December 11, 1990)
"'Lopez' Revisited" (November 13, 1990)
"'First Impressions' in Litigation" (September 11, 1990)
"A Call For Legislative Action" (August 14, 1990)
"The Shortest Statute of Limitations Known to the Law" (June 12, 1990)
"One Justice's Call for Reform" (May 8, 1990)
"The 'Top 25' With the Most Complaints" (March 13, 1990)
"Collateral Estoppel and Res Judicata in Arbitration" (February 13, 1990)
"Recent Decisions: Epstein, Redmond, et al." (Dec. 12, 1989)
"The SUM Trigger: Confusion Reigns" (September 12, 1989)
"Liens, Schemes and Driving Machines" (August 8, 1989)
"Trial De Novo -- Read Your Policy" (June 13, 1989)
"Coverage for Underinsured Motorist" (May 9, 1989)
"Complaints Against Auto Insurers" (March 14, 1989)
"Timely Notice of Denial" (February 14, 1989)
"Seek and Ye Shall Hope to Find" (December 13, 1988)
"Arbitration v. Litigation" (November 8, 1988)
"General Liability Insurance Issues" (September 12, 1988)
"Serious Injury Redux" (August 9, 1988)
"Arbitration" (June 14, 1988)
"Unfair Claims Settlement" (March 8, 1988)
"The Top 25" (February 9, 1988)
"Maximizing Coverage" (December 8, 1987)
"Recent Developments" (October 13, 1987)
"Serious Injury Update" (September 8, 1987)

TRAINING MANUALS

"Uninsured and Underinsured Motorist Protection" Association of Supreme Court Justices/Board of Judges of the Civil Court (May 1999).

"Uninsured and Underinsured Motorist Protection", 1998 Judicial Seminar, Westchester, NY (July 1998).

"Uninsured Motorist (UM), Underinsured Motorist (UIM) and Supplementary Uninsured Motorist (SUM) Coverage in New York -- 1995," 1995 Appellate Terms Judicial Seminar, St. John's University School of Law, Presented by Hon. Edward J. Hart, Associate Justice, Appellate Division, Second Department, December 1995.

"Uninsured Motorist (UM), Underinsured Motorist (UIM) and Supplementary Uninsured Motorist (SUM) Coverage in New York -- 1994," 1994 Appellate Terms Judicial Seminar, St. John's University School of Law, Presented by Hon. Edward J. Hart, Associate Justice, Appellate Division, Second Department, December 1994.

MISCELLANEOUS

"AV Preeminent" Rating in Martindale-Hubbell;

Listed in Martindale-Hubbell Bar Register of Preeminent Lawyers;

Designated a New York Metro "Super Lawyer" (Appellate Practice) (top 5% of attorneys in the New York Metropolitan area) (2010 - present);

Named and recognized as among "Long Island's Top Legal Eagles" (Personal Injury Law) by Long Island Pulse Magazine (2010 - present);

Honored member, Premier International Who's Who Registry of Outstanding Professionals (2008-2009 Edition);

Member, Nassau Democratic Judicial
Screening Committee (1992-1998);

Proficient in Westlaw/Westlaw Next