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SUPPLEMENTARY UNDERINSURED MOTORIST/UNINSURED MOTORIST COVERAGE—AN OVERVIEW

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A. Examine the details of Offering/Purchasing Coverage, Waiving Coverage and Selecting Limits

There are a confusing terms used in relationship to uninsured motorist coverage and supplementary uninsured/underinsured motorist coverage. In New York State, the Legislature provided for mandatory uninsured motorist coverage (UM) as part of every insurance policy. Therefore, it is mandatory that an insurance carrier provide coverage of the statutory minimum for uninsured motorist coverage. Currently in this State, every person is charged for uninsured motorist coverage in the amount of \$25,000/\$50,000. It is then up to each individual to determine, based upon their liability limits and knowledge of insurance coverage issues to decide how much supplemental coverage they want to obtain.

It is estimated that eight percent of all drivers in New York State are uninsured. The resulting risk to insured drivers is considerable, especially if one assumes that uninsured drivers are the least safety conscious of all.

In 1939, New York was one of the first states to enact uninsured motorist coverage to protect New York residents against uninsured drivers. Today, protection is afforded under New York Insurance Law articles 34 and 52. These articles protect two distinct classes of people. The first class are “insureds” who are protected under insurance contracts. The second class are “qualified persons” (non-insureds) whose rights arise under Insurance Law Article 52. Innocent insureds and qualified persons are protected against motor vehicle accidents caused by:

- uninsured motor vehicle registered in a state other than New York;
- unidentified motor vehicles that leave the scene of an accident;

- uninsured motor vehicles registered in New York State;
- stolen motor vehicles;
- motor vehicles operated without an owner's permission;
- insured motor vehicles where an insurer disclaims liability or denies coverage;
- and unregistered motor vehicles.

An insurance carrier is under no obligation to offer anything over the statutory limit of the mandatory uninsured motorist coverage. Unfortunately, most insurance agents fail to advise their clients of the benefits of purchasing supplemental uninsured/underinsured motorist coverage. This is especially troublesome considering the relatively low cost associated with this additional coverage.

The purpose behind uninsured motorist coverage and supplemental uninsured/underinsured motorist coverage is simple. It is to protect the policy holder from being in a position that the insurance coverage limits provided by a vehicle that has caused severe and devastating injuries are not enough to cover your injuries.

For example, you were injured in an automobile accident and suffered injuries that were valued in the \$300,000-\$400,000 range. Unfortunately the vehicle that caused the accident only carried the statutory minimum of \$25,000/\$50,000 per accident. You would only be entitled to receive \$25,000 for your injuries. You would have no recourse for attempting to recover any additional sums. However, if you had purchased supplemental coverage through your supplemental uninsured/underinsured (SUM) option, you would be entitled to go back to your insurance company and obtain the additional sums from the carrier up to the amount of the supplementary underinsured motorist (SUM) coverage limit.

As indicated above, insurance carriers and their agents are under no obligation to offer any additional coverage. This is solely an option that is rarely discussed with anyone at the time that they are purchasing insurance coverage. Unfortunately, not enough insurance agents/insurance companies even discuss supplemental uninsured/underinsured coverage with their clients.

This is truly unfortunate because of the relatively low amount that this additional coverage costs. Simply stated, there are significant number of people that are driving in New York State that simply do not have enough coverage to provide them adequate compensation if they are severally injured in an automobile accident.

The majority of people that I speak with are not even aware of the benefits of supplemental uninsured/underinsured motorist coverage. It would appear that the only people that are aware of the benefits of this coverage are individuals employed in the insurance industry and attorneys that deal with personal injury claims.

As indicated above, the mandatory uninsured motorist coverage cannot be waived. Mandatory uninsured motorist coverage is set by statute at \$25,000. This is required by an act of the Legislature and is required on every insurance contract. However, no one is required to purchase additional coverage through their supplemental uninsured/underinsured provisions.

There is no penalty that exists for failing to procure this coverage except for the individual unfortunate to be involved in an accident that the offending party only has the statutory minimums.

The selection of the SUM limits is very simple. Prior to March 9, 1998, supplementary uninsured or underinsured motorist coverage was subject to a maximum of \$100,000 for bodily injury or death of one person in one accident and \$300,000 for bodily injury death of two or more persons in one accident. Insurance Law Section 3420(f)(2). Pursuant to the statutory amendment effective March 9, 1998, these limits were increased to \$250,000 per accident and \$500,000 per accident or a combined single limit of \$500,000. The amended statute further provides that the insurer can only offer a \$100,000/\$300,000 policy if it also offers to the insured a personal umbrella policy that covers supplementary uninsured motorist coverage and has limits “up to at least \$500,000. Insurers can and generally do offer coverage with higher limits.

The statute does not provide for minimum amounts of SUM coverage, even in the event of death. Allstate v. Silver, 225 AD2d 690, 639 NYS2d 485 (2nd Dept., 1996).

The mandatory endorsement provides SUM policy limits as follows:

(b) By purchasing SUM coverage, which cannot be purchased in an amount exceeding the amount of third-party liability coverage purchased, the policy holder and any insured under the policy can: (1) be protected for bodily injury to themselves, up to the limit of the SUM coverage purchased; and (2) receive from the policy holders own insurer payment for bodily injury sustained due to the negligence of the motor vehicle’s owner or operator.

The mandatory supplemental endorsement further provides (e)(1) an insurer shall offer: (i) SUM limits in a motor vehicle liability insurance policy with split limits, up to \$250,000 per person/per accident and, subject to the limit of \$500,000 maximum per accident; or (ii) a SUM limit in a motor vehicle liability insurance policy with a combined single limit up to \$500,000 per accident. See, 11 N.Y.C.R.R. Section 60-2.1.

By contrast, basic UM coverage, created pursuant to Insurance Law Section 3420(f)(1), must be in the amount not to exceed \$25,000. There is no prohibition or voluntary offering of coverage beyond that amount.

Therefore, a person can obtain coverage up to \$250,000 if they have a split policy of insurance coverage or up to \$500,000 if their liability coverage is in a single limit. However,

they may not take out more coverage than their bodily injury coverage.

B. Determine the Nature and Extent of UM and UIM Coverages

Uninsured Motorist Coverage

Insurance Law Article 52 created the Motor Vehicle Accident Indemnification Corporation (MVAIC), a nonprofit corporation, to provide the protections required by the article. Pursuant to Insurance Law Section 5206, MVAIC's specific powers are to prescribe the policy endorsement form to be issued as required by Insurance Law Section 3420(f) (2); to provide for the investigation of any claims asserted by a ("qualified person"), (defined in Insurance Law Section 5202(b)), against a "financially irresponsible motorist" (defined in Insurance Law Section 5202(j)); to settle and pay a claim or judgment asserted by a qualified person against a financially irresponsible motorist; and to appear and defend through attorneys on behalf of the financially irresponsible motorist or on behalf of the corporation in any action brought against him or it as provided in Insurance Law Section 5209(b).

Typically, an automobile liability policy issued in New York State insures the named insured, his or her spouse (if residents of the same household), and any other person using the motor vehicle with permission of the named insured. Protection against uninsured motorist derives from Insurance Law Section 3420(f)(1), which mandates and delimits an uninsured motorist endorsement for automobile liability policies.

MVAIC is a non-profit corporation that is capitalized by an assessment against all insurers providing motor vehicle liability insurance in New York State. All insurers writing such policies are required to be and remain members of the corporation. The MVAIC was created by Legislature to establish a fund from which individuals involved in motor vehicle accident could seek compensation for their otherwise uncompensable injuries and damages.

MVAIC coverage is excluded for property damage; injuries or death of a person driving in violation or suspension of driving privileges, claims against person not liable under law; accidents caused by vehicles owned by the United States, Canada, a State or any political subdivisions or agencies; accident occurring outside of New York State; and hit and run claims that do not meet the statutory requirement for such claims. (I.e., no contact, not promptly reported to a police agency).

Under the initial statutory scheme, all uninsured motorist coverage was provided by the MVAIC out of its own funds. By statutory amendment in 1965, the duties and obligations of providing uninsured motorist coverage to insured individuals was transferred from the MVAIC to individual insurers. Coverage and protection of noninsured, or "qualified person" remains with the MVAIC.

Thus, the MVAIC provides a "qualified person" with the same uninsured motorist benefits than an "insured person" would be entitled to receive under his own basic policy. See, Insurance Law Section 5203. Disputes between a qualified person and the MVAIC with respect to uninsured motorist benefits must be resolved by litigation; no specific provision is made for arbitration of uninsured motorist claims by "qualified persons".

Initially, the New York Automobile Accident Indemnification Endorsement provided that in consideration of the payment of an endorsement premium, the insurer will pay up to \$10,000 on

account of injury to one person and one accident; \$20,000 on account of injury of two or more persons and \$50,000 on account of death of one person or \$100,000 on account of death of two or more persons. Effective January 1, 1996, and applicable to all accidents occurring on or after that date, the required per person limit was increased from \$10,000 to \$25,000 and the required per accident limit has been increased from \$25,000 to \$50,000. The death limits remained unchanged.

In order to qualify for these benefits, the insured or his legal representative must be legally entitled to recover damages from the owner or operator of the uninsured automobile because of bodily injury, sickness or disease including death resulting therefrom, sustained by the insured that were caused by an accident arising out of the ownership, maintenance and use of the uninsured automobile.

Whether the insured or representative is legally entitled to recover such damages, and if so, the amount thereof are to be agreed upon by the insured and the insurer.

In order to recover uninsured or underinsured motorist benefits, the innocent victim must meet the statutory and endorsement requirements of being either an insured or a qualified person. While an insured person relies on the terms of his uninsured motorist endorsement to determine whether he is covered, a qualified person has no such policy and must, therefore rely upon the statutory definition in order to determine whether he may sue the MVAIC directly.

The statutory definition of the term insured refers to the definition as outlined in Insurance Law Section 3420(f).

The qualified person is a creation of Insurance Law Section 5202(b). A qualified person is a New York resident who is: (1) not an insured under a policy, (2) not the owner of an uninsured motor vehicle, or (3) not the owner spouse when a passenger in a vehicle. Non residents are considered qualified persons if their government allows New York residents reciprocal recourse that is substantially similar to New York. Insurance Law Section 5202(b). If a qualified person is injured as a result of an uninsured motorist, he is authorized to proceed against MVAIC for payment of damages. However, a passenger in a stolen vehicle who is aware that the vehicle is stolen, is not an innocent victim, and therefore is not a qualified person. Jackson v. State Farm Mutual Auto Insurance Company., 213AD2d 598, 624 NYS2d 256 (2nd Dept., 1995).

MVAIC must provide first party benefits to qualified persons for basic economic loss arising out of an uninsured motor vehicle accident in New York. Insurance Law Section 5221. These benefits are generally referred to as no-fault benefits.

If the insured and insurer do not settle the claim, either party may demand arbitration of the issues in accordance with the rules of the American Arbitration Association. See, 11 N.Y.C.R.R. Section 60-2.4(a). An arbitrator has the power to resolve issues of liability and damages including the serious injury threshold issue. See, Aetna Casualty Insurety Company v. Cochrane, 64 NY2d 796, 486 NYS2d 915 (1985). Coverage and procedural issues are to be handled through the Court system.

Under policy terms, the insured and insurer agree to consider themselves bound by an arbitrator's award. Such an award may be entered in any court having jurisdiction. A demand for arbitration of an uninsured motorist claim is subject to the sixth year statute of limitation which runs from the time when subsequent events render the offending vehicle uninsured. See, DaLuca v. MVAIC, 17 NYS2d 76, 268 NYS2d 268 (1976). If for any reason coverage is eliminated, the insurer will be entitled to a permanent stay of arbitration, pursuant to New York Civil Practice Law and Rules Section 7503.

Supplemental Uninsured/Underinsured Coverage

Following the enactment of Regulation 35-D, the mandatory uninsured motorist endorsement remains applicable only if the insured chooses to maintain only the basic mandatory uninsured motorist coverage and not to purchase SUM coverage. If SUM coverage is purchased, the Regulations new endorsement applies in place of the mandatory uninsured motorist coverage. See, 11 N.Y.C.R.R. Section 60-2.3(e).

In addition to mandatory uninsured motorist coverage, the Legislature created supplementary uninsured/underinsured motorist coverage. Courts have recognized that SUM coverage is in fact a form of underinsured/uninsured motorist coverage. Morris v. Progressive Casualty Insurance Company, 662 FSupp. 1489, 1494 (SDNY 1987).

SUM coverage is not mandatory whereas uninsured motorist coverages are. The law only requires that coverage be made available in the voluntary market. Eagle Insurance Company v. Brown, 205 AD2d 774, 614 NYS2d 913 (2nd Dept., 1994).

The mandatory endorsement maintains the optional nature of the coverage. The news release accompanying the adoption of the mandatory endorsement stated: supplementary uninsured, underinsured motorist, as optional coverage that drivers can purchase to protect themselves and other occupants of their vehicles. The mandatory endorsement does however require written notice with all new policies issued on or after October 1, 1992, and all policies renewed between October 1, 1992 and September 30, 1993 as to the availability and nature of SUM coverage. 11 N.Y.C.R.R. Section 60-2.2.

New York State will not reform a foreign insurance contract to afford SUM benefits. 11 N.Y.C.R.R. Section 60-2.1 and 60-2.2. The statutory requirement for applicability of SUM coverage must be contrasted with uninsured motorist coverage, which is applicable only for accidents occurring within the State of New York. Insurance Law Section 3420(f)(1). SUM coverage, however, is available for accident outside of New York. Home Indemnity Company v. Allwood, 122 Misc.2d 757, 471 NYS2d 824, (Sup. Ct, Chem. Co., 1984).

As a condition precedent to the insured's obligation to pay under this additional coverage, the limits of liability of any bodily injury policies applicable at the time of the accident must be exhausted by payment of judgments or settlements. Insurance Law Section 3420(f)(2).

In the past, different insurers provided different supplementary underinsured or uninsured motorist endorsements. These endorsements not only differ from each other, but also differ from standard uninsured motorist endorsements. With the advent of Regulation 35D, there is to be a

single, uniform supplementary uninsured motorist endorsement which governs both supplementary uninsured and underinsured motorist coverage. Under the terms of Regulation 35D, arbitration is to be conducted by the American Arbitration Association, and there is no right to a de novo review.

C. Stacking of Coverages and Excess Liability: What You Must Know

The term “stacking” is used to describe the situation wherein a person who has more than one policy or endorsement covering injuries sustain a given type of accidents seeks to recover under each such applicable policy or endorsement. Although stacking of insurance policies is generally permitted in the area of liability insurance, it is often not permitted under no-fault or uninsured motorist coverage.

There are virtually no cases dealing with SUM coverage stacking. In cases involving uninsured motorist coverage, the courts have consistently prohibited the stacking of endorsements. The basis for such holdings was the “other insurance” provisions and such policies, which require payment from concurrent policies on a pro rata basis. Such a provision generally states “when two or more policies cover on the same basis, either excess or primary, we will only pay our share. Our share is the proportion that the limit of our policy bears to the total of the limit of all policies covering on the same basis”.

The courts have generally found stacking impermissible where the claimant attempts to increase the applicable limits by implying the coverage of two or more vehicles that are insured under one policy. For example, a pedestrian’s truck by an uninsured motor vehicle, who was an “insured person” under his father’s uninsured motorist endorsement covering two motor vehicles paid for by two separate premiums was not able to stack the limits applicable to the two vehicles. Sisson v. Travelers Inc., 94 AD2d 953, 464 NYS2d 77 (4th Dept., 1983).

The court held that the uninsured motorist coverage for each vehicle cannot be stacked to provide additional benefits, adding that the additional premium charged for the second uninsured motorist policy was justified, as ownership and operation of two vehicles increased the risk.

However, stacking had been permitted in the past where the claimant attempts to recover under two or more separate policies, each which expressly covers the claimant and for which separate premiums have been paid. DiStasi v. Nationwide Mutual Insurance Company, 132 AD2d 305, 522 NYS2d 340 (3rd Dept., 1987).

In DiStasi, the Plaintiff was a pedestrian that was struck by a vehicle that was carrying a bodily injury limit of \$10,000. DiStasi had an automobile liability insurance policy with Nationwide containing bodily injury limits of \$25,000 per person and \$50,000 per accident. DiStasi’s parents had an additional policy with Nationwide Insurance Company covering two vehicles with bodily injury limits of \$300,000/\$500,000 and \$300,000/\$300,000 respectively. The parents’ policy had underinsured coverage of \$50,000/\$100,000. Distasi argued that the available “supplementary” uninsured motorist limits should equal the aggregate amounts on each of the families three covered automobiles or \$110,000.00. The insurer argued that only the claimants own \$10,000 coverage should apply. The court held that even though the parents’

policy included a premium for two vehicles, the coverages thereunder could not be stacked to afford more than the \$50,000 limits stated in the policy.

The court also held that since the claimant had purchased his own separate policy of insurance he could potentially recover \$10,000 of his endorsement in addition to the \$50,000 under his parents' policy. The court reasoned that to forbid the stacking would constitute "either unjust enrichment for the insurer or loss of consideration for one of the insureds".

Since that time, Regulation 35-D was passed which is considered the "non-stacking" clause. 11 N.Y.C.R.R. Section 60-2.3(e), condition 7. Regulation 35D provides that regardless of a number of vehicles involved, persons covered, claims made, vehicles or premiums shown in the endorsement or premiums paid, the limit of coverage may not be added together or combined for two or more vehicles to determine the extend of coverage available to an insured injured in the same accident.

The Regulation also contains a "priority of coverage" clause which provides that where an insured may be covered for uninsured or supplementary uninsured motorist coverage under more than one policy, the maximum amount recoverable may not exceed the highest limit of coverage for anyone vehicle under anyone policy; in such cases, the following order of priority applies (1) the policy covering the vehicle occupied by the claimant; (2) the policy identifying the claimant as a named insured; (3) and any other policy covering the claimant. 11 N.Y.C.R.R. Section 60-2.3(e) Condition 8.

D. Interpret Exclusions and Limitations on Coverage

Even if all factors are present for the accident to fall within the coverage of the particular endorsement, coverage may be denied based upon several specific exclusions. Those exclusions are as follows:

(1) **Violation of order of suspension or revocation.** The mandatory uninsured motorist endorsement contains an exclusion rendering coverage inapplicable "to bodily injury to an insured while operating an automobile in violation of an order of suspension or revocation or to care or loss of services recoverable by an insured because of such bodily injury so sustained. This exclusion has been applied to preclude recovery by an uninsured motorist claimant who is injured while operating a vehicle with a suspended driver's license. Aetna Casualty Insurety Company v. Gonzalez, 84AD2d 528, 443 NYS2d 613 (1st Dept., 1981).

(2) **Lack of reasonable belief that the operator is entitled to use of the vehicle.** This exclusion has been held to involve " a much broader concept than actual permission. In Kenyon v. Newton, 144 AD2d 991, 534 NYS2d 600, 601 (4th Dept., 1988), the driver of an insured automobile had the permission of the registered owner's son to drive the vehicle and the driver believed that the son was the owner. The court found that the driver certainly had a reasonable belief that she was entitled to drive the car. Consequently, the exclusion did not apply.

(3) **Settlement without consent.** 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 therefore". See, Kenyon v. Newton. The SUM endorsement

mandated by Regulation 35-D contains the provision that states “an insured shall not otherwise settle with any negligent party, with or without a written consent, such that our rights would be impaired.” 11 N.Y.C.R.R. 60-2.3(e) Condition 10.

The purpose of this clause is to prevent the claimant from prejudicing the insurers subrogation rights. The mandatory uninsured motorist endorsements grants to the insurer, in the event of payment under the endorsement into the extent of such payment the right to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery against the person that actually caused the injury.

The SUM endorsement mandated by Regulation 35-D contains a provision granting the insurer the right of subrogation against the tortfeasor to recover the amount of payments under the SUM policy and warning that the insured “shall do nothing to prejudice this right.” 11 N.Y.C. R.R. Section 60-2.3(e) Condition 13.

The mandatory SUM endorsement addresses the obligation of an insurer when a policy limit has been offered. Condition 10 of the endorsement, entitled “Release or Advance,” provides the following:

In accidents involving the insured and one or more negligent parties, if such insured settles with any such party for the available limit of the motor vehicle bodily injury liability coverage of such party, release may be executed with such party after thirty calendar days actual written notice to us, unless within the period we agree to advance such settlement amounts to the insured in return for the cooperation of the insured in our lawsuit on behalf of the insured.

We shall have the right to the proceeds of any such lawsuit equal to the amount advanced to the insured and any additional amounts paid under this SUM coverage. Any excess above those amounts shall be paid to the insured.

An insured shall not otherwise settle with any negligent party, without our written consent, such that our rights would be impaired. 11 N.Y.C.R.R. Section 60-2.3, Condition 10.

(4) Exhaustion of underlying limits of tortfeasors coverage. By statute, SUM coverage cannot be exercised until such time as the underlying tortfeasor has offered the total SUM of his underlying policy limits. The SUM Insurance Law Section 3420(f)(2). The SUM endorsement prescribed by Regulation 35-D provides that the insurer will pay:

Only after the limits of liability have been used up under all motor vehicle bodily injury liability insurance policies or bonds applicable at the time of the accident to any one person who may be legally liable for the bodily injury sustained by the insured.” 11 N.Y.C.R.R. Section 60-2.3(e) Condition 9.

Under this endorsement, it is coverage of only a single vehicle and not the total number of vehicles involved that must be exhausted. Colonial Penn Insurance Company v. Salti, 84AD2d 350, 446 NYS2d 77 (1st Dept., 1982).

(5) **Proceeding to Judgment without consent.** The mandatory uninsured motorist endorsement also excludes from coverage any claim by an insurer who “shall, without written consent of the company ... prosecute the judgment any action against any person or organization who may be legally liable therefore. ...”

The courts have required that there be a final judgment entered into favor of the insured before the provision is given effect. A decision or verdict upon which no final judgment has been formally entered does not absolve the insurer of liability. DiMaria v. MVAIC, 37 AD2d 617, 236 NYS2d 443 (Sup. Ct., Mon. Co. 1963). Consequently, termination of an action by stipulation prevents any possible application of the proceeding to judgment without consent exclusion.

(6) **Worker’s Compensation or Disability Benefits.** Regulation 35-D SUM endorsement provides that SUM coverage “shall not duplicate benefits payable under Worker’s Compensation or similar laws” and “non-occupational disability benefits” under the Worker’s Compensation Law or other similar laws. 52 11 N.Y.C.R.R. Section 60-2.3(e) Condition 11.

(7) **Vehicles used to carry persons or property for fee.** The mandatory uninsured motorist endorsement specifically excludes from the coverage provided to occupancy insured persons occupying a non New York registered automobile being used is a “public or livery conveyance.” The typical underinsured motorist endorsement also excludes coverage for bodily injury sustained by persons while occupying a covered auto while it is being used to carry persons for a property for a fee. This exclusion is specifically made inapplicable to the share the expense car pool.

E. How to Proceed With Injury Claims Due to Vehicle Operation, Maintenance or Use

Under claims against the MVAIC, the person must first make a timely notice of claim. Insurance Law Section 5218 specifically states that the filing of a Notice of Intention to Make a Claim is a condition precedent to making a claim against both the MVAIC and an insurer. The specifics of the notice and proof required, and the timeliness thereof differ depending upon whether the claimant is a qualified person or an insured person.

A qualified person filing a claim against the MVAIC must file a Notice of Intention to Make a Claim in Affidavit form. The Notice must state that the claimant has a cause of action for damages arising out of an accident that took place in the State of New York, set forth the facts in support of the claim, and state further that he or she intends to make a claim for damages. The Affidavit must further state that the cause of action is against the owner or operator of a designated uninsured motor vehicle or the cause of action is against a person whose identity is unascertainable on the basis that an accident report was made within 24 hours after the occurrence to the police or that the insurer of the alleged vehicle has disclaimed liability or denied coverage because of some act or omission of the policy holder of that vehicle including the denial on the ground that no policy was in effect at the time of the accident. Id.

The Notice of Claim Affidavit must also allege compliance with the time limitations applicable to the particular situation involved. Insurance Law Section 5208(a) specifically states that a qualified person making a claim on the basis of an accident with a designated uninsured motorist must file a Notice of Claim within 180 days of the date of the accident.

Additionally, a qualified person claiming injuries on the basis of an accident with an insured motorist whose insurer subsequently disclaims liability or denied coverage must file the Affidavit within 180 days from the date of the claimant's receipt of Notice of the disclaimer or denial of coverage. Id.

Insurance Law Section 5208(a) has a shorter statutory time period to make claims based upon an accident with a hit and run driver. The Notice of Claim based upon an accident with a hit and run driver must be filed within 90 days from the date of the accident.

As with most shortened Notice of Claim provisions, the courts interpret the shortened time frames very strictly. However, a person who fails to file a Notice of Claim within the prescribed time is allowed to file an application with the court for relief to file a late Notice of claim. There are only three (3) instances where a person will be allowed to do so. A person would be allowed to file late Notice of Claim if they failed to file an Affidavit after an accident with a designated uninsured motor vehicle or hit and run vehicle within the specified time period; or fails to file within 90 days as a result of being furnished with erroneous information as to the identification of the other vehicle by the department of motor vehicles or a police report; or if the qualified person is prevented from timely filing the Affidavit by reason of infant, mentally or physically incapacitated or being deceased. Insurance Law Section 5208(b).

The application may be accepted by the MVAIC notwithstanding its lateness if it contains satisfactory proof of the fact for the delay, that it was not reasonably possible to file an Affidavit within the statutory time period and that the Affidavit was filed as reasonably

ossible.

However, if MVAIC refuses to accept the late Notice of Claim, a court may grant leave to file the application within a reasonable time after expiration of the specified. Insurance Law Section 5208(b)(2). Such an application must be qualified person for leave to file a late Affidavit within one year from the date of the accident. Thompson v. MVAIC, 57 AD2d 713, 395 NYS2d 778 (4th Dept., 1977), affirmed 44 NY2d 765, 406 NYS2d 36, 377 NE2d 480 (1978). This is an absolute time limitation and the court is without power to grant leave to file a late Notice of Claim after the one year period has ended. *See*, Thompson.

The Notice and Proof of Claim by an insured person to his insurer is governed by the mandatory endorsement. The mandatory uninsured motorist endorsement provides a more flexible time limitation for notice to the insured. Under the endorsement, the insured or other person making claim, must give the company written Notice of Claim within 90 days or soon as practicable.

To determine what constitutes a reasonable time, one cannot only look at the mere passage of time. It has been held that promptness is relative and measured by the circumstances. Metropolitan Property & Casualty Insurance Company v. Mancusso, 93 NY2d 487, 693 NYS2d 81, 715 NE2d 107 (1999). However, where there has been a delay in giving notice to the

insurer, the insured has the burden to show lack of knowledge or other such circumstances to explain the delay and demonstrate that it was reasonable. Security Mutual Insurance Company v. Acker-Fitzsimons Corp., 31 NY2d 436, 330 NYS2d 902, 293 NE2d 76 (1972).

Insurance Law Section 3420(f)(2)(A) states that “the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements before the insurer must pay under the SUM coverage. If the settlement is for less than the full policy, no claim of SUM coverage can be made.

Under Regulation 35-D and its prescribed SUM endorsement, the definition of an uninsured motor vehicle’s expanded to include a motor vehicle for which there is bodily injury liability insurance coverage or bond applicable at the time of the accident, but the amount of such coverage or bond is less than the third party bodily injury liability limit of the policy. 11 N.Y.C.R.R. Section 60-2.3(e).

In order to determine whether a claimants underinsured motorist coverage has been triggered, the bodily injury liability limits of the claimants policy must be compared to the bodily injury liability limits of the tortfeasors policy.

The issue causing the greatest confusion is whether the Defendant’s liability limits are compared to the Plaintiff’s SUM limits or to liability limits before triggering coverage. It appears the SUM coverage is triggered when the Plaintiff’s bodily injury limits exceed the Defendant’s bodily injury liability limits. The Court of Appeals in Prudential Prop. & Cas. Co. v. Szeli, 193 AD2d 748, 598 NYS.2d 55 (2nd Dept., 1993) *rev’d*, 83 NY2d 681, 686, 613 NYS2d 113, (1994) held that Insurance Law Section 3420 (f)(2) requires “ a facial comparison of the policy limits without reduction from Judgment of other claims arising from the [same] accident.” The Court further decided that “the determination of whether SUM coverage is available at all is made without reference to the terms of the SUM endorsement. Instead, that determination requires a comparison of each policy’s bodily injury liability coverage as it in fact operates under the policy terms applicable to that particular coverage.” Id. at 688.

As stated above, once it has been determined that the coverage has been triggered by the claimant’s policy being more than the Defendants liability limits, the Defendants having offered his full limits and the Plaintiff obtaining the SUM carriers prior consent, the matter then can be arbitrated through the American Arbitration Association. This applies only to insured persons. Qualified persons must attempt to have their issue resolved through the MVAIC. If MVAIC will not provide coverage, the claimant must pursue legal action against MVAIC.

Under Regulation 35-D in its prescribed endorsement, the insured has the option of proceeding to court or to arbitrate to resolve disputes where the coverage exceeds the statutory minimum amounts. If, however, the maximum of SUM coverage provided by the endorsement equals the amount of minimum coverage in the amount of \$25,000/\$50,000, the agreement shall be settled by arbitration.

F. Answer Questions Related to Offsets and Reimbursements

An offset provision is valid and unenforceable in a policy that contains the combined limit of uninsured and underinsured coverage by one premium and a combined endorsement for uninsured and underinsured coverage. Similarly, the offset provision is unenforceable even when the insurer uses separate endorsements to differentiate uninsured and underinsured coverage. New York Central Mutual Fire Insurance Company v. Smith, 244 AD2d 958, 665 NYS2d 994 (4th Dept., 1997).

The mandatory endorsement provides that the maximum a SUM payment regardless of the number of insureds is a difference between (a) the SUM limits stated, and (b) the motor vehicle bodily injury liability insurance or bond payment 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. 11 N.Y.C.R.R. Section 60-2.3 Condition 6.

This endorsement precludes a full recovery of the SUM limits when the tortfeasor has any insurance coverage. However, the SUM endorsement also encompasses UM coverage. When the tortfeasor has no coverage, the full limits are available. Allstate Insurance Company and Stolerz v. New Jersey Manufacturers, 81 NY2d 219, 597 NYS2d 904 (1993).

Additionally, many SUM policies contain an endorsement that the amount payable shall be reduced by sums paid on behalf of persons or organizations who may be legally responsible. Thus, if the claim is under an endorsement with a \$25,000 limit and the claimant has already received \$25,000 pursuant to an uninsured motorist endorsement contained in another policy, the limit under the endorsement claimed is zero.

The MVAIC Act provided that the application limits of liability are to be reduced by (1) the amount of any collectible liability insurance and valuable assets or contributions of the financially responsible motorist and/or (2) any payment received by the qualified person from or on behalf of any person jointly or severally liable with the financially responsible motorist. 46 Insurance Law Section 5210(b)(1)(2).

Regulation 35-D and its now standard SUM endorsement specifically requires the reduction and coverage for amounts recovered from the underinsured motorist. The SUM endorsement specifically provides that the maximum payment there under will be:

“The difference between (a) the SUM limits and (b) the motor vehicle bodily injury liability insurance or bond payments received by the insured or the insured's legal representative, on behalf of all persons that may be legally liable for the bodily injury sustained by the insured.”

Under the Regulation, insurers are required to provide their SUM insurance with examples of SUM coverage, which further explain the applicability of reduction and coverage. 11 N.Y.C.R.R. Section 60-2.2(b).

Regulation 35-D in its mandatory SUM endorsement contains no reference to the Worker's Compensation Law or disability benefits in its limits of liability section. However, a SUM

endorsements nonduplication condition provided that the SUM coverage shall not duplicate “benefits payable under Worker’s Compensation or similar laws” “non-occupational liability benefits under Article 9 of the Worker’s Compensation Law or other similar law. 71. 11 N.Y. C.R.R. Section 60-2.3(e) Condition 11.

Regulation 35-D Sum endorsement omits the offsets for benefits received under Worker’s Compensation are disability laws. In addition. The mandatory SUM endorsement does not permit carriers to take an offset no-fault payments. The Insurance Department the position that no-fault and Worker’s Compensation benefits are intended to cover a claimants economic losses, including medical bills and lost wages. The Insurance Department further believes that the uninsured motorist and supplementary uninsured motorist endorsements are designed to compensate a Plaintiff for pain and suffering. The department maintains that payments made to cover a persons economic life should not be utilized to reduce the available funds to compensate a Plaintiff’s pain and suffering.

G. Does the Insurer Have Subrogation Rights to UM Benefits.

Under the standard SUM policy provision, the insured has a duty not to impair the insured’s right of subrogation. Insured cannot settle without a SUM insurers consent.

This section was previously addressed in the prohibition against the Plaintiff from settling without consent of the insurance company. Insurer does have subrogation rights to proceed against the tortfeasor.

H. How the Statute of Limitation Applies

For insured persons, the statute of limitations is six (6) years. However, the six (6) years does not begin to run until such time as the full amount of the Defendant’s policy has been offered and accepted. As the SUM coverage is contract based between the parties, the six (6) year statute of limitation applies.

As to the claims of a qualified person against the MVAIC, the six (6) year statute of limitations for a contract action does not apply. The rationale is that the qualified persons claimed does not arise out of a contract, such as an endorsement or policy provision. These claims must be made within the applicable limitation period for tort actions which is three (3) years or in the case of death, two (2) years. CPLR 214 and EPTL 5-4.1.