

5 THINGS TO KNOW ABOUT SUM COVERAGE

I. OVERVIEW OF UNINSURED MOTORIST, UNDERINSURED MOTORIST AND SUM COVERAGES

Uninsured motorist ("UM") coverage in New York State is mandatory. Traditionally, an uninsured motorist claim could be made if the tortfeasor was uninsured; if the tortfeasor had a policy of insurance but the carrier disclaimed coverage; or if the tortfeasor drove a hit-and-run motor vehicle that came into physical contact with the claimant or his/her vehicle.

Underinsurance ("UIM") coverage in New York State is optional, which means the claimant must request this coverage and pay the additional premium in order to enjoy this protection. This coverage is designed to apply if the tortfeasor is covered by a policy of insurance, but the limits are inadequate to properly compensate the injuries sustained by the claimant.

Prior to October of 1993, insurance carriers prepared their own UM and UIM endorsements that often set forth significant differences. Under the old approach, a potential gap in coverage could exist.

In order to overcome such problems, the Insurance Department prepared a prescribed policy form, the Supplementary Uninsured Motorist ("SUM") endorsement, that affords both UM and UIM protection. 11 N.Y.C.R.R. §60-2.3(f). The SUM endorsement became effective on October 1, 1993, when a motor vehicle liability policy was either issued or renewed and the accident occurred subsequent to the issuing or the renewal of the policy. The SUM endorsement removed the gap in coverage by adopting a unified endorsement that affords both uninsured motorist and underinsured motorist protection for accidents that occur in United States or Canada. This is accomplished by the Insuring Agreement defining an "uninsured motor vehicle" to include the following:

- i. A motor vehicle that is not covered by a liability policy (including a motor vehicle where the policy has been cancelled for non-payment of the premium, a stolen vehicle, a vehicle operated without the permission of the owner, or an unregistered vehicle);
- ii. A hit-and-run motor vehicle;
- iii. A motor vehicle covered by a policy of insurance or a bond where the insurer denies coverage or becomes insolvent; and
- iv. An underinsured motor vehicle.

UM coverage is optional, so an insured must request this coverage and pay an additional premium. An insured can still elect to only obtain a bare bones UM endorsement. The Insurance Department prepared the policy form for this

endorsement, which provides protection against drivers who are uninsured, but not underinsured.

The SUM endorsement is a pro-consumer coverage that allows an insured to protect himself and his family. A bodily injury liability policy only protects third persons who may be involved in a motor vehicle accident. High limits will benefit a stranger, but not provide any protection to one's own family. In contrast, the SUM endorsement permits one to set a minimum level of financial protection that will potentially be available to cover the pain and suffering and economic loss of the claimant and his or her family.

II. THE TRIGGER FOR SUM COVERAGE

There are *five requirements* that must be satisfied in order to make a SUM claim

A. The Claimant Must Provide Timely Notice (and Forward Suit Papers)

Condition "2" of the SUM endorsement requires a claimant to provide written notice of an intention to make a SUM claim "as soon as practicable". If requested, the claimant must furnish a written statement and/or attend an examination under oath regarding the circumstances behind the accident and the injuries alleged. If a claimant fails to provide timely notice, this will provide the carrier with a basis for denying coverage.

There is a related provision in the SUIVI endorsement, Condition "4", that requires a plaintiff, after commencing suit against the tortfeasor, to "immediately" forward a copy of the summons and complaint to the SUM carrier. The failure to do so can result in the forfeiture of SUM coverage only if the carrier can demonstrate that its rights were prejudiced by the delay. *Brandon v. Nationwide Mut. Ins. Co.*, 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).

B. The Claimant Must Obtain a Policy Limit Offer

Condition "9" of the SUM endorsement requires all liability policies or bonds covering any one negligent person to be exhausted by judgment or settlement. *Garcia v. State Farm Ins. Co.*, 232 A.D.2d 488, 648 N.Y.S.2d 340 (2nd Dept. 1996); *Sutorius v. Hanover Ins. Co.*, 233 A.D.2d 332, 649 N.Y.S.2d 183 (2nd Dept. 1996). This requirement retains the necessity for a claimant to demonstrate negligence against at least one responsible party.

C. The Bodily Injury Limits for the Plaintiff Must Exceed the Tortfeasor's Bodily Injury Limits

Prior to the adoption of the SUM endorsement, there had been some confusion whether the triggering event should focus upon the bodily injury limits or upon the SUM

limits for the plaintiff relative to the tortfeasor's bodily injury limits. The SUM endorsement removes this uncertainty by defining an "uninsured motor vehicle" as one where the tortfeasor's bodily injury limits are less than the bodily injury limits for the plaintiff. In *Geico v. Young*, 39 A.D.3d 751, 835 N.Y.S.2d 283 (2nd Dept. 2007), the Court recognized that SUM coverage was not triggered because the policy limits for the vehicle occupied the plaintiffs equaled the policy limits for the tortfeasor's vehicle.

For hit-and-run accidents, the plaintiff must establish physical contact with an unidentified vehicle, or with an integral part of an unidentified vehicle. *Matter of Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325, 574 N.Y.S.2d 927 (1991). In the event of a hit and run accident, the plaintiff needs to file a sworn statement with the UM carrier within ninety (90) days of the accident. The failure to satisfy this condition precedent will result in the plaintiff forfeiting coverage. *Hanover Ins. Co. v. Etienne*, 46 A.D.3d 825, 848 N.Y.S.2d 312 (2nd Dept. 2007).

D. The Claimant Must Qualify As An "Insured"

In the typical situation, a motor vehicle policy with a SUM endorsement is issued to an individual. In that situation, the following persons qualify as an "insured":

- i. The named insured and spouse.
- ii. Someone who is related to either the named insured, or spouse, and he/she resides in the same household.
- iii. Someone who occupies a motor vehicle insured for SUM coverage under the policy a claim is made against.
- iv. Someone who occupies a motor vehicle driven by the named insured or spouse.

In the event the motor vehicle policy is issued to a corporation, the following entities are identified as an "insured" pursuant to the SUM endorsement:

- i. The named insured. However, because the "named insured" is a corporation, no individual qualifies as a "named insured". Thus, the corporate officers, family members of corporate officers, and employees of the corporation do not qualify under this definition. *Buckner, Jr. v. MVAIC*, 66 N.Y.2d 211, 495 N.Y.S.2d 952 (1985); *Royal Ins. v. Bennett*, 226 A.D.2d 1074, 642 N.Y.S.2d 125 (4th Dept. 1996).
- ii. A person who "occupies" the insured vehicle.

E. The Loss Must Arise from an "Accident"

The SUM endorsement requires a plaintiff's injuries to arise from an accident. There is no coverage for a staged loss or a fraudulent claim. For cases discussing the

nature and extent of proof necessary to demonstrate that an "accident" was actually staged see *State Farm Ins. Co. v. Paul*, N.Y.L.J., Nov. 3, 2006, p. 24, col. 1 (Sup. Ct. Nassau Co.); *V. S. Med. Servs., P.C. v. Allstate Ins. Co.*, 11 Misc. 3d 334, 811 N.Y.S.2d 886 (Civ. Ct. Kings Co. 2006); *Universal Open MRI v. State Farm Mut. Auto. Ins. Co.*, 12 Misc. 3d 1151 (A), 819 N.Y.S.2d 852 (Civ. Ct., Kings Co. 2006).

III. EXCLUSIONS

A. The SUM Endorsement Negates Coverage in the Event the Plaintiff Settles with the Tortfeasor Without Obtaining the Consent of the SUM Carrier

Exclusion "1" of the SUM endorsement provides that a claimant will forfeit the right to SUM coverage if he or she settles with a tortfeasor without the written consent of the SUM carrier. *State Farm Auto Ins. Co. v. Blanco*, 208 A.D.2d 933, 617 N.Y.S.2d 898 (2nd Dept. 1994); *State Farm Fire & Casualty Co. v. Zyburo*, 215 A.D.2d 566, 626 N.Y.S.2d 847 (2nd Dept. 1995). A related provision, Condition "10", directs a plaintiff to provide written notice to the SUM carrier that the defendant has offered his/her policy limits. The SUM carrier then has 30 days to either consent to the settlement, or to agree to tender an amount equal to the tortfeasor's policy limits and accept an assignment of the claim by the plaintiff/insured against the tortfeasor. If the claimant does not wait 30 days before signing a general release, the claimant will breach this condition precedent to SUM coverage. *USAA Cas. Ins. Co. v. Kaufmann*, 261 A.D.2d 275, 690 N.Y.S.2d 269 (1st Dept. 1999). *State Fann Mut. Auto. Ins. Co. v. Lucano*, 11 A.D.3d 548, 783 N.Y.S.2d 618 (2nd Dept. 2004); *Friedman v. Allstate Ins. Co.*, 268 A.D.2d 558, 703 N.Y.S.2d 198 (2nd Dept. 2000); *State Fann Mut. Auto. Ins. Co. v. Donath*, 164 A.D.2d 889, 559 N.Y.S.2d 567 (2nd Dept. 1990); *Aema Cas. & Sur. Co. v. Scirica*, 170 A.D.2d 448, 565 N.Y.S.2d 557 (2nd Dept. 1991); *Continental Ins. Co. v. Canni*, 192 A.D.2d 651, 596 N.Y.S.2d 471 (2nd Dept. 1993).

B. The SUM Endorsement Negates Coverage If the Claimant Sustains Injury While Occupying a Motor Vehicle that He/She Owns and is Not Covered by the Policy a SUM is Made Against

In *Cohen v. CHUBB Indem. Ins. Co.*, 286 A.D.2d 264, 729 N.Y.S.2d 105 (1st Dept. 2001), the claimant sustained injury while operating a motorcycle that he owned and insured with Progressive. The claimant asserted a SUM claim under his wife's policy with CHUBB seeking to recover the \$300,000 limits. CHUBB denied coverage based upon the exclusion pertaining to an insured who sustains injury while occupying a vehicle owned by the insured if that vehicle is not insured for SUM coverage by the policy against which a claim is made. The claimant argued that this exclusion was ambiguous in view of the no-fault endorsement setting forth a definition of "motor vehicle" that did not include a "motorcycle". Consequently, the claimant argued that a SUM claim could be made if one occupied a motorcycle at the time of the accident. The First Department held that the carrier was entitled to summary judgment because it was clear the plaintiff could entertain no reasonable expectation of receiving coverage when he had paid no premium for this coverage. The court further noted that the liability, no-fault and SUM sections of a policy are discrete and internally complete coverages, so that a provision in the no-fault endorsement is not dispositive of coverage under the SUM endorsement.

Since this provision negating coverage is an exclusion, it is necessary for a carrier to issue a timely denial of coverage, or it will waive the right to do so. *Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185, 712 N.Y.S.2d 433 (2000); *Great American Ins.*

Co. v. Tomaino, 293 A.D.2d 944,741 N.Y.S.2d 315 (3rd Dept. 2002) lv. to appl. denied 98 NY2d 611,749 N.Y.S.2d (2002).

Further, this exclusion only applies if the plaintiff or his/her spouse owns the vehicle. If the vehicle was owned by some other family member, even if it was regularly used by the plaintiff, the exclusion does not apply. See the provision in the SUM endorsement at **INSURING AGREEMENTS, 1. Definitions, C. Uninsured Motor Vehicle** stating that the term "uninsured motor vehicle" does not include a motor vehicle owned by the named insured, or spouse residing in the same household; *Walts v. Masullo-George*, 34 A.D.3d 1311, 824 N.Y.S.2d 506, (4th Dept. 2006). Thus, this exclusion is more narrow than the one in a typical liability policy that negates coverage when a vehicle is not listed as an insured vehicle and the vehicle is either owned by, or regularly furnished or available for the regular use of the named insured or a resident relative.

C. The SUM Endorsement Excludes Coverage if the Plaintiff Can Not Establish a "Serious Injury".

In *Raffellini v. State Farm Mut. Ins. Co.*, 9 N.Y.3d 196, 848 N.Y.S.2d 1 (2007), the tortfeasor's insurer tendered its \$25,000 liability limits. The plaintiff then commenced suit seeking to recover the SUM benefits from his own carrier, State Farm. State Farm raised in its answer the "serious injury" threshold as an affirmative defense. The plaintiff moved to dismiss that defense. The Court of Appeals held that a plaintiff could recover for non-economic loss under the SUM endorsement only if he could establish a "serious injury". The plaintiff argued that the "serious injury" requirement only applied to uninsured motorist claims in view of Insurance Law §3420(f)(1) specifically requiring a "serious injury" for a UM claim while Insurance Law §3420(f)(2) was silent as to whether this requirement existed for a SUM claim.

The Court of Appeals cited three reasons for requiring a plaintiff to pass the "serious injury" threshold in order to make a SUM claim. First, the Court of Appeals concluded that the legislative history did not draw a distinction between TJM and SUM coverages with respect to requiring a "serious injury". As a second reason for requiring a "serious injury", the Court of Appeals observed that SUM coverage is intended to provide the insured with the same level of protection that his policy affords to an injured third party. Because the serious injury requirement applies to a typical plaintiff, it should also apply to a plaintiff making a SUM claim. Finally, the Court recognized that the Superintendent of Insurance had included the serious injury requirement in the SUM endorsement. The Court recognized that this provided "persuasive authority" for enforcing the serious injury requirement, and that the superintendent had the power to adopt regulations even though the implementing statute was silent on certain issues.

IV. COLLATERAL ESTOPPEL

This doctrine recognizes that a party in a later proceeding is precluded from challenging a finding made by a court or arbitrator in an early proceeding under the

following circumstances: (1) the same issue is addressed in both proceedings; and (2) the party being precluded had a full and fair opportunity in the earlier proceeding to litigate that issue. The courts have addressed whether this principle can be applied to require the SUM carrier to be bound by the jury verdict or arbitration award from the underlying personal injury case.

In *Russell vs. New York Central Mutual Fire Ins. Co.*, 11 A.D.3d 668, 783 N.Y.S.2d 404 (2nd Dept. 2004), the plaintiff obtained a jury verdict against the tortfeasor. The plaintiff then argued that the SUM carrier was bound by that jury verdict. In rejecting that argument, the Second Department held that the SUM carrier is not estopped from contesting the right of the plaintiff to recover SUIV1 benefits when the carrier failed to intervene in the underlying personal injury action. The Court observed that the carrier's duty to pay SUM benefits does not arise until after the plaintiff exhausts all policies covering the defendant. Further, the Court noted that the doctrine of collateral estoppel only applies if the SUM carrier was either a party, or in privity with a party, to the original trial.

However, in *Culpepper vs. Allstate Ins. Co.*, 31 A.D.2d 490, 818 N.Y.S.2d 544 (2nd Dept. 2006), Allstate was both the liability carrier for the tortfeasor and the SUM carrier for the plaintiff. A jury awarded the plaintiff damages against the tortfeasor in the sum of \$115,000. Allstate paid its \$25,000 liability limits. The plaintiff then pursued a SUM claim against Allstate. The Court held that Allstate was collaterally estopped from challenging the prior award. The Court noted that Allstate was in privity with the tortfeasor on the issue of damages.

The courts have also addressed whether the doctrine of collateral estoppel can be applied to preclude a plaintiff from seeking an amount from a SUM carrier greater than a jury verdict or arbitration award in the underlying personal injury case. See *New York Central Mutual Fire Ins. Co. vs. Reinhardt*, 27 A.D.3d 751, 813 N.Y.S.2d 158 (2nd Dept. 2006).

V. STATUTE OF LIMITATIONS

The statute of limitations for UM or SUM claim is six years. For a UM claim, the statute begins either from the date of the accident, or from the time when subsequent events render the offending vehicle uninsured. The plaintiff has the burden of proving the applicability of a later accrual date than the date of the accident. *Jenkins v. State Fann Ins. Co.*, 21 A.D.3d 529, 801 N.Y.S.2d 42 (2nd Dept. 2005); *Preferred Mutual Ins. Co. v. Rand*, 15 IVlisc. 3d 1112 (A), 2007 WL 939855 (Sup. Ct. Richmond Co. 2007); *Travelers Ind. Co. v. Yagudaev*, 11 Misc. 3d 1080 (A), 819 N.Y.S.2d 852 (Sup. Ct. Queens Co. 2006).

For a SUM claim, the statute of limitations accrues on the date of the settlement between the plaintiff and the tortfeasor. *Continental Ins. Co. v. Richt*, 253 A.D.2d 818, 677 N.Y.S.2d 634 (2nd Dept. 1998); *In the Matter of the Arbitration between Allstate Ins. Co. and Schelter*, 280 A.D.2d 910, 720 N.Y.S.2d 685 (4th Dept. 2001); *Alkity Ins. Co. v.*

Mirghani, 11 Misc.3d 1080 (A), 819 N.Y.S.2d 846 (Sup. Ct. Kings Co. 2006).