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SECTION: OUTSIDE COUNSEL

HEADLINE: Contact Requirement of Regulation 35-D

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BODY:

The mandatory minimum uninsured motorist endorsement and the supplementary uninsured motorist endorsement known as Regulation 35-D provide several definitions for an uninsured motor vehicle, including a stolen or unregistered vehicle or a vehicle operated without the owner's permissive use. The regulation also delineates the criteria for a category of uninsured vehicle commonly referred to as a "hit and run" vehicle. This article will focus on coverage for hit and run accidents and, in particular, will explore the evolving concept of contact within the context of the endorsements.

Pursuant to regulation 35-D, an uninsured motor vehicle is defined as one for which:

- (1) No bodily injury liability insurance policy or bond applies to such vehicle (including a vehicle that was stolen, operated without the owner's permission, or unregistered) at the time of the accident: or
- (2) neither owner nor driver can be identified (including a hit-and-run vehicle), and which causes bodily injury to an insured by physical contact with the insured or with a motor vehicle occupied by the insured at the time.

Contact Requirement

The contact requirement was imposed in an effort to avoid fraud as the nature of the claim lends itself to contrived claims. Physical contact is a condition to coverage and thus is properly to be determined by the courts, serving as a basis to stay arbitration pending a hearing on the issue.¹ Thus, counsel receiving a demand for arbitration where contact is questioned must timely petition to stay the arbitration or the objection will be waived.² The party seeking to stay arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue that would justify the stay.³ The respondent however, bears the burden of proving contact with the hit and run vehicle.

In *Countrywide Ins. Co. v. Colon* ⁴, the court held that where another vehicle "cut off" the claimant, causing claimant to lose control and strike a tree, the requisite contact was not present thereby defeating her uninsured claim. In *Prudential v. Hobson*⁵ the hit and run vehicle made an illegal turn in front of the claimant causing her to spin out of control striking another vehicle. The claimant conceded there was no contact between his vehicle and the hit and run vehicle. The petition to stay was granted on the grounds that there was no contact and thus no valid hit and run claim.⁶

Where the police report fails to mention contact, a factual issue is raised necessitating a hearing on the issue.⁷ For example, in *Great Northern Insurance Co. v. Ballinger*,⁸ while the police report did not mention contact, the respondent submitted an affidavit from a nonparty witness, which averred that there was contact

between an unidentified vehicle, and the nonparty's bicycle, which then came into contact with the claimant's bicycle. A hearing was deemed necessary as to whether the contact requirement had been met. See also *Utica Mutual Ins. Co. v. Leconte*⁹; *Eveready v. Scott*¹⁰; *Maryland Casualty Co v. Piaseckill*. The appellate courts will not disturb the trial court's finding vis-a-vis contact unless the court's finding could not be reached upon any fair interpretation of the evidence.¹² In cases where the police report does not indicate contact and the claimant is now alleging the existence of a hit and run vehicle, photographs showing the damage to the vehicle and, of even greater value, the insurer's opportunity to examine the vehicle and obtain an accident reconstructionist or engineer to provide an expert opinion as to the cause of damage to the car can be critical for the insurer's success. Otherwise, the issue typically is one of credibility as between the claimant and the police officer who prepared the report.

Direct Contact

Another issue that has provoked considerable litigation is whether direct contact with the hit and run vehicle itself is necessary. In 1966, in *MVAIC v. Eisenberg*,¹³ the Court of Appeals considered language similar to that contained in the present statute and held that where a hit and run vehicle pushed another vehicle across the roadway and into claimant's vehicle, the contact requirement was met. Considering the legislative purpose of the statute and noting that the existence of a hit and run vehicle is easy to allege and difficult to disprove, the Court held that the potential for abuses, including fraud and collusion were nearly eliminated with the requirement of 'physical contact.' The Court reasoned that proof that a hit and run vehicle did in fact exist is then clearly available as 'physical contact' almost invariably produces visible evidence of impact and thus, the likelihood of a 'phantom' hit and run driver is minimized. The rationale for requiring proof of 'physical contact' was apparent to the court, while the requirement of an actual impact between the hit and run vehicle and the insured's vehicle was not.

In *Smith v. Great American Insurance Company*,¹⁴ the Court of Appeals considered the contact requirement where snow and ice became dislodged from a tractor-trailer, striking the claimant's windshield and causing injuries. The Court determined the contact requirement was not met where the accident did not originate in a collision with an unidentified vehicle. In its analysis, the Court acknowledged that the contact requirement could be met by the continued transmission of force indirectly and simultaneously through an intermediate agency, but held that the initial impact must, nevertheless, involve a collision between the unidentified vehicle with the claimant, the vehicle occupied by him, an obstruction or other object causing the bodily injury. The Court in dicta noted that objects cast off or cast up by the hit-and-run vehicle, whether ice accumulated on the vehicle or pebbles or rocks or other debris on the roadway surface would be excluded. Several purposes were served by this interpretation according to the court, including a greater likelihood that the offending vehicle was operated negligently and a greater likelihood that the damage to the claimant or his vehicle would establish that there was an unidentified vehicle, thereby deterring fictitious claims. This language was interpreted by the Courts as foreclosing uninsured claims involving hit and run vehicles where a part of the vehicle struck the claimant or claimant's vehicle until the 1991 Court of Appeals' decision discussed below.

The Appellate Division, Second Department in *GEICO v. Goldschlager*,¹⁵ constrained to follow *Smith*, held that while the respondents met their burden of establishing contact between a wheel from an unidentified vehicle and the respondent's vehicle, the physical contact requirement was not met. The dissent criticized the court's holding in *Smith* for imposing the requirement of an initial collision between the hit and run vehicle resulting in direct or indirect contact with the claimant. "Whether the part is still attached or comes flying through the air, it seems to us, can make little difference in principle, although in the latter case it might present some difficulties (not here present) in carrying the burden of proof." In *Goldschlager*, an abandoned car missing its front wheel was found near the scene of the accident.

In the years after *Smith*, there were numerous cases involving flying automobile

parts striking claimants that were denied based upon the language of Smith.¹⁶ However, in *Aetna Casualty & Surety v. Loy*,¹⁷ the Appellate Division reversed the trial court to the extent it determined that the contact requirement was met where the claimant was hit while working on the LIE when a car hit a cone and then a two by four which then struck the claimant in the eye. The court held that the requirement for contact was met when the inert two-by-four was propelled into respondent as a result of being struck either by the unidentified vehicle or the cone into which the vehicle had initially swerved. The force of the collision was transmitted through either or both of these objects to respondent.

Finally, in *Allstate Ins. Co. v. Killakey*,¹⁸ the Court of Appeals considered the purpose of the contact requirement and availed itself of the opportunity to clarify its holding in Smith. In *Killakey*, the claimant of uninsured benefits was killed when a rim and tire detached from an unidentified vehicle striking his vehicle and causing it to crash. The Court found the physical contact requirement of the statute was met where the accident originated in a collision with an unidentified vehicle, or an integral part of an unidentified vehicle. "The remedy for distinguishing between valid and fraudulent hit-and-run claims should rest on the proof that there was, indeed, an unidentified vehicle and that physical contact with the vehicle caused an accident, not on artificial distinctions between accidents involving a vehicle and those which may involve parts which undeniably come from it." The Court noted that the burden of proving the involvement of a hit and run vehicle when only part of the vehicle was involved to be "necessarily substantial." In subsequent caselaw, the focus thus became whether the object was an integral part of the unidentified vehicle.

In *Bajrami v. General Acc. Ins. Co.*,¹⁹ the trial court held that the contact requirement was satisfied where a load of gravel and sand fell out of the truck striking another vehicle which lost contact and swerved into the claimant's car. Noting initially that contact between the unidentified truck and the claimant was not necessary; the court determined that the load was an integral part of the truck. The court distinguished the load of gravel and sand from snow and ice (as in Smith) because it was intentionally placed on the vehicle by the driver and concluded that during its transporting, it was an integral part of the truck.

In *Matter of Insurance Company of North America v. Carrozo*,²⁰ the court found insufficient evidence to warrant a hearing as to the fulfillment of the physical contact condition where the evidence did not establish that the metal gearbox, which was propelled into Carrozo's vehicle, was an integral part of the unidentified vehicle.

In *Locasio v. Atlantic Mutual Insurance Co.*,²¹ the claimant was involved in an accident with another vehicle, but was not injured as a result of the crash. Both drivers exited their vehicles and the claimant was shot by the other driver who then fled the scene. The claimant was not entitled to first party or uninsured benefits as the injuries did not arise from use or operation of the vehicle, the incident did not constitute an "accident" within the meaning of the policy and the injuries did not arise as a result of contact with the unidentified vehicle.

In *GEICO v. Yarmoluk*,²² the court found that the claimant had not established the requisite contact where her car struck debris in the road, including a muffler. Based upon the substantial burden imposed where only part of a vehicle is involved, the lack of witnesses and the absence of any proof as to how long the muffler had been in the roadway, the court concluded that the claimant had failed to meet her burden.

In *Nationwide Insurance Co. v. Bellreng*,²³ the claimant was injured in a hit and run accident while spraying water on asbestos as part of his employment. Respondent was using a hose that was stretched across a road. A taxicab driven by an unidentified driver made contact with the hose, pulling respondent into a utility pole. The court held that there was physical contact as the accident originated in a collision with an unidentified vehicle or an integral part of an unidentified vehicle.

In *Allstate Insurance Co. v. Basdeo*,²⁴ where there were multiple vehicles and the

accident originated with an unidentified vehicle, the court found the contact requirement was met, noting that direct contact by the unidentified vehicle with the claimant's vehicle was not necessary. In *State Farm Mutual v. Johnson*,²⁵ a case also involving multiple vehicles, the court found a triable issue of fact as to whether the accident originated from a collision with an unidentified vehicle existed necessitating a hearing.

In order for the condition precedent of contact to be met by the claimant of uninsured motorist benefits, he must establish that there was contact between the unidentified vehicle and the claimant or the vehicle the claimant was occupying. While direct contact between the unidentified vehicle and the claimant or claimant's vehicle is not necessary, the contact must involve the continued transmission of force indirectly or simultaneously through an intermediate agency, and the initial impact must be that of a collision between the unidentified vehicle or an integral part of the vehicle with the claimant, the vehicle occupied by him, an obstruction, or other object causing the bodily injury.

1. [NYCM Fire Ins. Co. v. Peredes, 289 AD2d 495, 735 NYS2d 179 \(2d Dept. 2001\)](#).
2. The claimant must establish the liability of the "hit and run" vehicle at the arbitration i.e. that the hit and run vehicle was the proximate cause of his injuries. While an arbitrator may not conclude that there was no contact in issuing his award, he may find the sole proximate cause of the accident was the negligence of the claimant driver and "dismiss the claim" according to the recent Second Dept decision, [Karadhimas v. Allstate Ins. Co. 2004 WL 1615955 \(N.Y.A.D. 2d Dept.\)](#), [2004 N.Y. Slip Op. 06120](#) and see [Nationwide Ins. Co v. McDonnell, 708 N.Y.S.2d 146 \(2d Dept. 2000\)](#) where the court found the arbitrator exceeded his powers by finding no contact.
3. [GEICO v. Estate of Sosnov, 275 AD2d 325, 712 NYS 2d 54 \(2d Dept.2000\)](#)
4. [279 AD2d 427, 720 NYS 2d 71 \(1st Dept. 2001\)](#)
5. [67 NY2d 19, 490 NE2d 504, 499 NYS 2d 637 \(1986\)](#)
6. Of note, the court found that contact was a condition to coverage rather than an exclusion and as such, no disclaimer was required.
7. [1 AD 3d 436, 767 NYS2d 31 \(2d Dept. 2003\)](#) citing [64 AD 2d 985](#); [235 AD 2d 420](#); [178 AD 2d 529](#)
8. [303 AD2d 503, 757 NYS 2d 309, 2003 \(2d Dept. 2003\)](#)
9. [3 AD3d 534, 770 NYS 2d 750 \(2d Dept. 2004\)](#)
10. [1 AD3d 436, 767 NYS 2d 31 \(2d Dept. 2003\)](#)
11. [235 AD2d 423, 652 NYS2d 545 \(2d Dept. 1997\)](#);
12. [Metropolitan Property & Casualty v. Sands, 5 AD3d 601, 772 NYS2d 850, \(2d Dept.2004\)](#); [State Farm Mutual. Auto. Ins. Co. v. Mucerino, 275 A.D.2d 464, 712 NYS 2d 893, \(2d Dept. 2000\)](#)
13. [18 NY2d 1, 218 NE2d 524, 271 NYS 2d 641 \(1966\)](#)
14. [29 NY 2d 116, 272 NE2d 528, 324 NYS 2d 15 \(1971\)](#)
15. [44 AD2d 715, 355 NYS 2d 9 \(2nd Dept. 1974\)](#)
16. [Utica Mutual v. Tucker, 505 NYS 2d 992 \(Sup. Ct. Onondoga County 1986\)](#); In Re: [Diaz, 440 NYS 2d 13 \(1981\)](#); [Utica Mutual v. Spenningsby, 520 NYS 2d 163 \(2d Dept 1987\)](#); [Soto on Behalf of Gonzalez v. Motor Vehicle Acc. Indemnification Corp, 140 A.D.2d 223, 528 NYS 2d 543 \(1st Dept. 1988\)](#)

17. [108 AD2d 709, 485 NYS 2d 1018 \(1st Dept 1985\)](#)
18. [78 NY 2d 325, 574 NYS 2d 927, 580 NE 2d 399 \(1991\)](#)
19. [156 Misc 2d 435, 593 NYS2d 405 \(Sup. 1993\)](#)
20. [611 NYS 2d 171 \(1st Dept. 1994\)](#)
21. [511 NYS 2d 934 \(2nd Dept. 1987\)](#)
22. [262 AD 2d 561, 692 NYS2d 433 \(2d Dept 1999\)](#)
23. [288 AD 2d 925, 732 NYS 2d 822 \(2d Dept. 2001\)](#)
24. [273 AD2d 466, 710 NYS 2d 111 \(2d Dept 2000\)](#)
25. [287 AD 2d 640, 732 NYS2d 21 \(2d Dept. 2001\)](#).

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11/5/2004 NYLJ 4, (col. 4)