MVAIC Six Years Later--A Practical Appraisal

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lations, his attitude in regard to purchase price would be determined by the probability of the restriction being changed in the reasonably near future. He would not pay more because of a potential use if it appeared that he would never be able to take advantage of that use. Therefore, the future use should not be considered in valuation, unless the potential purchaser could foresee a change in the zoning laws. In such a case, future use should be considered since the "willing buyer" might well determine his purchase price in relation to the probability of such change.

The purchaser on the open market would be influenced by the profits he could expect to make by reason of his buying the land. But he would also consider the money he would have to invest before he could realize such profits. He would not pay a greater price for the land by reason of its adaptability if actualizing the future use would require sufficient investment to offset the value of the adaptability. Therefore, potential income should influence the determination of market value to the extent that it is not offset by the investment required to adapt the property.

"Just compensation," therefore, is an award which results in neither undue hardship nor unwarranted benefit for either party to the condemnation proceedings. If we admit the existence of personal or sentimental attachments to certain land which cannot be bargained for, if we realize that land condemned for a state highway may be valuated as farmland, the condemnation process may seem unfair. However, the "common good" basis of the eminent domain theory sometimes requires individual sacrifices. As an abstract concept, "just compensation" may correctly be considered the goal, rather than the product, of our case law.

MVAIC SIX YEARS LATER—A PRACTICAL APPRAISAL

The mounting toll of highway accident victims suffering death or bodily injury has presented many problems of varying complexity and scope. Among them, the difficulties in the area of providing such persons with indemnification against the wrongful acts of uninsured and financially irresponsible motorists remain particularly distressing and acute. The New York Legislature's first step toward a solution to the problem was recognition of the helpless predicament of innocent auto accident victims whose common-law remedy proved to be a Pyrrhic victory against the judgment-proof or uninsured motorist, and nonexistent against the unknown hit-and-run driver. Concern for the plight of such claim-
ants triggered the enactment of the Motor Vehicle Safety Responsibility Act of 1929\textsuperscript{1} and the Motor Vehicle Financial Security Act of 1956.\textsuperscript{2} These statutes afforded some relief where formerly there was none, but large problem areas remained untreated. Dissatisfaction with the inadequate protection provided by these earlier statutes resulted in the enactment of the Motor Vehicle Accident Indemnification Corporation Law\textsuperscript{3} in 1958.

Effective January 1, 1959, MVAIC was created as a private, non-profit corporation whose membership consisted of every authorized motor vehicle liability insurer in the state.\textsuperscript{4} Its purpose was to close the gaps left open by the two earlier statutes, and its powers included the handling, investigation, litigation, adjustment, settlement and payment of claims against the corporation.\textsuperscript{5}

However, a study of MVAIC's short history reveals that it has failed to attain some of the goals it was designed to reach. Moreover, several of the MVAIC provisions have themselves operated to confuse and frustrate claimants and practitioners. The objective of this note, therefore, will be to indicate some of the major areas of difficulty with respect to MVAIC and to suggest approaches useful to the solution of these problems.

**General Limits of MVAIC Coverage**

A clear understanding of the limits of MVAIC's coverage is the essential starting point in reviewing the problem areas. The maximum recovery limits are fixed at ten thousand dollars, exclusive of interests and costs, on account of injury or death to one person in any one accident and twenty thousand dollars to more than one person in any one accident.\textsuperscript{6}

The basic protection extends only to accidents occurring within the State of New York.\textsuperscript{7} It pertains only to innocent\textsuperscript{8} persons who are legally entitled to recover damages as a result of death or bodily

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\textsuperscript{1} N.Y. Vehicle & Traffic Law art. 7.
\textsuperscript{2} N.Y. Vehicle & Traffic Law art. 6.
\textsuperscript{3} N.Y. Ins. Law art. 17-A. (Hereinafter referred to as MVAIC.)
\textsuperscript{4} N.Y. Ins. Law § 602.
\textsuperscript{5} N.Y. Ins. Law § 606.
\textsuperscript{6} N.Y. Ins. Law § 167(2-a).
\textsuperscript{7} Ibid.
\textsuperscript{8} It has been held that if a claimant knew that the automobile was stolen when she entered it or if she remained therein, having had a reasonable opportunity to alight therefrom after learning it was stolen, she is barred from recovery because she is not an innocent victim within the meaning of that term as used in N.Y. Ins. Law § 600(2). MVAIC v. Levy, 17 App. Div. 2d 965, 234 N.Y.S.2d 152 (2d Dep't 1962).
injury sustained in automobile accidents caused by the driver of any of seven narrowly prescribed categories of vehicles. Such vehicles must fall into at least one of the following categories: 1) uninsured, 2) unidentified, 3) registered in New York but for which a liability insurance policy was not in effect at the time of the accident, 4) stolen, 5) operated without the permission of the owner, 6) subject to a disclaimer or denial of coverage by the insurer, or 7) unregistered.

Once a claim has met these elementary requirements, the next step is to classify the victim’s status as a claimant, a process vital to the proper prosecution of his remedy against MVAIC.

It would be difficult to overemphasize the importance of properly categorizing the accident victim into one of the two possible classifications applicable to eligible claimants, viz., “insured” or “qualified person.” Proper classification of the claimant is vital in determining the rights available to claimants, the coverage afforded, the notice requirements to be observed, the procedural steps to be followed, and even the applicable forum (arbitration or trial) which might ultimately entertain the claimant’s cause.

The “Insured Person”

The broadest classification and the one into which most claimants fall is that of the “insured person.” Since the statute does not define this term, but merely refers to the definition of “insured” as found in the policy, one must resort to the standard New York automobile accident indemnification endorsement itself in order to obtain a precise and technical meaning of the word “insured.”

As set forth in the endorsement the word “insured” means:

1. the named insured and, while residents of the same household, his spouse and the relatives of either;

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9 Recovery for property damage is not provided for in the statute or in the MVAIC endorsement.


11 Supra note 6.

12 It is not possible for a claimant to be both an “insured person” and a “qualified person.” Balletti v. MVAIC, 16 App. Div. 2d 814, 228 N.Y.S.2d 768 (2d Dep’t 1962); N.Y. INS. LAW §§ 601(b), (i).

13 N.Y. INS. LAW § 601(i).
(2) any other person while occupying
   (i) an automobile owned by the named insured or, if the named insured
       is an individual, such spouse and used by or with the permission
       of either, or
   (ii) any other automobile while being operated by the named insured
       or such spouse,
       except a person occupying an automobile not registered in the State
       of New York, while used as a public or livery conveyance; and
(3) any person, with respect to damages he is legally entitled to recover
for care or loss of services because of bodily injury to which this
endorsement applies.

The "exclusions" are set forth as follows:

This endorsement does not apply:
(a) 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;
(b) to bodily injury to an insured, or care or loss of services recoverable
   by an insured, with respect to which such insured, his legal representatives
   or any person entitled to payment under this endorsement shall without
   written consent of MVAIC, make any settlement with or prosecute
   to judgment any action against any person or organization who may
   be legally liable therefor;
(c) so as to inure directly or indirectly to the benefit of any workmen's
   compensation disability benefits carrier or any person or organization
   qualifying as a self-insurer under any workmen's compensation or dis-
   ability benefits law or any similar law.

Although an "insured person's" rights derive initially from
section 167, they are basically contractual rather than statutory.14
Thus, it is the endorsement which regulates each step of the "in-
sured person's" claim, from the imposition of notice requirements
to the prescription of arbitration as a final disposition when settle-
ment negotiations fail. An accurate understanding of the definition
of "insured" is obviously essential to the accident victim who desires
recognition as an "insured person," but it is no less important to
the claimant seeking to avoid this designation so that he may bring
suit against MVAIC as a "qualified person."

It is well established that a claimant holding an automobile
insurance policy issued in his name is an "insured person."15 A
husband may be deemed an "insured person" because of his wife's

14 MVAIC v. Lembeck, 37 Misc. 2d 24, 235 N.Y.S.2d 34 (Sup. Ct. 1962),
A separated wife has been deemed an "insured person," although not occupying the same household as her husband. A boy injured while riding his bicycle when the occupant of a parked automobile opened the door and struck him was deemed an "insured person" because he was a relative residing with his parents who had insurance coverage. A son-in-law of a named insured who resided in the same household was deemed an "insured person." A stepson on military duty in Hawaii has been deemed an "insured person." A passenger without any insurance of his own, injured while riding in the car of an owner whose carrier later disclaimed for untimely notice, was deemed to be an "insured person."

It is apparent, even from this limited selection of case law interpretations, that there is a development toward liberalization of the coverage afforded. In part this may derive from judicial tradition which characteristically applies strict construction standards initially and then gradually relaxes them; but inasmuch as the coverage in the "insured" classification is basically contractual, it may be assumed that the well-settled principle construing doubtful language in insurance policies against the carrier has also played a part. However, it is interesting to note a parallel trend in the classification of the "qualified person," which is solely based on statute.

The "Qualified Person"

The definition of the "qualified person" and the provisions with respect to his rights and applicable procedural steps are set forth

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19 As an "insured person" the claimant was precluded from bringing suit against MVAIC, and his only remedy was arbitration despite the fact that he could not be compelled to arbitrate because of his infancy. Graber v. MVAIC, 38 Misc. 2d 969, 239 N.Y.S.2d 332 (Sup. Ct. 1963).
20 MVAIC's contention that the term "relative" meant relative by blood but not by affinity was disposed of under the principle that if an insurance policy is of doubtful construction, the doubt must be resolved in the insured's favor. McGuinness v. MVAIC, 35 Misc. 2d 827, 231 N.Y.S.2d 795, aff'd, 18 App. Div. 2d 1100, 239 N.Y.S.2d 920 (2d Dep't 1963).
22 MVAIC v. Marshall, 39 Misc. 2d 142, 240 N.Y.S.2d 347 (Sup. Ct. 1963); MVAIC v. Goldman, 33 Misc. 2d 703, 227 N.Y.S.2d 58 (Sup. Ct. 1961). The former case held that when the main policy was rendered unenforceable, the endorsement continued in effect to protect the passenger as an "insured person." But see Mayes v. Darby, 38 Misc. 2d 979, 239 N.Y.S.2d 284 (Sup. Ct. 1963).
in Article 17-A of the New York Insurance Law. A "qualified person" is a claimant other than an "insured person" who is a resident of New York State or of another state, territory or federal district of the United States or province of the Dominion of Canada or foreign country which affords recourse to New York residents of substantially similar character to the MVAIC provisions. In addition, the claimant's legal representative is deemed a "qualified person." The accident giving rise to the "qualified person's" claim must have occurred in New York State. A claimant is not deemed a "qualified person" if he is the owner of an uninsured vehicle or the spouse of such owner when a passenger in such uninsured vehicle.

Although the provisions regarding giving of notice of claim to MVAIC and some of the procedural requirements are more restrictive with respect to "qualified persons" than "insured persons," the typically greater recoveries obtainable by "qualified persons" through suit against MVAIC illustrate one preferable aspect of this classification over that of "insured persons" whose only recourse is arbitration.

It has been held that the claimant bears the burden of proof in establishing his status, either as a "qualified person" or as an "insured." A national of the Philippines who had lived in New York State for over eight years and was a full-time student at New York University was held to be a resident of New York, and hence entitled to sue MVAIC as a "qualified person" for damages resulting from his injury by a hit-and-run driver. The driver of a taxicab covered by a financial security bond rather than by a policy of insurance was not an "insured person" but a "qualified person" entitled to bring suit against MVAIC. A passenger could be classified as a "qualified person" when the insurer successfully disclaimed coverage of the car because of the insured's failure to give proper notice and to cooperate with the carrier.

Judicial construction with respect to nonresident claimants is dependent on the reciprocal treatment which New York citizens might expect under identical circumstances in the foreign jurisdiction. An Ontario resident, injured when his host's vehicle struck

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24 For the various requirements of arbitration see p. 335 infra.
28 Mayes v. Darby, supra note 22.
a utility pole in New York State was denied the status of a “qualified person” because the Province of Ontario would have precluded a New York guest from recovery under the same set of operative facts. Where an uninsured New Jersey vehicle was struck by a hit-and-run car in New York, it was held that a passenger in the Jersey vehicle, unrelated to the owner, could sue MVAIC as a “qualified person” because a reciprocal New Jersey statute would afford similar relief to a New York resident. However, “qualified person” status was denied to the daughter of the owner because her claim would have been barred by New Jersey law.

Two other areas, however, disclose a notable expansion of the judicial concept of the “qualified person.” In the field of derivative suits, a husband has been deemed a “qualified person” for the purpose of asserting a cause of action against MVAIC for the loss of his wife’s services and her medical expenses. The case of McNair v. MVAIC held that a pedestrian, struck by a hit-and-run driver while crossing a Manhattan street, was a “qualified person,” despite his ownership of an uninsured vehicle at the time of the accident. This decision established that each spouse is disqualified when a passenger in the uninsured vehicle, but is “qualified” when a pedestrian.

With respect to the importance of the distinction between the “insured person” and the “qualified person,” one leading authority on MVAIC has said:

The most common error made in the handling of MVAIC claims is the failure to properly classify the claimant. A mis-classification can result in an unnecessary action or proceeding and, if not discovered in time, the denial of a claim. In most cases all the information necessary for classification can be obtained from the claimant.

After determining a person’s status as either an “insured” or “qualified person,” the next prerequisite to a successful claim against MVAIC is that of notice.

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30 White v. MVAIC, supra note 25.
31 Farina v. MVAIC, 34 Misc. 2d 34, 228 N.Y.S.2d 20 (Sup. Ct. 1962).
32 The court held that nothing in the statute limits the maintenance of a cause of action against MVAIC solely to persons who had received bodily injury or their representatives so as to exclude a derivative action on behalf of a husband whose wife had been injured. Thus, one having a derivative action is a “qualified person” within the meaning of the statute. Morisi v. MVAIC, 19 App. Div. 2d 727, 242 N.Y.S.2d 641 (2d Dep't 1963). However, it has been held that where a married woman had already recovered $10,000, her husband could not bring an additional derivative action because the maximum limitation on liability had already been recovered. Mizell v. Miller, 29 Misc. 2d 1007, 214 N.Y.S.2d 827 (Sup. Ct. 1961).
33 Supra note 23.
34 Dollard, Four Years of MVAIC, 26 QUEENS BAR BULL. 120 (1963).
Notice

As a condition precedent to the right to apply for payment from MVAIC, timely notice of the claim must be filed with the corporation. The nature of the notice and its timeliness depend on whether the victim is an "insured" or a "qualified person." The procedure to be followed by the "insured" is governed by the standard endorsement on his policy. The "qualified person" must comply with the provisions of the statute.

"Qualified Person"

Within ninety days of the accrual of the cause of action, a "qualified person" must file an affidavit with MVAIC, establishing that he is within that class of persons protected by Article 17-A of the Insurance Law. In the usual case, the ninety-day period commences as of the date of the accident. However, if the accident victim dies, the cause of action for wrongful death accrues when the executor or administrator is appointed, and the period for filing commences on that date. This requirement of filing within ninety days has been strictly enforced by the courts. The rationale is that article 17-A creates a new remedy unknown under common law. Since the legislature chose to restrict this right by imposing a time limit for seeking relief, this must be strictly construed. Much weight has been given to the fact that the language of the notice section of this article is substantially similar to that contained in Section 50-e of the General Municipal Law, which deals with filing notice of claim in tort actions against municipalities. This section and its predecessors were also strictly construed. The courts have presumed that the legislature, in enacting article 17-A, was aware of this construction of 50-e, and consequently intended that the Insurance Law be similarly construed.

In order to alleviate some of the harsh effects of the ninety-day limitation, the legislators allowed an additional thirty-day period for late filing if the "qualified person" is an infant or is

35 N.Y. Ins. Law §608.
mentally or physically incapacitated or is deceased, and by reason of such disability or death" 41 is prevented from giving notice within ninety days. In such a situation, the statute provides that the corporation may accept a late filing of affidavit, accompanied by satisfactory proof of the cause of delay. As an alternative the claimant may file an application accompanied by the required affidavits, returnable in the supreme court or county court provided that notice is given to MVAIC at least eight days prior to the date set for the hearing.42 The original time limit of 120 days was extended to one year, effective September 1, 1963. The courts have construed the provisions strictly, with the result that only the disabilities mentioned expressly in the statute will excuse compliance.43 Thus, in Raphael v. MVAIC,44 where the accident occurred shortly after article 17-A became effective, the court rejected the excuses that the procedure was still not well known to attorneys, and that the delay had been caused by an unsuccessful attempt to locate and serve the owner of the other vehicle.

When the claimant is disabled within the provisions of the statute, the delay must have been caused by that disability. Thus, the petition of an infant for late filing was rejected when the excuse offered was that the petitioner was under arrest.45 Likewise, when an infant's excuse for late filing was his attorney's ignorance of the statutory requirement, his application was rejected.46 Where mental or physical incapacity is alleged as the excuse for late filing, the claimant must "show a disability so incapacitating as to prevent filing."47 Thus, in Grys v. MVAIC,48 petitioner alleged that he had been hospitalized during the entire filing period, but he submitted no statement as to the nature of the alleged disability and no supporting medical affidavits. He had retained an attorney five days before the expiration of the ninety-day period. The court found that there was no showing of physical incapacity within the meaning of the statute. On the other hand, the fact that

41 N.Y. Ins. Law § 608(c).
42 Ibid.
47 Grys v. MVAIC, supra note 39.
an injured applicant had counsel within the ninety-day period does not, as a matter of law, preclude a finding that delay was due to the disability. This was established in *Holmes v. MVAIC*,\(^4\) where the petitioner, eighty-three years of age, who had been confined to the hospital for several months after the accident, was granted relief, even though he had the services of an attorney almost a month before the filing time expired. The court found that the basic cause of the delay had been the petitioner's physical and mental disability.

Often, the failure to file within the time limitation is caused by the fact that the claimant's attorney reasonably relied upon information that the wrongdoer was insured. Nonetheless, strict judicial interpretation has resulted in a denial of relief to these claimants. Thus, in *Cappiello v. MVAIC*,\(^5\) the third party had claimed he was insured, and the records of the Motor Vehicle Bureau indicated the same. The carrier was served, but obtained an extension to appear on a date beyond the ninety-day filing period. After the carrier failed to appear, the claimant learned that the policy had been cancelled eight days before the accident. His application to permit service of notice of claim *nunc pro tunc* upon MVAIC was rejected. The court stated that difficulty in determining the existence of insurance coverage, and administrative delay in informing claimant of a lack of coverage, were not valid excuses for late filing. The court further indicated that there seemed to be no remedy available for a "qualified person" in the position of the petitioner. As to the suggestion that such persons file with MVAIC in every case, the court stated:

> [I]t is difficult to see how, under circumstances such as those presented here, petitioner could have honestly made an affidavit stating, as expressly required by subdivision (a) of section 608, that the motor vehicle in question was—or was even believed to be—uninsured when all available information indicated that it was insured.\(^5\)

Yet the court refrained from granting relief since case law has consistently held that the courts have no discretion to extend filing beyond the statutory limit. It will be seen that the "insured person" is in a more favorable position when seeking to file after the specified time.

\(^{49}\) 16 App. Div. 2d 1003, 229 N.Y.S.2d 335 (3d Dep't 1962).
\(^{50}\) 44 Misc. 2d 156, 253 N.Y.S.2d 69 (Sup. Ct. 1964).
\(^{51}\) Id. at 159, 253 N.Y.S.2d at 72.
"Insured Person"

The time for giving notice by an "insured person" is controlled by the standard endorsements contained in every New York automobile liability insurance contract. It requires written notice of claim to MVAIC within ninety days or "as soon as practicable." Since this right of action on the policy is contractual, rather than statutory, the rationale used to justify a strict construction of the statutory words does not apply. In construing the meaning of "as soon as practicable," it has been held that the words are relative and must be measured by all the circumstances. Infancy as well as mental and physical incapacity could be held to excuse late filing by an "insured," as in the case of a "qualified person." In addition, the "insured" can be excused on other reasonable grounds, such as administrative delay. The "insured person" is not required to give notice until he knows that his opponent is not insured. Therefore, if he makes a diligent effort to ascertain that fact, his delay in filing will be excused. However, if the "insured" has not been diligent in this respect, his failure to file within ninety days will not be excused, and he will be deemed to have breached a material condition of the policy.

In addition to the condition of notice with which both the "insured" and "qualified person" must comply, there is a further

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52 N.Y. Auto. Acc. Indemnification Endorsement (notice cl.). In the case of a hit-and-run claim, notice must be given to MVAIC by means of a statement under oath within ninety days. Ibid.
57 Sorrentino v. MVAIC, 37 Misc. 2d 550, 236 N.Y.S.2d 123 (Sup. Ct. 1962). In this case, the claimant's attorney received the name of the opponent's carrier from the Motor Vehicle Bureau. Before the ninety days had run, the carrier informed the attorney that the policy had been cancelled. The attorney then informed the Motor Vehicle Bureau, which supplied a new policy number with the same carrier. After the filing period had expired, it was discovered that no such number existed. It was held that notice should have been given to MVAIC when the carrier first informed claimant's attorney of the cancellation. In the case of Marcus v. MVAIC, 29 Misc. 2d 573, 210 N.Y.S.2d 296 (Sup. Ct. 1961), the court found lack of due diligence when the first attempt to discover whether a New Jersey driver, who had collided with the petitioner, had insurance was made more than a year after the accident had occurred.
burden placed upon the claimant who sustained injuries from a "hit-and-run" accident.

Hit-and-Run Claims

As a condition precedent to giving notice of intention to file a claim against MVAIC, the "qualified person" basing his claim on a hit-and-run accident must show that he notified a police, peace or judicial officer in the vicinity within twenty-four hours or as soon as was reasonably possible after the accident.58 Under the standard endorsement, an "insured" is subject to a similar condition.59 The reasons that have been given for the requirement are: (1) to make possible the apprehension and identification of the culprit, and (2) to provide MVAIC with a reasonable protection against fraud.60

The "qualified person" who is a hit-and-run victim must, upon notice to MVAIC, apply to the supreme court for an order permitting the action against the corporation.61 The application must indicate compliance with the requirement of a timely report to the police.62 If there was an unexplained and unexcused delay, permission to sue MVAIC will not be granted.63

In order to constitute a sufficient report, the claimant must have informed the authorities of a hit-and-run accident, not merely of an "accident." 64 Where the injured party established that he had given this information orally to a policeman at the scene of the accident, there was held to be a sufficient "report," even though the officer had failed to enter the incident on the police records.65 Where the police record attributed the injury to another cause, the court allowed a claimant to establish that she had orally reported a hit-and-run accident to a member of the police department at the scene.66 Since report to the

58 N.Y. Ins. Law § 608(b).
61 N.Y. Ins. Law § 618(a).
police is a condition precedent, it would seem that a written report should be made, so as to obviate any possibility that the cause of action against MVAIC would be endangered by an apparent failure to comply with this provision.

Still another burden upon the claimant arises when the insurance company either disclaims liability or denies coverage.

Disclaimer

A "qualified person" may be faced with a situation in which his opponent's insurer disclaims liability or denies coverage because of some act or omission of the opponent. The "qualified person" is then given ten days from receipt of such disclaimer or denial of coverage in which to file an affidavit with MVAIC.67 A disclaimer of liability or denial of coverage presupposes that an insurance policy was in force at the time of the accident.68 The denial of coverage situation arises when the carrier claims that the policy does not encompass the particular accident. A disclaimer, on the other hand, is the carrier's refusal to respond because of some behavior on the part of the insured.69 Such behavior would include late service of notice of the accident upon the insurer, lack of cooperation by the insured and fraud on the insurer.70 There are a number of cases in which the accident victim discovered, after the statutory period had run, that his opponent's policy had been cancelled prior to the accident.71 Since the receipt of this knowledge is not a disclaimer according to the accepted interpretation, the petitioners were not qualified to file within ten days of receipt. Since the statutory filing period had expired, the claimants were left without relief. An insured person in the same situation would probably be excused, as having filed his claim "as soon as practicable."

After the claimant has determined his status and complied with the strict notice requirements of the statute or endorsement,
there are other prerequisites to a successful claim against MVAIC. For example, in the hit-and-run situation, the claimant must first establish the existence of actual physical contact.

**Physical Contact**

One absolute prerequisite in the area of hit-and-run claims is the occurrence of physical contact between the hit-and-run vehicle and the claimant or the vehicle he was occupying at the time of the accident.\(^7\) This requirement falls equally upon "qualified persons" and "insured persons."\(^7\) Rigid adherence to this rule thus precludes recovery when an unknown vehicle cuts off the claimant’s car and causes an accident without the occurrence of physical contact between the vehicles. An examination of the decisions in this field reveals no exception to the absolute rule that physical contact must have occurred, and only slight disparity of interpretation regarding the nature of the contact required.

Where a blind woman crossing the street was knocked down by a car which was in turn struck by a hit-and-run vehicle and caused to strike the injured pedestrian a second time, the absence of physical contact between the claimant and the hit-and-run car was held fatal to her application for relief.\(^7\) Where a stolen hit-and-run vehicle collided with a parked car, causing it to jump the sidewalk and strike a pedestrian, the claimant lacked a remedy because of the absence of direct physical contact between the victim and the hit-and-run car.\(^7\) However, the latter decision was specifically questioned in a later case which held that the physical contact rule could be satisfied either by direct contact or by the hit-and-run vehicle striking an intervening car and propelling it into contact with the claimant's automobile.\(^7\)

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7\(^3\) The statutory requirement for both "qualified persons" and "insured persons" appears in N.Y. INS. LAW § 617. In addition, the same requirement for "insured persons" is contained in the endorsement.


7\(^5\) Bellavia v. MVAIC, 28 Misc. 2d 420, 211 N.Y.S.2d 356 (Sup. Ct. 1961). The court indicated that the language of the statute was clear and unambiguous and that an extension by judicial construction would permit claims to arise from accidents merely proximately caused by hit-and-run vehicles. The court concluded that if the legislature had intended to afford such protection, it would have been a simple matter to manifest this intent.

7\(^6\) Tuzzino v. MVAIC, 42 Misc. 2d 786, 249 N.Y.S.2d 279 (Sup. Ct. 1964). In questioning the *Bellavia* decision, *supra* note 75, the court found the construction of "contact" too narrow and limited in that case.
case appears to be the sole exception to the established interpretation requiring direct physical contact.

Inasmuch as the physical contact rule is applicable between the hit-and-run vehicle and the automobile which the claimant was "occupying at the time of the accident," the proper meaning of this phrase is to be found in the decisions construing the word "occupying." The broadest meaning attributed to this word is illustrated by two recent cases. In MVAIC v. Shindler, a passenger who had emerged from a taxi was injured when the taxi, which the claimant could not identify, drove off with her clothing caught in the door. It was held that the claimant was "occupying" the taxi at the time of the accident, and thus within the protection of the statute. In MVAIC v. Oppedisano, a claimant who had alighted from his car to release it from the high snow into which it had skidded was held to have been "occupying" his automobile at the time he was thrown down and injured by an unidentified hit-and-run vehicle.

While the requirement of physical contact has no doubt operated at times to deny relief to deserving claimants, it may also be assumed that fraudulent claims have been prevented by the imposition of this rule.

After compliance with various prerequisites, the form the claimant’s relief will take is dependent upon his previously determined status, i.e., whether he is an "insured" or a "qualified person."

Arbitration

The rights of an "insured person" against MVAIC are derived, not from article 17-A, but from the endorsement on his policy. Unlike the "qualified person," whose remedy in case of a dispute with MVAIC is suit against the corporation, the "insured" must submit to arbitration. The endorsement provides that if a dispute arises between a claimant and MVAIC as to the former’s being "legally entitled to recover damages" from the owner or operator of an uninsured vehicle, or as to "the amount of payment," then the "matter or matters" on which they disagree will be settled by arbitration. Some of the earlier cases

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77 "Occupying" as it applies to both "qualified persons" and "insured persons" is defined in N.Y. Ins. Law § 617. In addition, the same definition for "insured persons" is contained in the endorsement.
79 41 Misc. 2d 1029, 246 N.Y.S.2d 879 (Sup. Ct. 1964).
80 N.Y. Auto. Acc. Indemnification Endorsement (arbitration cl.).
interpreting this provision differed as to which issues are arbitrable and which are to be determined by a court before arbitration. The second and third departments of the appellate division had held that the provision limits arbitration to the issue of negligence and the resulting question of damages. On the other hand, the first department had held that the provision "may extend to other questions of law and fact pertaining to the eligibility of the injured party to recover." The court of appeals resolved the controversy in the case of *Rosenbaum v. American Sur. Co.* That case involved an "uninsured motorist" clause, which had been used in New York automobile liability policies prior to the MVAIC endorsement, and which contained an identical arbitration provision. The issue presented was whether a court or the arbitrators should decide the question of coverage. The rule that "where the covenant to arbitrate is made subject to conditions precedent, the existence of such conditions when disputed is an issue for the court" was applied to the facts of the case. Therefore, the court held lack of insurance to be a condition precedent to proceedings against MVAIC, and, as such, this must be established before the parties go to arbitration. The endorsement must be construed as making only two issues arbitrable—fault and damages.

In adherence to the theory of this decision, the courts have held the following questions to be conditions precedent to arbitration: whether notice to MVAIC was timely under the terms of the policy; whether there was an "accident" as distinguished from an intentional assault; and whether the injured party was an "innocent victim" within the meaning of the statute. When the

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84 Id. at 314, 183 N.E.2d at 668-69, 229 N.Y.S.2d at 378.
87 MVAIC v. Levy, 17 App. Div. 2d 965, 234 N.Y.S.2d 152 (2d Dep't 1962), in which claimant, while a passenger in a stolen car, was injured by the alleged negligent driving of the thief. *Cf.* Short v. MVAIC, 42 Misc. 2d 682, 248 N.Y.S.2d 664 (Sup. Ct. 1964), in which an infant-claimant was injured while a passenger in an uninsured automobile driven by her intoxicated.
claimant alleges a hit-and-run accident, it is not within the jurisdiction of the arbitrator to decide whether there was contact, a sufficient report to the police, or a hit-and-run car involved. Where the ground for proceeding against MVAIC is disclaimer by the opponent’s carrier, the courts will predetermine whether such a disclaimer was made. When a dispute exists as to any of these factors, the court will, upon application, grant a stay of arbitration until the issue is determined.

Since the claimant may proceed against MVAIC when an insurance company either disclaims liability or denies coverage, a problem arises as to what is a sufficient disclaimer for commencement of an action against MVAIC.

What Constitutes Disclaimer

The Insurance Law provides that an “insured” may proceed against MVAIC when his injury is caused by “an insured motor vehicle where the insurer disclaims liability or denies coverage.” While this provision is not expressly stated in the standard endorsements, the policy must be construed as if the condition were included. Thus, an “insured,” as well as a “qualified person,” is protected in the event that his opponent’s insurer disclaims.

The problem has arisen as to whether the word “disclaimer” is to be interpreted as “valid disclaimer.” In the case of MVAIC v. Scott, MVAIC urged that two claimants should procure a judgment as to the validity of the disclaimer of their opponent’s insurers before proceeding with arbitration, or, in the alternative, that the court appoint a referee to report on its validity so that the court could summarily dispose of the issue. The court found no basis for these contentions, either in the Insurance Law or cated companion. The court distinguished this case from Levy in that the auto here had not been stolen, and therefore stated the issue to be not whether claimant was an “innocent victim” but whether she had been contributorily negligent.

90 See cases cited notes 85-91 supra.
91 See N.Y. Ins. Law § 167(2-a).
92 Ibid.
93 Ibid.
94 Ibid.
95 N.Y. Ins. Law § 608(c).
in the arbitration provisions of the Civil Practice Act [now Article 75 of the CPLR], but went on to state: "For the purpose of making a claim under his own policy, it is sufficient for the respondent to show that there has in fact been a disclaimer, and that prima facie there is a valid basis for it." Temporary stays were then granted until hearings could be held on the prima facie validity of the disclaimer.

Relying on Scott, the petitioner, in the case of MVAIC v. Holley, sought a stay of arbitration proceedings, alleging that the disclaimer had no prima facie validity. The court in Holley rejected the position espoused in Scott, stating that, in interpreting a right unknown under common law, the courts are not to restrict or enlarge upon the statute when a literal application is satisfactory. The Insurance Law does not require a showing that a disclaimer is valid, and therefore this additional requirement should not be imposed by the court. Subsequent cases are in accord with the holding of Holley that the fact, rather than the validity (actual or prima facie), of a disclaimer is all that must be shown by a claimant.

It has been held that the claimant has a right to seek a declaratory judgment against his opponent's insurance company to determine the invalidity of the disclaimer. In an action to determine the liability of an insurer denying coverage, MVAIC may be joined as a defendant, for its own convenience and protection. If the corporation is not named as a defendant, it has been held that it may be permitted to intervene in the action under Section 1013 of the CPLR.

When the insurer of the claimant's opponent brings an action for a declaratory judgment on its right to disclaim, the judgment itself constitutes the actual disclaimer. This was the holding in Crump v. MVAIC, wherein the claimant made a motion to compel arbitration. MVAIC defended on the ground that the disclaimer had not been filed within ten days. The disclaiming

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97 Id. at 494, 214 N.Y.S.2d at 602.
103 44 Misc. 2d 180, 253 N.Y.S.2d 83 (Sup. Ct. 1964).
insurer had previously brought an action for a declaratory judgment on the validity of its disclaimer. MVAIC argued that the complaint in that action had constituted a disclaimer, while the claimant contended that the final judgment, within ten days of which notice was filed, was the disclaimer. Referring to the CPLR, wherein a declaratory judgment itself fixes the rights and other legal obligations of the parties, the court concluded that "the mere bringing of the action cannot be said to have established that which is to be ultimately adjudicated." The ten-day period during which to file claim against MVAIC thus commenced on the date of the judgment which allowed the disclaimer.

MVAIC Checklist

Inasmuch as the proper prosecution of MVAIC claims demands strict compliance with a number of exacting technical requirements, the field is a prime area for potential malpractice suits. In order to avoid this problem, and to save time and effort, the following checklist is suggested with respect to the preparation of an MVAIC claim.

It is essential that the attorney first classify and then verify the claimant's status. It should be noted that even if the policy omits the required statutory provisions, it will nonetheless be construed to include them. Therefore, if the claimant is an "insured person," the attorney should examine the client's policy and resolve any conflict between it and section 167 in favor of the latter. The attorney should also inquire whether the claimant has made any material misrepresentations which might provide grounds for rescission by the carrier.

Assuming the claimant is a nonresident and seeks recognition as a "qualified person," the attorney should make a current check of legislative enactments in the foreign state to ascertain if any new law of that jurisdiction, similar to MVAIC, might render the client eligible as a "qualified person."

If the wrongdoer's identity is known, the attorney should immediately inquire whether or not he has insurance coverage. In addition, he should contact both the Motor Vehicle Bureau and the wrongdoer's carrier to make certain that he has the correct information. If there is any suspicion of lack of coverage, the attorney should immediately file notice of his claim with MVAIC.

104 Id. at 181, 253 N.Y.S.2d at 85. See CPLR 3001, 3017(b).
105 N.Y. INS. LAw § 167(2-a).
If the wrongdoer is an unknown hit-and-run driver, an immediate report of the accident, characterizing it as hit-and-run, should be filed with the proper authority. In this type of claim, any evidence supporting the allegation of physical contact, e.g., photographs or testimony of witnesses indicating contact between the claimant or his vehicle and the hit-and-run car, is invaluable. Of course, in all the MVAIC claims the respective deadlines should be met. For convenience they are listed here.

**Deadlines for “Insured Persons”**

Within twenty-four hours or as soon as reasonably possible:
A hit-and-run accident must be reported to police, peace or judicial officer or the Commissioner of Motor Vehicles.

Within ninety days:
A statement under oath in the case of a hit-and-run accident must be filed with MVAIC.

Within ninety days or as soon as practicable:
Written notice of claim must be filed with MVAIC.

**Deadlines for “Qualified Persons”**

Within twenty-four hours or as soon as reasonably possible:
A hit-and-run accident must be reported to police, peace or judicial officer or the Commissioner of Motor Vehicles.

Within ninety days of the accrual of the cause of action, or
Within ten days after receipt of notice of disclaimer or denial of coverage by the carrier of the offending vehicle:
An affidavit of intention to make claim must be filed with MVAIC.

Within one year from the beginning of the applicable period for filing the affidavit in the case of a “qualified person” whose infancy, mental or physical incapacity or death has prevented filing within ninety days:
An application for leave to file late must be filed with MVAIC.

**Suggested Legislative Changes**

In interpreting the MVAIC provisions, the courts of New York have adopted a rule of strict construction since the statute creates a remedy unknown under common law. By such construction they have frequently reached results acknowledged to
be inequitable, but nevertheless considered necessary because of the literal meaning of the statute. Thus, any liberalization must come from the legislature, and not from the courts.

An obvious example of the inadequacy of the statute was seen in *Uline v. MVAIC*. Here, the claimant was unable to recover from his opponent’s insurer because the latter had been forced into receivership. The other party was not “uninsured” within the terms of the statute, since the policy had been effective at the time of the accident. The action of the insurer was not a disclaimer since its sole reason for failing to respond was financial inability. Moreover, the claimant could not be classified within any of the seven categories of coverage specifically listed in the Insurance Law. The court, drawing from the specific listing of categories the inference that whatever was not included was intended to be excluded, held that the claimant was not entitled to relief under the statute. It is probable that the legislature, in enacting the statute, never foresaw the *Uline* situation, and therefore failed to include this as one of the categories of coverage. In view of the *Uline* decision, however, the legislators should be motivated to add some provision to extend coverage to an innocent victim of a motorist insured by a carrier that has become defunct.

Several of the cases concerning the notice provisions applicable to a “qualified person” have reached inequitable results. It might be argued that there is no injustice under the present notice provisions, whereby an “insured” stands in a better position than a “qualified person” since the latter has not paid for his coverage. However, denial of relief appears to defeat the purpose of the statute in those cases where a claimant, reasonably relying on the mistaken information that his opponent is insured, fails to file notice against MVAIC within ninety days. A possible solution would be to change the notice provision for a “qualified person” to conform to the clause used on the policy, i.e., “within ninety days or as soon as practicable.” This would place the applications of those filing after ninety days within the discretion of the courts. Then, even if the courts were to apply “as soon as practicable” strictly, they would still be able to grant relief to claimants who had demonstrated due diligence, but were induced into believing that their opponents were insured.

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207 N.Y. INS. LAW § 600(2).
Legislative reform might also be directed toward the arbitration provision in the MVAIC endorsement. Since this endorsement has been interpreted as requiring arbitration for only the issues of fault and damages, there is often needless litigation on factual questions before the parties can proceed with arbitration. It has been suggested that "the New York Simplified Procedure for Court Determination of Disputes,"\(^{108}\) whereby trial by jury is waived, be adopted to deal with the problem.\(^{109}\) As an alternative, the endorsement provision could be rephrased so as to allow arbitration on all issues affecting the claimant's liability, thereby reducing the calendar congestion problem.

The holding of the courts that the fact, and not the validity, of the disclaimer is all that must be proved has increased the burden upon MVAIC. This problem was discussed in a recent first department case\(^{110}\) which observed that there has been a noticeable increase in disclaimers.\(^{111}\) Under present procedures, MVAIC may, as subrogee, institute an action against the insurer to contest the validity of the disclaimer. However, this occurs only after the claimant has completed arbitration. Additionally, MVAIC may find it unprofitable to proceed against the insurer if a small sum is involved. The disclaiming carrier will have gained additional time as well as the benefit of additional information revealed at the arbitration. The first department suggests legislation providing "machinery for the expeditious disposition of the question [of validity of the disclaimer] raised in advance of arbitration."\(^{112}\)

Other suggestions for legislative change have been made, often as a result of an apparently unjust decision. For example, there is some opinion favoring abolition of the contact requirement in hit-and-run cases, and for including coverage for victims of intentional assaults as well as "accidents." However, it must be remembered that some limitations on coverage are necessary to protect MVAIC from fraud, notwithstanding the possibility that some innocent persons will suffer. It is suggested that the legislature concern itself, at present, with the more immediate problems previously discussed. Having eliminated these major problems, the legislators could then concern themselves with the minor inadequacies in the statute.

\(^{108}\) CPLR 3031.
\(^{111}\) Id. at 205, 254 N.Y.S.2d at 484.
\(^{112}\) Ibid.