

## RECENT COURT DECISIONS/"TOP 10" INSURERS

### Appeals From Denial of Stay of Arbitration

Does an appeal lie to the Appellate Division from an order of the Supreme Court that denies an insurer's petition to stay arbitration of an uninsured or underinsured motorist claim? Of course it does -- theoretically, at least. A series of recent decisions from the Second Department indicates, however, that the right to appeal in such cases may be more illusory than real.

For example, in *State Farm Mutual Auto. Ins. Co. v. Blumen*, \_\_ AD2d \_\_, \_\_ NYS2d \_\_, 1995 WL 689777 (NYLJ, November 27, 1995, p. 31, col. 5) the Supreme Court denied the insurer's application for a stay by order dated May 10, 1993, which order was reversed by the Appellate Division, Second Department on October 17, 1994 (208 AD2d 752 [2d Dept. 1994]). It appears, however, that at the time the appellate court rendered its decision, it was unaware that prior thereto the parties had proceeded to arbitration and award. Granting the insurer's motion for reargument, the Second Department stated:

"This Court has been informed by the attorney for the respondent that the underlying arbitration hearing was held on August 29, 1993, which resulted in a judgment entered September 7, 1994, in favor of the respondent. The parties having proceeded to arbitration, the appeal must be dismissed (see *Matter of Beagle* (MVAIC) 19 NY2d 834)."

See also *Nationwide Mutual Ins.Co. v. Rothbart*, \_\_ AD2d \_\_, \_\_ NYS2d \_\_, 1995 WL 596001 (2d Dept. 1995) ("By participating in the arbitration with respondents, the petitioner has waived its right to appeal [citing *Matter of Beagle*, *supra*]").

As an aside, it should be noted that the Second Department was so upset by the failure of the parties in *Blumen* to notify it, prior to the rendering of its decision on the appeal, of the fact that they parties had proceeded to and through arbitration that, by subsequent decision and order, it sua sponte ordered counsel for both parties to show

cause "why an order should not be entered imposing such sanctions as the court may deem appropriate." See NYLJ, December 1, 1995, p. 33, col. 4.

The case cited by the courts to support the determinations in the *Blumen* and *Rothbart* cases, above, i.e., *Matter of Beagle* (MVAIC), 19 NY2d 834 (1967), is remarkable if only for its terseness. Granting a motion made by the respondent to dismiss the appeal, the Court of Appeals succinctly stated "motion granted and appeal dismissed, with costs and \$10 costs of motion, upon the ground that, since the decision of the Appellate Division, MVAIC has arbitrated the claim in question and thereby waived its right of appeal."

Considering the still fairly extensive delay between filing and determination which presently exists in the Second Department, it can reasonably be anticipated that in all cases, scheduling of the arbitration hearing will precede scheduling of the appeal. What, then, can an insurer do to make certain that it will not be deemed to have waived its right to appeal? May it unilaterally refuse to participate in the arbitration hearing pending the appeal? If it does, will it nevertheless be bound by the results obtained by the claimant before the arbitrator?

Of course, the insurer may apply either to the Supreme Court or to the Appellate Division to stay the arbitration pending the appeal. It is unclear, however, whether the right to appeal will be deemed to have been waived if the insurer proceeds to arbitration following the denial of such application(s). How does this jibe with CPLR 5523, which deals with the right to restitution of property or rights lost by the judgment or order where the Appellate Court reverses or modifies the order appealed from? Does the appellate court have the right effectively to negate the right of appeal granted by the Legislature through the simple expedient of denying a stay pending appeal? Until the appropriate case comes along, we can only ask these questions, not answer them.

In this connection it should be noted that in two prior cases *Allstate v. Picciarelli*, 208 AD2d 530 (2d Dept. 1994) and *Interboro Mut. Ins. Co. v. Betancourt*, 187 AD2d 593 (2d Dept. 1992), the Second Department, although not stating that the result would have been otherwise had a motion for stay pending appeal been made, stated that "By participating in the arbitration proceeding instead of moving to temporarily stay the proceeding pending appeal, the petitioner waived its right to seek a permanent stay of arbitration" (emphasis added).

### **Life In The Real World**

Uninsured motorist insurance provides protection to persons injured through the use or operation of, inter alia, an uninsured motor vehicle, and is intended to provide the same type of coverage as would have been available to the tortfeasor if he had in effect a policy providing the mandatory coverage required under New York law. Thus, just as an insured motorist is not covered for injuries he inflicts as a result of intentional assault, so, too, does uninsured motorist coverage provide no protection to an insured whose injuries resulted from an assault. See *Travelers Ins. Co. v. Morales*, 188 AD2d 350 (1st Dept. 1992); *Matter of Kilbride*, 62 Misc.2d 641 (Sup. Ct. N.Y. Co. 1970); *McCarthy v. MVAIC*, 16 AD2d 35 (4th Dept. 1962), affd. 12 NY2d 922 (1963).

In *Aetna Cas. & Sur. Co. v. Perry*, \_\_ AD2d \_\_, 632 NYS2d 31 (2d Dept. 1995), the claimant's vehicle, while stopped at a red light, was suddenly hit in the rear by another vehicle. While the claimant was still shaken, an unidentified individual pointed a gun at him and told him to get out of the car. The individual then drove away in the claimant's vehicle. Reversing the Supreme Court, Nassau County's denial of Aetna's application to stay arbitration, the Second Department succinctly concluded that the claimant's injuries "were the result of an intentional assault, not the result of an accident."

The facts recited in the opinion do not demonstrate how the court knew that the initial contact which caused claimant's injuries were not accidental. It is unclear on what basis the court concluded that the carjacking was not an afterthought. Indeed, since the individual who stole the vehicle was "unidentified," it is not even clear on what basis the court determined that he was an occupant of the vehicle which struck claimant's vehicle or that he was in any way involved in the accident.

### **Declaratory Judgment By Claimant**

There appears to be a disparity among the Appellate Divisions as to whether a claimant has standing to commence an action for declaratory judgment against a liability insurer prior to the entry of judgment against the insured.

In Clarendon Place Corporation v. Landmark Ins. Co., 182 AD2d 6 (1st Dept. 1992), lv. to app. denied 80 NY2d 918 (1992), a case arising out of the tragic fire at Happyland Social Club, the First Department refused to allow the estates of the victims to seek declaratory relief against the liability insurer. As the court stated:

"It is clear, and not disputed by our dissenting colleagues, that the estates of the deceased fire victims through their representative Black are strangers to the insurance contracts at issue. They are not in privity with the insurers; nor are they third-party beneficiaries of these contracts. (See Stainless, Inc. v. Employers Fire Ins. Co., 69 AD2d 27, 33-34, affd. 49 NY2d 924). Thus, they may not seek enforcement of the insurers' obligations under the policies on either of these grounds.

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". . . Black and the estates he represents have no present rights flowing from Insurance Law § 3420(b)(1) since the statutory conditions precedent to an action thereunder have not been satisfied. Absent any legally cognizable interest in the insurance contracts at issue, there is no justiciable controversy between Black and the insurers to give him standing to bring this action. (See New York Pub. Interest Research Group v. Carey, 42 NY2d 527). Any request for declaratory relief is premature if the standing for such an action is contingent on the happening of a future event which is beyond the control of the parties and may never occur. (Supra, at 531). If the Happyland claimants are unsuccessful in obtaining a judgment against DiLorenzo and Clarendon Place in the underlying third-party actions there would be no need to litigate the coverage issue between Black and the insurers. Moreover, if

DiLorenzo and Clarendon Place successfully prosecute this declaratory judgment action, there would be no remaining dispute to be resolved between Black and the insurers. That Black may be collaterally estopped from contesting any adverse coverage ruling as a result of the determination made in this proceeding (see, D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 NY2d 659) is not a basis upon which to confer standing on him pursuant to CPLR 1002(a). (See, Lloyd v. Capital Corp. v. Behrmann, 122 AD2d 783). Finally, to allow joinder here would plainly contravene the provisions of Insurance Law § 3420 (b) (1), which, as noted, must be strictly construed."

See also Mount Vernon Fire Insurance Co. v. NIBA Construction, Inc., 195 AD2d 425 (1st Dept. 1993); Hershberger v. Schwartz, 198 AD2d 859 (1st Dept. 1993) ("Plaintiffs are strangers to the homeowner's insurance policy and may not seek enforcement of the insurer's obligation under the policy. Plaintiffs may commence a direct action against defendant's insurer only when a judgment has been rendered against the insureds and the judgment remains unsatisfied thirty days after entry"); Sincerbeaux v. Nationwide Mutual Fire Ins. Co., 206 AD2d 907 (4th Dept. 1994) ("Plaintiff's remedy is a direct action against the insurer in the event that a judgment is rendered against the Snows and the Judgment remains unsatisfied thirty days after entry.")

The rule in the Second Department, however, is otherwise. Citing a long line of its own prior decisions, the Second Department recently stated in Tepedino v. Zurich Amer. Ins. Group., \_\_ AD2d \_\_, 632 NYS2d 604 (2d Dept. 1995), as follows:

"We reject the defendant's contention that the instant action is premature as the underlying action has not been resolved. A party who is not privy to an insurance contract but would nevertheless benefit from the insurance policy may bring a declaratory action to determine whether the insurer owes a defense and/or coverage under the policy (citations). Moreover, a declaratory judgment action against insurers with respect to jural relations, either as to present or prospective obligations, is permitted prior to entry of judgment in the underlying action (citations)."

It should be noted that less than a month prior to its decision in Tepedino, a different panel of the Second Department, relying on the First Department's Clarendon decision, dismissed a claimant's declaratory judgment action upon the ground that

claimant lacked standing since he had not yet obtained a judgment against the insured. See Latoni v. Mt. Vernon Fire, \_\_ AD2d \_\_, 631 NYS2d 756 (2d Dept. 1995). In light of the Second Department's otherwise consistent holdings to the contrary, however, Latoni must be deemed to be an anomaly.

### **Assault and Battery Exclusion**

In *U.S. Underwriters Ins. Co. v. Val-Blue Corp.*, 85 NY2d 821 (1995), a nightclub was insured under a liability policy which included an "Assault and Battery Exclusion Endorsement" which states:

"It is agreed that no coverage shall apply under this policy for any claim, demand or suit based on Assault and Battery and Assault and Battery shall not be deemed an accident, whether or not committed by or at the direction of the insured."

In that case, Val-Blue, the owner of the nightclub, employed a retired New York City police officer as a security guard. One day, in the early morning hours, another off-duty police officer apprehended a suspect outside the nightclub and, with a gun drawn, brought the suspect into the club in order to use the telephone. The club's security guard told the arresting off-duty officer to drop the gun and, when he did not do so, the security guard shot him twice. In his suit against Val-Blue and the security guard, the officer alleged that the guard "negligently, carelessly and recklessly" shot him and that Val-Blue was vicariously liable under the doctrine of respondeat superior and that it was also liable for its negligence in hiring, supervising and training the guard. In its recent decision, the Court of Appeals stated:

"We agree with the Appellate Division that the language of the exclusion for suits 'based on Assault and Battery' is unambiguous. Although respondents acknowledge the intentional nature of assault and battery under New York law, they claim the act of shooting Hanley -- twice -- was merely negligent, careless or reckless because there was no intention to shoot a police officer. The lack of DiSilvo's intent to cause the actual harm that results, however, is irrelevant in determining the intentional nature of his act (*Technicon Elecs. Corp. v. American Home Assur. Co.*, 74 NY2d 66, 74-75, 544 NYS2d 531, 542 NE2d 1048 [lack of intent to harm environment did not avoid policy exclusion for intentional discharge of pollutants]). The injury being sued upon here is an assault and battery. The plethora of claims surrounding that injury, including those for 'negligent shooting' and 'negligent hiring and supervision' are all 'based on' that assault and battery without which Hanley would have no cause of action."

This very same exclusion was involved in *Mt. Vernon Fire Insurance Company v. Creative Housing, Ltd.*, \_\_ F2d \_\_ (2d Cir. [Dec. 11/15/95]). The facts in that case, however, were markedly different. In *Mt. Vernon*, supra, a tenant was criminally assaulted in her apartment building. Reviewing a host of prior New York Court of Appeals cases discussing the words "based on" or "arising out of" used in assault and battery and other policy exclusions, the Second Circuit concluded that it could not determine how the New York Court of Appeals would rule where the person committing the assault and battery was a third party having no connection to the insured. Accordingly, the federal appeals court certified the following questions to the New York Court of Appeals to resolve:

1. Is the language "based on" narrower than the language "arising out of" when used in an insurance policy and does the *Val-Blue* decision establish that neither is ambiguous?
2. When a third party rather than an insured's employee perpetrates an assault, is the basis of the victim's claim against the insured assault or the negligent failure to maintain safe premises?

We will, of course, keep a careful watch for the Court of Appeals further pronouncements on this issue.

It should be stressed that not all liability insurance policies contain similarly exclusionary language. Some, for example, provide coverage for an "occurrence", which is defined as "an accident resulting in injuries neither expected nor intended from the standpoint of the insured." Thus, the focus in those cases is not necessarily only on the nature of the act, but on the status of the actor. The question is, therefore, not whether the act committed by the perpetrator was intentional, but whether the non-perpetrator, by his participation, instigation or otherwise, did something from which it could be concluded from his standpoint, the injuries were intended. As we have many times cautioned READ YOUR POLICY before you jump to conclusions as to the scope and limitations of its coverage.

## **ANNUAL RANKINGS**

As the holiday season comes to a close, it is time once again for the State of New York Insurance Department's "Annual Ranking of Automobile Insurance Complaints" for 1994, the latest year for which such data is available.

Edward J. Muhl, the new Superintendent of Insurance, has assisted in providing statistical information on the claims-handling ability of 58 insurance companies or groups, which information can and should be taken as an indication of policyholder satisfaction. Thousands of complaints are handled by the Department's Consumer Services Bureau each year. Complaints that are upheld against an insurer, i.e., that are justified to some degree or that raise questions of fact beyond the jurisdiction of the Insurance Department, are used as the basis for the ranking.

As in the past, the complaint ratio was calculated by dividing the number of private passenger auto insurance complaints charged against an insurer and closed by the Consumer Services Bureau in 1994 by the insurer's 1993-1994 average private passenger auto premium volume in New York State. Because many complaints closed in any given year are initiated the previous year, the complaint ratios are computed using an average of two years' premium data. The ranking includes both voluntary and residual market (New York Automobile Insurance Plan or "Assigned Risk") experience. All companies or groups of companies with at least \$5,000,000 in average annual private passenger auto premiums in 1993 and 1994 are included in the ranking. Companies or groups with less than \$5,000,000 in premiums are not included unless they had ten or more complaints charged against them.

The first chart below lists the ten auto insurers with the worst performance record for the calendar year 1994. As always, we sarcastically refer to this list as the "Top 10." The company with the highest ratio is ranked first; the company with the lowest ratio is ranked last. Thus, those ranked near the top of the list had the worst performance. For

purposes of comparison, these companies' rankings in 1993 and 1992 are also shown. It should be noted that four of the listed companies -- Country-Wide, Winterthur U.S. Holdings, CIGNA and Home New York -- appeared in last year's "Top 10" as well. Last year's "top" company -- Eveready -- improved substantially; in 1994, it is the 56th ranked company out of 58.

The second chart represents the other side of the spectrum -- the real Top 10, i.e., the ten companies with the fewest complaints against them, or, the ten best performers of 1994. It should be noted that this list contains five repeat performers -- Executive, Electric, State-Wide, American Mutual and Chubb. It should also be noted that all of the top five best performers -- Transamerica, Electric, Eveready, State-Wide and Executive -- had a 0.00 complaint ratio, i.e. they had no complaints upheld against them. Although Executive Insurance Company is licensed to write all automobile insurance lines, it writes only collision and comprehensive (fire and theft) automobile coverages.

Finally, for those interested in the performance records of the ten largest auto insurers in New York State, we offer the third chart, which indicates those companies' rankings and complaint ratios.

A copy of the complete 1994 ranking is available from the Insurance Department upon request. The Department encourages any New Yorker unable to resolve a complaint against an insurance company, broker, agent or adjuster to contact its Consumer Services Bureau by writing or calling it at: 160 West Broadway, New York, New York 10013, (212) 602-0203; Agency Building One, Empire State Plaza, Albany, New York 12257, (518) 474-6600; or Walter J. Mahoney Office Building, 65 Court Street, Room 7, Buffalo, New York 14202, (716) 847-7618. The toll-free number is 1-800-342-3736.

#### **The "Top 10":**

### The 10 Worst Performers of 1994

	<u>Company or Group</u>	<u>1994 Complaint Ratio</u>	<u>1993 Ranking</u>	<u>1992 Ranking</u>
1.	Eagle	0.81	17	48
2.	American Financial	0.72	37	50
3.	Winterthur U.S. Holdings	0.69	3	***
4.	AIG	0.68	26	41
5.	Zurich-American	0.49	15	9
6.	Home New York	0.47	6	11
7.	General Accident	0.40	21	32
8.	CIGNA	0.34	4	6
9.	Country-Wide	0.33	2	7
10.	Continental	0.32	34	12

**The Real Top 10:**  
**The 10 Best Performers of 1994**

	<u>Company or Group</u>	<u>1994 Ranking</u>	<u>Number of Upheld Complaints</u>	<u>Complaint Ratio</u>
1.	Transamerica	58	0	0.00
	Electric	57	0	0.00
	Eveready	56	0	0.00
	State-Wide	55	0	0.00
	Executive	54	0	0.00
2.	Chubb	53	1	0.02
3.	Amica Mutual	52	2	0.03
4.	Progressive	51	7	0.05
5.	Government Employees	50	24	0.05
6.	Home Mutual of Binghamton	49	1	0.06

**The "Big 10"**  
**The Largest Auto Insurers in New York**

	<u>Company or Group</u>	<u>1994 Ranking</u>	<u>Number of "Upheld" Complaints</u>	<u>Complaint Ratio</u>
1.	Allstate	31	225	0.16
2.	State Farm	37	141	0.14
3.	Government Employees	50	24	0.05
4.	General Accident	7	106	0.40
5.	Aetna Life and Casualty	15	64	0.25
6.	New York Central Mutual Fire	33	37	0.15
7.	Travelers	43	25	0.11
8.	Nationwide	41	29	0.13
9.	Liberty Mutual	44	20	0.09
10.	Leucadia	21	46	0.21