

## BLACKOUTS, BLIZZARDS AND THE “20-DAY RULE OF CPLR 7503(c)

Among the many and varied effects of the big blackout of the Summer of 2003 was to bring our minds to the question of the effect, if any, upon the strict 20-day time limitation for filing Petitions to Stay Arbitration set forth in CPLR 7503(c), of such dramatic events as blackouts, blizzards and other disasters, be they natural or man-made, that result in the closure of courts and/or County Clerk’s offices. In analyzing this issue, a review of the basic rules pertaining to the timeliness of filing Petitions to Stay Arbitration will prove salutary.

### The 20-Day Rule

The time within which an insurer must move to stay arbitration of an uninsured motorist or underinsured motorist claim is set forth in CPLR 7503(c), which provides, in pertinent part, that “An application to stay arbitration must be made by the party served [with a Demand for Arbitration or Notice of Intent to Arbitrate] within 20 days after service upon him of the notice or demand, or he shall be so precluded.” Failure to make application for a stay of arbitration within this 20-day period requires the denial of the Petition as untimely and constitutes a bar to judicial intrusion into the arbitration proceedings. *See Steck v. State Farm Ins. Co.*, 89 NY2d 1052 (1996); *Aetna Life & Cas. Co. v. Stekardis*, 34 NY2d 182 (1974); *Matter of Knickerbocker Ins. Co. [Gilbert]*, 28 NY2d 57 (1971); *Matter of Jonathan Logan, Inc. [Stillwater Worsted Mills, Inc.]*, 31 AD2d 208 (1<sup>st</sup> Dept. 1968), *affd.* 24 NY2d 893 (1969); *Aetna Cas. & Sur. Co. v. Bondy*, 203 AD2d 561 (2d Dept. 1994).

The statutory 20-day period is construed as a strict statute of limitations – one of the shortest limitations periods known to the law. *See Worldwide Ins. Group v. Wing*, 202

AD2d 682 (2d Dept. 1994); Matter of Allstate Ins. Co. [Vitucci], 151 AD2d 430 (2d Dept. 1989), affd. 74 NY2d 879 (1989); Gold Mills, Inc. v. Pleasure Sports, Inc., 85 AD2d 527 (1<sup>st</sup> Dept. 1981); Allstate Ins. Co. v. Orsini, 142 Misc.2d 25 (Sup. Ct. N.Y. Co. 1988). Thus, lateness of even one day will result in a complete forfeiture of the Petitioner/insurer's right to contest compliance with an arbitration agreement or to challenge the failure to fulfill any condition precedent to arbitration. See Allstate Ins. Co. v. Vitucci, supra; City of New York v. Collins, 126 Misc.2d 377 (Sup. Ct. N.Y. Co. 1984).

#### Computation of Time Period

The 20-day time period provided for in CPLR 7503(c) is to be computed from the time the Demand for Arbitration or Notice of Intent to Arbitrate is received, not from the time it is mailed. See Matter of Knickerbocker Ins. Co. [Gilbert], supra; Allstate Ins. Co. v. Metayer, 137 AD2d 454 (1<sup>st</sup> Dept. 1989); Eagle Ins. Co. v. Pierre-Louis, 306 AD2d 344 (2d Dept. 2003). Moreover, the day on which the Demand or Notice is received is not included in the calculation. See General Construction Law §20; Allstate Ins. Co. v. Metayer, supra. The Petition to Stay Arbitration must be filed within the 20-day period. If the twentieth day after receipt of the Demand or Notice happens to fall on a Saturday, Sunday or national holiday, filing on the next succeeding business day will be deemed timely. See General Construction Law §25-a ("When any period of time, computed from a certain day, within which . . . an act is . . . required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day."); American Casualty Ins. Co. v. McCoy, 138 AD2d 485 (2d Dept. 1988).

### Exceptions to the Rule

Absent special circumstances that constitute exceptions to these general rules, the courts are without discretion to extend the statutory 20-day time period and/or consider an untimely application. See Aetna Life & Cas. Co. v. Stekardis, *supra*; State Farm Mut. Auto. Ins. Co. v. Kankam, \_\_\_ AD2d \_\_\_, 770 NYS2d 714 (1<sup>st</sup> Dept. 2004). We have previously written about several of the recognized exceptions to the strict application of the 20-day rule – the exception where “no agreement to arbitrate has ever been made” (see Matarasso v. Continental Casualty Co., 56 NY2d 264 [1982]); the exception where the Demand or Notice fails to contain the statutorily-required 20-day preclusion caveat (see Blamowski v. Munson Transp. Inc., 91 NY2d 190 [1997]; New Hampshire Indemnity Co. v. Vranica, 294 AD2d 287 [1st Dept. 2002]; Allstate Ins. Co. v. White, 267 AD2d 382 [2d Dept. 1999]); the exception where the Demand or Notice has been intentionally or even inadvertently misdirected to an incorrect office of the insurer (see Dandy Dan Taxi, Inc. v. Ins. Co. of State of Pennsylvania, 155 AD2d 458 [2d Dept. 1989]; Continental Ins. Co. v. Sarno, 128 AD2d 870 [2d Dept. 1987]; American Sec. Ins. Co. v. Tabbachi, 95 AD2d 808 [2d Dept. 1983]); the exception where the Demand or Notice is hidden or buried within a stack of other documents, such as medical records, and is not referred to in the enclosure letter, in the hope that it will be overlooked (see Nationwide Mut. Ins. Co. v. Monroe, 75 AD2d 765 [1<sup>st</sup> Dept. 1980]; Travelers Ins. Co. v. Thompson, 117 AD2d 595 [2d Dept. 1986]; Cf. State Farm Mut. Auto. Ins. Co. v. Santiago, 84 AD2d 552 [2d Dept. 1981]); and the exception where the claimant conceals a material fact that was unavailable to the insurer through reasonable diligence (see State Farm Mutual Auto. Ins. Co. v. Isler, 38 AD2d 193 [2d Dept. 1976]). See Dachs,

Norman and Dachs, Jonathan, "The Shortest Statute of Limitations Known to the Law," NYLJ, June 12, 1990. We now turn to the question of what happens when on the 20<sup>th</sup> day after receipt of the Demand or Notice, the filing of the Petition to Stay Arbitration is rendered impossible by the emergency closing of the County Clerk's office?

#### Emergency Closings of Clerk's Office

Several reported cases have addressed this issue, with differing results.

In *New Hampshire Ins. Co. v. Terentiev*, NYLJ, April 23, 1996, p. 25, col. 5 (Sup. Ct. N.Y. Co. 1996), the SUM insurer filed its Petition to Stay Arbitration two (2) days late because of a blizzard that made timely filing impossible due to the extremely heavy accumulation of snow and the state of emergency that was in effect at the time. Noting that "[t]he courts have no discretion to extend the [20-day] time period to permit consideration of an untimely application," and that the Petitioner failed to demonstrate how the storm impaired its ability to timely file, as well as the fact that there was no suspension of any civil law during the declaration of the state of emergency, the court denied the Petition as untimely. It appears that the critical factor in that case was that although the blizzard made filing extremely difficult, it was not impossible since, apparently, neither the Court nor the County Clerk's office was officially closed.

In *Kiernan v. Cipriano*, NYLJ, October 18, 1999, p. 30, col. 4, the Supreme Court, Suffolk County was presented with this issue in the context of an attempted filing of a summons and complaint on the date that the Statute of Limitations was to expire on a personal injury action. On that date, the Suffolk County Clerk's office closed early "because of the high consumption of electricity caused by a heat wave." As a result, Plaintiff's counsel was unable to file the summons and complaint with the County Clerk and, instead,

visited the Suffolk County Supreme Court in Riverhead, which was not similarly closed, and had the summons and complaint “date stamped” by the Clerk of the Special Term. On the next day, *i.e.*, the day after the expiration of the Statute of Limitations, Plaintiff’s counsel filed the original summons and complaint with the Suffolk County Clerk (and thereafter served the Defendant).

In opposing Defendant’s motion to dismiss the complaint as time-barred, Plaintiff argued that he was prevented from timely commencing the action within the limitations period because of an emergency closing of the County Clerk’s office. In denying Defendant’s motion and finding that the Plaintiff’s complaint was timely filed, the Court (Justice Marquette Floyd) cited to Judiciary Law 282-a, which permits a court to extend the statute of limitations by providing that “[w]henver the last day on which any paper is required to be filed with a clerk of a court outside the City of New York expired on a Saturday, Sunday, a public holiday or a day when the office of such clerk is closed for the transaction of business, the time therefore is hereby extended to and including the next business day such office is open for the transaction of business.” [A similar statute, Judiciary Law § 282[2], applies to courts in New York City (and New York, Kings, Queens, Richmond and Bronx Counties)]. The court also cited to County Law 206-a[2], entitled “Business in County Offices on Holidays and Saturdays,” which similarly provides with respect to county offices. Since in Suffolk County, as in most of the other counties, the County Clerk is deemed the “clerk of the court” for purposes of filing, recording and depositing of papers in actions (see County Law 525), and it was undisputed that the County Clerk’s office was closed for business prior to 5:00 p.m. on the pertinent day, “thus preventing Plaintiff’s counsel from filing his action,” the Court refused to reach “the harsh

result as requested by Defendant's counsel" under the circumstances. As explained by the Court, "Plaintiff's counsel was prevented from filing the summons and complaint because of an emergency situation which caused the County Clerk's office to be closed. It is of no moment that counsel waited until the last day to file the summons and complaint in this action nor is he required to proffer an explanation. The statute of limitations did not expire until the close of official business on July 6, 1999, that is, 5:00 p.m. on that date. Had Plaintiff's counsel arrived at the Clerk's office at 4:54 p.m. and filed his summons and complaint, said filing would have been timely. He was however precluded from filing that complaint through no fault of his own because of the emergency closing of the Clerk's office. Notwithstanding that Plaintiff's counsel may have utilized CPLR 203(c)(2), to seek a Court Order allowing an additional five (5) days to file the summons and complaint, he was entitled to rely upon the Clerk's office acceptance of his summons and complaint until the close of business on the last day that the statute of limitations expired, in this case, July 6, 1999 at 5:00 p.m.. Thus, this Court interprets Judiciary Law 282-a and County Law 206-a to mean that when the Clerk of the Court is not open for the transaction of business, that is, emergency situations such as loss of power, snow storms, impending hurricanes, bomb threats, floods, fires, employee strikes and any other basis which permits closing of official business, even for a portion of the business day, such emergency extends the filing of documents to the next day when the Clerk transacts business."

In *Martin v. J.C. Penney, Co., Inc.*, 275 AD2d 910 (4<sup>th</sup> Dept. 2000), the Appellate Division spoke to this issue also in the context of the attempted filing of a summons and complaint on the date on which the Statute of Limitations was to expire. In that case, a major snowstorm in the city of Buffalo resulted in a travel ban and the closing of the Erie

County Clerk's office. Thus, the Plaintiff was unable to file the summons and complaint until the day after the statute's expiration. In affirming the decision of the Supreme Court, which had denied the Defendant's motion to dismiss the action as time-barred, the Court rejected the Defendant's contention that the Court had no authority to extend the Statute of Limitations, and agreed with the Plaintiff that the Statute of Limitations was extended by the travel ban and closing of the County Clerk's office. In support of its decision, the court also cited to Judiciary Law § 282-a and County Law 206-a[2] and County Law 525.

In *Matter of Prudential Property & Casualty Ins. Co.*, NYLJ, June 26, 2001, p. 22, col. 4, which involved a Petition to Stay Arbitration, Justice Joan B. Lefkowitz provided an excellent review of the options available to Petitioners when faced with an inability to file the Petition because of an emergency closing of the County Clerk's office. Therein, the Petitioner had until March 6, 2001 to move to stay arbitration and attempted to do so by filing a Petition to Stay Arbitration on March 5, 2001 and March 6, 2001, but was prevented from doing so because the courthouse in White Plains and the County Clerk's office were closed both days "because of inclement weather (a severe snow storm)." As noted by Justice Lefkowitz, these closures were ordered by the Westchester County Executive since the County is the owner of the courthouse building and county personnel were directed not to report to the building. The special proceeding was commenced by appropriate filing on March 7, 2001.

Justice Lefkowitz noted that "petitioner's counsel, had he been so advised, may have secured the benefit of the five-day deferral for filing under CPLR 203(c)(2) had he been able to reach a judge outside of the courthouse and presented the judge with an Order to Show Cause to be executed by the judge" – and, presumably, delayed paying the fee for an index

number and RJJ until the filing. Also, the Court noted, “petitioner’s counsel might have availed himself of the opportunity to file in an adjacent county where the courthouse and County Clerk’s office were open and, thereafter, move to change venue to Westchester County.” However, having made such suggestions, Justice Lefkowitz went on to state that “The Court, however, does not require a party or an attorney to resort to extreme legal measures that unduly burden the court system and increase the expense of litigation.”

Relying upon Judiciary Law § 282-a and County Law 206-a, as well as the Fourth Department’s decision in *Martin v. J.C. Penney Co., Inc.*, *supra*, Justice Lefkowitz held that the Petition to Stay Arbitration was timely filed on March 7, 2001 – the next business day that the County Clerk’s office was open for business. Interestingly, although not necessary to her decision, Justice Lefkowitz added an additional theory upon which to support the extension of the limitations period. Noting that General Construction Law § 25-a(1) extends the time to perform an act to the “next succeeding business day following a Saturday, Sunday or public holiday” [emphasis added], and that the definition of “holiday” in General Construction Law § 24, which lists specified occasions and such other dates as the Governor or President may designate is “not necessarily applicable to the courts” (*Berthold v. Wallach*, 14 Misc. 55 [Sup. Ct. N.Y. Co. 1895]), Justice Lefkowitz argued that the term “holiday,” which has elsewhere been defined to mean “a day on which one is exempt from one’s usual labor or vocational activity” (Webster’s Third New International Dictionary, p. 1080), and “A day upon which the usual operations of business and government are suspended and the courts are closed . . .” (Black’s Law Dictionary [6<sup>th</sup> Ed.], p. 732; *see* 40 CJS, Holidays, § 2-4, 6; 19A Words & Phrases [Help to Hysterical], Holiday, pp. 292-96), could incorporate the closure of the court system in White Plains by reason of a

snow/weather emergency, and, therefore, “litigants should receive the remedial benefit of section 25-a(1) of the General Construction Law.”

Although in the majority of cases the plaintiffs will be saved by the tolling of the applicable filing periods when circumstances beyond anyone’s control result in the closure of the County Clerk’s office, the lesson of these cases is still the old lesson that is more honored in the breach than in the observance – that it is better not to wait until the last day (or the last minute) before making the requisite filing because, consistent with that other well-known maxim, if something can go wrong, it usually will.