

STECK ON STAYS -- PART I

We have, for many years, noted a divergence of opinion between and among the various judicial departments on the question of whether an insurer is bound by Insurance Law § 7503(c) to seek a stay of arbitration within 20-days after receipt of a demand for arbitration in cases where there is a policy with an agreement to arbitrate, but that agreement is claimed to be inapplicable under the circumstances of the particular case, or unenforceable because its conditions have not been complied with. In its recent decision in *Steck v. State Farm Ins. Co.*, NYLJ, April 26, 1996, p. 28, col. 5, the Court of Appeals has resolved that important issue in favor of the claimant, ruling, as described more fully below, that the carrier is, in fact, bound by the strict 20-day limitations period in such circumstances. In answering the question, however, the Court, in the very last sentence of its opinion, has raised another important question in uninsured and underinsured motorist cases -- i.e., whether the issue of coverage can be raised before the arbitrator after the insurer has failed to timely seek a stay of arbitration.

The Statute

CPLR 7503(c) provides, in pertinent part that an application to stay arbitration must be made by the party served within twenty days after service upon him of a notice of intention to arbitrate or demand for arbitration, or he shall be precluded "from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time." It is well-settled that the failure to make a timely application for a stay of arbitration requires denial of the application as untimely and constitutes a bar to judicial intrusion into the arbitration proceedings. See *Aetna Life & Cas. Co. v. Stekardis*, 34 NY2d 182 (1974). Although the Legislature and the courts clearly intended the procedure to obtain a stay of arbitration to be followed strictly (see, *Allcity Ins. Co. v. Vitucci*, 151 AD2d 30 (1st Dept. 1989), affd. 74 NY2d 819 (1989)), certain limited exceptions to the 20-day petition requirement have been recognized. See, Dachs, N. and Dachs, J., "The Shortest Statute of Limitations Known to the Law," NYLJ, June 12, 1990. For purposes of this analysis, the most significant of these exceptions is the "no agreement to arbitrate" exception created by the Court of Appeals in 1982 in *Matarasso v. Continental Casualty Co.*, 56 NY2d 264 (1982).

In Matarasso, the insured purchased automobile and "umbrella" coverage from Continental. Although the umbrella policy supplemented the insured's liability protection, it did not, by its terms, afford additional underinsured motorist coverage. Moreover, the umbrella policy did not contain a provision calling for the arbitration of disputes arising thereunder. Noting that the rule "barring judicial intrusion into the arbitral process operates only when an agreement to arbitrate exists," and that "we cannot impute to the Legislature an intent to bind persons to the arbitral process by their mere inaction for 20 days where no agreement to arbitrate has ever been made," the Court held that where an application to stay arbitration is made on the ground that the parties never agreed to arbitrate, as distinct from situations where there is an arbitration agreement which nevertheless is claimed to be invalid or unenforceable because its conditions have not been complied with, such a motion may be entertained notwithstanding the fact that it was made after the expiration of the 20-day period.

First Department

The First Department has consistently restricted the breadth of the Matarasso exception. Beginning with Matter of Woodcrest Fabrics, Inc. v. Taritex, 98 AD2d 52 (1st Dept. 1983), where a party to an agreement that contained an arbitration clause challenged the validity, rather than the existence of that agreement, the First Department recognized that "clearly, the courts may not construe CPLR 7503 (subd.[c]) to require a party to an agreement which makes no mention of arbitration to move timely to stay arbitration. Conversely, CPLR 7503 (subd.[c]) should not be construed in a manner that totally vitiates the 20-day proscription, a result which would be inevitable if any party to an agreement containing an arbitration clause could ignore the requirements of the statute merely by alleging that there is no arbitration clause in existence. That claim can be made in any case where the validity of the arbitration clause is in issue."

The same rationale was subsequently applied by the First Department in several uninsured and underinsured motorist cases wherein the court rejected the "no agreement to arbitrate" exception where an arbitration agreement undeniably existed, but the carrier contended that a condition of arbitration was not complied with. See Metropolitan Prop.

& Cas. Ins. Co. v. Coping, 179 AD2d 499 (1st Dept. 1992) (claim that offending vehicle not uninsured); Travelers v. Brown, 207 AD2d 672 (1st Dept. 1994) (claim that "Other Insurance" clause eliminated uninsured motorist coverage); Hanover Ins. Co. v. Gaeta, 215 AD2d 331 (1st Dept. 1995) (claim that underinsurance coverage was not triggered because the limits of the offending vehicle's policies were not exhausted). In U.S. Fire Ins. Co. v. Lihterman, 201 AD2d 267 (1st Dept. 1994), the First Department reasserted this position while simultaneously acknowledging that its view appeared to be contrary to that of the Second Department as set forth in several of its decisions (see discussion below).

Second Department

The decisions of the Second Department in this area appear, at least, to have been less consistent. Initially, the Second Department refused to apply the "no agreement to arbitrate" exception to cases where the validity or enforceability of an existing arbitration clause was contested. See State Farm Mut. Auto Ins. Co. v. Richards, 99 AD2d 785 (2d Dept. 1984), and Allstate Ins. Co. v. Bonilla, 116 AD2d 571 (2d Dept. 1986) (rejecting claim of "no agreement to arbitrate" based upon assertion that uninsured motorist policy had been cancelled prior to the accident).

Shortly after deciding Bonilla, supra, however, the Second Department issued several decisions which have often been cited for the opposite conclusion. However, two of the most frequently cited cases for the proposition that an untimely petition to stay arbitration may be entertained did not involve the validity or enforceability of an existing arbitration clause, but, rather, whether there was an arbitration agreement at all with the particular claimant involved. See Continental Ins. Co. v. Sarno, 128 AD2d 870 (2d Dept. 1987) (insurer claimed that policy issued to claimant's parents did not cover his separately owned and insured vehicle and that the claimant failed to submit any evidence of physical contact between his vehicle and an unidentified vehicle), and USF&G v. Housey, 162 AD2d 523 (2d Dept. 1990) (claimant was operating self-owned, separately insured vehicle). Colonial Penn Ins. Co. v. Matthews, 169 AD2d 721 (2d Dept. 1991), however, dealt with a condition precedent to recovery -- whether underinsured motorist coverage was triggered by virtue of the tortfeasor's bodily injury coverage being less than the claimant's. In reliance upon its earlier decision in Sarno, the court held that "Since the respondent cannot claim coverage under the underinsured motorist endorsement containing an agreement

to arbitrate, the [insurer's] alleged failure to timely move to stay arbitration within the statutorily 20-day period specified in CPLR 7503 is immaterial." See also Aetna Cas. & Sur. Co. v. Cartigiano, 178 AD2d 472 (2d Dept. 1991) (untimely petition allowed based upon assertion that claimant was not an insured under the underinsured motorist policy; therefore, no agreement to arbitrate).

Although at first glance, Sarno and its progeny have been viewed by some as an implied reversal of the Second Department's earlier cases, it is important to note that the court subsequently returned to the narrow construction approach to Matarasso in Metropolitan Prop. & Liab. Ins. Co. v. Hancock, 183 AD2d 831 (2d Dept. 1992), wherein it refused to apply the "no agreement to arbitrate" exception to a case where a valid agreement to arbitrate existed but the insurer claimed that the claimant failed to preserve its subrogation right in settling with the tortfeasor, which was a condition precedent to recovery. The Hancock decision did not cite or refer to either Sarno, Housey or Matthews.

The decisions of the Second Department which followed Hancock demonstrated a lack of consistent application of the "no agreement to arbitrate" exception. In several underinsured motorist cases, Matarasso was applied (as in Sarno and Housey) to allow untimely petitions to stay based upon assertions that the policy containing the arbitration clause did not cover the claimant as an insured. See Liberty Mutual Ins. Co. v. Panetta, 187 AD2d 719 (2d Dept. 1992) and GEICO v. Hehl, 203 AD2d 570 (2d Dept. 1994). In Board of Education, Yonkers City S.D. v. Olena Constr. Corp., 195 AD2d 458 (2d Dept. 1993), the court distinguished and refused to apply Matarasso on the basis that the litigants were both parties to an arbitration agreement [citing Matter of Woodcrest Fabrics, *supra*]. In Aetna Cas. & Sur. Co. v. Bondy, 203 AD2d 561 (2d Dept. 1994) involving underinsured motorist coverage, the court refused to apply Matarasso to a claim that the claimant failed to exhaust the underlying limits of the tortfeasor's policies [citing Bonilla, *supra*], but, subsequently, and most recently, in Harley v. CNA Ins. Co., 212 AD2d 614 (2d Dept. 1995), an uninsured motorist case, the court applied the "no agreement to arbitrate" exception where the insurer claimed that the offending vehicle was not uninsured.

Fourth Department

The Fourth Department, like the Second Department, appears to have been somewhat inconsistent in its approach to application of the "no agreement to arbitrate"

exception. Although several cases preceding and subsequent to *Matarasso* applied this exception narrowly (see *USAA v. Cutrona*, 42 AD2d 1033 (4th Dept. 1973) [rejecting insurer's claim that 20-day rule was inapplicable because offending vehicle was not uninsured]; *Spychalski v. Continental Ins. Co.*, 58 AD2d 193 (4th Dept. 1977), *affd.* 45 NY2d 847 (1978) [rejecting insurer's claim that there was nothing to arbitrate because other insurer offered \$10,000 to claimant]; *John W. Cowper Co., Inc. v. Clintstone Properties, Inc.*, 120 AD2d 976 (4th Dept. 1986) [refusing to apply *Matarasso* where dispute was over validity and not existence of agreement to arbitrate], subsequent decisions were more generous in their application of *Matarasso*. In several cases, the "no agreement to arbitrate" exception was applied where it was clear that the policy did not, in fact, contain an arbitration agreement. See *Transport Ins. Co. v. Tedesco*, 147 AD2d 936 (4th Dept. 1989) (accident occurred outside the State of New York and policy only provided for arbitration upon consent of the insurer); *Utica Mutual Ins. Co. v. Leno*, 214 AD2d 980 (4th Dept. 1995) (umbrella liability policy contained no provision for arbitration of disputes and no uninsured motorist coverage). In *Maryland Cas. Co. v. Hopkins*, 142 AD2d 946 (4th Dept. 1988), although the court recognized that the *Matarasso* exception applied where "the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because the conditions have not been complied with," it nevertheless held that the exception applied because the claimant failed to purchase underinsured motorist coverage containing an agreement to arbitrate. In *Graphic Arts Mut. Ins. Co. v. Leno*, 214 AD2d 976 (4th Dept. 1995), although the court determined that an arbitration agreement existed in a policy under which the claimants were "insureds," it nevertheless entertained the insurer's late petition to stay arbitration on the basis of its determination that the *Matarasso* exception to the 20-day rule is applicable where the claim is one for which no coverage exists by virtue of an exclusion in the policy, there, the claim that the insureds were excluded from coverage because they were using the insured vehicle "without a reasonable belief that [they were] entitled to do so." Significantly, the court cited the Second Department's clearly distinguishable holding in *Sarno* to support its conclusion.

Finally, in *Steck v. State Farm Ins. Co.*, 213 AD2d 1051 (4th Dept. 1995), the Fourth Department, by a 4-1 vote, upheld the grant of an untimely petition to stay arbitration based

upon the claim that there was no agreement to arbitrate because the underinsurance coverage was not triggered since the tortfeasor's bodily injury limits exceeded the claimant's. As stated by the majority, "In the absence of underinsurance coverage, an insurance carrier is not barred by its failure to move to stay arbitration within the required 20-day period [citing, *inter alia*, the Second Department's decision in *Matthews*, *supra*].

Court of Appeals

In an effort to inject some clarity into this complicated area of law, the Court of Appeals granted leave to appeal in the *Steck* case. By decision dated April 25, 1996, the Court unanimously reversed the Fourth Department and held that insofar as the insurer's contention "that because the other vehicle's insurance exceeds appellant's insurance, there is no coverage under the underinsurance provisions, relates to whether certain conditions of the contract have been complied with and not whether the parties have agreed to arbitrate," the insurer's contention "is outside the exception articulated by this Court in *Matarasso* and is barred by the CPLR 7503(c) 20-day period to object to arbitration."

Thus, it appears that *Steck* has effectively overruled such decisions as *Matthews*, *Harley* and *Graphic Arts Ins. Co. v. Leno*, where the issues involved compliance with conditions of the arbitration agreement, rather than the existence of such an agreement. Decisions such as *Sarno*, *Housey*, *Cartigiano*, *Panetta*, *Tedesco*, *Hopkins*, and *Utica Mutual Ins. Co. v. Leno*, which involved the question of whether, in fact, there was any agreement to arbitrate or agreement to arbitrate with the particular claimant, remain unaffected.

Questions Raised

We have often preached the wisdom and advisability of not only reading insurance policies, but reading them fully and carefully. The Court of Appeals' decision in *Steck* provides an excellent example of how those same precepts apply as well to judicial opinions, because in one sentence -- the final sentence of the opinion, which almost appears as a throw-away line or an afterthought (and which may very well constitute *dicta*) -- the Court altered the significance of its holding and turned the claimant's victory into a pyrrhic one. After ruling in favor of the claimant that the insurer was barred from asserting in court the issue of whether underinsurance coverage was triggered, and, accordingly,

giving claimant the impression that he was then free to proceed to arbitration on the issues of liability and damages (only), as provided for in the policy's narrow arbitration clause, the Court added the following words: "The issue of coverage is, therefore, now within the province of the arbiter" (emphasis added). Thus, if this language means what it says, the claimant, who won the battle to keep the trigger issue out of the courts nevertheless may have lost the war because he will now have to litigate the same issue in the arbitration, and then again, perhaps, in court on a post-award proceeding pursuant to CPLR 7511.

This sentence immediately struck us as being rather odd for a number of reasons, which space, unfortunately, does not allow us to analyze herein. Not the least of these apparent oddities were the following: (1) the unlikelihood that the question of whether the trigger issue could subsequently be presented to the arbitrator was raised by the parties when it was consideration of that issue as a threshold issue for the courts that concerned them at the time (see *Metropolitan Prop. & Liab. Ins. Co. v. Traphagen*, 199 AD2d 915 (3d Dept. 1993); *Rosenbaum v. American Surety Co. of NY*, 11 AD2d 310 (1962), and thus, the inexplicability of the Court of Appeals addressing itself to an issue not before it; (2) the fact that although apparently it was the "trigger" issue to which the Court referred as an "issue of coverage," such an issue did not appear to fit squarely within the category of coverage issues which are exempt from the statutory notice and timely motion provisions of Ins. L. § 3420(d) and CPLR 7503(c), i.e., where the insurer had no contract with the particular person or with respect to the particular vehicle (see *Zappone v. Home Ins. Co.*, 55 NY2d 135 (1982); Cf. *Prudential Prop. & Cas. Ins. Co. v. Hobson*, 67 NY2d 19 (1986); (3) the fact that, to our knowledge, courts had never before expressly stated that the issue of coverage is for the arbitrators to determine notwithstanding an untimely petition to stay arbitration; and (4) the fact that the court failed to address the scope of arbitration as determined by the breadth or narrowness of the specific arbitration clause involved.

We are advised that both parties in *Steck* were themselves surprised by the last sentence of the decision and that, indeed, the "victorious" claimant will be seeking a clarification of the decision from the Court of Appeals.

Did the court mean what it said? Did it intend to announce a broad, general rule or was its last sentence pronouncement somehow limited to the facts of the case before it?

We will, in our Part II of this article, attempt to analyze the last sentence of the Steck opinion in detail, with the assistance of a review of the Record on Appeal and Briefs in Steck, as well as an extensive review of the prior case law in this interesting, but complex, area of insurance law and practice.

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