

*New York Law Journal, August 17, 1998*  
Copyright 1998 New York Law Publishing Company  
New York Law Journal  
August 17, 1998, Monday

**SECTION:** OUTSIDE COUNSEL; Pg. 1

**LENGTH:** 2475 words

**HEADLINE:** Courts Have Created Confusion in UM/UIM Arbitration Cases

**BYLINE:** BY ROSA M. FEENEY AND ELIZABETH A. FITZPATRICK; Rosa M. Feeney and Elizabeth A. Fitzpatrick are members Feeney, Gayoso & Fitzpatrick, LLP.

**BODY:**

ANYONE WHO practices in the area of uninsured/ underinsured motorist law is all too familiar with the case of *Matter of Matarasso*<sup>n1</sup> and the confusion that surrounds its applicability. In fact, there has been much commentary on the case attempting to reconcile it with the plethora of case law that soon followed. n2

n1 [56 N.Y.2d 266 \(1982\)](#)

n2 See Norman Dachs and Jonathan A. Dachs, "Steck: Issue Resolved Questions Raised," NYLJ, May 16, 1996, at p.3, (col.1); Robert A. Barker, "Arbitration and the '20-Day Rule,'" NYLJ, September 16, 1996, at p. 3, (col.1); Norman Dachs and Jonathan A. Dachs, "Petitions to Stay Arbitration: Special Proceedings," NYLJ, July 8, 1997 at p. 3 (col 1). Some view the *Matarasso* exception to apply only to those situations where there is no clause in the insuring agreement providing for arbitration. This article discusses how the adoption of this view has led some New York courts to create uninsured or underinsured motorist coverage which does not exist.

CPLR @ 7503(c) provides that "An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand or he shall be so precluded."

In *Matarasso*, the claimant sought to recover uninsured motorist benefits under an umbrella policy, which did not provide uninsured motorist benefits. The Court of Appeals, finding that the claim was outside the scope of coverage of the policy, held that the carrier was entitled to a permanent stay even though the petition to stay was made more than 20 days from service of the demand for arbitration.

While the holding in *Matarasso* may appear straightforward, its application has not been, thus creating confusion and additional litigation.

The cases decided after *Matarasso* have been inconsistent in their application of its holding and have sought to distinguish between "conditions to coverage" which have not been complied with and situations where the parties had "no agreement to arbitrate." The Court

of Appeals' holding in *Matter of Steck*, n3 decided some 14 years after *Matarasso*, did little to alleviate the confusion.

n3 [88 N.Y.2d 1018](#), [672 N.E.2d 610](#), [649 N.Y.S.2d 384](#) (1996)

In *Steck*, the Court of Appeals reversed the Appellate Division and denied the petition to stay, holding:

Respondent's argument 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. As such, respondent's contention is outside the exception articulated by this Court in *Matarasso* and is barred by the . . . 20-day period to object to arbitration.

The confusion in applying *Matarasso* lies in the requirement that there be "no agreement to arbitrate." The interpretation given by many to the phrase "no agreement to arbitrate" is that the agreement cannot contain a clause providing for arbitration. n4 If the policy contains such a clause, then a petition to stay must be made within the 20-day time frame, regardless of the type of claim being made. Any other requirement in the uninsured/underinsured endorsement is then characterized as a "condition to coverage".

n4 See Robert A. Barker, "Arbitration and the '20-Day Rule,'" *NYLJ*, September 16, 1996, at p. 3, (col.1).

There is, however, another school that would apply the *Matarasso* exception, even where the insuring agreement contains an arbitration clause, where there is no coverage because the claim is "outside the scope of coverage" of the policy.

The distinction between "conditions to coverage" and claims "outside the scope of coverage" has been fully explored by the New York courts in their interpretations of Insurance Law @ 3420. The Court of Appeals clearly has made a distinction between an insurance carrier's obligation to disclaim coverage because of an exclusion or condition in a policy and situations where no obligation exists because the claim is outside the scope of coverage.

Insurance Law @ 3420(d) provides as follows:

If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

In the seminal case involving this distinction, *Zappone v. Home Ins. Co.* n5 the Court of Appeals found that an insurance carrier's failure to disclaim coverage does not create coverage the policy was not written to provide. The Court of Appeals specifically held : the purpose of the statutory requirement to disclaim coverage was to avoid prejudice to the insured, the injured claimant and the Motor Vehicle Accident Indemnification Corporation, each of whom could be harmed by the delay in learning of the carrier's position. It was not however, to provide an additional source of indemnification which had never been contracted for and for which no premium had ever been paid.

n5 [55 N.Y.2d 131](#) (1982)

As noted by the Court in *Zappone*, the requirement to timely disclaim applies only when the carrier is relying upon exclusions or conditions to coverage, and not when the basis for applicability of the policy in the first instance has not been met.

The policy underlying Insurance Law @ 3420, requiring prompt disclaimers of coverage, and CPLR @ 7503, requiring strict adherence to the 20-day limit to petition to stay arbitration, parallel one another. And the instances where a timely petition to stay is required should mirror those situations where a timely disclaimer is required.

Thus, where the agreement to provide the sought coverage is not triggered in the first instance, the courts should not create coverage either by requiring adherence to the Insurance Law @ 3420 or CPLR @ 7503. However, where the carrier is attempting to disclaim or petition to stay, based upon an exclusion or condition in the policy, the statutory requirements should apply.

Despite the similar policy underlying each and the parallel that seems should be logically followed, the courts have inconsistently applied the requirement to petition within 20 days by vacillating between situations deemed to involve a "condition to coverage" versus claims that are "outside the scope of coverage." As will be shown by a comparison of a sampling of cases involving disclaimers and petitions to stay arbitration, the case law can not be reconciled.

In *Continental Insurance Company v. Sarno* n6, the Second Department granted an untimely petition to stay where the policy, ". . . excludes coverage to any person struck by or occupying any motor vehicle owned by you or a relative other than an insured auto." Finding

that the vehicle was not an "insured auto" and that no evidence of physical contact had been provided, the court granted the untimely application for a stay. Citing *Matarasso* for the premise that the 20-day limitations period did not apply, the court held that ". . . the petitioner cannot be compelled to arbitrate a claim which the parties never agreed to arbitrate and for which no coverage was provided."

n6 [128 A.D.2d 870, 513 N.Y.S.2d 791 \(2nd Dept. 1987\)](#)

Similarly, in *Aetna v. Cartigiano*, n7 the Second Department permitted the carrier to petition beyond the 20-day limit where the issue was whether the claimant was an "insured" under the policy.

n7 [178 A.D.2d 472, 577 NYS2d 314 \(2nd Dept. 1991\)](#)

In *United Community Insurance Company v. Gabriel*, n8 the Second Department permitted an untimely petition where the carrier's argument was that the injury was caused by an assault, rather than a motor vehicle accident and therefore, there was no coverage available under the policy.

n8 [229 A.D.2d 444, 645 NYS2d 82 \(2nd Dept. 1996\)](#)

In *the matter of Colonial Penn Insurance Company v. Matthews*, n9 the Second Department held that where the bodily injury limits of both policies were \$ 10,000/20,000, there was no right of recovery under the underinsured motorist endorsement and thus, "since the respondent cannot claim coverage under the underinsured motorist endorsement containing an agreement to arbitrate, the appellant's failure to timely move to stay arbitration within the statutory 20-day period specified in CPLR @ 7503 is immaterial."

n9 169 A.D.2d 721, 564 N.Y.S.2d 472 (2nd Dept. 1991)

In the context of proper disclaimers of coverage under Insurance Law @ 3420 (d) and consistent with the above holdings, the Court of Appeals in *Prudential v. Hobson*, n10 held that there was no requirement to timely disclaim where there was no physical contact and thus no uninsured vehicle. "The requirement of 'physical contact' in the definition of 'hit-and-run automobile' contained in the uniform uninsured motorist endorsement is a matter of coverage, not exclusion from coverage." The court concluded that a "hit and run" vehicle could exist only if there were the requisite contact as defined in the insuring agreement section of the policy. "No coverage exists in the absence of contact."

n10 67 N.Y.2d 19, 490 N.E.2d 504, 499 N.Y.S.2d 637(1986)

In the *Matter of State Farm Mutual Insurance Company v. Vazquez*, n11 the Second Department followed the Hobson decision and held that an uninsured motorist carrier has no obligation to timely disclaim coverage, where it has not been established in the first instance that there was no insurance coverage on the offending vehicle on the date of the accident.

The court held that although an insurer will be estopped from denying coverage based on an exclusion in a policy where it has delayed unreasonably in issuing its disclaimer, an insurer has no obligation to disclaim coverage in those situations where coverage does not exist. n11 New York Law Journal, April 10, 1998, p. 31 col.4 (2nd Dept.) However, in the context of timely petitions to stay arbitration under CPLR @ 7503, there have been a number of decisions which seem irreconcilable with the body of case law surrounding disclaimers of coverage. In *Carsley v. CNA Insurance Company*, n12 the Second Department specifically held that the carrier was required to raise the issue of physical contact, in a petition to stay within 20-days of service of the demand. The failure to petition within the 20 days was a waiver of the carrier's right to seek a stay.

n12 663 N.Y.S.2d 92 (2nd Dept. 1997)

Similarly, In *Allcity Insurance Company v. Herriot*, n13 the First Department denied a petition to stay as untimely despite the fact that the policy limits had been exhausted by an award made after the demand for arbitration was filed and thus, there was no applicable exclusion, but rather the claim was one for which there was no existing coverage.

n13 210 A.D.2d 117, 621 N.Y.S.2d 842 (1st Dept. 1994)

In *Aetna Casualty and Surety v. Bondy*, n14 the court held that the carrier forfeited its right to stay on the grounds that the claimant failed to exhaust the available primary underinsured coverage by failing to move within the 20-day period. The court found this was a condition to arbitrate and thus not within the purview of Matarasso.

n14 203 A.D. 2d 561, 611 N.Y.S.2d 33 (2nd Dept 1994.)

The same result was reached in *Travelers v. Balthazar*, n15 when the First Department held that the carrier was required to raise the issue of whether the offending vehicle was uninsured within 20 days of service of the demand. The failure to petition within the 20 days

was deemed a waiver of the carrier's right to seek a stay. Likewise, in *Lyerly v. Victoria Fire & Casualty*, n16 the Second Department held that the failure to petition within 20 days barred the insurer's claim that the tortfeasor was not uninsured.

n15 [224 A.D.2d 303, 638 NYS2d 36 \(1st Dept. 1996\)](#)

n16 [666 N.Y.S.2d 698 \(2nd Dept. 1997\)](#)

Even more recently in *Hartford Insurance Company v. Buonocore*, n17 the Second Department reiterated that whether the offending vehicle was insured "relates to whether certain conditions of the contract have been complied with and not whether the parties have agreed to arbitrate."

n17 1998 WL 376148 (N.Y.A.D. 2nd Dept.)

The principles enunciated in *Vazquez*, logically applied in *Travelers*, *Lyerly*, *Buonocore*, and *Bondy* should have led to the conclusion that if a vehicle is not "uninsured" or "underinsured" then the uninsured/underinsured motorist endorsement does not apply, nor the arbitration provision therein. Is not the requirement that an involved vehicle be "uninsured" or "underinsured" the premise upon which coverage is provided?

The Second Department holding in *Carsley v. CNA*, *supra*, also directly violates the Court of Appeals' holding in *Prudential v. Hobson*. In *Hobson*, the Court of Appeals found no requirement to disclaim coverage if the requirements for a hit and run vehicle are not met and declined to create coverage where none existed in the first instance. However, in *Carsley*, the Second Department created coverage because a petition was not filed within 20 days of service of the demand for arbitration.

The case law leads to the conclusion that a disclaimer need not be issued where the claim is outside the scope of coverage; however, a petition must be filed within 20 days even if the claim is outside the scope of the policy. In some circumstances, is not a petition to stay arbitration the functional equivalent of a disclaimer of coverage? In *Glens Falls Insurance Company v. Smith*, the Second Department held that it was. n18

n18 [221 A.D.2d 529, 634 NYS2d 395 \(2nd Dept. 1995\)](#) citing [Matter of Allcity Insurance Company \[Jiminez\]](#), [78 N.Y.2d 1054, 576 N.Y.S.2d 87](#), [Matter of State Farm v. Velasquez](#), [211 A.D.2d 636, 621 N.Y.S.2d 357](#).

## Conclusion

The inconsistent application of *Zappone* and the *Matarasso* exception has created additional litigation since litigants cannot be reasonably assured that the claim will be deemed one where the *Matarasso* exception applies. Therefore, when in doubt, a claim will be made and a petition must be brought.

In addition, in many instances, by disallowing petitions beyond the incredibly short 20-day time frame the courts are, in fact, creating coverage where none exists in the first instance. Could it have been the intent of the Court of Appeals in *Matarasso* to require the carrier to litigate claims for which no premium was paid and which was not contemplated by the insuring agreement? We await clarification from the Court of Appeals.