

# CPLR 7503(a): Mere Conclusory Allegations in Support of a Stay of Arbitration Proceedings Under MVAIC Statute Deemed Insufficient

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has only to pay 6 per cent interest upon his judgment debt while he can earn a better return on his money in the open market."<sup>152</sup>

*CPLR 5015(b): Amendment to allow vacatur by mere stipulation.*

CPLR 5015(b) has been amended to permit a default judgment to be vacated by the clerk, without application to the court, whenever the parties so stipulate. There is no time limit on such a stipulation.

#### ARTICLE 57 — APPEALS TO THE APPELLATE DIVISION

*CPLR 5704(a): Review of ex parte orders by appellate division.*

CPLR 5704(a) has been amended to authorize the appellate division to vacate or modify an *ex parte* order granted by any court from which an appeal to the appellate division would lie, and to issue an *ex parte* order or provisional remedy if it is refused by any such court.<sup>153</sup> Under the former CPLR 5704(a), the appellate division was authorized to vacate or modify an *ex parte* order of the supreme court only, and could grant an *ex parte* order or provisional remedy only if it had been refused by the supreme court.

#### ARTICLE 75 — ARBITRATION

*CPLR 7503(a): Mere conclusory allegations in support of a stay of arbitration proceedings under MVAIG statute deemed insufficient.*

The Motor Vehicle Accident Indemnification Corporation<sup>154</sup> (MVAIC) was established to compensate innocent traffic victims or their survivors for injuries or deaths sustained in accidents involving hit-and-run drivers or uninsured vehicles.<sup>155</sup> All motor vehicle liability insurers authorized to do business in New York are members of the Corporation,<sup>156</sup> which is charged by statute with investigating claims and appearing on behalf of financially irresponsible motorists.<sup>157</sup> Liability is limited to \$10,000 for injury or death of one person and \$20,000 in the event of an accident injuring two or more persons;<sup>158</sup> no provision is made for compensating property damage.<sup>159</sup>

<sup>152</sup> McLaughlin, *New York Trial Practice*, 168 N.Y.L.J. 3, July 13, 1972, at 1, col. 1.

<sup>153</sup> L. 1972, ch. 435, at 909, eff. Sept. 1, 1972.

<sup>154</sup> N.Y. Ins. LAW §§ 167(2)(a), 600-26 (McKinney 1966).

<sup>155</sup> Compulsory automobile insurance went into effect in New York on Feb. 1, 1957 (N.Y. VEH. & TRAF. LAW art. 6 (McKinney 1960)). This legislation did not provide compulsory insurance for accidents involving uninsured nonresident drivers, hit-and-run drivers, those driving stolen vehicles or vehicles operated without consent, and vehicles whose insurers disclaimed liability or denied coverage.

<sup>156</sup> N.Y. Ins. LAW § 602 (McKinney 1966).

<sup>157</sup> *Id.* § 609.

<sup>158</sup> *Id.* § 610.

<sup>159</sup> For a discussion of the general background of MVAIC and the problems of the

The standard uninsured motorist endorsement requires arbitration in the event of disagreement as to the right of recovery or amount of damages. The New York Court of Appeals, in *Rosenbaum v. American Surety Co. of New York*,<sup>160</sup> was faced with the question of whether a determination as to the status of a vehicle as insured or uninsured should be made by an arbitrator or by a court prior to the commencement of arbitration proceedings. The majority, in a 4-3 decision, ruled that under the arbitration provision only two issues were made arbitrable — that as to fault and that as to damages should fault be established.<sup>161</sup> Thus, the Court ordered a jury trial “of the preliminary issue of fact as to whether the plaintiff’s decedent was struck by an uninsured automobile.”<sup>162</sup>

The dissenting judges in *Rosenbaum* maintained that the provision in the uninsured motorist endorsement for arbitration of the “matter or matters” of disagreement was sufficiently broad to cover all aspects of whether the claimant was entitled to recover. The dissenters argued:

We should not read into that agreement a provision for piecemeal treatment of a specified area of dispute by two separate and distinct procedures. If we do so, we will be adding a new type of cause to an already overburdened court calendar with its attendant delay, personal effort and financial burden. . . .<sup>163</sup>

The *Rosenbaum* decision limiting arbitration to issues of fault and damages has apparently given rise to some of the difficulties anticipated by the minority opinion in its warning against a piecemeal approach. In New York County, motions by insurance companies have become so numerous that it is impractical to hold the immediate trial on factual

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uninsured motorist, see Laufer, *Embattled Victims of the Uninsured: In Court with New York's MVAIC, 1959-1969*, 19 BUFFALO L. REV. 471 (1970); Smith, *Handling Uninsured Motorist Claims in New York*, 32 ALBANY L. REV. 96 (1967); Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present and Future*, 8 BUFFALO L. REV. 215 (1959); Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283 (1960); Note, *The Problem of the Financially Irresponsible Motorist — New York's MVAIC*, 65 COLUM. L. REV. 1075 (1965); Note, *MVAIC Six Years Later — A Practical Appraisal*, 39 ST. JOHN'S L. REV. 321 (1965).

<sup>160</sup> 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962).

<sup>161</sup> The majority in *Rosenbaum* argued that the arbitration clause was particular, not general, and stressed the rule that no one is under a duty to arbitrate unless he has so agreed in unambiguous language. The status of the opposing motorist was held to be a condition precedent to arbitration and therefore properly a matter for the trial court prior to the commencement of arbitration proceedings.

<sup>162</sup> 11 N.Y.2d at 313, 183 N.E.2d at 668, 229 N.Y.S.2d at 377.

<sup>163</sup> *Id.* at 316, 183 N.E.2d at 670, 229 N.Y.S.2d at 379-80 (dissenting opinion). Before *Rosenbaum*, the judicial departments were divided in their treatment of the scope of the arbitration clause. The First Department, in *MVAIC v. Velez*, 14 App. Div. 2d 276, 220

issues which the arbitration statute (CPLR 7503) contemplates, and there is currently an eighteen-month delay.<sup>164</sup>

The issue most frequently raised by insurance companies on these motions to stay arbitration is whether the vehicle which injured the claimant was in fact uninsured. Some insurance companies routinely make a motion for a stay of arbitration, arguing that a hearing must be ordered if the claimant's proof of noninsurance is not conclusive. In *Aetna Insurance Co. v. Logue*,<sup>165</sup> the Supreme Court, New York County, recently observed:

It is easy to see the difficulties that a claimant faces in proving the negative proposition that the stranger whose car hurt him was not insured, particularly as the case cannot involve a great deal of money and the lawyers for the claimant simply cannot make an exhaustive investigation excluding every possibility of insurance.<sup>166</sup>

The critical question for the courts is deciding how to apportion the burden of proof in determining whether to order an evidentiary trial of the preliminary issues relating to the right of arbitration. Under *Rosenbaum*, if such preliminary issues are demonstrated, arbitration must be stayed. A number of decisions<sup>167</sup> have dismissed mere conclusory allegations by insurance companies which challenged a claimant's proof as being insufficient without introducing contrary evidence.

With respect to a different preliminary issue, the Appellate Division, First Department, in *Fuscaldo v. MVAIC*,<sup>168</sup> held that MVAIC, in seeking a stay of arbitration, must show with evidentiary proof that a factual issue exists. In *Foster v. MVAIC*,<sup>169</sup> the Supreme Court, New

N.Y.S.2d 954 (1st Dep't 1961) (per curiam), held that all issues relating to recovery under an uninsured motorist endorsement were to be settled by the arbitrator. Cases following the *Velez* holding include *McCarthy v. MVAIC*, 16 App. Div. 2d 35, 224 N.Y.S.2d 909 (4th Dep't 1962), *aff'd mem.*, 12 N.Y.2d 992, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963); *Application of Zurich Ins. Co.*, 14 App. Div. 2d 669, 219 N.Y.S.2d 748 (1st Dep't 1961) (per curiam); *MVAIC v. Kirby*, 12 App. Div. 2d 739, 208 N.Y.S.2d 1010 (1st Dep't 1961) (per curiam); *Steinitz v. MVAIC*, 33 Misc. 2d 228, 225 N.Y.S.2d 147 (Sup. Ct. Onondaga County 1962). The Second Department, in *MVAIC v. Lucash*, 16 App. Div. 2d 975, 230 N.Y.S.2d 262 (2d Dep't 1962) (mem.), and the Third Department, in *Application of Phoenix Assur. Co.*, 9 App. Div. 2d 998, 194 N.Y.S.2d 770 (3d Dep't 1959) (mem.), held that arbitration should be limited to the issue of negligence and the resulting question of damages. This position was subsequently adopted by the Court of Appeals in *Rosenbaum*.

<sup>164</sup> *Aetna Ins. Co. v. Logue*, 68 Misc. 2d 841, 843, 328 N.Y.S.2d 569, 572 (Sup. Ct. N.Y. County 1972).

<sup>165</sup> *Id.* 841, 328 N.Y.S.2d 569.

<sup>166</sup> *Id.* at 843, 328 N.Y.S.2d at 572-73.

<sup>167</sup> *E.g.*, *O'Brien v. Aetna Cas. & Sur. Co.*, 33 App. Div. 2d 1085, 307 N.Y.S.2d 689 (3d Dep't 1970); *Highsmith v. MVAIC*, 31 App. Div. 2d 424, 298 N.Y.S.2d 648 (4th Dep't 1969); *Kuhn v. MVAIC*, 31 App. Div. 2d 707, 295 N.Y.S.2d 864 (3d Dep't 1968); *Beakbane v. MVAIC*, 20 App. Div. 2d 736, 246 N.Y.S.2d 843 (3d Dep't 1964) (mem.).

<sup>168</sup> 24 App. Div. 2d 744, 263 N.Y.S.2d 919 (1st Dep't 1965) (per curiam).

<sup>169</sup> 55 Misc. 2d 784, 286 N.Y.S.2d 775 (Sup. Ct. N.Y. County 1967).

York County, initially noted "that claimant is neither assisted by any presumption of noninsurance nor is he burdened by any contrary presumption of insurance."<sup>170</sup> The court further held that the claimant must establish the noninsured status of the other vehicle by a fair preponderance of the evidence, and that, in the instant case, the claimant's presentation was strengthened by the failure of MVAIC to in any way controvert his evidence.

*Aetna Insurance Co. v. Logue*<sup>171</sup> is the most recent decision to attempt to reconcile the need for an expeditious resolution of the issues with the strict construction placed on the arbitration statute in *Rosenbaum*. The court proposed reasonable guidelines to determine when a genuine factual issue calling for resolution under CPLR 7503(a) exists:

Arbitration should be stayed and at least an evidentiary hearing ordered where:

(a) claimant does not present some reasonably persuasive evidence of noninsurance (or other basis for invoking the arbitration clause); or

(b) claimant has failed diligently to try to ascertain the facts, within the practical limitations of the situation, or to follow up some reasonable indication of insured status; or

(c) the insurance company presents some evidence that the offending vehicle is insured.

Arbitration should be directed, without ordering an evidentiary hearing, in the converse situation. . . .<sup>172</sup>

The *Logue* guidelines would end a confusing and inconsistent approach to an increasingly serious problem, reduce court congestion, and encourage faster and fairer settlements.

*CPLR 7503(a): Statute applied in conjunction with waiver doctrine precludes all remedies in arbitrable controversy.*

An agreement which calls for an exclusive remedy in arbitration binds all parties to the extent that no judicial remedy may be sought which would affect this contractual right. CPLR 7503(a) supplies a means of enforcing such an agreement by providing for a stay of a judicial action involving an issue arbitrable under its terms.

In *Sowalskie v. Cohoes Housing Authority, Inc.*,<sup>173</sup> the defendant sought a stay under CPLR 7503 on the basis of the parties' agreement to settle all disputes by arbitration. Additionally, the defendant argued that by commencing an action to foreclose a mechanic's lien, the plain-

<sup>170</sup> *Id.* at 786, 286 N.Y.S.2d at 778.

<sup>171</sup> 68 Misc. 2d 841, 328 N.Y.S.2d 569 (Sup. Ct. N.Y. County 1972).

<sup>172</sup> *Id.* at 846-47, 328 N.Y.S.2d at 575-76.

<sup>173</sup> 69 Misc. 2d 665, 330 N.Y.S.2d 481 (Sup. Ct. Albany County 1968).