

RUSH TO FILE COUNTERCLAIMS FOR SETOFFS

The Illinois Courthouses are being flooded with motions for leave to file counterclaims for setoff. The reason – the Illinois Supreme Court’s decision in *Thornton v. Garcini*.

In *Thornton*, the Illinois Supreme Court held that a party cannot be granted relief in the form of a setoff without a pleading requesting a setoff. The Court upheld the denial of a setoff in that case, stating that without a pleading for setoff, the plaintiff did not have fair notice and opportunity to defend against the setoff claim.

The *Thornton* case arose from the death of an infant during delivery. The infant died when its head became stuck inside the mother and the delivery could not be completed. The plaintiff sued the hospital for wrongful death related to the failure to deliver the infant as well as for intentional infliction of emotional distress. The plaintiff also sued an obstetrician, who was not present during the delivery, but who failed to arrive for more than an hour after the baby had died to remove the deceased infant. The plaintiff sued the obstetrician for negligent infliction of emotional distress for the delay in removing the deceased infant. The hospital settled the wrongful death claim and the case went to trial against the obstetrician on the sole count of negligent infliction of emotional distress. The jury awarded a verdict in favor of the plaintiff and the obstetrician moved for a setoff equal to the amount of money the hospital paid in

settlement. As discussed above, the setoff was denied. The court held that the defendant forfeited his setoff claim by raising the issue for the first time at the post-trial stage.

Before *Thornton*, counterclaims for setoff arising from settlements with co-defendants were not routinely filed. The issue of setoff for settling defendants was handled at the post-judgment stage. Now, *Thornton* strongly suggests that no setoff will be granted without the filing of a counterclaim requesting specific relief. Hence, the sudden flurry to file counterclaims in tort cases.

It is interesting to note, though, that the *Thornton* case involved a case of defendants being sued for different injuries. Against the hospital, the plaintiff was seeking damages related to the wrongful death of the infant whereas against the obstetrician, the plaintiff was seeking emotional damages caused by the one-hour delay in delivery. The result may have been different if the recovery sought was the same because then the plaintiff could not claim unfair surprise or an inability to defend against a setoff. Nevertheless, the language of the decision is broad enough that filing counterclaims for setoffs is prudent.

The attorneys at McKenna have been going through their cases and identifying cases where filing a counterclaim for setoff is prudent.

THORNTON STANDS FOR MORE THAN FILING COUNTERCLAIMS FOR SETOFF

Thus far, the *Thornton* decision has received most of its attention for the issue it raised with filing counterclaims. Yet, perhaps more interesting is its decision regarding the proof necessary to prove emotional damages in a negligent infliction of emotional distress type case.

In that case, as discussed above, the obstetrician was sued under the theory of negligent infliction of emotional distress because of his delay in removing a deceased infant. The facts of the delivery are quite horrific. The infant was born in a breach position at approximately 24 weeks. During the childbirth, the infant's head became stuck in the mother's vagina. The infant died when the nurses at the hospital were unable to complete the delivery.

The evidence at trial demonstrated that the obstetrician was at home when he was notified that the infant had been partially delivered. The obstetrician took a shower before driving to the hospital to deliver the infant, arriving approximately one hour later. Meanwhile, the mother was laying on the table for over an hour waiting for the obstetrician to come to remove the deceased infant. The mother testified that she had had thoughts of suicide because it was so horrible and that she is continuously reminded of the one hour and ten minutes she waited for the obstetrician to remove the infant. No medical expert testified to the emotional distress suffered by the mother. The jury found in favor of the plaintiff and awarded emotional damages.

The obstetrician argued on appeal that the verdict should be overturned because no expert testified regarding the emotional

damage suffered by the mother and further argued that expert testimony was necessary to distinguish the emotional suffering caused by the death of the infant and the emotional suffering caused by the delay in delivery. The Supreme Court rejected the obstetrician's arguments. The Supreme Court held that based on personal experience alone, the jury could reasonably find that the circumstances of this case caused the plaintiff emotional distress. In addition, the mother testified that her distress derived directly from the obstetrician's delay in removing the deceased infant and not the death of the infant. While the Supreme Court reaffirmed its prior position "that expert testimony may be required in some cases to prove psychological injury," this decision suggests that the plaintiff's testimony may be sufficient to establish emotional stress in most cases.

For further information on the issues in *Thornton*, contact **Kristin Tauras** at ktauras@mckenna-law.com or 312-558-3923.

NO STACKING OCCURS WHEN TWO SEPARATE INSUREDS SEEK UIM COVERAGE UNDER SEPARATE POLICIES ARISING FROM THE DEATH OF A COMMON INSURED

The Second District Court affirmed the trial court's decision in favor of the insureds in *Economy Premier Assurance Company v. Tommy W. Jackson and Ellen Ann Hall*, 913 N.E. 2d 90 (2009) and held that the antistacking clauses of two separate insurance policies issued to two separate insureds did not apply to claims arising from the death of a common insured. The Court concluded that the insureds' claims for underinsured motorists coverage ("UIM") proceeds were for their own separate claims. The Court reasoned that the insureds, as next of kin of a common insured

under multiple policies, could maintain a separate cause of action that was recognized under the Wrongful Death Act, distinct from a claim sought by the estate of the deceased common insured.

In *Economy*, Ellen Ann Hall and Tommy W. Jackson (“Hall/Jackson”) were divorced and lived apart. Their son, Thomas Jackson (“Thomas”), was a resident of each parent’s household. He was an insured under the Safeco policy issued to Hall (with UIM coverage of \$100,00 each person/\$300,000 each accident) and an insured under the Economy Premier policy issued to Jackson (with UIM coverage of \$100,000 each person/\$300,000 each occurrence). Neither Hall nor Jackson had any other automobile policies, and neither was an insured under the other’s policy.

Thomas was killed in an auto accident when he was a passenger in a car operated by Christian DeFilippo (“DeFilippo”) as a result of DeFilippo’s negligent driving. At the time of the accident, the DeFilippo vehicle was insured by Allstate (\$50,000 per person/\$100,000 per occurrence), and Allstate paid its policy limit of \$100,000 in settlement of claims made against DeFilippo, disbursing the fund to Hall (\$15,000), Jackson (\$15,000), Sarah Jackson (Thomas’ sister) (\$15,000), and the remaining \$55,000 to the other two injured passengers of the DeFilippo vehicle.

Hall then made a claim with Safeco, seeking her UIM coverage, and Jackson likewise made a claim with Economy, seeking his UIM coverage in connection with the DeFilippo accident. Both Safeco and Economy argued that they were entitled to share liability under their respective anti-stacking clauses. Both Safeco and Economy maintained that each had to pay only a share of a single \$100,000 per person policy limit, contending that Thomas’ death was only one loss. Economy claimed that its \$100,000 limit was reduced by the

\$50,000 bodily limit of the Allstate policy, leaving only \$50,000 available, which Economy further reduced to \$25,000, alleging that the Safeco policy was other similar insurance. Safeco reduced its \$100,000 limit by subtracting the \$45,000 paid to all of Thomas’ heirs, subtracting the \$10,000 combined medical payments from the Economy and Safeco policies, and finally reducing the balance by half to \$22,500. Multiple lawsuits and motions were filed.

The trial court concluded that the anti-stacking clauses of each policy issued to Hall and Jackson did not apply, and it ruled that Hall and Jackson were each entitled to UIM coverage from their respective policies. The court held each policy was reduced by half of the \$45,000 paid to Hall/Jackson and entered judgment against Safeco and Economy in the amount of \$77,500 each. Safeco and Economy appealed.

On appeal, Hall/Jackson argued that their respective claims for UIM coverage under their respective policies were “for their own individual damages accruing to them as next of kin under the Wrongful Death Act.” Therefore there was no stacking. However, Safeco and Economy contended that the anti-stacking clauses contained in their respective policies applied to limit Hall/Jackson’s UIM recovery to \$100,000, a single policy limit provided under their policies since Thomas was the common insured under both policies.

Recognizing that an anti-stacking clause contained in an automobile policy does not contravene public policy and is permitted under the Insurance Code, the *Economy* Court reasoned that “for stacking to occur, the insured seeking to aggregate the policies must have coverage available under more than one policy or provision of coverage.” The Court stated that Thomas was the only insured who had coverage under more than one policy in this action, and he could not stack the policies. However, the action was

not by Thomas, the Estate of Thomas, or Hall/Jackson on behalf of Thomas for Thomas' UIM coverage determination. It was two separate claims filed by Hall and Jackson individually seeking their UIM coverage under their respective policies for "their own damage arising out of the wrongful death" of Thomas. It was irrelevant that Hall and Jackson could have brought a single wrongful death lawsuit against DeFilippo because, had DeFilippo had adequate insurance, no UIM coverage issues would exist. The Court concluded that the anti-stacking clauses were not applicable to limit Hall/Jackson's UIM recovery from their respective policies under the facts of this case.

For further information on this case, contact **Sumi Yang** at syang@mckenna-law.com or 312-558-8306.

McKENNA NEWS

Greg Cochran, the chair of McKenna's Toxic Tort Practice Group, was featured in a recent issue of Crain's Chicago Business. In the article Greg addressed mass tort litigation issues including tactics, lessons learned and how these lessons can be applied to future claims relating to workplace exposures.

Pat Kraft was the featured speaker at a recent seminar on estate planning sponsored by the Northern Illinois University Foundation.

WELCOME!!!

McKenna Storer takes pleasure in announcing that **Jennifer B. Groszek** has joined our Toxic Tort group as an associate. Jennifer brings several years of experience in defending asbestos, benzene, chemical exposure and other toxic tort cases. Jennifer also gained extensive court and trial experience as an Assistant State's Attorney in Kane County, Illinois prior to joining the private sector in 2004. She is a 1999 graduate of the University of Wisconsin-Stevens Point with a B.A. in Political Science, French & International Studies, and received her J.D. from Valparaiso University School of Law in December 2001. Jennifer is admitted to the bars of Illinois and Missouri.

Margaret Foster and **Jennifer Groszek** attended the All Bar Association Holiday Diversity Event, to raise money for law school scholarships for diverse students.

Jennifer recently co-presented the *Direct & Cross Examination Tips for Young Lawyers* program for the Illinois Association of Defense Trial Counsel on December 10, 2009, and attended The Advocates Society meeting.

McKenna Storer has offices located at:

33 N. LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 558-3900

666 Russel Court
Suite 303
Woodstock, IL 60098
(815) 334-9690

*This Law Update and News is intended to provide information of general interest and does not constitute legal advice. Readers should consult with their counsel before taking any action based on the information in this publication. All rights reserved. Copyright 2009, McKenna Storer. For information, contact the specific attorney or **Dawn Ehrenberg** at 312.558.3933*