

Practice Tips...

More Problems With Multiple Collision Cases

Everyone knows that recovery of fair compensation is complicated where the plaintiff has been in two successive auto collisions, both of which caused injury. The question of segregating damages is but one of the problems faced by plaintiff's counsel. For a discussion of the burden of segregating damages see *Phennah v. Whalen*, 28 Wn. App. 19 (1980) and David Heller's article in the October 1990 *Trial News*, "Multiple Accidents-A Crack in the Joint & Several Wall?"



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The problem of recovering full compensation for the plaintiff involved in successive auto collisions is compounded when the claims are to be decided in separate forums. This can happen in several ways. The most common situation I have encountered is where accident #1 involves a defendant who is insured. Accident #2 involves an uninsured motorist. The defendant in accident #1 has a constitutional right to a jury trial. In accident #2 the plaintiff's insurance contract probably provides for arbitration of the UIM claim.

If the claims cannot be settled and must be resolved in two separate forums then this will present a significant chance that there will be inconsistent results. For example, in

the jury trial the attorney for the defendant in accident #1 will point the finger at the uninsured defendant involved in accident #2. Given that defendant #2 is not there to defend himself the jury may find that plaintiff's damages were substantially caused by defendant #2. Later, in the UIM proceeding, the insurer will point a finger at defendant #1, who will not be present at the proceeding to defend himself. Thus, the arbitrators may decide that the bulk of plaintiff's damages were caused by accident #1. To reduce the possibility of inconsistent results you should address the problem of multiple forums and decide what is in the best interest of your client given the facts of the case.

It seems to me that there are three choices. You could resolve both claims in a jury trial, resolve both claims in an arbitration proceeding, or resolve one claim in a jury trial and the other in an arbitration proceeding. Here are some arguments you might use depending on which path you want to pursue.

Resolve Both Claims in A Jury Trial

There are some claims that have aggravated liability facts, substantial damages, or some other reason that causes you to want a jury trial. If you want to have both cases resolved in a jury trial then you need to argue that the arbitration proceeding should not occur. Here is how to do it.

The statute authorizing arbitration states that "two or more parties . . . may include in

a written agreement a provision to settle by arbitration any controversy thereafter arising between them . . ." RCW 7.04.010. As long as there is only one collision it seems to me that the dispute is between the parties to the insurance contract and the provision requiring arbitration is valid. However, when there are successive tort feasons causing an indivisible injury then it seems to me that the matter no longer involves a controversy arising solely between the parties to the insurance contract. Arguably, a contract cannot call for arbitration of decisions that involve persons not parties to the original insurance contract.

A second argument for asserting that the arbitration proceeding should not be held is that contract provisions calling for arbitration of disputes are revocable "upon such grounds as exist in law or equity for the revocation of any agreement." RCW 7.04.010. Given the cost of two separate proceedings and the likelihood of inconsistent results it seems inequitable to resolve

a case involving indivisible injury in two separate proceedings. Although there is a strong public policy favoring arbitration of disputes, that public policy is based on arbitration being a speedy, inexpensive, and fair way of resolving a dispute. None of those goals seems to be met by requiring two proceedings to resolve an indivisible injury claim.

Another way to push a matter normally decided in arbitration into a jury trial setting is to simply file suit and proceed toward a jury trial. A defendant who does not invoke arbitration in the trial court may waive the right to proceed by arbitration. RCW 7.04.040, *Pedersen v. Klinkert*, 56 Wn.2d 313 (1960).

Resolve Both Claims in Arbitration

I can think of no way to compel defendant #1 to arbitrate a case in which he has a constitutional right to a jury trial. However, you may be able to negotiate with defendant

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#1's attorney to put the matter into arbitration. Some obvious arguments you could make include the fact that arbitration is speedy, inexpensive, is binding on the parties, and offers considerable flexibility, (such as a "high-low" arbitration) and the opportunity to select the persons who will decide the case.

You can put additional pressure on defense counsel to agree to arbitration if the plaintiff is willing to waive any recovery in excess of the amount of the insurance policy. In other words, by agreeing to resolve the matter in arbitration defendant #1 now has no risk whatsoever that his personal assets will be subject to execution in the event of a substantial jury verdict.

Resolve Claims Separately in Two Proceedings

I have discussed with several attorneys the problem of resolving successive accident claims in multiple forums. There are some attorneys who prefer to resolve such claims in two separate proceedings. Under the fact situation I have given above this would be a jury trial and a UIM arbitration. The reasons usually given for this manner of proceeding is the possibility of a double recovery or the feeling that two separate proceedings gives the plaintiff an advantage in negotiating. Interestingly, some attorneys feel it is to their advantage to have an arbitration proceeding first and then a jury trial and other attorneys feel just the opposite.

In my opinion, it is seldom to the plaintiff's advantage to try to resolve an

indivisible injury claim in two separate proceedings. Usually one forum or the other will favor your client and you should attempt to enter that forum. I also think you should be cautious in pursuing a strategy which will result in the increased cost of two separate proceedings and the risk of inconsistent results.

If you make an effort to have both claims heard in one forum but the insurers won't agree then you might want to consider one final strategy. It is not a strategy I have tried or can find any case law support for. However, if the two claims are going to be resolved in two separate proceedings then it seems to me that you could have the arbitrators be present at and listen to the evidence presented at the jury trial. This should reduce the chance of inconsistent results because the arbitrators will have heard the arguments concerning liability, causation, and damages from parties who are present and have an interest in the outcome.

Conclusion

There is little law that addresses what to do with an indivisible injury claim that is scheduled to be resolved in two forums. If you have such a case I hope the above suggestions are helpful.

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