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(Notice to librarians: The following issues were published in Volume 27 of this newsletter during the fiscal year ending June 30, 1992: September, No. 1; November, No. 2; February, No. 3; May, No. 4)

From the editors

Dear readers,

Judge Lester D. Foreman and I will continue as co-editors of this newsletter. Oly Bly Pace III becomes the chair of the Tort Law Section Council, replacing James J. DeSanto. While we look forward to Oly Pace's term, the members of this council are thankful to Jim DeSanto for his service to the council, this publication and the ISBA over the years.

This issue begins with two articles: one by Josette Belvedere, our new council secretary, which discusses the problem of statute of limitations on injured minors' medical expense claims; the other by Mark L. Karno, which discusses a possible solution.

Next we have an article by council member, James P. Ginzkey, entitled *Settlement with Joint Tortfeasor is not Subject to Uninsured Motorist Setoff Absent Necessity to Prevent Double Recovery.*

We have a host of articles on current tort issues from members of the firm of McKenna, Storer, Rowe, White & Farrug. We would like to thank council member, Gene Farrug, for eliciting the contributions from his firm.

Finally, as in the past, we encourage comment from our readers. Please direct any letters to the editors to Joseph R. Marconi, Johnson & Bell, Ltd., Suite 2200, 222 North LaSalle Street, Chicago, Illinois 60601.

Sincerely, Joseph R. Marconi, co-editor

Statute of limitations on injured minors' medical expense claims, the problem

By Josette Belvedere

Even attorneys not concentrating their practice in accident and injury litigation know that the time within which to bring a claim on behalf of an injured minor generally extends through two years following attainment of majority. (See Ill. Rev.Stat. ch.ll0, pars.13-211 and 13-203). What is less apparent — even to seasoned plaintiff's litigators — is the appropriate statute of limitations applicable to claims for medical expenses incurred in relation to a minor plaintiff's injury.

This is by no means a trivial question. Dismissal of the medical expense portion of a plaintiff's claim can have a serious adverse impact on the potential verdict and settlement value of the case (as well as arguably leaving plaintiffs and their families open to the possibility of collateral debt-collection actions). Defendants, hoping to lower the value of plaintiff's case, often seek to bar claims for medical expenses incurred on behalf of an injured minor where the case was filed more than two years after the accident (on the "minor's" statute). They argue that the right to recover medical expenses lies in the parent or

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Statute of limitations on injured minors' medical expense claims, the solution

By Mark L. Karno

Josette Belevedere addressed the problems facing the tort practitioner by reason of the case of *Reimers v. Honda Motor Company, Ltd.*, 150 Ill. App.3d 840, 502 N.E.2d 428, 104 Ill. Dec. 165 (1st Dist., 1st Div., 1986) appeal denied, 114 Ill.2d 557, 508 N.E.2d 735, 108 Ill. Dec. 424 (1987) which perpetuated a quandary for the tort law practitioner who is faced with a case involving a severely injured minor child. That case stands for the rule that although a child can bring a cause of action for personal injuries within time limits established by the appropriate tolling statutes (See Ill. Rev.Stat., ch. 110, par. 13-211 to 13-213), the child's parents must bring their derivative causes of actions for medical expenses pursuant to the Family Expense Act and loss of services arising out of the injury to the child, within two years of the time the cause of action accrued. Any assignment of the cause of action to the minor child will not serve to toll the statute of limitations. This dilemma is of special significance where a child has received a head trauma which could or might result in the child being diagnosed, years later with a seizure disorder which is causally connected to the head injury. Many practitioners facing this scenario would desire to prolong bringing an action against a tortfeasor as long as possible, so as to avoid going to verdict before this medical problem surfaces. However, the wait could result in a waiver of any claims for medical care received by the child.

When faced with this narrow issue, most other states have reached the same result as Illinois, reasoning that tolling statutes are personal to the protected class. [See, *Rose v. Hamilton Medical Center, Inc.*, 184 Ga.App. 182, 361 S.E.2d 1 (1987), cert.den. 184 Ga.App. 910, *Gookin v. Norris*, 261 N.W.2d 692 (Iowa, 1978), *Waiter v. City of Flint*, 40 Mich.App. 613, 199 N.W.2d 264 (Michigan, 1972), *Ostrander v. Cone Mills, Inc.*, 445 N.W.2d 240 (Minn., 1989), *Moncar Trust Company v. Feil*, 105 N.M. 444, 733 P.2d 1327 (1987), *Besette v. Enderlin School District No. 22*, 310 N.W.2d 759 (N.D., 1981), *Lewis v. New York City Transit Authority*, 100 A.D.2d 896, 474 N.Y.S.2d 555 (2d Dept., 1984), *Macku by and through Macku v. Drackett Products*, 216 Neb. 176, 343 N.W.2d 58 (1984), *Osburn v. Savage Arms Corp.*, 66 Ohio Misc 1, 419 N.E.2d 1138 (1980), *Apicella v. Valley Forge Military Academy and Jr. College*, 630 F.Supp. 20 (E.D., Penn., 1985), *Simpson v. City of Abilene*, 388 S.W.2d 760 (Tex.App., 1965), *Perez v. Espinola*, 749 F.Supp 732 (E.D. Virginia, Alexandria Div., 1990].

When the New Jersey courts reached this result, (*See e.g. , Higgins v. Schneider*, 61 N.J.Super. 36 (1960)) the New Jersey legislature enacted a statute to solve this unfair problem. N.J. S.A. 2A: 14-2.1 provides in pertinent part that:

> Where a parent or other person has a claim for damages suffered by him because of an injury to a minor child caused by the wrongful act, neglect or default of any person within this State, an action at law upon such claim may be commenced by the said parent or other person within the same period of time as provided by law in the case of the said minor child so injured, provided that, if an action is commenced by or on behalf of the said minor child, the said claim of the parent or other person shall be asserted and maintained in such action brought on behalf of the injured minor child either as a plaintiff or third party plaintiff and if not so asserted shall be barred by the judgment in the action brought on behalf of said injured minor child.

The Wisconsin courts when recognizing this unfair problem took an activist stance and ruled that the parents' cause of action for the medical expenses of their minor children are tolled with the minor child's bodily injury claim. The Wisconsin Supreme Court recognized that it might not be in the minor child's best interest to initiate an action within their three year limitations period, and they have a statute which mandates that the parents' and minor child's claims be brought within the same action. They reasoned that granting the parents the benefit of the disability tolling provision would not necessarily place an additional burden upon a defendant since the defendant must preserve evidence to defend against the minor's claim. *Korth by Lukas v. American Family Insurance Company*, 115 Wis.2d 326, 340 N.W.2d 494 (1983).

It has been suggested that Illinois currently has a solution to the problem by reason of Illinois Code of Civil Procedure section 13-203 which provides that:

> Section 13-203. Loss of consortium—Injury to person. Actions for damages for loss of consortium or other actions deriving from injury to the person of another, except damages resulting from first degree murder or the commission of a Class X felony, shall be commenced within the same period of time as actions for damages for injury to such other person. Where the time in which the cause of action of the injured person whose injuries give rise to the cause of action brought under this Section is tolled or otherwise extended by any other Section of this Act, including Sections 13-211, 13-212, 13-215, the time in which the cause of action must be brought under this Section is also tolled or extended to coincide with the period of time in which the injured person must commence his or her cause of action. Amended by P.A. 85-907, Art. II, Section, eff. Nov. 23, 1987.

However, given the lack of specificity of the above statutory provision in addressing the medical expense issue, it is not unforeseeable that a court could dismiss a claim for medical expenses advanced by the injured minor's parents which were not filed within two years of the date of injury. (But see, *Reichert v. Ford Motor Company*, 768 F.Supp. 262 (S.D. Ill., 1991) where the U.S. District Court for the Southern District of Illinois interpreted Illinois Code of Civil Procedure section 13-203 as permitting a tolling of the wife's action brought pursuant to the Family Expense Act, due to the disability of her husband prior to his death.) Accordingly, I suggest that the Illinois Code of Civil Procedure be amended to include a new section 13-225 which would state the following:

13-225 Medical Bills of Minors

In personal actions brought pursuant to Sections 13-201 through 13-224 of this Act wherein the minority of a person serves to toll the limitations period applicable

to that Minor's Action, all claims for the recovery of medical expenses of the minor arising from that Action shall be tolled for a like period of time, regardless of who owns the claim for medical expenses.

This proposal was unanimously approved by the Tort Law Section Council on February 16, 1991. It is now out for comment to other ISBA section councils. Alternatively, section 13-203 of the Illinois Code of Civil Procedure could be amended to specifically address a parent's claim for medical expenses incurred in the treatment of their minor child as a part of that statute of limitations tolling provision. I would urge all readers to contact the Legislative Committee of the ISBA Board of Governors and any members of the Board of Governors that they may know, to include proposed section 13-225 or an amendment to Illinois Code of Civil Procedure section 13-203 as a part of the ISBA'S legislative package.

Settlement with joint tortfeasor is not subject to uninsured motorist setoff absent necessity to prevent double recovery

By James P. Ginzkey

In March the Illinois Supreme Court struck down as against public policy an offset provision contained in virtually all uninsured motorist coverage provisions. But the court's holding applies only in limited circumstances. In *Hoglund v. State Farm Mutual Automobile Insurance Co.* and *Greenawalt v. State Farm Mutual Automobile Insurance*, consolidated docket numbers 71713 and 71714, plaintiffs were injured while they were passengers in uninsured motor vehicles when the drivers in the vehicles collided with other vehicles. IN EACH CASE, THE DRIVERS OF BOTH VEHICLES WERE AT FAULT. The drivers of the other vehicles each had bodily injury policy limits of $100,000 and this amount was paid to each plaintiff. Both plaintiffs allegedly suffered damages in excess of the $100,000 paid to them and filed claims against defendant, State Farm, each seeking uninsured motorist benefits for the excess damages under their own policies. State Farm denied the claims based on its interpretation of the policy language finding a complete setoff.

In the *Hoglund* case, plaintiff, while riding as a passenger on an uninsured motorcycle, was involved in a crash with an insured automobile and suffered $200,000 in damages. Both drivers were at fault for the injury. The automobile driver had insurance with a $100,000 limit, which was paid to Miss Hoglund. Although the driver of the motorcycle on which she was riding had no insurance, Miss Hoglund was covered by the uninsured motorist clause of her father's policy with State Farm which had a $100,000 limit for injury caused by an uninsured driver. Greenawalt also sought relief under her uninsured motorist policy. Her husband was driving the car in which she was a passenger. Although he carried insurance, he was effectively "uninsured" because the policy excluded claims by family members. Uninsured motor vehicle policies issued to both plaintiffs included a setoff provision which provided in pertinent part:

Limits of Liability

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2. Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the *insured:*
   a. by or for any person or organization who is or may be held legally liable for the *bodily injury* to the *insured;*
   b. for *bodily injury* under the liability coverage; or
   c. under any worker's compensation, disability benefits, or similar law.

State Farm denied the claims of Hoglund and Greenawalt, stating that because both plaintiffs had received payments of $100,000 from a legally liable party, State Farm was entitled to a setoff whereby it could reduce its coverage by the $100,000 payment and thus owe the claimants nothing. Noting that it is well-settled law that the purpose behind the statutorily mandated uninsured motorist provision is that the insured be placed in substantially the same position as if the wrongful uninsured driver had been minimally insured, the court held "the meaning of the setoff provisions at issue both in the statute and in the policies in the instant cases is to prevent a double recovery by the insured." The court also noted that it could not ignore the fact that a premium was paid for the uninsured motorist protection and that the exculpatory language on which State Farm relied could not be read in isolation.

One of the most critical points in the holding is the court's statement that "it is significant that Miss Hoglund was injured in part by an uninsured motorist and in part by an insured motorist," because if "the uninsured motorcycle driver had been insured for $100,000, Miss Hoglund could have collected that sum in full from that driver's insurer, along with the $100,000 she collected from the other insured driver. The separate collections of $100,000 from each of the two culpable drivers would have fully compensated her for her $200,000 in damages."

The court's holding seems to be confined to those cases in which there are joint tortfeasors, one of whom is uninsured, and where plaintiff's damages clearly exceed the liability limits of the insured tortfeasor. It would follow then that the holdings of other uninsured motorist offset cases are left undisturbed. See *Schutt v. Allstate Insurance Co.*, (1985), 135 Ill. App. 3d 136, 478 N.E. 2d 644 (where setoff is allowed to prevent double recovery); *Stryker v. State Farm Mutual Automobile Insurance Co.* (1978), 74 Ill. 2d 507, 386 N.E. 2d 36 (amount paid pursuant to uninsured motorist coverage is reduced by benefits paid under workers' compensation).

The most interesting question left unanswered by the *Hoglund* decision is what effect that decision will have on underinsured (not uninsured) setoff claims. Currently, an insured's claim under his own underinsured motorist coverage is set off by the amount he has recovered from the underinsured tortfeasor regardless of the fact that his damages may far exceed the difference with which he is left. *Giardino v. American Family Ins.* (1987), 164 Ill. App. 3d 389, 517 N.E. 2d 1187; *Adolphson v. Country Mutual Insurance Co.* (1989), 187 Ill. App. 3d 718, 543