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TORT TRENDS

The newsletter of the ISBA's Section on Tort Law

(Notice to librarians: The following issues were published in Volume 39 of this newsletter during the fiscal year ending June 30, 2004: October, No. 1; December, No. 2; March, No. 3; April, No. 4; May No. 5; June, No. 6).

Editor's note

By John L. Nisivaco of Lavin & Nisivaco, Chicago

The first article in this edition is written by Marty Dolan and Myco Dang of Dolan & Shannon. The article discusses the proper procedure for naming respondents in discovery pursuant to Section 2-402 of the Illinois Code of Civil Procedure. In addition, the authors provide an explanation of the relevant case law for those practitioners who want to avoid the pitfalls of this provision.

The second article in this edition is written by Mark Karno of Mark Karno & Associates. Mr. Karno provides a hypothetical scenario to explore the variety of bankruptcy issues that arise in a wrongful death case.

I would also like to inform the readership that the ISBA's Federal Civil Practice Section Council offers information that is complimentary to the membership of the Tort Law Section Council. The Federal Civil Practice Section Council focuses on procedural and substantive issues that arise in federal court. The newsletter that this section council provides would likely be useful to those attorneys practicing in federal court.

Thank you to all of the contributors. The articles are excellent and we hope you find the materials helpful.

Exploring the bankruptcy law issues a tort law practitioner faces in a Wrongful Death Act case

By Mark L. Karno of Mark L. Karno & Associates, Chicago

The wife of one of your clients walks in the door of your offices in tears. She is despondent over the death of her husband which had been caused earlier in the day in a collision with a drunk driver who ran a red light. The impact killed him instantaneously. Besides the wife, he had left behind two teenage children. After calming the widow down, you begin to analyze the various legal issues that we as attorneys are called upon to decipher for a grieving family. In conducting your factual research, you learn that the driver who ran the red light had been charged with DUI. He had blown a .240 on the Breathalyzer. He was on his way home from the local tavern where he admits that he had consumed a few whiskeys, washing them down with pints of beer. Just prior to leaving the tavern, he had picked up his vehicle from a nationwide auto repair retailer. He had just had the vehicle's brakes replaced by this retailer. However, as luck would have it, the mechanic utilized the wrong caliper in the brake assembly which caused a brake failure at the stoplight.

Now you are contemplating the legal issues facing the family. One of the obvious claims that you will bring is against the tavern that served the whiskey and beer to the driver. This claim takes the form of a Dram Shop Action. However, you know that there are statutory limits on your recovery of $45,000 for each person incurring damages, and $55,000 for the widow's loss of means of support claim, subject to a CPI index adjustment and the maximum recovery under the act being no greater than the indexed $55,000. Having researched the act, you also learn that a Dram Shop Act claim must also be brought within one year of the date of the occurrence, all in accordance with 235 ILCS 5/6-21(a).

Another legal issue that you analyzed was the Wrongful Death Act claim of the family. Being the great tort law practitioner that you are, you called in your partner who concentrates his practice in trusts and estates to kick around the issues. He gave you a few very helpful tips. Having become an unqualified expert in the probate law issues facing your deceased client, based upon your 15 minute conversation with your partner, you then discuss these issues with the grieving widow. You had learned from your partner that because your client held all of his property in joint tenancy with his wife that there is no need to open up a formal probate estate. He only had $7,500 in equity in his half of the house and, in accordance with 735 ILCS 5/12-901, this equity interest is exempt from the claims of his creditors. You are relieved because you had just represented this client in a breach of contract action and a $10 million judgment was recently entered against him. In accordance with 740 ILCS 180/2.1, since the only asset of the deceased client's estate is the Wrongful Death Act claim, you need only prepare a petition on behalf of the next of kin to have a special administrator appointed. You are relieved because now you are confident that whatever monies you recover in the case will go on to benefit the family and will not be subject to the claims of the $10 million judgment creditor. This is the result because a Wrongful Death Act claim is brought for the benefit of the next of kin and not for the benefit of the estate.

That afternoon, you appear in front of the judge to have the widow appointed the special administrator. You then file the complaint with the clerk of the circuit court and place the summons and complaint with the sheriff to be served upon the defendants. You are now waiting to find out which insurance companies will become involved and what the insurance coverages will be. Two weeks later, you receive a telephone call from the repair shop's insurance carrier and learn that the repair shop had $10 million in liability insurance coverage. About three weeks later, you learn that the driver of the car only had a liability insurance policy with liability limits of $20,000. You then learn that the dram shop was also insured. Four weeks later, you learn that the auto repair shop chain, given the poor economic climate, has just filed a Chapter 11 bankruptcy petition. You also learn that the intoxicated driver of the vehicle that crashed into your client had, upon being served with the lawsuit papers, gone straight to his lawyer who promptly filed a Chapter 7 bankruptcy petition on his behalf.

The first issue that you face is the Automatic Stay provisions of the Bankruptcy Code. 11 USCS §§ 362(a) provides that:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS §§ 78eee(a)(3)], operates as a stay, applicable to all entities, of--(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; (7)

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the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

The immediate impact of the automatic stay is that your case has been frozen in its tracks. You cannot take any further action in prosecuting your client's case as long as the automatic stay is in effect because 11 USCS §§ 362(h) provides the following penalties for a violation of the Bankruptcy Code's automatic stay:

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney fees, and, in appropriate circumstances, may recover punitive damages. 11 USCS §§ 362(h).

While you are eating lunch in the firm's lunchroom, looking despondent, your partner enters the room and asks what is bothering you. After explaining the facts, he advises you not to worry about the bankruptcies filed by the repair shop chain and the individual driver. You do have a remedy. However, he advises you that you must now act quickly while the bankruptcy cases are still open. He further describes how you can file a motion to lift the automatic stay to the extent of the applicable insurance coverages. He describes how this motion is spindled up as a normal motion before the bankruptcy court judge assigned to the case and that it is almost routinely granted. The authority for lifting the automatic stay to the extent of insurance coverages is found in 11 USCS §§ 362(d) which provides that:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--(1) for cause...

Authority is also found in the case of *ABC-NACO, Inc. v. Eastman*, 2003 U.S. Dist. LEXIS 3659, Case Nos. 02 C 5170 and. 02 C 5242 (U.S. Dist. N.D. Ill., ED, 2003) where Judge Gottschall held that lifting the automatic stay to the extent of insurance coverages was the only just result because the only parties entitled to collect the liability insurance policy's proceeds are parties who would otherwise be claimants against the assets of the bankrupt's estate. However, the court did leave open the possibility that a party could come back to the bankruptcy court to seek relief if allowing a particular claimant to lift the automatic stay to the extent of insurance coverages then exhausted the insurance coverages and there were other parties with claims who would otherwise be covered by that same insurance policy.

The other issue facing you is whether you want to proceed against the drunk driver's personal assets. Normally, you might not want to go down this road because there now appears to be adequate insurance coverages from the repair facility to compensate the family. However, even though you made your policy limits demand in accordance with both *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill. App. 649, 60 N.E.2d 896 (1st Dist., 1945) and *Haddick v. Valor Ins.*, 198 Ill. 2d 409, 763 N.E.2d 299, 2001 Ill. LEXIS 1436, 261 Ill. Dec. 329 (2001), the insurance carrier steadfastly refuses to tender their $20,000 policy. Your clients became outraged and now instruct you to go after that drunk driver. Now, not only do you have to lift the automatic stay to the extent of the applicable insurance coverages, but you must also separately file an adversary complaint to object to the dischargeability of your clients' claim by the bankrupt driver.

Under the Bankruptcy Code, 11 USCS §§ 523 provides for exceptions to the dischargeability of certain debts. These include the following:

> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;
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> * * *
>
> (9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

The procedure is to file a separate lawsuit in the bankruptcy court. 11 USCS §§523(a)-sets forth the requirement of filing a complaint and issuing a summons. The case is styled as "Your Client vs. The Bankrupt Party." The complaint will typically recite the basic facts of the case including a jurisdictional statement and then it should contain a prayer for relief seeking to have the bankruptcy court determine that the debt is a non dischargeable debt. Note that the bankruptcy court can only hear the issue as to whether the debt is dischargeable. This is pursuant to the doctrine that the bankruptcy court only has jurisdiction to hear "Core Proceedings" or those which invoke a substantive right provided by Title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.

You have now been successful in both your motion to lift the automatic stay and the adversary complaint to determine the dischargeability of the claim against the drunk driver. You must now return to the state court to pursue your clients' Wrongful Death Act claims because 11 U.S.C.§§ 157(c)(1) does not authorize bankruptcy judges to dispatch tort suits. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982), the court held that Article III of the Constitution bars bankruptcy judges who lack life tenure from deciding tort claims founded on state law. In the wake of the Northern Pipeline case, Congress required bankruptcy judges to transfer personal injury claims to district judges. Thus, the whole case goes off to the district judge or back to the state court for trial. See, *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir.,1991) [Cf, *S.N.A. Nut Co. v. Haagen-Dazs Co. (In re S.N.A. Nut Co.)*, 206 B.R. 495, where the court determined that the adversary complaint "relates to" the debtor's bankruptcy estate in that its outcome affects distribution under the plan and accordingly held that it had jurisdiction pursuant to 28 U.S.C. 1334 to hear an underlying contract claim.]

You have now successfully navigated the waters of the U.S. Bankruptcy Court. The family's case is now back in state court where most of us tort law practitioners feel right at home.