

Jim's Perspective...

Derivative Claims

We all understand and appreciate that in the case of a bodily injury liability claim, there is a “per person” limit of liability coverage that applies to that individual’s claim. This straight-forward process can become a little more complicated when a person suffers a physical injury caused by the wrongful conduct of another, and then the uninjured spouse asserts his/her own claim in addition to the claim asserted by the physically-injured spouse. That claim is commonly known as a “loss of consortium” claim. A claim involving loss of consortium is based upon the disruption of a protected marital relationship, and arises when the uninjured spouse loses the benefit of society and service in his/her relationship due to injuries to his/her spouse. Loss of consortium is viewed as a “derivative” claim, in the sense that it flows from a bodily injury to another person. The Nebraska Supreme Court confirmed that the non-injured spouse’s claim is derivative in Schendt v. Dewey, 246 Neb. 573, 520 N.W.2d 541 (1994).

As you may know, the insurance coverage question that arises with a loss of consortium claim is whether the physically injured party, and spouse claiming loss of consortium, should be allowed to recover from only one “per person” limit, or should they each be allowed to recover from separate “per person” limits and subject to only the “per occurrence” limit.

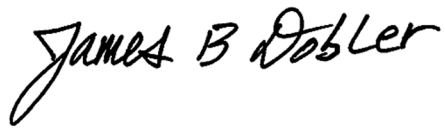
The current law in Nebraska supports the view that both spouses must recover from only one “per person” limit under the auto liability coverage. Wilson v. Capital Fire Ins. Co., 136 Neb. 435, 286 N.W. 331 (1939). The “per person” limit was also applied to a loss of consortium claim asserted in an uninsured motorist coverage case styled, Rasmussen v. State Farm, 278 Neb. 289, 770 N.W.2d 619, (2009) which cited the Wilson case. I think the one “per person” limit would apply to other liability insurance policies in addition to an auto liability policy.

The Court, in Farm Bureau Ins. Co. v. Martinsen, 265 Neb. 770, 659 N.W.2d 823 (2003) was faced with a similar question in the context of another type of derivative claim described as “negligent infliction of emotional distress.” After reviewing the language of the automobile liability insurance policy, the Court found that in order to recover the higher “per occurrence” limit, there had to be more than one “physical bodily injury.” The policy’s definition of “bodily injury” did not extend to a purely emotional injury in a way that would allow for a separate per person limit of coverage to apply to such a claim.

Derivative claims can also become an issue at the time of settlement of a bodily injury claim. The case of Simms v. Vicorp Restaurants, 272 Neb. 744, 725 N.W.2d 406 (2006) involved an underlying claim by Mrs. Simms that she had been injured due to a slip and fall at a restaurant. Mrs. Simms settled her claim for these injuries and signed a “Release of All Claims.” Subsequently, Mrs. Simms’ husband made a claim for loss of consortium arising out of the slip and fall. Vicorp argued that the wife’s release barred her husband’s claim as the release extinguished all claims stemming from the accident, including her spouse’s loss of consortium claim. The Nebraska Supreme Court disagreed, stating, “Although a loss of consortium claim derives from the harm suffered by the injured spouse, it remains as a personal legal claim which

is separate and distinct from those claims belonging to the injured spouse.” When settling claims, it is therefore always important to consider the existence of potential loss of consortium claims and include spouses in any release signed as part of a settlement.

The issue of how derivative claims are covered under liability insurance can be interpreted differently in the courts of each state. Some state courts have held that a derivative claim of loss of consortium is to be covered under liability insurance with a separate “per person” limit. Consequently, the issue of how to handle liability coverage for derivative claims, particularly loss of consortium claims, requires additional legal research when the auto accident occurs in another state.



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