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## Double Dipping in Wrongful-Death Cases Rebuffed

Justices rule split-limit policies don't allow separate recoveries for death and survivorship claims

By Tim O'Brien

**H**anding the personal injury bar a setback, the state Supreme Court last Thursday scotched the theory that plaintiffs suing on behalf of a decedent can double their money under split-limit insurance policies — recovering once for wrongful death and again for survivorship.

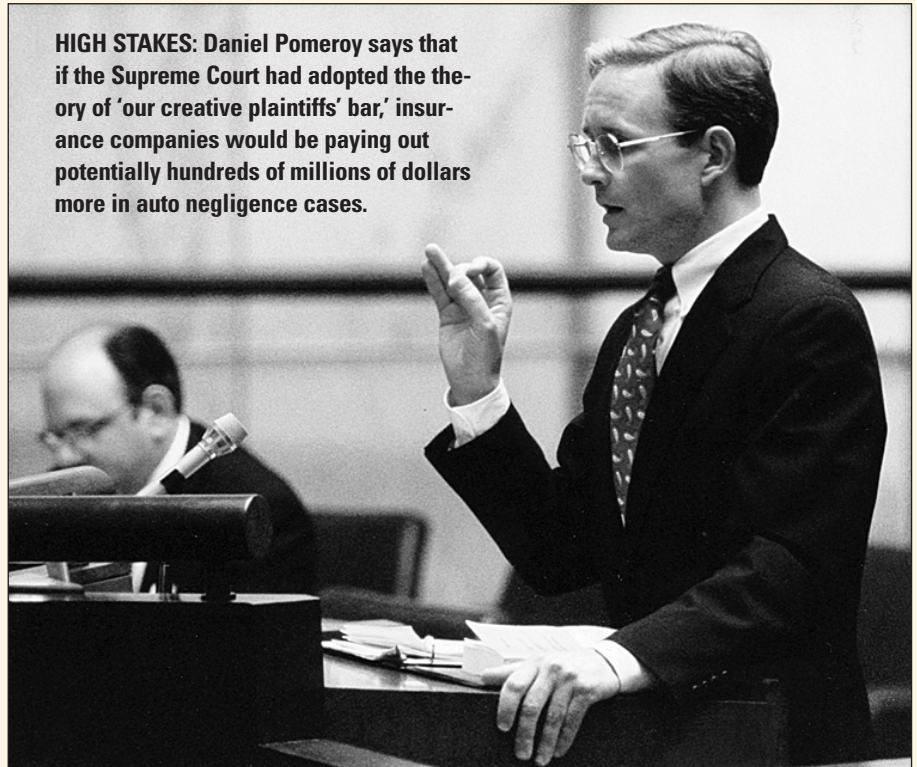
In *Christine Vassiliu v. Daimler Chrysler Corp.*, A-63-64, the justices unanimously held that the plain and unambiguous language of the policies at issue barred a double payout.

Justice Peter Verniero led the Court in siding with the insurance industry on another issue, finding that carriers that write underinsured motorists (UIM) policies are entitled to a set-off against payouts to the plaintiff in a settlement of claims against third-party tortfeasors.

But it was the split-limit issue that galvanized both sides to weigh in with amicus briefs after the Supreme Court took the case at the request of Prudential Property & Casualty Insurance Co.

"This is huge," says Prudential's lawyer, Daniel Pomeroy, who argued the case before the Court. Pomeroy, of Springfield's Mortenson & Pomeroy, says "at stake is tens of millions and maybe hundreds of millions of dollars" had the plaintiffs won.

**HIGH STAKES:** Daniel Pomeroy says that if the Supreme Court had adopted the theory of 'our creative plaintiffs' bar,' insurance companies would be paying out potentially hundreds of millions of dollars more in auto negligence cases.



He and plaintiffs' lawyers say the ruling primarily affects fatal auto accident cases, though it could have applied to products liability and other negligence claims as well.

Louis DeVoto, who argued the case for plaintiff Christine Vassiliu, says he's "terribly disappointed by the decision and terribly disappointed for my client." He adds, "I think the Court missed a grand opportunity for all insurance consumers in New Jersey."

DeVoto, with the Cherry Hill firm of Ferrara, Rossetti & DeVoto, says he still believes many similar cases will have to be litigated "because of the policy language of each case that controls, and no matter what happened in my case, the language of another case

may be different."

Pomeroy disputes that, saying that about 90 percent of auto policies written in New Jersey use the standard endorsements provided by the Insurance Services Office, a national industry organization, and so the language in split-limit policies is identical for the most part.

Four industry organizations — the Alliance of American Insurers, the American Insurance Association, the National Association of Independent Insurers and the Insurance Council of New Jersey — submitted amicus briefs. On the other side was an amicus brief filed at the appellate level by the Association of Trial Lawyers of America-New Jersey. ATLA's lawyer,

Kevin Haverty, relied on the same brief when the case went up.

Lawyers on both sides say that while this issue has been settled by state courts around the country, New Jersey trial judges have decided it both ways. Verniero noted that “courts in other jurisdictions that have considered similar split-limit policy language also have concluded that only a single ‘per person’ limit applies when there are survivor and wrongful death claims arising out of the injury and death of a single person.”

### Two For One

Hristos Vassiliu was driving his van in Franklin Township, Gloucester County, in June 1995 when he was broadsided by another car. He died later that day.

In her capacity as administratrix of her husband’s estate and as administratrix ad prosequendum for his heirs, which was only herself, Christine Vassiliu filed a personal injury suit consisting of a wrongful death claim and a separate survivorship claim against the other driver, Shaun O’Brien. She also filed a products liability claim against the maker of the van, DaimlerChrysler, and the car dealer.

O’Brien had two liability policies, a \$35,000 single limit policy by New Hampshire Insurance Co. and a \$15,000 “per person” and \$30,000 “per accident” split-limit policy by Prudential. In addition, Vassiliu had two UIM policies that were both \$100,000/\$300,000 split-limit policies, one issued by Prudential and the other by Selective Insurance Co.

During jury selection before Superior Court Judge William Cook in Camden County, the two products liability defendants agreed to settle for a total of \$215,000, without admitting liability.

Cook then conducted a bench trial and eventually ruled that O’Brien, who had run a red blinking light and a stop sign, was 100 percent negligent. The judge awarded Vassiliu \$175,000 for the survival action and \$1.75 million for the wrongful death action, plus funeral expenses.

New Hampshire paid out the full \$35,000. Cook then found that Prudential, under its \$15,000/\$30,000 liability policy, had to pay \$15,000 for the wrongful death action and another \$15,000 for the survival action because the claims amounted to “separate causes of action, with differing types and elements of damages for different parties.” He rejected Prudential’s argument that the plain ordinary language of the policy limits the liability to “one person” per accident and that the “one person” is the deceased.

Instead, Cook held for the first time — two other judges had rejected similar arguments — that “a wrongful death action and a survival action be considered as two separate claims, for purposes of determining the coverage available under ‘per person’ or ‘per injury’ split limits liability, uninsured motorist (UM) or underinsured motorist (UIM) policies.”

The Appellate Division upheld Cook on the split-limit question, but reversed on the set-off issue, finding that the insurers are entitled to a credit for the products liability settlement based again on the language of the UIM policies.

Pomeroy sought certification for Prudential on the split-limit issue, joined by Selective’s lawyer, Stephen Sobocinski of Marlton’s Tucker & Munyon. DeVoto, on behalf of Vassiliu, cross-petitioned to overturn the set-off granted by the unanimous appeals panel of Erminie Conley, Richard Newman and Philip Carchman in November 2002.

The Supreme Court, in finding that Cook and the appellate court got it wrong, said both claims were still subject to a single “per person” limit in the split-limit policies because they are both derivative of and dependent on Hristos Vassiliu’s injuries, including his death. The justices agreed with Pomeroy and Susan Stryker, who submitted the amicus brief on behalf of the four industry organizations, that “person” can only mean the decedent, not his estate or his heirs.

Stryker, a partner with Sterns & Weinroth of Trenton, says the decision

“is in line with other jurisdictions around the country,” saying that had the Court ruled for the plaintiff “it had the potential to double, triple or quadruple the payout [in multi-death accidents] without that being factored into the pricing.”

The Supreme Court noted that despite the legal distinction between a wrongful death action and a survival action, they trigger a single “per person” limit under the policy. The Court rejected the arguments of DeVoto and Kevin Haverty, who filed the amicus brief on behalf of ATLA-NJ, that there is a distinction between the decedent’s death and the pre-death bodily injuries for the purposes of the “per person” coverage limitations.

Haverty, an associate with Cherry Hill’s Williams, Cuker & Berezofsky, says he believes the Court “seems to have resurrected the dependent derivative rule,” which he says joins wrongful death claims with other claims dependent upon the same incident. He says that rule stems from a pair of Supreme Court cases, *Alfone v. Sarno*, 87 N.J. 99 (1981) and *Miller v. Estate of Sperling*, 166 N.J. 370 (2001), but adds that he believes the Court had been moving away from that position.

Haverty also disputes Pomeroy’s contention that the plain language of most policies dictates that plaintiffs will never be able to recover under a “one person” limit using two separate actions. While state courts throughout the nation have ruled for the industry on the issue, many of those out-of-state policies had more explicitly exclusive language than policies sold in New Jersey, he says.

Haverty plays down the significance of the ruling, saying it keeps things as they were. However, when the trial and appellate courts ruled for the plaintiffs, colleagues in the personal injury bar cheered. Gerald Baker, of Baker, Garber, Duffy & Pedersen in Hoboken, said after Cook’s decision that it was “huge, because in every such action, you’ve essentially doubled your coverage.”

Now the defense bar can breathe easier. Says Pomeroy, “Our creative plaintiffs’ bar tries to find a way to

raise a survivorship claim because that has all the sex appeal." He adds that it's a legitimate claim because Vassiliu "may have seen the car coming and knew he was about to die, but while you can raise both claims [wrongful death and survival] it's still one injury, one limit on one policy.

As for the set-off issue, the high court upheld the appellate panel ruling that the UIM carriers were entitled to reduce their payouts by the \$215,000 settlement that came from the products liability defendants.

So Christine Vassiliu will wind

up with \$265,000 total: \$35,000 from New Hampshire; \$15,000 from Prudential's liability policy; and the \$215,000 from the insurers of DaimlerChrysler and the dealer who sold the van. She will get nothing from her husband's UIM policies because the \$100,000 available "per person" in each of those two policies is wiped out by the \$215,000 set-off.

Sobocinski, representing Selective Insurance, says he's received 30 calls from other lawyers about the case in the past two years, saying both

sides have been tracking *Vassiliu* since Cook's decision. "I think it was the only decision they could have reached based upon the ordinary language of the policies," he says

DeVoto still insists that "we've got to look at each case because the definitions of each policy are clearly different ... to see whether or not the language of each policy is ambiguous or clearly written."

Haverty adds that he sees the ruling as "a pragmatic decision ... in the context of today's world of high insurance costs." ■