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Excellence In All That We Do

Inside this issue:

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Did you know?

A claimant may recover for injuries and damages under 3 separate categories:

1. economic damages, such as medical expenses (amount not capped);
2. non-economic damages, such as pain and suffering (amount is capped by statute);
3. permanent impairment or disfigurement (which is not subject to a cap).

Who Can be Held Legally Liable for the Aurora Movie Theater Shootings?

Other than from the perpetrator himself, victims and their families are probably without any real legal remedy for the unimaginable harm they suffered when mass murderer James Holmes went on a shooting spree on July 20th in a sold-out movie theater airing the release of the Batman sequel.

With his hair painted red proclaiming to be The Joker, James Holmes randomly killed 12 people and wounded 58 others.

Companies, such as the movie studio that produced The Dark Knight Rises or the owner of the theater Cinemark Holdings, are rarely found liable for the intentional crimes of non-employees.

Violence in movies and videogames is expression that is protected under the First Amendment of the U.S. Constitution, shielding studios from liability.

Businesses are only held liable in cases where they had reason to know that their customers would be at risk for violence from another member of the public, such as having prior warning or prior attacks at the premises.

Be Ready to Withdraw that Offer of Settlement

On April 26, 2012, the Colorado Court of Appeals held that a court's grant of summary judgment on all claims does not terminate a valid settlement offer made pursuant to C.R.S. § 13-17-202. ***Rost v. Atkinson***, 2012 WL 1436136 (Colo. App. Apr. 26, 2012).

In ***Rost***, the defendant served a statutory offer of settlement while a motion for summary judgment was pending.

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Be Ready to Withdraw that Offer of Settlement, *continued from page 1*

After the trial court granted the summary judgment as to all claims, Plaintiff accepted the offer of settlement before it was withdrawn. The trial court rejected the Defendant's argument that the summary judgment order terminated the settlement offer.

Relying on C.R.S. § 13-17-202(1)(a), the Court of Appeals found that the only two conditions terminating a valid statutory settlement offer are either withdrawal of the offer or the expiration of the statute's 14-day acceptance period.

Summary judgment, even if granted on all claims, does not invalidate an otherwise valid settlement offer.

The court noted that defendants may avoid such a result by conditioning the settlement offer on the outcome of a pending motion for summary judgment, citing ***Centric-Jones v. Hufnagel***, 848 P.2d 942 (Colo. 1993).

Limitation of Liability Clauses Not Enforced for Willful And Wanton Conduct

In ***Core-Mark Midcontinent, Inc. v. Sonitrol Corp.***, 2012 COA 120 (Colo. App. July 19, 2012), the Colorado Court of Appeals held that a limitation of liability clause in a contract will not be enforced for willful and wanton conduct.

Core-mark and Sonitrol contracted to have Sonitrol install and monitor a burglar alarm system at one of Core-Mark's warehouses.

Their contract limited Sonitrol's liability to a sum equal to 6 months monitoring payments or $500, whichever is less.

In December 2002, Sonitrol failed to detect or to respond to a burglary at the warehouse.

One of the burglars

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Notice of Claim Constitutes a "Suit" Requiring a Defense

In ***Melssen v. Auto-Owners Ins. Co.***, 2012 WL 2353802 (Colo. App. June 21, 2012), the Colorado Court of Appeals held that a notice of claim made under the Colorado Construction Defect Action Reform Act (CDARA) was a "suit" as defined by Auto-Owners' policy (which expired in November 2004).

The policy defined "suit" as a "civil proceeding" and included in the definition ". . . any other alternative dispute resolution proceeding in which damages are claimed and to which you submit with our consent."

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The Debate is Over: Amount Billed is Recoverable

On April 30, 2012, the Colorado Supreme Court released three opinions, all holding that evidence of what a plaintiff's insurance company actually paid for medical expenses was not admissible. Instead, the plaintiff is entitled to claim the full amount billed by health care providers even though a fraction of that billed amount is paid by insurance companies with the balance being written off as part of their contracts.

In re Smith v. Jeppsen, 2012 CO 32 (Colo. Apr. 30, 2012); ***Sunahara v. State Farm***, 2012 CO 30 (Colo. Apr. 30, 2012); ***Wal-Mart v. Cosgrove***, 2012 CO 31 (Apr. 30, 2012).

The good news, however, is that the Supreme Court also held that plaintiffs are not entitled to discover settlement authority or reserves in UM/UIM cases, recognizing those claims are adversarial just like third party claims.

Limitation of Liability Clauses Not Enforced for Willful And Wanton Conduct, *continued from page 2*

started a fire in the warehouse that destroyed the building and its contents, resulting in a $7 million jury verdict in favor of Core-mark for Sonitrol's willful and wanton breach of their contract.

The Court discussed and recognized the numerous Colorado appellate decisions holding that a contract provision relieving a party from liability for its own willful and wanton conduct is against public policy.

Interestingly, Sonitrol did not challenge the sufficiency of the evidence that it willfully and wantonly breached the contract.

Notice of Claim Constitutes a "Suit" Requiring a Defense, *continued from page 2*

The Court held that the notice of claim process was an "alternative dispute resolution proceeding," affirming the jury findings that Auto-Owners impliedly consented to the process and waived the consent requirement.

For current policies in force or expiring after May 21, 2010, C.R.S. § 13-20-808(7)(a)(I) statutorily requires insurers to defend a notice of claim.

Under ***Melssen***, a notice of claim potentially triggers a duty to defend under any policy issued to a construction professional if it contains a similar definition of "suit."

Therefore, for any notice of claim alleging facts potentially within the policy's coverage, claims adjusters should reasonably investigate and cooperate with the insured in the notice of claim process pursuant to C.R.S. § 13-20-808(7)(b).

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