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Lambdin & Chaney is pleased to announce that both of its founding partners, Suzanne Lambdin and Kathy Chaney, have been invited to join the prestigious Council on Litigation Management. The council is a non–partisan alliance comprised of thousands of insurance companies, corporations, Corporate Counsel, Litigation and Risk Managers, claims professionals and attorneys. Through education and collaboration the organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows.

Lambdin & Chaney, LLP provides unmatched knowledge and experience in the insurance defense industry representing a variety of insurers with attorneys who have had personal experience handling claims, serving as in–house legal counsel, and earning the CPCU designation. Lambdin & Chaney, LLP provides civil litigation services across a broad range of areas, including class action defense, employer liability, intentional torts, personal injury, premises liability, professional malpractice, third party liability, wrongful death, and a special expertise in construction defect litigation representing developers, general contractors, and subcontractors.

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Apportioning Defense Costs

If you deal with construction defect claims against subcontractors you have likely come across claims against your insured for defense costs of the general contractor. These claims are usually based upon language in the indemnity clause of the subcontract requiring the subcontractor to defend and indemnify the general contractor. For a subcontractor whose work is not a significant part of the Plaintiff's defect claim, such an allocation of defense costs can greatly increase their exposure.

There is no Colorado law directly on point for the issue of whether a subcontractor should bear an equal share or a share determined by its proportional responsibility for the defects claimed. However, the Nevada Supreme Court recently issued a decision squarely addressing this issue. ***Reyburn & Landscaping Design v. Plaster Development Co., Inc.***, 2011 WL 2162766 (Nev. June 2, 2011). The Nevada Supreme Court held:

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Apportioning Defense Costs

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"...[W]e now hold that unless specifically otherwise stated in the indemnity clause, and indemnitor's duty to defend an indemnitee is limited to those claims arising from the negligence of the indemnitor's scope of work and does not include defending against claims arising from the negligence of other subcontractors or the indemnitee's own negligence."

What this means is that unless the contract clearly states otherwise, the subcontractor is only liable for defense costs of the general contractor actually incurred to defend against the alleged defects in the subcontractor's scope of work. While not binding law in Colorado, ***Reyburn*** can be used to persuade Colorado courts and arbitrators.

Insurer Not Required to Offer UM/UIM Coverage Under Umbrella Policy

The Colorado Supreme Court recently held, in ***Apodaca v. Allstate Ins. Co.***, 2011 WL 2449481 (Colo. June 20, 2011), that an umbrella policy that includes supplemental liability coverage for automobiles or motor vehicles is not an "automobile liability or motor vehicle liability policy" under C.R.S. § 10–4–609 (1)(a) and, thus, an insurer issuing an umbrella policy is not required to offer UM/UIM coverage as part of the umbrella policy.

Apodaca involved an automobile accident in which the insureds were covered as resident relatives under both an auto policy including UM/UIM coverage of $100,000 per person and $300, 000 per accident and a personal umbrella policy providing $1 million of excess liability coverage for "occurrences" arising out of, among other things, occupancy of a land vehicle...by an insured for personal transportation.

The Court reasoned that a primary liability policy covers an injured third–party's damages beyond the insured's deductible, up to the limits of the insured's automobile liability coverage, when the insured is at fault. In contrast, the Court noted that an umbrella policy is a distinct type of excess liability coverage designed for the infrequent situation in which an insured will be liable for a judgment that exceeds the primary policy's limits.

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Criminal Act Exclusion Barred Coverage to Meth Addict in High Speed Chase

In a recent Colorado Supreme Court case, ***Bailey v. Lincoln General Ins. Co.***, 2011 WL 2150759 (Colo. May 16, 2011), the Court held that a criminal acts exclusion prohibiting the use of a rental car "in the commission of a crime that could be charged as a felony" does not violate public policy.

In ***Bailey***, the insured drove a rental car under the influence of methamphetamines and led police on a high speed chase resulting in the insured striking another vehicle killing one passenger and critically injuring another passenger. The insured pled guilty to five felonies.

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The insured assigned his rights to the passengers of the other vehicle to collect on a $1 million excess insurance policy issued by Lincoln General when he rented his car. Lincoln General denied coverage based, in part, on an exclusion in the rental agreement that voided coverage if the car was used to commit a crime that could be charged as a felony.

The Court held that the insurer's use of the criminal acts exclusion was a proper exercise of the insurer's freedom to contract to limit coverage for damages caused by accidental events, which does not violate the doctrine of reasonable expectations. The Court also noted the public policy concern of giving insureds the license to engage in intentional misconduct without having to bear the financial costs of the intentional conduct. The Court found this public policy principle so compelling that failure to include a criminal acts exclusion could actually run counter to the law.

Putting Teeth in Construction Defense and Indemnity Contracts

Developers and general contractors have long included defense and indemnity provisions in standard construction contracts with their subcontractors. Until recently, efforts to enforce these provisions have focused on indemnity. Depending on the language of the contract, Colorado's appellate courts have found that some indemnity clauses require the subcontractor to indemnify a general contractor, even for its own negligence, so long as the negligence is related to the subcontractor's scope of work, while others require a finding of negligence by the subcontractor.

Starting with ***Lafarge North America, Inc. v. K.E.C.I. Colorado, Inc.***, 250 P.3d 682 (Colo. App. 2010), however, Colorado's courts have begun addressing the issue of when the duty to defend is triggered under a construction contract. Lafarge served as the general contractor for a Colorado Department of Transportation highway construction project. KECI provided traffic control services pursuant to a subcontract agreement with LaFarge that included a clause obligating KECI:

"To indemnify [Lafarge] against and save [it] harmless from any and all claims, suit, or liability for injuries to property, injuries to persons including death, and from any other claims, suits, or liability on account [sic], arising in whole or in part of *[sic]* any act or omission of [KECI], or any of [its] officers, agents, employees or servants...."

A motorcyclist, with his wife riding as a passenger, collided with a Lafarge vehicle parked on a highway entrance ramp. The motorcyclist was killed and the wife was injured. The wife sued Lafarge, the Lafarge employee who parked the vehicle, and KECI for negligence.

Citing cases from the insurance context, the Colorado Court of Appeals held that the subcontractor's duty to defend arose when the injured party in the underlying suit "alleged facts even potentially triggering the obligation to indemnify", regardless of whether the subcontractor was, in fact, partially at fault. ***Id.*** at 688. The court ruled that, because the wife's complaint specifically alleged that KECI was negligent, the duty to defend was triggered.

In construction defect lawsuits brought by homeowner associations, HOAs will often make very broad allegations of defects related to virtually all significant areas of construction. General contractors facing these allegations have started asking trial courts to follow the court of appeals in ***Lafarge*** and force their subcontractors who perform the work identified in the HOAs' allegations to defend them. Although we are aware of only a few instances where the courts have ruled on these issues, they have largely applied ***Lafarge*** to these circumstances and ordered that subcontractors must defend the general contractors.

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