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LAMBDIN & CHANEY, LLP CLAIMS GAZETTE

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Inside this issue:

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Did you know?

Colorado statute 13-21-301 prohibits a claims adjuster from taking a statement from an adverse injured person under a doctor's care, whether oral, written or recorded, within 15 days after the date of the accident for use in negotiating or getting a release.

10th Circuit Decides Construction Coverage Case

On **November 1, 2011**, the 10th Circuit Court of Appeals issued an opinion in ***Greystone v. National Fire & Marine***, 2011 WL 5148688, holding that National Fire had a duty to defend a general contractor in two separate single family home construction defect cases. The court held that damages flowing from improper or faulty workmanship constitute an "occurrence" so long as the resulting damage is to nondefective property, and is caused without expectation or foresight. The court explained that nondefective property is property that has been damaged as a result of poor workmanship. The court was careful to note that there is a distinction between damage to nondefective work product and damage to defective work product. That is, the obligation to repair defective work, such as a poorly constructed foundation, is an economic loss that is not covered. However, the resulting property damage caused by the defective foundation, such as movement of the basement floor and damage to the upper living areas, would trigger the insuring agreement. The court also held that C.R.S. 13-2-808 (also known as HB 10-1394) does not apply to insurance policies whose policy periods have already expired.

Beware of Loss of Consortium Claims *AFTER* "Settlement"

On **September 1, 2011**, the Colorado Court of Appeals held that a husband did not release his own right to sue by signing a settlement agreement and the wife's settlement agreement did not automatically bar the husband's loss of consortium claim, though it was derivative of the wife's claim, it is also a separate claim.

As a matter of first impression, the court also ruled that the husband's

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Beware of Loss of Consortium Claims ***AFTER*** "Settlement"

negligent infliction of emotional distress claim was not a derivative claim and could be independently pursued. ***Draper v. DeFrenchi-Gordineer***, 2011 WL 3851738 (Colo. App. Sept. 1, 2011).

The case involved serious injuries to a wife/mother after being struck by a Jeep, causing her leg to be amputated. Following her settlement with the driver and vehicle owners, the husband then filed a lawsuit.

The settlement agreement only referred to the wife's claims even though the husband signed the release.

The moral of this case is that you always need to include any potential claims by the spouse in the settlement agreement.

No Workers Compensation Subrogation for Noneconomic Damages

In an opinion issued on **October 13, 2011**, ***Chavez v. Kelley Trucking, Inc.***, 2011 WL 4908751 (Colo. App.), the Colorado Court of Appeals held that a worker's compensation carrier did not have a subrogation right to amounts the claimant collected for non-economic damages for pain and suffering, inconvenience, emotional stress, or impairment of quality of life. The subrogation interests of a worker's compensation carrier are for payment of medical expenses, temporary disability and permanent disability benefits. However, the court noted that a claimant could not get around subrogation by characterizing settlement proceeds in the release as noneconomic damages reflected their reasonable value.

In this case, the claimant settled without knowledge or approval of the worker's compensation carrier. The carrier then tried to re-apportion the settlement amount.

Recent Statutory Changes Effecting UM/UIM Claims

Pursuant to C.R.S. 10-4-609, for policies issued **on or after January 1, 2011**, regardless of whether the at-fault driver is actually insured, the at-fault driver will be considered uninsured for purposes of UM coverage if the at-fault driver cannot be located for service after a reasonable attempt **AND** service on the at-fault driver's insurer is insufficient or ineffective; **OR** the police report fails to disclose the identity of the insurer **AND** the identity of the insurer is not actually known.

C.R.S. 10-1-135, which took effect on August 11, 2010, provides:

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When Does Wyoming's Professional SOL Begin to Run?

In ***Adelizzi v. Stratton***, 243 P.3d 563 (Wyo. 2010), the Wyoming Supreme Court affirmed that the two-year statutory period of limitations for professional negligence begins to run on the last day the professional performed services, unless the alleged act, error or omission forming the basis of the malpractice claim was not reasonably discovered and was in fact not discovered within the 2 year period. Furthermore, if the claimant has a reason to suspect a problem, the claimant has an affirmative duty to exercise due diligence to investigate and discover what role, if any, the professional played. That is, unlike other statutes of limitation that begin to run when a cause of action accrues, such as damage, as to professionals in Wyoming, it begins to run much earlier.

Insurer's Authorized Settlement Range is Not "Undisputed"

In UM/UIM cases, more and more courts are ruling that an insurer's authorized monetary settlement range is not a determination of an undisputed amount that is owed. These courts recognize that a range of what an insurer might be willing to pay is much different from a determination of legal entitlement by the judicial or arbitration process.

As noted by the Colorado Court of Appeals in an unpublished opinion, ***Alarcon v. Am. Family Mut. Ins. Co.***, 10CA1786 (Sept. 8, 2011), there is no Colorado authority requiring an insurer to pay the "undisputed" amount in a UM/UIM claim and that a settlement offer is not an admission of liability. *See also* ***Etherton v. Owners Ins. Co.***, 2011 WL 4565733 (D. Colo. Sept. 29, 2011)

UM/UIM Claims *continued from page 2*

a payer of benefits shall not delay, withhold or otherwise reduce benefits because the obligation to pay benefits results from a liable third party or as a means of enforcing a subrogation right. C.R.S. 10-1-135 further provides that if a claimant recovers less than the total amount of coverage available under the liability policy, there is a rebuttable presumption that the injured party has been fully compensated. Similarly, if the claimant recovers the policy limits under all available policies, the rebuttable assumption is that the claimant has not been fully compensated.

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