

# LAMBDIN & CHANEY, LLP

## CLAIMS GAZETTE

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### Did you know?

C.R.S. § 10-1-123 requires each insurer to send within 90 days to the examining board of plumbers, information relating to each malpractice claim against a licensed plumber that is settled or in which a judgment is entered against the insured.

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## Court of Appeals Answers CDARA Questions

On **February 2, 2012**, the Colorado Court of Appeals answered two questions of first impression under the Construction Defect Action Reform Act in ***Shaw Construction, LLC v. United Builder Service, Inc.***, 2012 WL 311665.

First, the Court held that C.R.S. § 13-20-805 tolls construction defect claims only against parties who receive actual notice of a claim.

Therefore, a notice of claim to a general contractor does not toll the statute of repose as to a subcontractor unless and until the subcontractor is also served with the statutory notice of claim.

Second, in applying the statute of repose found in C.R.S. § 13-80-104, to a multi-phase construction project, an improvement may be a discrete component of the larger project, which can be

substantially completed before the entire project is finished.

That is, a subcontractor's work on an improvement may be substantially completed to trigger the running of the statute of repose prior to the entire project getting the final completion certificate from the architect of record.

## Landlord May Be Indemnified for its Own Negligence

A customer of a flower shop slipped and fell on ice in the parking lot at a shopping center.

The flower shop and the shopping center had a

lease agreement where the flower shop agreed to indemnify the shopping center from liability for injury to anyone who was present on the

premises to visit the flower shop except for the shopping center's gross negligence.

In a different section

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## Landlord May Be Indemnified for its Own Negligence

of the lease, it required the shopping center to keep the driveways and parking areas in good condition and if it failed to do so, then the flower shop's only remedy was to perform the work itself and deduct the cost from the rent.

The customer sued the shopping center and the

shopping center filed a third party lawsuit against the flower shop. The flower shop argued that indemnifying the shopping center for its own negligence was against public policy as the shopping center had a non-delegable duty to the pedestrian in its parking lot.

The Colorado Supreme Court disagreed and held that the lease provisions were not against public policy and the flower shop was contractually obligated to indemnify the shopping center for its own negligence.

**Constable v. Northglenn, LLC**, 248 P.3d 714 (Colo. 2011).

## Current Damages Caps and Interest Rates on Judgments

For all claims for relief that accrue on and after January 1, 2008, the current damages caps are as follows:

Dram Shop Actions under C.R.S. § 12-47-801: the adjusted limitation is \$280,810.

Non-economic damages under C.R.S. § 13-21-102.5: the adjusted limitation is \$468,010, which may be increased by the court upon clear and convincing evidence to a maximum of \$936,030.

Wrongful death damages under C.R.S. § 13-21-203: the adjusted limitation is \$436,070, and the adjusted limitation for a solatium award in lieu of wrongful death damages is \$87,210.

Pre-judgment interest is calculated at 9% simple interest until suit is filed, after suit the interest is compounded.

The current annual rate of interest on appealed money judgments post-judgment is 3%.

## Calculating Time-On-The-Risk



It is very common for more than one insurer to be involved in a construction defect claim as the damages are often alleged to be continuous and progressive over successive policy periods. Each policy period

is triggered if there are allegations that property damage occurred during the policy resulting from an occurrence. The question becomes how to allocate indemnity obligations between multiple insurers over differ-

ent policy periods with different limits. In **Public Serv. v. Wallis**, 986 P.2d 924, the Colorado Supreme Court adopted the following time-on-risk allocation method:

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## Beware of Where You Board a Ship

For over 100 years, the common law of the United States has imposed a special duty on cruise ships as common carriers to its vessel passengers, requiring them to use the highest degree of care to protect the passengers from harm. **N.J. Steamboat Co. v. Brockett**, 121

U.S. 637 (1887). Cruise ships that depart U.S. waters are also subject to the federal Shipping Act of 1984.

Unfortunately, U.S. citizens aboard the Costa Concordia may have very limited protections as the ship departed from Genoa, Italy and did not involve any U.S.

Ports. Claims will be governed by Italian law, which caps personal injury and death claims at approximately \$70,000. Because of these severe limitations, expect claims by U.S. passengers against U.S. based tour companies from whom they bought their tickets.



## No Requirement to Disclose Public Documents



On November 7, 2011, the Colorado Supreme Court held that the rules that require parties to make mandatory, automatic disclosures of certain discovery materials do not apply to require automatic disclosures of public documents.

**Avery v. Wal-Mart Stores, Inc.**, 2011 WL

5325525. The case involved a commercial truck driver who slipped in grease, suffering career-ending injuries, while making a delivery to the store. Wal-Mart denied a grease spill ever happened. The truck driver's attorney obtained a report filed with the county by

Wal-Mart documenting the spill and related investigation. The truck driver's attorney first disclosed the report at trial while cross-examining the Wal-Mart employee. The resulting verdict was \$15 million dollars. Moral of the story: Investigate your insured's version before it's too late.

## Calculating Time-On-The-Risk *continued from page 2*

1. Determine total damages;
2. Determine total years of loss (notably the Colorado Supreme Court used the end date of when the insured discov-

3. Divide total damages by number of years

4. For the degree of risk for each layer for the per year allocation, divide the policy limits of each policy by the total limits.



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