Volume 1, Issue 1

May 1, 2011

LAMBDIN & CHANEY, LLP CLAIMS GAZETTE

Excellence In All That We Do

Inside this issue:

L. Kathleen Chaney, CPCU is a founding partner of Lambdin & Chaney, LLP. She has tried approximately three dozen jury trials and is an insurance expert. kchaney@lclaw.net

Did you know?

Anyone handling claims-made policies is required to attend a Division of Insurance approved class? Lambdin & Chaney is an approved trainer. **Next Class is June 7th from 11:00 to 1:00** Email Alexis at atormey@lclaw.net to register.

Colorado Supreme Court Changes Standard for Experts

On March 21, 2011, the Colorado Supreme Court rejected the "reasonable degree of medical probability" standard for admissibility of expert testimony. Instead, the supreme court ruled that admissibility was governed by Rule of Evidence 702 and the factors outlined in *Shreck*. ***Estate of Ford v. Eicher, M.D.***, 2011 WL 976597, involved a lawsuit by an infant's parents against an obstetrician after the infant suffered a brachial plexus injury to the right shoulder following delivery. The proper standard for determining admissibility of expert medical testimony is through analysis of testimony under Rule 702, rather than through the reasonable medical probability standard.

The importance of this case for claims adjusters when handling claims is to recognize that it will now be much easier for plaintiffs to present testimony in support of their claims based on mere possibility rather than certainty. This change will apply to all expert testimony such as doctors, engineers, architects, accountants, etc.

No UM Coverage When Shot Outside the Car

In ***State Farm Mut. Auto. Ins. Co. v. Fisher***, 2010 WL 3312841 (10th Cir. Aug. 24, 2010), the Tenth Circuit held that a vehicle was not being used for UM purposes where the uninsured motorist followed the insured for 2 miles, rammed his vehicle several times, parked his vehicle behind the insured's vehicle after insured pulled over, and then got out of his vehicle . . . **continued on back page**

Gregg Rich is a partner whose practice focuses on the defense of contractors.
grich@lclaw.net

Inconvenience Damages in a Construction Defect Case

In ***Hildebrand v. New Vista Homes II, LLC***, 2010 WL 4492356 (Colo. App. 2010), the Colorado Court of Appeals ruled that the Construction Defect Action Reform Act (CDARA) does not preclude an award of damages for inconvenience as result of construction defects in a case where a father, who co-owned the home with his son, only occupied the property intermittently.

The court noted, however, that any such noneconomic damages shall not exceed the statutory cap of $250,000. Because the builder-vendor did not raise the issue at the trial court level, the court declined to consider the builder-vendor's argument that because damages had to be "reasonable" under CDARA, "betterment" damages were statutorily prohibited.

Insurance Policies Issued to Construction Professionals

On May 21, 2010, C.R.S. § 13-20-808 took effect, which governs insurance policies issued to construction professionals. While much was made about this law (also known as HB-1394), it changes very little about the law that was already in place. It does, however, expressly disavow the case of ***Gen. Sec. Indem. Co. of AZ v. Mountain States Mut. Casualty Co.***, 205 P.3d 529 (Colo. App. 2009). In so doing, courts are now required to assume that property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured. But the statute also makes it clear that it is not creating insurance coverage.

Division of Insurance Gives Examples of "Reasonable Dispute"

As all claims adjusters probably know by now, C.R.S. § 10-3-1116 permits double recovery of benefits, attorney fees and costs for unreasonable delay or denial of first party benefits that are owed. But when are such benefits owed? And when is there a "reasonable dispute" justifying the insurance company's decision to withhold payment? While the answer always depends on the facts of each claim, in Regulation 5-1-14, the Division of Insurance has listed 7 examples of what may be included as a "reasonable dispute:"

1. Necessary information has not been submitted or obtained;

Colorado Supreme Court Permits Double Recovery in Tort

In ***Volunteers of Am. Colo. Branch v. Gardenswartz***, 2010 WL 4595812, the Colorado Supreme Court held that a successful plaintiff could recover damages for the full amount of medical expenses incurred regardless of the fact that only a discounted amount was paid by a health insurance company.

The supreme court reasoned that write offs and discounts were the direct result of the health insurance contract, which was a collateral source under C.R.S. § 13-21-111.6. The tortfeasor was not entitled to benefit from this contractual arrangement.

For claims adjusters, this means that the full amount of medical bills must be considered in evaluating and negotiating claims without regard to what was actually paid.

Suzanne Lambdin is a founding partner of Lambdin & Chaney, LLP. She is an experienced trial lawyer and is a member of the American Board of Trial Advocates.
slambdin@lclaw.net

No Double Recovery in UM/UIM Case

In ***Levy v. Am. Family Mut. Ins. Co.***, 2011 WL 322527 (Colo. App. Feb. 3., 2011), the court of appeals held that an insurer was entitled to reduce a UM/UIM arbitration award by the amount it paid for medical expenses even though the medical expenses could have been recovered against the tortfeasor.

The court reasoned that no public policy was served by allowing the claimant double recovery of medical payments, and neither the collateral source rule nor the contract exception to C.R.S. § 13-21-111.6 dictated a contrary result. [One has to wonder why the same public policy doesn't apply in a tort case.]

Examples of "Reasonable Dispute" continued from page 2

2. There is conflicting information and additional investigation is necessary;

3. The insured is not in compliance with the terms and conditions of the policy;

4. Coverage for the loss has not been determined;

5. Indicators are present in the application or submission of the claim and additional investigation is necessary;

6. Litigation is commenced on the claim;

7. Negotiations or appraisals are in process to determine the value of a claim.

LAMBDIN & CHANEY, LLP
ATTORNEYS AT LAW

303-799-8889 www.lclaw.net

No UM Coverage When Shot Outside the Car

continued from front page.

and shot the insured, who had exited his own vehicle and was standing in the middle of the roadway.

To be entitled to UM benefits under a Colorado automobile insurance policy, a claimant must first demonstrate that an uninsured motor vehicle was being "used" at the time he or she sustained an injury; if so, the next prong of the inquiry is whether the use is causally related to the injury.

The court reasoned that in a drive by shooting, the requisite causal nexus for recovering UM benefits is present; if, however, the vehicle in which the assailant is traveling stops and the assailant gets out of the vehicle before attacking his or her victim, the requisite causal connection between the use of the vehicle and the attack becomes more difficult to establish.

The moral of this story is to stay in your car.

Lambdin & Chaney, LLP,
4949 S. Syracuse Street, Suite 600,
Denver, CO 80237

Certified WBENC Women's Business Enterprise