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LAMBDIN & CHANEY, LLP CLAIMS GAZETTE

Excellence In All That We Do

Inside this issue:

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Did you know?

C.R.S. 10-4-120 requires insurers to pay for repair services and products based on a prevailing competitive price, as established by competitive bids, generally accepted insurer-based methodology, or market surveys that determine a fair and reasonable market price for similar services, in the same geographic area.

Once-In-A-Millennium

The National Weather Service described the amount of rain that fell in certain areas in Colorado as "biblical" with the recorded amounts occurring less than once every 1,000 years. There were widespread torrential rains of 4 to 6" in less than twelve hours. The resulting floods in 17 counties caused the destruction of approximately 1,500 homes with an additional 17,500 homes damaged and more than 10,000 people displaced from their homes. The economic damages are expected to exceed $2 billion dollars.

More than 20 years ago, the Colorado Supreme Court in ***Kane v. Royal Ins. Co. of Am***, 768 P.2d 678 (Colo. 1989), held that the word "flood" does not distinguish between overflows of man-made structures and overflows of natural waterways. The court affirmed the denial of coverage based on the flood exclusion as a result of dam failure.

However, just a year after the ***Kane*** decision, the Colorado Supreme Court issued the opinion in ***Heller v. Fire Ins. Exch.***, 800 P.2d 1006 (Colo. 1990), holding that there was coverage for water damage from spring runoffs that were diverted into trenches. The court held that the runoff lost its character as surface water when it was diverted by the trenches.

And, almost 10 years after the ***Heller*** decision, the Colorado Court of Appeals held that damage to a building that was settling caused by a water-main break was not excluded by the flood exclusion due to the sudden forceful release of water. ***Novell v. Am. Guar. & Liab. Ins. Co.***, 15 P.3d 775 (Colo. App. 1999).

The moral of these cases is that every claim needs to be adjusted and considered based on the individual facts. Claims adjusters need to consider what caused the damage to each policyholder's property. There may be some damage that is covered.

Was there a sewer back up for which the insured purchased the additional coverage? Did the roof leak from the heavy rains, causing interior damage? Just as excluded surface water may become covered if it loses its character as surface water, a covered peril such as rain could lose its character and become an excluded loss. For example, a sewer back up caused by heavy rain that discharged raw sewage into a homeowner's basement was not covered based on a plumbing exclusion, even though the policy covered the weather-related damage. ***Haines v. United Sec. Ins. Co.***, 602 P.2d 901 (Colo. App. 1979).

When a Construction Lender Becomes a Homeowner

On August 1, 2013, the Colorado Court of Appeals held in ***Mid Valley Real Estate Solutions V, LLC v. Hepworth-Pawlak Geotechnical, Inc.***, that a "homeowner" includes a wholly-owned subsidiary of the construction lender on the project, which holds title to the home solely for purposes of resale.

A developer entered into a written contract with Hepworth-Pawlak (H-P) to analyze the soil on which a house would be built for resale. H-P produced a report with foundation recommendations.

After completing the house, the developer was unable to sell it and eventually defaulted on the construction loan agreement with the bank. To avoid foreclosure, the developer and the bank entered into a deed-in-lieu agreement. Under this agreement, the bank received $355,000 and title to the house transferred to Mid Valley, which had been created to hold the house, its sole asset, for resale. In return, the bank forgave the remaining balance on the construction loan.

Soon after Mid Valley took title, significant structural damage began to appear. Mid Valley sued H-P for negligence in failing to identify expansive soils and specify an appropriate foundation.

It is well established law in Colorado that a construction professional has an independent duty to act without negligence in the construction of a home as stated in ***Cosmopolitan Homes, Inc. v. Weller***, 663 P.2d 1041 (Colo. 1983), and reaffirmed in ***A.C. Excavating v. Yacht Club II Homeowners Ass'n***, 114 P.3d 862 (Colo. 2005).

Whether Mid Valley fell within the class of plaintiffs who may enforce defendants' independent duty under ***Cosmopolitan Homes*** and ***A.C. Excavating*** depends on whether that duty, which arises from the services provided in constructing a home, is limited to particular characteristics of the party holding title when the latent defect ripens.

The court concluded that the scope of a construction professional's duty is not limited based on Mid Valley's relationship with the bank, lack of occupancy, or status as a commercial entity holding title only for purposes of resale. To hold otherwise, the court stated, would grant construction professionals a windfall by avoiding liability based solely on who owned the house.

Real Estate Broker Malpractice

On July 1, 2013, the Colorado Supreme Court decided an issue of first impression in ***Gibbons v. Ludlow***, 304 P.3d 239 (Colo. 2013).

The supreme court held that in a transactional broker professional negligence case, a plaintiff must show that, but for the alleged negligent acts of the broker, he either: (1) would have been able to obtain a better deal in the underlying transaction; or (2) would have been better off by walking away from the underlying transaction. Because the sellers could not show an injury based on this standard, summary judgment was affirmed.

The Newly Enacted "Homeowner's Insurance Reform Act of 2013"

As a result of the FourMile Canyon, High Park and Waldo Canyon wildfires, the Colorado legislature enacted the "Homeowners Insurance Reform Act of 2013." Most provisions are effective on January 1, 2014, with the exception that any provision of a homeowner's insurance policy that requires a policyholder to file suit against an insurer within a period of time that is shorter than required by the applicable statute of limitations is prohibited unless otherwise already barred by contract, which is effective immediately upon passage of the Act on May 10, 2013.

Other key provisions include:

- An insurer shall offer law and ordinance coverage in an amount equal to 10% of the dwelling limit and offer extended replacement cost coverage in an amount equal to 20% of the dwelling limit.
- All replacement cost policies must include ALE coverage for a minimum of 12 months and offer up to 24 months.
- The text of all endorsements, summary disclosure forms and homeowner's insurance policies must not exceed a 10th grade reading level—this provision becomes effective on January 1, 2015.
- The insurer must consider, subject to the insurer's underwriting requirements, an estimate from a licensed contractor or licensed architect submitted by the policyholder as the basis for establishing the replacement cost of a dwelling.
- Every insurer shall make available to a policyholder an electronic or paper copy (whichever the policyholder chooses) of the insurance policy, including the declarations pages and any endorsements, within 3 business days, with a certified copy of the policy being provided within 30 days.
- In the event of a total loss of the contents of an owner-occupied residence, the insurer shall offer the policyholder a minimum of 30% of the value of the contents coverage without requiring submittal of a written inventory of the contents.

Colorado Division of Insurance Bulletin B.5.28

Colorado DOI Bulletin B.5.28 addresses the Equitable Payment of Claims Resulting from Natural Disasters.

Following a natural disaster event, the Division expects full transparency and disclosure regarding the extent of coverage available, including timely information before the coverage limits are reached; reasonable extensions of time to allow the policyholder to receive benefits of replacement cost coverage; and consideration of factors not included in estimating programs, such as the slope of land, building grade of the dwelling and availability of labor and materials. An insurer's refusal to consider additional information related to the cost to rebuild a particular dwelling may constitute a violation of the Unfair Claims Practices Act.

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