Volume 4, Issue 1

December, 2014

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 over three dozen jury trials and is an insurance expert.
kchaney@lclaw.net

EXTRA, EXTRA:

The Colorado Div. of Ins. re-issued Bulletin No. B-5.26, effective 12/3/2014, to make it clear that the requirements related to disputed claims subject to appraisal also applies to insureds and to public adjusters, which includes the obligation to select fair and impartial appraisers and to disclose financial interests.

No Coverage under HO Policy for Leaking Pipes

On June 19, 2014, in ***Wagner v. American Family***, Lambdin & Chaney, LLP obtained summary judgment in a first party bad faith property damage case involving a homeowners' policy.

There was a leak from a water pipe underneath the slab foundation near an exterior wall, eroding the soil underneath the home, causing settlement and cracking of the slab, which caused drywall and flooring panels to crack.

While agreeing there was damage, the insurer denied coverage based on earth movement and water damage exclusions. The insurer also denied coverage based on an exclusion caused by continuous or repeated leakage.

The Tenth Circuit ruled that no ambiguity exists in the earth movement exclusion. In ruling that the damage came squarely under the earth movement exclusion, the Tenth Circuit did not reach the "any resulting damage" provision.

The court noted nevertheless that any ambiguity in "any resulting loss" would not end the inquiry, as the next step would be to determine whether the loss is subject to some other policy exclusion or exception.

With regard to the unreasonable delay and denial of the claim in violation of C.R.S. § 10-3-1115 and common law bad faith, the Tenth Circuit found nothing unreasonable about the insurer's denial of the claim because it had a reasonable basis for its action and that its actions were reasonable as a matter of law, noting the insurer inspected the loss within days after the claim was reported and issued a denial letter two weeks later.

Determining the Duty to Defend Based on Orders in the Case

On September 5, 2014, in ***KF-103 v. American Family,*** Lambdin & Chaney obtained summary judgment in federal court involving no duty to defend under a commercial policy involving the development of a new residential subdivision.

The underlying action arose out of an easement dispute involving reconfiguration of an intersection that involved changes to roads that modified the width and elevation.

Owners of the adjoining properties objected, contending that the planned modification would violate an express easement that provided access to their properties.

The developer filed a quiet title action seeking a determination of rights in the right-of-way easement and a declaration that the easement could be relocated.

When the litigation was still in its initial stage, construction of the intersection was completed.

In answering the complaint, the property owners asserted counterclaims against the developer (insured).

Following a bench trial, the trial court issued rulings holding that the owners' easement rights had been impaired and, despite having full knowledge of the easement issues, the developer nevertheless elected to go ahead and make dramatic changes that trespassed on the deeded rights of way and substantially damaged the Owners' rights.

The counterclaims against the insured developer included trespass, negligence, restoration and equitable relief.

The counterclaims were tendered to the developer's liability insurer for a defense, which was denied.

Judge Matsch ruled that all the claims were premised on intentional disregard of the Owners' easement rights, despite attempting to characterize the actions as "negligent" in order to trigger coverage.

Importantly, Judge Matsch also ruled that the trial court's rulings that preceded the counterclaims could be considered in determining whether there was a duty to defend.

Strict Compliance with Hospital Lien Not Required

In ***Wainscott v. Centura Health Corporation***, on August 14, 2014, the Court of Appeals held that substantial compliance satisfies the filing and notice provisions of the hospital lien statute, C.R.S. § 38-27-102.

Wainscott was injured in an auto accident caused by third party tortfeasors. He received treatment at St. Anthony's (operated by Centura) which asserted a statutory hospital lien against any settlement or judgment. But Centura did not comply with all of the statute's filing and notice requirements in that it did not identify in its lien who the responsible tortfeasors were and did not serve a copy of the notice on them.

But Centura mailed a copy of the lien notice to the Wainscotts and the tortfeasors' insurer with a cover page entitled "Hospital Lien."

In rejecting strict compliance, the court noted that actual notice was provided to all parties against whom it was attempting to enforce its lien.

Other Notable 2014 Colorado and Tenth Circuit Decisions

- On January 17, 2014, federal district court Judge Martinez issued an order addressing whether allocation of defense costs among multiple subcontractors should be based on policy limits or equal shares and whether the allocation should apply to all 54 subcontractors implicated in the underlying state court case or only the 23 that were named as parties in the action before the court. Judge Martinez ruled that defense costs would be allocated into equal shares per subcontractor and only subcontractors represented in the case should be included in the allocation. ***The Travelers Indem. Co. v. AAA Waterproofing, Inc.***
- On January 30, 2014, the Colorado Court of Appeals, in a matter of first impression, ruled that applying the Homeowner Protection Act of 2007, C.R.S. § 13-20-806(7), to invalidate Terracon's limit of liability clause in its contracts with commercial entities predating the effective date of the statute would be an unconstitutional retrospective application of the HPA. The court declined to address the issue of whether the HPA applied only to protect residential property owners as opposed to commercial entities. ***Taylor Morrison v. Bemas Constr.***
- On May 22, 2014, the Colorado Court of Appeals held that a UM/UIM carrier was allowed to offset paid med pay benefits against UM/UIM coverage. While a setoff is not allowed where the benefits are impaired, it is allowed to prevent a double recovery. The statutory sections prohibit a reduction in coverage as opposed to benefits. The insured's policy had $300,000 in UM/UIM coverage and $5,000 in med pay coverage. The jury awarded $68,338.97 in benefits, which was properly reduced by the $5,000 in med pay benefits already received. ***Calderon v. American Family***
- On May 27, 2014, in interpreting C.R.S. § 13-21-124, the Colorado Supreme Court held that the working dog exemption of Colorado's civil dog bite statute applies when a bite occurs on the dog owner's property or when the dog is working under the control of the dog owner, i.e., the focus is on the owner's control of the dog, not on the owner's control of the property. ***Robinson v. Legro***
- On June 17, 2014, the Tenth Circuit ruled that diminution in value damages constitute "property damage" within the meaning of a CGL policy when it was undisputed that subsidence and cavern growth in the insured's subsurface property qualified as a physical injury, rendering the property completely valueless. ***Mid-Continent Cas. Co. v. Circle S Feed Store, LLC***
- On June 20, 2014, the Tenth Circuit affirmed the trial court's order that a builder's risk policy did not cover the expense of a new dewatering design and the implementation costs because such an interpretation would encourage a builder to economize on the initial dewatering plan and later require the insurer to pay for a more elaborate plan. ***Glacier Constr. Co. v. Travelers Prop. & Cas. Co.***
- On September 11, 2014, the Colorado Court of Appeals, in a matter of first impression, ruled that evidence of a plaintiff's failure to file income tax returns for several years was probative of the plaintiff's character for truthfulness, and therefore was admissible to impeach the plaintiff's credibility. ***Leaf v. Beihoffer***

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

L | C LAMBDIN & CHANEY, LLP
ATTORNEYS AT LAW

303-799-8889 www.lclaw.net

Certified WBENC Women's Business Enterprise

CLM COUNCIL ON LITIGATION MANAGEMENT
Advancing Ethics, Cooperation & Education

CPCU SOCIETY
INSURING YOUR SUCCESS