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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.
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EXTRA, EXTRA:

We are pleased to announce that Ed Dillon is now a partner with Lambdin & Chaney, LLP. He can be reached at edillon@lclaw.net.

90-Day Rule for a General Contractor to Sue Subcontractors Now in Doubt

Prior to October 20, 2016, it was believed that the 2-year statute of limitations did not apply to claims by a general contractor against its subcontractors. Instead, a general contractor had 90 days from the date of a settlement or judgment to bring those claims against subcontractors pursuant to C.R.S. § 13-80-104.

However, in ***Sopris Lodging, LLC v. Schofield Excavation***, the Colorado Court of Appeals ruled that if a general contractor decides to bring third party claims in the same lawsuit as the one against it, then the 2-year statute of limitations applies.

That is, the court ruled that the 90-day rule only applied in a separate lawsuit filed against the subcontractors after the lawsuit against the general contractor was resolved.

The court stated that when the general contractor received the Notice of Claim from the Owner it had several options. It could have sent its own notices to the subcontractors, which would have tolled the statute of limitations during the notice of claims process. The general contractor could have also sought a tolling agreement with those subcontractors.

Alternatively, the general contractor could have waited to file indemnity or contribution claims against subcontractors until after resolution of the Owner's underlying claims against it.

This means that a general contractor has to sue all subcontractors in a third party complaint as soon as possible to protect the statute of limitations or wait for years until the litigation for which it is being sued has resolved but of course those may be barred by the statute of repose.

Get out your shotgun….

Colorado Supreme Court Bars MedPay Setoff

On November 7, 2016, in ***Calderon v. American Family Mutual Insurance Company***, the Colorado Supreme Court reversed the Colorado Court of Appeals in a MedPay setoff case.

Calderon was involved in an accident with an uninsured motorist. Calderon had UM and MedPay coverage with American Family.

American Family paid the $5,000 med pay limit and the case proceeded to trial on the UM claim. Following a jury verdict of $68,338.97, the trial court reduced the award, pursuant to a provision in the policy, by the $5,000 MedPay coverage.

The Court of Appeals affirmed the trial court's order, interpreting the language of the UM/UIM statute, which prohibits setoffs from "[t]he amount of the [UM/UIM coverage available pursuant to this section," as barring only those setoffs that would reduce the coverage limit of $300,000.

The Colorado Supreme Court reversed and held that "[t]he amount of the UM/UIM coverage available pursuant to this section" refers to the amount of UM/UIM coverage available on a particular claim (which was the jury verdict of $68,338.97), rather than the amount available in the abstract (the $300,000 UM policy limit).

Therefore, the court held that C.R.S. § 10-4-609(1) barred the setoff of MedPay payments from Calderon's UM claim.

Following the Supreme Court's ruling, class action lawsuits have been filed against a number of auto carriers, alleging that:

- the auto policy reducing UM/UIM coverage by the med pay dilutes statutorily mandated UM/UIM coverage under C.R.S. § 10-4-609; and
- that class members have been underpaid UM/UIM benefits due to these MedPay Reduction Policies.

10th Circuit Reverses in UIM Unreasonable Delay Case

On November 15, 2016, in ***Peden v. State Farm***, the 10th Circuit reversed the trial court's order that granted summary judgment in favor of State Farm.

The court ruled that a reasonable jury could find that State Farm unreasonably denied or delayed payment of UIM benefits in a case where State Farm discounted the liability by 15% based on its assumption that the UIM claimant voluntarily rode in a van with a drunk driver with whom she had been drinking.

Instead, if State Farm had conducted a timely investigation into the facts, it would have discovered that the UIM claimant went with a group to look at their friend's new vehicle and to take photos. Instead, the driver unexpectedly drove away with the group in the vehicle.

While State Farm ultimately paid the maximum amount of $350,000 in UIM benefits, the court ruled that it was for a jury to decide whether that payment was unreasonably delayed.

Other Notable Recent Colorado and Wyoming Decisions

- On August 17, 2016, in ***Century Surety v. Hipner***, the Wyoming Supreme Court in a matter of first impression, adopted the notice-prejudice rule, holding that an insurer could not deny coverage due to the insured's violation of providing timely notice absent a showing of prejudice.

- On September 22, 2016, in ***Dennis v. City & County of Denver***, the Colorado Court of Appeals held that as a matter of first impression, a deteriorated roadway posed an unreasonable risk to the health or safety of the public and was a dangerous condition, which constituted a waiver of immunity under the Colorado Governmental Immunity Act.

- On October 6, 2016, in ***Alhilo v. Kliem***, the Colorado Court of Appeals held that the statutory cap on noneconomic damages was properly applied after the damages were reduced by the Plaintiff's comparative negligence.

- On October 6, 2016, in ***Andrade v. Johnson***, the Colorado Court of Appeals held that a city code provision that imposed a duty on owners and occupants of real property to notify the city engineer of any damage to a public sidewalk that abutted or was adjacent to that owner's or occupant's real property, imposed civil liability for any injury proximately caused by a failure to comply with the code provision.

- On November 3, 2016, in ***Mr. Hawley Insurance Co. v. Casson Duncan Construction, Inc.***, which involved a declaratory judgment action as to whether there was coverage for an arbitration award, the Colorado Court of Appeals held that the insurer was obligated to pay all costs incurred in the underlying proceeding that were awarded against the insured regardless of whether it owed coverage based on this policy language under the Supplementary Payments:

  > We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
  >
  > e. All costs taxed against the insured in the "suit."

  Because Mt. Hawley defended the arbitration, it was required to pay all the plaintiff's awarded costs regardless of whether there was coverage.

- On November 17, 2016, in ***McGill v. DIA Airport Parking, LLC***, the Colorado Court of Appeals held that evidence that the plaintiff had been convicted of check fraud approximately 20 years earlier was admissible for the purpose of attacking her character for truthfulness.

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