Winter 2021

DEWHIRST & DOLVEN LLC Attorneys at Law

LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

IN BRIEF

COLORADO

- The Tenth Circuit Court of Appeals held that insureds who cashed settlement checks were bound by accord and satisfaction and not entitled to demand full reimbursement for registration and title fees as required by Colorado statute.

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UTAH

- The Utah Supreme Court held that the causes of action for "bad faith" and for "breach of the duty of good faith and fair dealing" are essentially duplicative.

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TEXAS

- The Fifth Circuit Court of Appeals held that a named defendant's related out-of-state entity cannot unilaterally substitute itself to create diversity jurisdiction without notifying the named parties or the court.

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COVID-19 COVERAGE & LITIGATION

As COVID-19 continues, so too have claims related to the coronavirus. Claims may include those such as an infected individual seeking to file suit against the cause of the exposure, or a business that was forced to close seeking coverage for business interruption losses. Dewhirst & Dolven attorneys are available to assist with COVID-19 coverage issues and litigation throughout Colorado, Utah, Wyoming, and Texas.

In Utah, Governor Herbert signed into law S.B. 3007, which enacts new legislation that grants civil immunity to persons (including private employers, businesses, and the government) related to exposure to COVID-19. The legislation is intended to allow businesses to reopen with more certainty about COVID-19-related civil lawsuits. The bill enacts U.C.A. 78B-4-517, which provides: "a person is immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by the person, or during an activity managed by the person." However, multiple exceptions exist, such as for willful misconduct, reckless infliction of harm, or the intentional infliction of harm.

COLORADO

DISCRETIONARY DMV REGISTRATION CREDIT FOR TOTAL LOSS OF VEHICLE DOES NOT CREATE EXCEPTION TO INSURER'S STATUTORY DUTY UNDER C.R.S. § 10-4-639(1) TO REIMBURSE REGISTRATION FEES

Colorado Court of Appeals: Named Plaintiff in a putative class action, Barbara Trudgian, bought auto insurance from Defendant/insurer LM General Insurance Company ("LM"). Trudgian paid registration fees for the vehicle, which was later damaged in an accident and determined by LM to be a total loss. LM's itemized settlement statement did not include reimbursement for any registration fees Trudgian had paid for the vehicle for the period following the accident, and LM never reimbursed Trudgian for those fees. Trudgian filed suit claiming breach of contract and common law and statutory bad faith and requesting a declaratory judgment.

Two statutes are at the core of the case. C.R.S. § 10-4-639(1) states that "[a]n insurer shall pay … any … registration fee associated with the

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total loss of a motor vehicle." C.R.S.. § 42-3-115(1) (2018) in effect at the time of the accident authorized the Department of Motor Vehicles to grant a discretionary credit towards registration fees for a replacement vehicle during the same registration period for a portion of the fees paid for the cancelled registration on another motor vehicle, proportionate to the unexpired remainder of the original term of the cancelled registration.

LM moved for a decision that, as a matter of law, C.R.S. § 10-4-639(1) did not require it to reimburse the insured for any such credit the DMV gave, or would give, the insured. The trial court disagreed, concluding that C.R.S. § 10-4-639(1) "[u]nambiguously states that an insurer 'shall' pay registration fees" associated with total loss of a vehicle, without any exception to or limitation on said statutory duty, and explaining that LM's contention was both inconsistent with its statutory duty and in conflict with the insurer's overarching obligation to pay claims in a reasonable time.

LM appealed, arguing that an insurer cannot calculate what amount, if any, it owes an insured for loss of registration fees until the insured tells the insurer either that she will not be registering a replacement vehicle, or that she has received a credit, and how much, from the DMV. Furthermore, LM argued that not allowing its proposed exception might result in windfalls for insureds by allowing them to collect twice: once from the insurer under C.R.S. § 10-4-639(1) and again in the form of a DMV credit under C.R.S. § 42-3-115(1) (2018).

The Court of Appeals ruled that C.R.S. § 10-4-639(1) uses the word "shall" to mandatorily oblige insurers to reimburse insureds' registration fees associated with total loss of a vehicle. Nothing in either C.R.S. § 10-4-639(1) or § 42-3-115(1) (2018) creates any exception to this obligation. The Court offered five reasons for rejecting LM's arguments. (1) Unlike an insurer's mandatory obligation to pay registration fees under C.R.S. § 10-4-639(1), the DMV credit authorized under C.R.S. § 42-3-115(1) (2018) is discretionary. Basing an exception to a mandatory statutory duty on a discretionary credit would be contrary to the ordinary meaning of these statutes. (2) LM's suggested interpretation of C.R.S. § 10-4-639(1) is contrary to the statutory scheme of Title 10, Article 4, "Property and Casualty Insurance", as a whole, because it places the burden on the insured to provide information based on the uncertain event of buying and registering a replacement vehicle before she can be compensated for total loss of the covered vehicle, contrary to the General Assembly's articulated legislative purpose emphasizing expeditious handling of liability claims. (3) Relatedly, forcing an insured to wait for reimbursement of registration fees until she has either decided against registering a replacement vehicle, or decided to register one and received a credit from the DMV, would unnecessarily delay payment of her claim, contrary to the stated legislative purpose. (4) LM's characterization of a "windfall" was inapposite where an insured was only seeking registration fees for the post-accident period when she was unable to use her vehicle due to total loss. (5) Despite the recent repeal of C.R.S. § 42-3-115(1) (2018) and related enactment of C.R.S. § 42-3-107(25) (2019) (effective January 1, 2020) making the DMV credit mandatory if the owner disposes of the totaled vehicle during the registration period, the 2019 statutory changes did not expressly create an exception to the insurer's statutory duty under C.R.S. § 10-4-639(1), and the Court cannot infer the intent of the predecessor legislature that enacted C.R.S. § 10-4-639(1) from the act of the successor legislature that enacted the 2019 statutory changes. The Court of Appeals affirmed the lower court's decision and remanded the case for further proceedings.

Trudgian v. LM General Insurance Company ___ P.3d ____, 2020 COA 147, No. 20CA965, 2020 WL 6066003 (Colo. App. Oct. 15, 2020).

INSUREDS WHO CASHED SETTLEMENT CHECKS BOUND BY ACCORD AND SATISFACTION, NOT ENTITLED TO FULL REGISTRATION AND TITLE FEES UNDER C.R.S. § 10-4-639(1)

Tenth Circuit: Plaintiffs/insureds Roger Pearson and Lonnie McRae submitted claims after their two cars were "totaled" in separate accidents. Defendant/insurer Geico Casualty Co. ("Geico") responded by sending checks to the insureds, each accompanied by a statement that the payment was a "total loss settlement" that covered "the Base Value of [the insureds'] vehicle, plus any applicable fees and adjustments," and included a list of covered items, which included a line item for "State and Local Regulatory Fees," for which Geico stated it was paying $26.50 as full payment for the registration and title fees for each vehicle. Plaintiffs cashed the checks, then claimed Geico had violated Colo. Rev. Stat. § 10-4-639(1) requiring insurers to reimburse policyholders for their actual vehicle registration and title fees. The insureds sued for common law and statutory bad faith. The district court granted summary judgment for Geico, concluding that the insureds' version of the facts would trigger an accord and satisfaction.

Under Colorado law, a party owing money can try to satisfy an obligation by offering less than the full amount owed. Acceptance of such an offer alters the original obligation through an accord and satisfaction. To show an accord and satisfaction, the offering party must prove that: 1) an offer was made to fully satisfy the claim and 2) the offer was accepted.

The insureds presented five arguments against the existence of an accord and satisfaction: 1) there was no meeting of the minds because the insureds were unaware of Geico's statutory obligation to pay the actual registration and title fees; 2) Geico

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misrepresented or omitted material facts; 3) Geico did not say that its offer would satisfy the statutory obligation to pay the actual expenses incurred for registration and title; 4) characterization as an accord and satisfaction would undermine public policy; and 5) insureds stated they were owed more than $26.50 for registration and title (at least $67.96 for one car and $70.93 for the other).

The Court affirmed the lower court's decision, rejecting each of Plaintiffs' arguments: 1) A meeting of the minds requires a mutual understanding of the facts, not the law; based on the record, no fact-finder could reasonably infer a factual misunderstanding. Furthermore, the insureds were responsible for knowing the law, and their assumption that Geico would tell them what the statutes required could not absolve them of that responsibility and prevent an accord and satisfaction. Also, by failing to raise it until their reply brief the insureds waived an argument that the statute requires insurers to ask the insureds the amount of their fees for registration and title. 2) Based on the record, Geico had not materially misrepresented anything to Plaintiffs. 3) An accord and satisfaction does not require a specific statement that claims have been released. Here, the required element was satisfied because Geico tendered checks for a "total loss settlement" and the insureds were bound to understand that the offer was to fully satisfy their claims. 4) While the statute in question does require insurers to pay registration and title fees, the statute does not say that insurers are powerless to amend this obligation through an accord and satisfaction or that they must tell insureds of this obligation. The strong public policy in favor of freedom to contract overrides the insureds' argument. 5) By the time the insureds had received the check for the second loss of a car, they had allegedly learned of Geico's statutory obligation, and with this knowledge they requested more money, but cashed the checks anyway, thereby accepting them as payments in full despite the request for more money.

Pearson v. Geico Casualty Co., *___ Fed.Appx. ____, No. 19-1303, 2020 WL 6537392 (10th Cir. Nov. 6, 2020, not yet released for publication in the permanent law reports).*

DOG-BITTEN TODDLER WAS AN "INSURED" SUBJECT TO POLICY EXCLUSION FOR INSURED-AGAINST-INSURED CLAIMS

U.S. District Court, Colorado:

Two-and-a-half-year-old toddler D.L. was with her mother, Haley Davis, at the home of her maternal grandparents, Defendants Devin and Cynthia Davis, when she was bitten in the face by a dog, causing significant injuries and requiring emergency surgery on her right cheek. D.L.'s father, Defendant Brad Larsen, made a claim on behalf of D.L. against the grandparents. Plaintiff State Farm, the carrier for the grandparents' homeowners' insurance policy, sought a declaratory judgment that there was no coverage under the policy for D.L.'s injuries from the dog bite incident.

On cross-motions for summary judgment, the Court noted that the critical question was whether, under the terms of the grandparents' homeowners' policy, D.L. qualified as an "insured." If so, there would be no coverage under the policy because it excludes insured-against-insured claims. The policy contained a provision excluding from coverage claims based upon bodily injury to an "insured," defined under the policy to include the named insured, relatives of the named insured, and any other person under the age of 21 in the care of a named insured or relative of a named insured. The policy defined "relative" as "any person related to [the named insured] by blood, adoption, marriage [or substantially similar legal relationship], and who resides primarily with you." The policy defined "bodily injury" as "physical injury, sickness, or disease to a person. This includes required care, loss of services, and death resulting therefrom." The term "in the care of" was not defined in the policy.

Notably, D.L.'s parents had ceased living together as a family some time before the dog bite incident, but shared custody and divided parenting time. At the time of the incident, D.L. was staying with Haley, who was living with her parents, the policyholders, and who was "taking care of" D.L. while they two of them were home alone that day. Despite Haley's supervision, no one was in the room with D.L. at the time of the attack—Haley was in another room, an estimated 25 feet away from her daughter.

State Farm argued that D.L. was "in the care of" her mother, who is a relative of the policyholders, therefore D.L. was herself an "insured" and specifically excluded from coverage for bodily injury claims against the policyholders. D.L.'s father argued that "in the care of" was ambiguous and susceptible to multiple meanings, including physical presence or direct "eyes-on" supervision, and that ambiguities in insurance policies should be construed against the insurer and accordingly, the Court should conclude that D.L. was not in anyone's care at the time of the incident, as she was alone in the room.

The Court rejected D.L.'s father's argument, concluding that it would make little sense for the policy to deem D.L. an "insured" while Haley was in the room or looking directly at her, but not when Haley stepped out of the room or even briefly turned her back to the toddler. Noting that at least one other court, in an Oregon case, has determined the phrase "in your care" to be ambiguous, the Court nonetheless was able to distinguish that case because while many facts were similar between the two cases, unlike in the Oregon case, it was clear here that Haley Davis was residing with her parents and was therefore an "insured" under the terms of the policy. Furthermore, using the definition of "in your care" articulated in the Oregon case, D.L. was in Haley Davis' "care" at the time of the incident.

Therefore, under any reasonable interpretation, and based on the undisputed facts presented, the Court concluded that at the time of the incident D.L. was "in the care of" her mother, who was an "insured" under the terms of the policy, and therefore the

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exclusion applied. The federal magistrate judge recommended granting State Farm's Motion for Summary Judgment and denying Defendant Brad Larsen's, and entering declaratory judgment in State Farm's favor that Defendants Brad Larsen and D.L. were not entitled to any benefits under the policy, that Defendants Devin and Cynthia Davis were not entitled to liability coverage for claims of bodily injury to D.L., and that State Farm was not required to make any payments to or on behalf of Defendants as a result of the dog bite incident.

State Farm Fire and Casualty Company v. Larsen Next Friend of Davis, No. 19-CV-03578-RM-NRN, 2020 WL 6870847 (D. Colo., Oct. 21, 2020) (not yet released for publication in the permanent law reports).

Utah

"Bad Faith" Cause of Action Dismissed as Duplicative of "Breach of Duty of Good Faith and Fair Dealing" Cause of Action

U.S. District Court, Utah: After Defendant/Carrier State Farm Fire and Casualty Co. only partially covered a roof damage claim under Plaintiff/Insured Genevieve Healy-Petrik's property insurance policy, Healy-Petrik filed suit against State Farm alleging causes of action for breach of contract, breach of duty of good faith and fair dealing, and bad faith. State Farm moved to dismiss Healy-Petrik's third cause of action (bad faith) under Rule 12(b)(6), and moved for an award of attorneys' fees for the time and expense incurred by filing said motion to dismiss.

Construing Healy-Petrik's bad faith claim as a contract claim arising out of the property insurance policy, the Court found that as such it was fundamentally the same as her second claim for breach of the duty of good faith and fair dealing. The Court noted that Utah contract cases use the terms "bad faith" and "breach of good faith and fair dealing" interchangeably. Since Healy-Petrik's bad faith cause of action was entirely duplicative of her cause of action for breach of the duty of good faith and fair dealing, the Court granted State Farm's motion to dismiss the bad faith cause of action. However, the Court also noted that to the extent cases use the phrase "bad faith" interchangeably with "breach of good faith and fair dealing," Healy-Petrik could still utilize such caselaw to advance her claim for breach of the duty of good faith and fair dealing.

The Court then considered State Farm's motion for attorneys' fees related to its successful motion to dismiss. To award attorneys' fees to a prevailing party, a court must determine that an action was 1) without merit and 2) not brough or asserted in good faith. The Court held that, because Healy-Petrik's bad faith claim was not a distinct cause of action from her second claim for breach of the duty of good faith and fair dealing, and therefore had no separate weight or importance, it was without merit. However, because State Farm did not provide sufficient evidence to show that Healy-Petrik did not assert the claim in good faith, the Court concluded that State Farm was not entitled to an award of attorneys' fees.

Healy-Petrik v. State Farm Fire and Casualty Co., No. 2:20-CV-611, 2020 WL 6273771 (D. Utah Oct. 26, 2020) (not yet released for publication in the permanent law reporters).

Bone Fracture Added to Statute Identifying Threshold Conditions Required to Make General Damages Claims.

Before January 1, 2021, pursuant to Utah Code § 31A-22-309(1)(a) there were five instances in which a person could make a claim for general pain and suffering after a car accident: death, dismemberment, permanent disability or permanent impairment, permanent disfigurement, or medical expenses in excess of $3,000.

Effective January 1, 2021, HB0361, which was passed during the 2020 Utah Legislative Session, amends Utah Code § 31A-22-309(1)(a) to include "a bone fracture" in the enumerated list of injuries that qualify for general pain and suffering claims.

Texas

Named Defendant Insurer's Related Out-of-State Entity Cannot Unilaterally Substitute Itself to Create Diversity Jurisdiction Without Notifying Parties or Court

Fifth Circuit: Plaintiff Perfecto Valencia owned a home in Houston, Texas that was covered by a homeowner's insurance policy. Valencia's property sustained damage in April 2015, but the carrier allegedly failed to pay for covered repairs for more than two years, during which time the property continued to suffer leaks that caused mold growth in the home. A claim for further damage sustained in October 2017 was denied in its entirety.

Valencia filed suit in Texas state court against Allstate Texas Lloyd's, Inc., a Texas entity ("Allstate Texas"), for breach of contract and to assert claims under the Texas Deceptive Trade Practices Act, Texas Insurance Code, Texas Business and Commerce Code, and Texas Civil Practice and Remedies Code. Allstate Texas Lloyds ("Allstate Illinois"), rather than Allstate Texas, answered the petition and removed the case to federal court on the basis of diversity jurisdiction, alleging that it was a citizen of Illinois for jurisdictional purposes. Valencia filed a motion to remand the case to state court, contending that removal was improperly effectuated by a non-party to the case. The federal court denied Valencia's motion with little analysis, after which Valencia filed an interlocutory appeal to the Fifth Circuit Court of Appeals.

The Fifth Circuit determined that Allstate Illinois lacked authority to remove the case to federal court because under 28 U.S.C. § 1441(a), only "the defendant or the defendants" may remove a case filed in state court to federal court. A non-party, even one that claims to be the proper party in interest, is not a defendant and therefore lacks removal authority. At

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the time of removal, Allstate Texas was the only defendant in the case. Allstate Illinois never sought to intervene in the case or to be joined as a defendant, and Allstate Texas never contended that it had been erroneously named in the matter. As a non-party, Allstate Illinois had no right to remove the case to federal court, and diversity jurisdiction could not be premised on its actions. The Court noted prior decisions for the proposition that a district court cannot create removal jurisdiction based on diversity by substituting parties.

Allstate Illinois argued that it was a proper party to the action as originally filed because it had been misnamed or alternatively misidentified as Allstate Texas in Valencia's state court petition, and that it in fact issued the policy in question and adjusted and investigated Valencia's claim. A *misnomer* exists when a plaintiff sues the correct entity under a mistaken name; a *misidentification* arises when two separate legal entities actually exist and a plaintiff mistakenly sues the entity with a name similar to that of the correct entity. The Court determined there was no misnomer here because Valencia named Allstate Texas in his petition, served Allstate Texas' registered agent, and maintains that it is Allstate Texas, not Allstate Illinois, that he intended to sue and from which to seek recovery. Furthermore, even if Valencia had misidentified Allstate Illinois, such misidentification would not justify its unilateral actions in this case, i.e., changing the case caption without notifying the parties or the court of its intention to defend the case.

Because Allstate Illinois was not a defendant in the case as originally filed and did not become a defendant through proper means, it lacked authority to remove the suit to federal court. The federal district court lacked subject matter [diversity] jurisdiction over the case when it denied Valencia's motion to remand because the only parties to the caseat the time of removal—Valencia and Allstate Texas—were both Texas residents. The Fifth Circuit therefore reversed and remanded the case to federal district court with instructions to remand to state court.

Valencia v. Allstate Texas Lloyd's, 976 F.3d 593 (5th Cir. 2020) (decided October 2, 2020).

First Impression: Lack of Appointment of Guardian Ad Litem Did Not Relieve Primary Insurer of Duty to Exercise Ordinary Care in Settlement of Claims

Fifth Circuit: In an underlying wrongful death case in which a cyclist had been killed in a collision with a stopped truck, the truck owner had a primary insurance policy with ACE American Insurance ("ACE") with policy limits of $2m, and an excess insurance policy with American Guarantee and Liability Insurance Company ("AGLIC"). ACE rejected three settlement offers from the decedent's survivors before and during trial, and the jury awarded the survivors nearly $28m. The survivors and the truck owner eventually settled for nearly $10m, of which AGLIC, the excess carrier, paid nearly $8m. AGLIC sued ACE for equitable subrogation, arguing that because ACE violated its *Stowers* duties in failing to accept one of the three settlement offers for the primary policy limits, ACE had to cover AGLIC's settlement contribution. The district court agreed, and the Fifth Circuit affirmed.

In the underlying case, the first settlement offer, made just prior to trial, asked for the primary policy limits of $2m. ACE counter-offered $500k, which the survivors rejected. Due to adverse evidentiary rulings and a stellar plaintiffs' witness in the surviving widow, trial went poorly for the defense. While awaiting a jury verdict, plaintiffs' counsel orally offered a high/low of $1.9m to $2.0m with costs. ACE believed the inclusion of "costs" would push the final settlement value beyond its $2m policy limit and thus outside its settlement valuation, and therefore rejected the offer. Plaintiffs' counsel then renewed his offer to settle for the policy limits of $2m. The defense declined and countered, and plaintiffs withdrew all offers. The next day, the jury returned a verdict of nearly $40m,

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CLM

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resulting in a $28m judgment against the truck owner after allocating 32% comparative negligence to the decedent.

In the equitable subrogation action, the district court held that all three settlement offers triggered *Stowers* duties, and that ACE's rejection of the first settlement offer was reasonable under *Stowers* but that the last two were not. ACE appealed from the resulting judgment for the entirety of AGLIC's excess payment. Under Texas law, the *Stowers* duty requires an insurer "to exercise ordinary care in the settlement of claims to protect its insureds against judgments in excess of policy limits." But a S*towers* duty is not activated by a settlement demand unless: 1) the claim against the insured is within the scope of coverage, 2) there is a demand within policy limits, and 3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. Further, *Stowers* applies only when the settlement offer "clearly state[s] a sum certain" and is unconditional.

ACE argued, among other things, that because the surviving widow asserted claims alongside her minor children, whom she represented as next friend, this generated adverse interests and mandated at least court and perhaps guardian ad litem approval of any settlement, rendering the settlement offers inherently conditional. This presented an issue of first impression upon which no Texas court has previously ruled. However, analyzing other Texas caselaw involving adverse interests in similar circumstances, the Fifth Circuit held that the third settlement offer did trigger *Stowers* duties and that because it did not specify which plaintiffs would get what percent of the settlement amount, any potential adverse interest between the mother and her children would only have arisen once the offer had been accepted, which it was not..

American Guarantee and Liability Insurance Company v. ACE American Insurance Company, ___ F.3d ____, No. 19-20779, 2020 WL 7487067 (5th Cir., Dec. 21, 2020) (not yet released for publication in the permanent law reporters).