Spring 2014

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas

IN BRIEF

UTAH

In a dispute over whether a homeowner's insurance policy excludes coverage for an ATV accident that occurred in common area of a residential subdivision, the Utah Court of Appeals held that the common area is an "insured location" under the policy.

.....*Page 1*

COLORADO

A developer's claims against a subcontractor were dismissed by the trial court after the subcontractor deposited the maximum recoverable amount under the parties' limitation of liability contract clause. The Colorado Court of Appeals remanded the dismissal for a determination of whether evidence of the subcontractor's willful conduct should have been permitted to overcome the limitation of liability clause.

..... *Page3*

WYOMING

In a trucking case, Plaintiff served Defendants with a summons containing incorrect information. The Wyoming Supreme Court held that this summons commenced the action under the statute of limitations because it provided notice of the action.

.....*Page 4*

NEW MEXICO

The New Mexico Court of Appeals held that an anti-stacking provision in an insurance policy did not apply because the tractor and trailer, which were both involved in the same accident, were separately covered vehicles.

.....*Page 5*

TEXAS

The Texas Supreme Court held: "a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, [and] thus it does not assume liability for damages arising out of its defective work so as to trigger [its policy's] contractual liability exclusion."

.....*Page 6*

UTAH

UTAH COURT OF APPEALS INTERPRETS "INSURED LOCATION" TO INCLUDE SUBDIVISION COMMON AREA IN HOMEOWNER'S INSURANCE COVERAGE CASE

Utah Court of Appeals: This case involves a dispute over whether a homeowner's insurance policy excludes coverage for an ATV accident that occurred on common area at a residential subdivision. Karen Simmons was the owner of the ATV. Stephen Olsen was a passenger on the ATV while it was being driven by Simmons' son, Corey Sorenson, on the subdivision's common area. The ATV tipped over and landed on Olsen, injuring his leg.

Simmons' residence was covered by a homeowner's insurance policy issued by Defendant American National. This policy provided coverage for any claim for damages brought against Simmons as an insured because of bodily injuries. The policy also covered medical expenses incurred by others injured "on the insured location" or injured "off the insured location, if the bodily injury … [was] caused by the activities of any insured." The policy also provided an exclusion for medical payments to others for bodily injury arising out of the use of motorized vehicles. The policy defined "motorized vehicles" as including a "motorized land vehicle owned by any insured and designed for recreational use off public roads, while off an insured location."

In a separate action, Olsen sued Sorenson and Simmons for his ATV accident injuries. American National filed a complaint against Sorenson, Simmons, and Olsen, seeking a declaratory judgment that it did not have a duty to defend Simmons and Sorenson, and that the insurance policy excluded coverage for Olsen's injuries. It argued that the policy excluded coverage under the motor vehicle exclusions because an ATV falls within the definition of a motor vehicle. Olsen argued that the exclusions did not apply because the accident occurred on an "insured location."

Continued on Page 2

NEW LOCATION:
Dallas, Texas

IN THIS ISSUE

Continued from Page 1

The district court entered a declaratory judgment denying American Nation's motion for summary judgment, explaining that the accident occurred on an "insured location" and that the motor vehicle exclusions thus do not apply. American National therefore had a duty to defend Sorenson and Simmons, and to provide coverage against Olsen's claims.

On appeal, American National's central argument was that the ATV accident did not occur on an "insured location" because it occurred on the subdivision's common area rather than on Simmons' property. If the accident did not occur on an insured location, then it falls within the motor vehicle exclusions.

The Court of Appeals noted that "insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance." The Court then ruled that the common area is an insured location. The Court adopted and applied the property "ownership and legal right to use" test. Because the CC&Rs provided rights to the common area for each property owner, and because each property owner is a member of the homeowners association, the Court liberally construed "insured location" to include the common area. The district court's judgment was thus affirmed.

American National Property & Casualty Co. v. Sorenson et al., 2013 UT App 295 (decided December 12, 2013).

HOMEOWNERS' ASSOCIATION'S EXPERT REPORT STRICKEN AS UNTIMELY IN CONSTRUCTION DEFECT CASE

Utah Court of Appeals: This case arises from alleged defects in the construction of the Townhomes at Pointe Meadows, a multi-unit townhome development. The development's Association sought recovery from the developer and general contractor of the development for the alleged defects. The developer then filed a third-party complaint against approximately twenty subcontractors.

The parties agreed to an amended case management order, which the Court entered. This order provided an August 15, 2011 deadline for the Association's final expert disclosures. In July 2011, the Association requested that the developer extend the expert deadline. Though the developer agreed to the extension, an amended order reflecting it was not approved by the developer until October 2011. None of the subcontractors agreed to the proposed extension.

Two subcontractors later moved for summary judgment, arguing that evidence of defects in their work had not been produced. The Association then filed a motion to extend the discovery deadlines. The developer both opposed the subcontractors' motions and joined in them against the Association, arguing that the Association had failed to formally disclose experts by the August deadline.

The Association opposed the motions and provided affidavits from its attorneys regarding its attempt to modify the case management order. With the opposition, the Association also produced an amended preliminary report from its expert as to alleged defects.

The district court denied the Association's motion to extend the discovery deadlines, and struck the Association's expert report as being untimely. The Court also granted summary judgment in the developer's favor on the basis that the Association's claims required expert testimony to prevail, and the Association had failed to meet that burden.

On appeal, the Association challenged the district court's denial of its motion to extend discovery deadlines. The Court of Appeals affirmed the district court's decision. In doing so, it noted that the developer was not the only party in the litigation, and it was unreasonable for the Association to rely only on the developer's stipulation. The Court also found that the Association had exhibited a pattern of delay and inaction in prosecuting its claims.

The Court of Appeals thus affirmed striking the Association's expert report as untimely. The Court also concluded that all of the Association's claims required expert testimony. Because the Association's claims could not prevail absent admissible expert testimony, the Court thus affirmed the district court's grant of summary judgment in the developer's favor.

The Townhomes at Pointe Meadows Owners Association v. Pointe Meadows Townhomes, LLC et al., 2014 UT App 52 (decided March 6, 2014).

ENACTED UTAH LEGISLATION

The following bills have recently been signed into law by Governor Herbert:

S.B. 271: This bill amends U.C.A. § 15-1-4 to increase the post-judgment interest rate addition from 2% to 10%. The bill's language includes the following: "Except as otherwise provided by law or contract, all final judgments under $10,000 in actions regarding the purchase of goods and services shall bear interest at the federal post judgment interest rate as of January 1 of each year, plus 10%." The phrase "final judgment" is also amended to mean "the judgment rendered when all avenues of appeal have been exhausted."

Senate Bill 271 (Signed into law by Governor Herbert on March 31, 2014).

H.B. 118: This bill amends provisions of U.C.A. § 78B-3-107 related to the survival of a cause of action for personal injury damages in cases where the wrongdoer dies, or injured person dies, as a result of an unrelated cause. In such cases, general damages are limited to $100,000. In cases where the injured person dies from an unrelated cause more than six months after the incident, the bill also specifies the types of notice that must be issued on behalf of the injured person prior to the injured person's death, so as to be able to recover general damages (limited to $100,000). If such notice is not provided, then the injured person's claim is limited to special damages only.

House Bill 118 (Signed into law by Governor Herbert on March 31, 2014).

Defense Verdict in Amusement Park Trip and Fall Case

Davis County: Plaintiff Heed allegedly suffered injuries when she lost her balance and tripped and fell. This occurred after she lost grip on the bar she had been holding while exiting a ride. The ride was at an amusement park owned and operated by Defendant Lagoon Corporation, Inc.

Plaintiff alleged that the ride was stopped prematurely because her door was not properly latched. Defendant's employee had chastised her and told her it was her fault the ride was stopped early. The employee then refused to give her the door, which she alleged she needed so that she could use the bar on the door for support as she lowered herself out of the ride. Despite informing the employee that she needed to exit the ride backwards, she attempted to exit it front ways since the employee stood there and "made her feel stupid." This allegedly caused her to lose her footing and slide off the step onto the ground.

Defendant denied liability and contended that Plaintiff's fall was entirely her fault. Defendant further asserted that testimony confirmed Plaintiff's use of the bar to exit the ride. Defendant also contended that Plaintiff refused any medical assistance by the Lagoon staff, refused to go to the first aide station, and chose to leave the park immediately without making a report. The jury reached a verdict for the Defendant.

Heed v. Lagoon Corp. Inc., Case No. 2008-07-00479.

Colorado

Dismissal Based on Limitation of Liability Clause Remanded for Evidentiary Determination of Subcontractor's Willful Conduct

Colorado Court of Appeals: In this construction defect case, Plaintiff Taylor Morrison of Colorado appeals: (1) the trial court's order dismissing Defendant Terracon Consultants with prejudice; and (2) the jury verdict in favor of Defendant Bemas Construction.

Taylor was the developer of a residential subdivision. Terracon and Bemas were both subcontractors. After construction of homes, Taylor received complaints about cracks in drywall. Taylor remedied the conditions and sued Terracon and Bemas for recovery. During litigation, Taylor moved for leave to add claims against Terracon. These claims were based on allegations that Terracon willfully breached duties to Taylor. The trial court denied Taylor's motion.

Taylor also moved for determination as to whether the Homeowner Protection Act of 2007 (HPA) invalidated the limitation of liability clauses in the contracts with Terracon. The trial court denied the motion on the ground that the HPA applies to residential property owners but not to commercial entities.

Thereafter, Terracon moved for leave to deposit into the court's registry $550,000, representing the maximum amount recoverable from Terracon under the parties' contractual limitation of liability clause. It also requested that upon acceptance of the deposit, the court dismiss Taylor's claims against them with prejudice. The trial court ruled in favor of Terracon. After the money was deposited and the claims were dismissed, Taylor went to trial against Bemas. The jury returned a verdict in Bemas's favor on all of Taylor's claims against Bemas. Taylor appealed.

Taylor argued that it was error to rule that the HPA did not invalidate the limitation of liability clause. The Court of Appeals affirmed the trial court's judgment, but for different reasons. The Court held that regardless of whether the HPA applies to commercial entities, retroactive application of the HPA would be unconstitutionally retrospective. The Court ruled, however, that further proceedings were necessary to determine whether Taylor should have been permitted to introduce evidence of Terracon's willful conduct to attempt to overcome Terracon's assertion of the limitation of liability clause.

Taylor also argued that if a new trial is ordered against Terracon, a new trial as to Bemas also should be granted. The Court held that Bemas's liability was distinct and separate from Terracon's liability. No unfairness would result to Taylor in allowing the verdict for Bemas to stand. The judgment as to Bemas was affirmed and the case was remanded to the trial court on the issue of evidence of Terracon's willful conduct.

Taylor Morrison of Colorado, Inc. v. Bemas Construction, Inc. et al., 2014 COA 10 (Colorado Court of Appeals, decided January 30, 2014, not yet released for publication in the permanent law reports).

Class Certification Denied in UM/UIM Fraudulent Concealment Case

Colorado Court of Appeals: In this putative class action, Plaintiffs asserted that Defendants United Services Automobile Association and USAA Casualty Ins. Co. (USAA) fraudulently concealed information necessary for Plaintiffs to make informed decisions about purchasing UM/UIM coverage on their additional vehicles. Plaintiffs appealed the trial court's denial of class certification.

Plaintiffs argued that the trial court erred in admitting data compiled by non-party State Farm, reflecting its insureds' retention rates of UM/UIM coverage on additional vehicles after its insureds were notified of a prior Colorado Supreme Court decision on the issue. This data showed that the majority of State Farm's insureds who were notified of the prior court decision chose to retain UM/UIM coverage on all vehicles. The Court of Appeals held that denial of Plaintiff's motion to exclude the State Farm data was appropriate because it was admissible hearsay, relevant, and not precluded by Colorado authority.

More on page 4

Continued from Page 3

Plaintiffs also argued that the trial court erred in concluding that Plaintiffs failed to satisfy the predominance requirement of C.R.C.P. 23(b)(3) for class certification. Under Rule 23(b)(3), Plaintiffs must establish that common questions of law or fact predominate over individual questions. Plaintiffs were thus required to prove that the fifth element of a fraudulent concealment claim, reliance on USAA's alleged concealment resulting in damages, was a common class issue. The Court of Appeals held that Plaintiffs were unable to establish such element.

The Court recognized that uniform concealment of material information by USAA creates an inference of the reliance element. However, that inference may be rebutted by evidence that a reasonable consumer would have made the same decision, even if the information had been disclosed. The State Farm data thus rebutted this inference of reliance.

The Court also held that the filed rate doctrine, which limits judicial review of rates approved by regulatory industries, applies to Colorado's insurance industry and bars claims challenging insurance industry rates. Plaintiffs' damages theory was thus barred under this doctrine because it involved judicial second-guessing of the approved insurance rates. The Court thus ruled that a refund of UM/UIM premiums for additional vehicles was not a permissible theory of damages in the putative class action. Denial of class certification was therefore affirmed.

Maxwell et al. v. United Services Automobile Assoc. et al., 2014 COA 2 (Colorado Court of Appeals, decided January 2, 2014, not yet released for publication in the permanent law reports).

PENDING COLORADO LEGISLATION

The following bills have been proposed and are currently pending with the Colorado legislature. As these bills have not yet been signed into law, language of the bills may be amended:

H.B. 14-1347: This bill would change time periods in certain court proceedings to seven day periods, or periods that are multiples of seven, to avoid actions being due on weekends. Similar changes to seven day periods were previously enacted to other court rules in 2012.

S.B. 14-092: This bill would add C.R.S. § 18-5-211 to create the crime of insurance fraud and criminalize claimant and insurance broker or agent conduct that would result in defrauding an insurance company or customer.

H.B. 14-1344: This bill would allow certain notices and other documents related to insurance coverage to be sent electronically to an e-mail address specified by the policyholder if the policyholder consents to receiving the documents electronically. Consent may be withdrawn at any time, reinstating the insurer's obligation to provide the documents in hard copy. This bill would also allow standard property and casualty insurance policies and endorsements to be posted on an insurer's website if no personally identifiable information is posted, policyholders are given information on accessing the documents, and the documents can be accessed for free.

H.B. 14-1282: This bill would allow an insurer to provide materials in a language other than English to customers. However, the insurer must also provide an English version of the insurance policy, rider, and endorsement to the customer. This bill would eliminate the requirement that explanatory or advertising materials must also be provided in English.

WYOMING

PERSONAL INJURY LAWSUIT DEEMED COMMENCED FOR STATUTE OF LIMITATIONS PURPOSES DESPITE ERRORS IN SUMMONS

Wyoming Supreme Court: On March 4, 2008, Plaintiff Reynolds was injured in an automobile accident with Defendant Moore. At the time of the accident, Moore was employed by the Jaegers.

On February 21, 2012, Plaintiff filed a complaint against Defendants, asserting negligence against Moore and respondeat superior against the Jaegers. Moore was personally served at her residence in California on March 13, 2012. The summons incorrectly stated that she was required to respond within twenty days, instead of the thirty days allowed for out of state service. The summons also incorrectly stated she must comply with the Idaho Rules of Civil Procedure, rather than the Wyoming Rules.

Moore asserted insufficient service of process in her answer. Plaintiff then served a corrected summons on Moore sixty-nine days after filing the complaint. Moore moved to dismiss the complaint, alleging errors in the first summons prevented the trial court from obtaining jurisdiction; that the action was not deemed commenced until the date of the second service; and that the four year statute of limitations had thus expired by the time of the second service. The trial court granted this motion.

The trial court also granted the Jaegers' motion to dismiss on the basis that the respondeat superior claims were derivative of the claims against Moore.

On appeal, the core issue was whether service of the first summons, with its errors, was sufficient to obtain personal jurisdiction and commence the action for purposes of the statute of limitations. The Court noted that the "purpose of service of process is to provide a defendant with notice and the opportunity to defend against the action." Moore was served with a legitimate summons and complaint, providing her notice of the substance of Reynolds' claims. The error that was considered fatal was the incorrect date of response, yet Moore responded in a timely manner. Her response thus cured the error, and any resulting prejudice was not established by Moore. The Court thus reversed the dismissal of Plaintiff's claims against both Defendants.

Reynolds v. Moore et al., 2014 WY 20 (decided February 11, 2014).

New Mexico

ANTI-STACKING CLAUSE HELD INAPPLICABLE IN A TRUCKING COVERAGE CASE

New Mexico Court of Appeals: In this case, the New Mexico Court of Appeals considered whether an insurance policy's limit of liability, or anti-stacking clause, restricts liability coverage limits applicable to only one of two covered vehicles involved in the same accident.

A tractor and a trailer, each insured with liability limits of $1 million, were operated by the insured, H&J Hamilton's employee and collided with a vehicle driven by Plaintiff Lucero. Defendant Northland Insurance issued an insurance policy to Hamilton, and both the tractor and trailer involved in the accident were listed as scheduled vehicles. The policy included an anti-stacking clause, stating that regardless of the number of covered vehicles involved in the accident, the most Hamilton will pay for the total of damages is the liability limits.

Plaintiff sued Northland, seeking a declaratory action that Northland was required to extend liability coverage in a minimum amount of $2 million, or $1 million each for the tractor and trailer. Plaintiff moved for summary judgment, arguing that that the tractor and trailer were two separate vehicles, that the policy provided $1 million in liability coverage for each vehicle, and that the anti-stacking clause did not apply because Plaintiff was seeking the coverage purchased for each vehicle involved.

Northland also moved for summary judgment, arguing that the policy language unambiguously limited coverage to $1 million regardless of the number of covered vehicles in the crash. The district court granted Northland's motion, and Plaintiff appealed.

The New Mexico Court of Appeals reversed, holding that the limit of liability was $2 million. It found that the policy provided $1 million in coverage for each covered vehicle, and the tractor and trailer involved in the accident were separately covered vehicles. The anti-stacking provision did not apply because both covered vehicles were involved in the accident. Thus, summary judgment in favor of Northland was reversed.

Lucero Jr. et al. v. Northland Insurance Co., Docket No. 32,426 (New Mexico Court of Appeal, slip opinion, decided February 24, 2014, not yet released for publication in the permanent law reports).

DEWHIRST & DOLVEN OPENS OFFICE IN DALLAS, TEXAS

In addition to serving clients in South Texas from the firm's Port Isabel office, Dewhirst & Dolven, LLC is pleased to serve clients in North Texas from its new office in Dallas at:

5430 LBJ Freeway
Suite 1200
Dallas, TX 75240
Phone 972-789-9344
Fax 972-789-9335

Dewhirst & Dolven, LLC is pleased to serve our clients throughout the intermountain west and Texas from the following offices: • Salt Lake City, Utah • Denver, Colorado • Colorado Springs, Colorado • Grand Junction, Colorado • Fort Collins, Colorado • Dallas, Texas • and Port Isabel, Texas. Please see our website at DewhirstDolven.com for specific contact information.

Dewhirst & Dolven, LLC has been published in the A.M. Best's Directory of Recommended Insurance Attorneys and is rated an "AV" law firm by Martindale Hubbell. Our attorneys have combined experience of over 300 years and are committed to providing clients throughout Utah, Wyoming, New Mexico, Colorado and Texas with superior legal representation while remaining sensitive to the economic interests of each case.

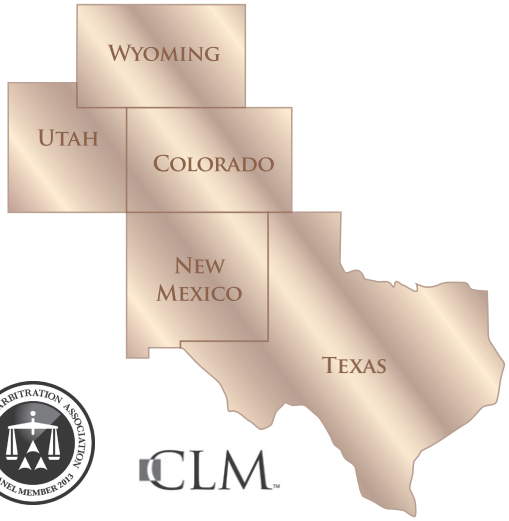
We strive to understand our clients' business interests to assist them in obtaining business solutions through the legal process. Our priority is to establish a reputation in the legal and business community of being exceptional attorneys while maintaining a high level of ethics and integrity. We are committed to building professional relationships with open communication, which creates an environment of teamwork directed at achieving successful results for our clients.

About Our Firm

Dewhirst & Dolven's Legal Update
is published quarterly by
Rick N. Haderlie, Esq and
Kyle L. Shoop, Esq
of
Dewhirst & Dolven, LLC

For more information regarding legal developments, assistance with any Utah, Wyoming, Colorado, Texas or New Mexico matter, or to receive this publication via email, contact Rick Haderlie at
rhaderlie@dewhirstdolven.com
2225 East Murray-Holladay Rd., Suite 103
Salt Lake City, UT 84117
(801) 274-2717
www.DewhirstDolven.com

DEWHIRST & DOLVEN
Attorneys at Law
www.DewhirstDolven.com



DENVER
(303) 757-0003
COLORADO SPRINGS
(719) 520-1421
GRAND JUNCTION
(970) 241-1855
FORT COLLINS
(970) 214-9698
SALT LAKE CITY
(801) 274-2717
PORT ISABEL
(956) 433-7166
DALLAS
(972) 789-9344

rhaderlie@dewhirstdolven.com
kshoop@dewhirstdolven.com

Texas

TEXAS SUPREME COURT HOLDS CONTRACTUAL LIABILITY EXCLUSION DOES NOT APPLY IN CGL POLICY COVERAGE CASE

Texas Supreme Court: The following issue was certified to the Texas Supreme Court from the U.S. Court of Appeals, 5th District: Does a general contractor that enters into a contract to perform construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, assume liability for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion?

Ewing Construction entered into a contract with Tuluso-Midway Independent School District (TMISD) to serve as the general contractor to construct tennis courts at a school. After construction, the tennis courts were rendered unusable for their intended purposes. When TMISD sued Ewing, Ewing tendered its defense to Amerisure Insurance Co., its insurer, under its commercial general liability coverage. Amerisure denied coverage, and Ewing filed suit seeking a declaration that Amerisure had duties to defend and indemnify Ewing.

The parties both filed motions for summary judgment. Amerisure argued that the contractual liability exclusion precluded coverage. Amerisure argued that because Ewing contractually undertook the obligation to construct the tennis courts in a good and workmanlike manner, Ewing assumed liability for damages if the construction did not meet that standard. Ewing argued that its contract did not enlarge its obligations beyond any general common law duty.

The district court granted Amerisure's motion under the contractual liability exclusion, holding that the exclusion applies when an insured has entered into a contract and, by doing so, has assumed liability for its own performance under that contract. The Texas Supreme Court, however, held that the exclusion only applies when the insured has assumed liability for damages exceeding the liability it would have under general law. Ewing already had a common law duty to perform its contract with skill and care.

Thus, the Texas Supreme Court held: "a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not assume liability for damages arising out of its defective work so as to trigger the contractual liability exclusion."

Ewing Construction Co. v. Amerisure Insurance Co., 420 S.W.3d 30, 57 Tex. Sup. Ct. J. 195 (decided January 17, 2014).