Fall 2020

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LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

IN BRIEF

COLORADO

The Tenth Circuit Court of Appeals held that under Colorado law, establishing an insurance broker's standard of care in a professional negligence case requires expert testimony.

.....*Page 1*

UTAH

The Utah Supreme Court held that "objective findings" for showing permanent disability or impairment means "findings based on externally verifiable phenomena," not "unbiased findings."

.....*Page 4*

WYOMING

The Tenth Circuit Court of Appeals held that under Wyoming law, an insurer who unconditionally assumes defense of an insured without reservation of rights is estopped from later denying coverage.

.....*Page 5*

TEXAS

The Fifth Circuit Court of Appeals held that under Texas law, notice to a broker constituted sufficient notice to the insurer, despite such notice differing from the notice provision contained in the policy.

.....*Page 6*

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

EXPERT REQUIRED TO ESTABLISH BROKER'S STANDARD OF CARE FOR PROVIDING ADEQUATE COVERAGE AND PREPARING AND SUBMITTING APPLICATION

Tenth Circuit: Plaintiff Omar Alabassi, who owned a limousine service, was involved in a hit-and-run automotive collision while driving his personal vehicle to pick up a customer at Denver International Airport. Prior to the accident, on the advice of T.I.B. Insurance Brokers ("TIB"), Alabassi had purchased a commercial auto insurance policy issued by Columbia Insurance that covered both Alabassi and his limousine company. TIB helped him prepare and submit his application. Alabassi's policy offered only $55,000 in coverage against the over $86,000 in medical expenses he allegedly suffered. Alabassi's complaint alleged that TIB negligently breached its duty of care in (1) providing him with adequate insurance coverage and (2) preparing and submitting his insurance application.

Continued on Page 2

IN THIS ISSUE

Continued from Page 1

The Tenth Circuit affirmed the district court's decision granting summary judgment for TIB because Alabassi failed to offer expert testimony establishing that the insurer breached its duty of care—an essential element of his negligence claim.

Under Colorado law, a plaintiff pursuing a professional negligence claim must show the defendant's professional conduct fell below the applicable standard of care for the defendant's profession. This typically requires expert testimony to help the factfinder determine the applicable professional standard of care, since such standards would typically be outside the common knowledge and experience of ordinary persons, unless the relevant standard of care in a given case does not require specialized or technical knowledge.

Applying Colorado law, the Tenth Circuit held that an insurance broker's determination of the proper insurance requires knowledge of terms and practices specific to the insurance industry. Because an ordinary person would neither understand how a reasonably prudent insurance broker would determine the proper policy for a client nor whether TIB's conduct was consistent with those practices, the Tenth Circuit held that the district court did not err in deciding that expert testimony was necessary, and affirmed the grant of summary judgment in favor of the broker.

Alabassi v. T.I.B. Insurance Brokers, Inc., ___ Fed.Appx. ____ (10th Cir. 2020), 2020 WL 5569342 (decided Sept. 17, 2020, not yet released for publication in the permanent law reports).

MAN WHO USED COVERED VEHICLE TO COMMIT VEHICULAR ASSAULT WAS CONVERTER NOT COVERED BY POLICY, SO NO DUTY TO DEFEND

U.S. District Court, Colorado: In this declaratory relief action, the insured left her vehicle running in the parking lot of a nightclub while she went inside to look for a friend. Defendant got into an altercation with another nightclub patron inside the club which continued outside in the parking lot. Defendant entered the insured's vehicle without permission and drove it into and over the other man, causing serious and disfiguring injuries. Defendant later admitted to police he was intoxicated at the time. The victim filed an underlying lawsuit against the Defendant asserting negligence and negligence per se.

The personal auto policy stated, in relevant part, "we will pay compensatory damages, for which an insured person is legally liable to others" due to bodily injury or property damage "that results from a motor vehicle accident." The insurer filed a declaratory judgment action against both Defendant and the plaintiff in the underlying lawsuit, seeking a declaration that (1) Defendant is not an "insured" under the Policy, (2) Defendant is a "converter" under the Policy, (3) there is no coverage under the Policy for Defendant's actions, and (4) Plaintiff has no duty to defend in the underlying lawsuit. Plaintiff subsequently moved for default against Defendant.

The Court agreed that Defendant is not an "insured" as defined in the policy because it was undisputed that Defendant was neither the named insured nor a family member thereof, and he had used the insured's vehicle without her permission. The Court also found that Defendant was a "converter" as defined by the Policy because Defendant used the insured's vehicle to assault the victim and no reasonable person could determine that such use of the vehicle was authorized. Having found that Defendant was a "converter" under the Policy, the Court also found the Policy explicitly excludes coverage for Defendant's actions, and as a result it also necessarily found that the insurer had no duty to defend in the underlying lawsuit.

Permanent General Assurance Corporation of Ohio v. Rodriguez Vanegas, No. 19-CV-02893-PAB-MEH, 2020 WL 4507307 (D. Colo. July 14, 2020); Permanent General Assurance Corporation of Ohio v. Rodriguez Vanegas, No. 19-CV-02893-PAB-MEH, 2020 WL 4571283 (D. Colo. Aug. 7, 2020).

MINOR INSURED'S INTENTIONAL CRIMINAL ACTS TRIGGER POLICY EXCLUSIONS, RESULTING IN NO DUTY TO DEFEND OR INDEMNIFY MINOR'S PARENTS AGAINST NEGLIGENCE CLAIMS

U.S. District Court, Colorado: Fifteen-year-old Aidan von Grabow assaulted and murdered twenty-year-old Makayla Grote ("Makayla") and was arrested the same day and charged with numerous felonies. Makayla's parents, as her surviving heirs, sued Aidan's parents for wrongful death, contributing to the delinquency of a minor, negligent supervision of a minor, reckless disregard for Makayla's well-being, negligent supervision of weapons, and infliction of emotional distress. Safeco Insurance Company of America ("Safeco") extended a defense to the von Grabows under a homeowners' insurance policy, subject to a full reservation of rights.

Aidan eventually pleaded guilty to nine criminal charges stemming from Makayla's murder. Safeco subsequently filed suit seeking summary judgment in the form of a declaratory judgment that no defense or indemnification for any personal liability coverage is available to the von Grabows under the Policy with respect to the underlying litigation.

An insurer's duty to affirmatively defend its insured against claims generally arises when the complaint in the underlying action against the insured alleges any facts that potentially fall within the coverage of

More on Page 3

Continued from Page 2

the policy. Colorado courts generally look no further than the four corners of the underlying complaint to determine whether a duty to defend exists. But an indisputable fact that is not an element of either the cause of action or a defense in the underlying litigation, such as an insured's guilty plea to murder, can be used to deny the duty to defend. An insurer's ultimate duty to indemnify its insured, i.e., to satisfy a judgment entered against the insured party, arises only when the policy actually covers the alleged harm, and is therefore narrower than the duty to defend.

The underlying complaint alleged that the bodily injury to Makayla was an intended act as a result of Aidan's violation of criminal law. The Policy excluded losses in the form of medical payments to others for bodily injury "intended by any insured" or which "results from violation of criminal law by any insured." Since Aidan was "any insured" under the Policy, the Court held that, under Colorado law, Aidan's intentional and criminal act of murder triggered the Policy's exclusions as to all insureds under the Policy, and thus no personal liability coverage exists as to any of the insureds for liability in the underlying lawsuit.

Safeco acknowledged that the Policy contained a Statutorily Imposed Vicarious Parental Liability provision that may provide Aidan's parents limited indemnification for liability related to the underlying lawsuit. The provision provides that Safeco will pay the lesser of $3,000 or the statutorily imposed limit (in this case, $3,500; see C.R.S. § 13-21-107(2)) for any legal obligation parents are required to pay as a result of acts of a minor child who resides with them, in excess over any other valid and collectible insurance. While Safeco conceded that this provision potentially entitles the von Grabows to $3000 in indemnification, it contended that no duty of defense applies because this provision specifies no such duty, while other additional liability coverages (e.g., credit card) do expressly provide for such a duty. The Court granted summary judgment in Safeco's favor.

SAFECO Insurance Company of America v. Henri, No. 19-CV-01825-LTB-KLM, 2020 WL 5517155 (D. Colo., July 23, 2020) (not yet released for publication in the permanent law reports).

UIM Claimant's Failure to Comply with Prompt Notice Provision Defeats Lawsuit

U.S. District Court, Colorado: Plaintiff, a passenger riding in a work vehicle owned by his employer, was injured when the vehicle was rear-ended in a hit-and-run collision. Plaintiff allegedly suffered permanent physical impairment, medical expenses, and noneconomic damages. The work vehicle was covered by an insurance policy issued by Defendant Owners Insurance Company.

The Policy provided uninsured motorist coverage up to $1m per person or per occurrence, and its definition of uninsured automobile included hit-and-runs, so long as the hit-and-run was reported to police within 24 hours (which Plaintiff did). As conditions of coverage, the Policy also required anyone seeking benefits to: (1) notify Defendant promptly of how, when and where the accident happened (failure to do so invalidates coverage if Defendant can show by preponderance standard that it is prejudiced by delay); (2) present a claim for compensatory damages according to the terms and conditions of the policy and conforming with any applicable statute of limitations for bodily injury claims in the state where the accident occurred; (3) "cooperate with [Defendant] in the investigation, settlement or defense of any claim or suit," including by "giving [Defendant] access to any documents which [it] request[s]"; and (4) comply with all terms of the Policy before taking any legal action against Defendant.

The Court considered Defendant's motion for summary judgment on Plaintiff's claims for breach of contract and common law and statutory bad faith.

Plaintiff's breach of contract claim was premised on the theory that Plaintiff provided prompt notice of his UM claim to Defendant through a series of letters purportedly sent to Defendant by Plaintiff's attorneys beginning approximately five months after the accident, and that Defendant failed to perform under the Policy when it did not open a claim, investigate, provide Plaintiff benefits, or otherwise act on the notice. Defendant represented that it never received the letters, and pointed to a lack of evidence to substantiate that they were ever actually mailed to Defendant, and asserted that Plaintiff's breach of contract by failing to promptly notify Defendant rendered him not entitled to benefits under the policy.

The Court applied the common law mailbox rule, which creates a rebuttable presumption of receipt only when the sender presents evidence that their letter was properly addressed and actually mailed. Plaintiff provided no evidence of actual mailing, such as testimony or an affidavit by individuals who mailed the letters, and in fact testified he does not know which letters, if any, were sent to Defendant. As such, the Court held Plaintiff was not entitled to a presumption the letters were received and that no rational trier of fact could find that Plaintiff provided prompt notice under the Policy. Additionally, the Court concluded that Plaintiff's failure to comply with the terms of the Prompt Notice, Assist and Cooperate, Time Limitation, and Legal Action provisions of the Policy prejudiced Defendant by rendering it unable to investigate the accident or Plaintiff's claimed injuries for three years, by forcing it to defend against this lawsuit a month after first receiving notice of Plaintiff's claim, and by denying it substantive information concerning Plaintiff's claim until more than a month after the lawsuit was filed. As a result, the Court held that under the terms of the Policy and Colorado precedent, Plaintiff was not entitled to benefits as a matter of law.

Bardill v. Owners Insurance Company, No. 18-CV-03319-CMA-SKC, 2020 WL 4539626 (D. Colo., Aug. 6, 2020) (not yet released for publication in the permanent law reports).

Utah

"Objective Findings" of Permanent Disability/Impairment Means "Based on Externally Verifiable Phenomena," Not "Unbiased"

Utah Supreme Court: Plaintiff Kathleen Pinney brought a personal injury action against Defendant Ricardo Carrera, the driver of a vehicle that ran a stop sign and struck Plaintiff's vehicle, causing Pinney to suffer an injured neck and a herniated disc in her back. The trial court denied Carrera's motion for judgment notwithstanding verdict and for a new trial and entered judgment on jury verdict in Pinney's favor. Carrera appealed, and the Court of Appeals affirmed. The Supreme Court granted Carrera's petition for writ of certiorari.

Carrera challenged the Court of Appeals' decision affirming the general damages award to Pinney on two grounds. First, he argued the Court of Appeals erred in interpreting the phrase "objective findings" as it appears in Utah Code § 31A-22-309(1)(a)(iii) (requiring motor vehicle owners to show they sustained a "permanent disability or permanent impairment based upon objective findings" as a prerequisite to maintaining a cause of action for general damages arising out of injuries sustained in an automobile accident). The Court of Appeals interpreted the statute to require findings "based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." Carrera argued the statute requires unbiased findings of permanent disability or impairment through an independent medical provider, because a treating physician's relationship with a plaintiff creates inherent bias. The Supreme Court found Carrera's interpretation unworkable because it would preclude any non-treating physician retained and paid by a plaintiff based on similar "inherent bias" to treating physicians, so a plaintiff could never prove the existence of a permanent disability or impairment. It thus affirmed the Court of Appeals' interpretation of "objective findings."

Alternatively, Carrera argued that under Utah Rule of Civil Procedure 59 a new trial on the amount of damages should be granted because the $300,000 in general, or noneconomic, damages awarded to Pinney was excessively disproportionate to the $0 economic damages awarded. Under its abuse of discretion standard of review, the Supreme Court held that the Court of Appeals correctly concluded that the damage award was supported by sufficient evidence because testimony regarding Pinney's inability to do some things she had previously been able to do and regarding the permanence of her injury gave the jury a reasonable basis for its awarded damages. The Supreme Court further held that the Court of Appeals correctly concluded that the damage award was not improperly excessive because Carrera failed to show that the damage award was excessive at all, let alone so excessive as to appear to have been given under the influence of passion or prejudice, as specified under Utah Rule of Civil Procedure 59(a)(5).

Without attempting to rebut any of Pinney's evidence of her pain and suffering (relevant to a general damages award), Carrera focused instead on Pinney's failure to present evidence that would support an award of specific (or "special") damages. Since specific and general damages aim at measuring different types of harm (i.e., economic vs. noneconomic), the fact finder is free to consider different factors in calculating an appropriate amount for each type of award, so there is no reason why the amount of one type of damage award would need to be proportional to the other. Accordingly, the Supreme Court affirmed the Court of Appeals.

Pinney v. Carrera, 469 P.3d 970 (Utah 2020).

Clarification of Statute Regarding DUI Limitation in Motor Vehicle Insurance Policies

The current version of Utah Code § 31A-22-303(7) allows an auto policy to limit liability coverage to the state minimums if the insured motor vehicle is operated "by a person who has consumed any alcohol or any illegal drug or illegal substance," as long as the insured provided a written signed declaration "that the insured motor vehicle would not be so operated."

Earlier this year, the Utah Legislature passed H.B. 159, which effective January 1, 2021 amends and clarifies Utah Code § 31A-22-303(7) in two ways: (1) it clarifies that the reduction in coverage does not apply to someone under the age of 21 who is a relative of the insured and a resident of the insured's household; and (2) it requires guilt for at least one of the specified offenses (not mere consumption, as in the current version) in order to trigger the reduction in coverage.

As amended by H.B. 159, the step-down in liability coverage allowed by Utah Code § 31A-22-303(7) specifically applies to the insured, the insured's spouse, and an individual who has a separate policy as a secondary source of coverage and is either over the age of 21 and resides in the insured's household or is a permissible user of the motor vehicle. The statute does not apply to an individual under the age of 21 who is a relative of the insured and a resident of the insured's household.

If one of the foregoing persons to whom the statute applies operates a covered motor vehicle and is guilty of driving under the influence, impaired driving, or operating a vehicle with a measurable controlled substance in the individual's body, as each offense is described by Utah statutes, Utah Code § 31A-22-303(7) (as amended) allows the policy of motor vehicle coverage to limit coverage to the policy minimum limits specified in Utah Code § 31A-22-304.

Wyoming

Insurer Estopped From Later Denying Coverage After Assuming Control of Defense Without Reservation of Rights

Tenth Circuit: Amber Lompe, a young college student in Casper, Wyoming, was injured when a malfunctioning furnace in her apartment exposed her to carbon monoxide gas. She prevailed in a lawsuit against her landlord, Sunridge Partners, LLC ("Sunridge"), and its property management company, Apartments Management Consultants LLC ("AMC"), and was awarded $3m in compensatory damages and $25.5m in punitive damages, of which $22.5m was allocated against AMC (reduced on appeal to $1.95m, with the punitive damages award against Sunridge vacated). See generally *Lompe v. Sunridge Partners, LLC, 818 F.3d 1041 (10th Cir. 2016)*.

Interstate Fire & Casualty Company ("Interstate") provided primary ($1m/occurrence; $2m/aggregate) and excess ($10m/occurrence; $10m/aggregate) liability insurance coverage to AMC and Sunridge. The primary general liability policy explicitly excluded punitive and exemplary damages, but the excess liability policy did not. Ten days after Lompe filed her complaint against Sunridge and AMC seeking punitive damages Interstate assumed their defense, but did not reserve its right to disclaim coverage for punitive damages until eighteen months later—a month after AMC and Sunridge's motion for summary judgment was denied and eleven days before the jury trial began. In the interceding eighteen months, Lompe clearly and unequivocally offered to settle within the primary policy limits. AMC made three separate demands to settle, but Interstate refused.

Days before judgment was entered in the underlying Lompe action, Interstate sued for relief under 28 U.S.C. § 2201 seeking a declaration that Interstate had no coverage obligation under either the primary policy or the excess policy nor any duty to indemnify either AMC or Sunridge against any punitive damages awards in the Lompe action. The district court held that Interstate was estopped from relying on the primary policy's punitive damages exclusion because Interstate unconditionally assumed AMC's defense and did not reserve its right to disclaim coverage until shortly before trial, and that excess liability coverage was triggered when the damages award exhausted the primary policy limits because the excess policy lacked a specific punitive damages exclusion.

On appeal, the Tenth Circuit rejected Interstate's argument that under Wyoming law equitable estoppel could not apply in this context, following its own controlling precedent in *Cornhusker Cas. Co. v. Skaj, 786 F.3d 842 (10th Cir. 2015)*. The Court quoted Cornhusker's conclusion that insurers "should be estopped from later denying coverage to an ostensible insured to escape liability stemming from litigation over which they deliberately assumed control without a reservation of rights."

In particular, the Court observed that AMC was inherently prejudiced when it relinquished control of the defense to the insurer without a reservation of rights, because even if punitive damages were discussed in correspondence between Interstate and AMC, AMC did not know of Interstate's intent to rely on the punitive damages exclusion and was therefore lulled into a false sense of security. The Court further held that the district court did not err or determining that the unambiguous terms of the excess policy were met when the judgment exhausted the primary policy limits.

Finally, the Court rejected Interstate's attempt to retroactively incorporate the primary policy's punitive damages exclusion via the excess policy's "follows form" provision, in part because said provision explicitly states that the underlying policy's exclusions apply to the excess policy "unless they are inconsistent with provisions of this policy."

Interstate Fire & Cas. Co. v. Apartment Mgmt. Consultants LLC, No. 18-8058, 2020 WL 5049018 (10th Cir. Aug. 27, 2020) (not yet released for publication in permanent law reports).

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CLM

Texas

NOTICE TO BROKER CONSTITUTED SUFFICIENT NOTICE TO INSURER

Fifth Circuit: A professional liability insurer issued two consecutive annual professional liability policies to its insured, providing general and professional liability coverage for claims made against the insured during the respective policy periods. The Policies also included a "Discovery Clause," which provided coverage for claims made against the insured after the end date of the policy period if the insured provided written notice to the insurer during the policy period. The Discovery Clause at "Item 11" provided an email address, physical address, and fax number where notice could be sent.

In January 2017, the insured sold its customer five million pounds of ceramic proppant used in hydraulic fracturing for oil and gas production. In February 2017, during the first Policy's coverage period, the customer notified the insured that the proppant was contaminated and had damaged some of the customer's equipment. On March 1, 2017, the insured notified its insurance agent in writing of the potential claim, who shortly thereafter notified an insurance brokerage that had a Producer Agreement with the insurer granting the broker authority to complete various insurance brokerage tasks on the insurer's behalf. The broker did not forward the notice to the insurer, despite the Producer Agreement's requirement for it to "immediately notify [the insurer] of all claims, suits, and notices."

In April 2017, during the second Policy's coverage period, the customer demanded that the insured pay approximately $1.5m in alleged damages caused by the contaminated proppant. The insured gave the demand letter to its insurance agent, who forwarded it to the broker, who in turn forwarded it to the insurer, who received the demand letter on April 7, 2017. The insurer filed suit against its insured seeking a declaratory judgment that it had no duty to defend or indemnify the insured for damage caused by the contaminated proppant. After cross-motions for summary judgment, the district court granted summary judgment for the insured. The insurer appealed to the Fifth Circuit regarding whether its insured provided sufficient notice to trigger coverage under the first Policy.

Applying Texas law, the Fifth Circuit concluded that although the insured did not provide written notice in accordance with Item 11, the insured was not required to do so because the Policy stated that the insured "may provide written notice" in accordance with Item 11.

The Court then considered whether the insured's notice to the broker through the insured's insurance agent constituted sufficient notice. This required determining whether the broker was properly considered an agent who could receive notice on behalf of the insurer. Under Texas law, there are limited circumstances in which an insurance agent may be deemed to have acted as an agent of both the insured and the insurer, including when an agent has authority to perform various functions on the insurer's behalf. Because the broker was the insurer's agent under the Producer Agreement that expressly required the broker to "immediately notify [the insurer] of all claims, suits, and notices," the broker was deemed to be the insurer's agent for notice purposes.

Accordingly, the Court concluded that the insured's notice to the broker constituted sufficient notice to the insurer. The Court affirmed the district court's grant of summary judgment in favor of the insured.

Evanston Insurance Company v. OPF Enterprises, L.L.C.
___ Fed.Appx. ____ (5th Cir. 2020), 2020 WL 5159861
(decided August 31, 2020, not yet released for publication in permanent law reports).