

WYOMING TORT AND INSURANCE DEFENSE NEWSLETTER

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ERISA Plan Subrogation Rights. In *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004), the fiduciary of a health plan brought suit against the plan participant seeking reimbursement of medical expenses under the Employee Retirement Income Security Act (ERISA) for amounts the plan paid on behalf of the participant, who was injured in an accident, from the proceeds of the participant's settlement with the third-party tortfeasor. The ERISA fiduciary sought to enforce the subrogation clause against the participant through imposition of a constructive trust on settlement funds received from the third-party. The 10th Circuit concluded that a plan fiduciary may maintain an action for equitable relief if the plan is seeking to recover funds that are specifically identifiable, belong in good conscious to the fiduciary, and are within the possession and control of the beneficiary. The 10th Circuit ruled that the claim was one seeking equitable relief and thus could be maintained under the ERISA provisions authorizing "appropriate equitable relief."

Other cases in the 10th Circuit including Wyoming case law further provide that in such circumstances the fiduciary must pay its *pro rata* share of attorney's fees and costs incurred by the beneficiary in securing the third-party recovery.

Recreational Safety Act. In *Dunbar v. Jackson Hole Mountain Resort*, 10th Cir. Docket 03-8057 (121404), the 10th Circuit addressed the Wyoming Recreational

Safety Act. Dunbar was skiing at Jackson Hole Mountain Resort when she fell 12 feet into a snowboard half-pipe. She filed suit alleging negligence on the part of the Resort and the trial court granted summary judgment under the Wyoming Recreational Safety Act. The Recreational Safety Act immunizes providers of recreational activities from suits arising out of risks inherent in the activity. Dunbar appealed claiming the inherent risks of skiing do not include falling into a snowboard half-pipe when following the instructions of the Defendant's employee on how to leave the area.

The 10th Circuit ruled that the intent of the Recreational Safety Act was to limit the duty a provider of recreational sports and activities owes to participants. Recreational activities possess inherent risks of which participants should be aware and for which providers should not be liable. No duty exists for those risks which are "inherent" to a particular activity. The provider of recreational activities does not have to eliminate, alter or control inherent risks. However, the Recreational Safety Act does not bar a cause of action if the injury is caused by some precipitating event that is not an "inherent risk" of the activity.

In this case, Dunbar did not want to engage in activities of the terrain park, specifically the half-pipe. She was trying to leave the terrain park, followed the directions provided her by one of the Defendant's employees, and fell into the

half-pipe. As such, summary judgment should not have been granted.

Underinsured Motorist Benefits. In a recent decision, the New Mexico Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Fennema*, Docket 28626 (32805), found that an insurance company must show that it was prejudiced by the insured's breach of a "consent-to-settle provision" before it can be relieved of its obligation to pay underinsured motorist benefits. The State Farm policy contained a consent-to-settle provision which denied coverage for an insured who, without State Farm's written consent, settles with any person for bodily injury or property damage. The insured did not obtain consent before settling his claim and State Farm later denied coverage. The Court found it would be inconsistent with the purpose of the underinsured motorist statute to deny an insured indemnification when the insured's breach of the consent-to-settle provision had no effect on the insurer's ability to recover from an insolvent tortfeasor through subrogation.

Compensatory Damages Reduced by HMO Write Off. In *Goble v. Frohman*, Florida Supreme Court, Docket SC-03-1245 (42805), the Florida Supreme Court ruled that it is proper to set off against a compensatory damage award in a personal injury action the medical bills that were written off by medical providers under their contracts with a health maintenance organization (HMO). In that case the plaintiff was injured in a motor vehicle accident and medical bills totaled over \$500,000. However, under the plaintiff's HMO program, only \$146,000 were actually paid. The plaintiff sued the tortfeasor and was awarded the full amount of his past medical expenses. The defendant filed a motion to reduce the jury award by the amount of the contractual

discounts. The Florida Supreme Court stated that the contractual discounts met the Florida statutory definition of "collateral sources" which are subject to a set-off.

There are several states where this proposition has been recognized and several other states where the ability to reduce damages by the amount of write offs has been expressly rejected. To date, this issue has never been squarely addressed under Wyoming law.

MCS 90 Endorsements. In *Adams v. Royal Indemnity Company*, 99 F.3d 964 (10th Cir. 1996), Adams was injured in an accident with a semi-tractor and trailer driven by Hofer. After the accident, Adams obtained a default judgment against Hofer of \$1 million dollars, but was unable to collect the judgment. Adams then brought suit against Royal Indemnity which had issued two insurance policies. The first Royal policy insured Geigley. Geigley was the lessee of the trailer involved in the accident and Geigley had loaned the trailer to Hofer (for purposes of this newsletter the second policy is not an issue). The United States District Court found that the Royal insurance policy did not provide coverage for the accident.

The 10th Circuit reversed, initially noting that an MCS 90 Endorsement requires liability coverage regardless of whether each motor vehicle is specifically described in a policy. It is designed to require ICC certified motor carriers to insure against public liability for all motor vehicles that are subject to the financial responsibility requirements of the Motor Carrier Act. The Court noted that an MCS 90 Endorsement requiring liability coverage regardless of whether each vehicle is specifically described in the policy abrogated, and thus rendered

unenforceable, any limitation of the definition of "insured" in the policy "to one who owned, hired or borrowed only specifically described motor vehicles." Thus, the endorsement was required to define an "insured" to include permissive users of an automobile owned, hired or borrowed by the insured and eliminated the limiting clause in the trucker's coverage form that coverage applied only to covered autos described in the policy. In essence, the Court found the MCS 90 Endorsement precluded policies from limiting the definition of "an insured" only to those who owned, hired or borrowed a specifically described vehicle. The driver was thus insured as a permissive user under the policy issued to the lessee, Geigley.

Motor Carrier Logo Liability. In *Ross v. Wall Street Systems*, 400 F.3d 478 (6th Cir. 2005), Conway was an owner-operator and under lease to motor carrier Wall Street. Wall Street procured insurance coverage which was confirmed by an MCS 90 Endorsement filed with the Motor Carrier Safety Administration. Ultimately, Wall Street terminated its lease with Conway by sending the required notices, but Wall Street had not retrieved its placards on Conway's vehicle. The Conway truck was then in an accident which injured plaintiff Ross. Ross sued Wall Street and its insurer claiming "logo liability" from old case law. These old cases basically held that a motor carrier was legally responsible for its lessee's accidents unless the carrier's placards (i.e. logo) are removed from the vehicle. The Court held that logo liability was no longer valid law and the letter sent to Conway by Wall Street was sufficient to end the lease. Wall Street was not required to engage in an exhaustive effort to retrieve the placards.

Premises Liability. In *Merrill v. Jansma*, 86 P.13d 270 (Wyo. 2004), a visitor to a tenant's apartment brought an action against the landlord after falling in a common area and injuring her shoulder. The Court overruled the prior common law that a landlord owed no duty of care to a tenant or her visitors and held that the Wyoming Residential Rental Property Act ("WRRPA") would establish the standard of care in such cases. The WRRPA requires landlords to maintain property in a fit and habitable condition and requires landlords to exercise reasonable care under the circumstances.

Offers of Judgment. In the *Real Estate Pros, P.C. v. Buars*, 90 P.3d 110 (Wyo. 2004), a real estate agent and a property seller were involved in a dispute which included the real estate agent's claim for attorney's fees. The seller and agent entered into a settlement agreement and a judgment was entered. Thereafter, the agent sought attorney's fees which the District Court denied. On appeal, the Supreme Court affirmed the denial of attorney's fees because the offer of judgment that was accepted expressly provided that the "settlement was in full and final satisfaction of all claims," which would necessarily include attorney's fees.

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