

WYOMING TORT AND INSURANCE DEFENSE NEWSLETTER

Brought to you as a service of Buchhammer & Kehl, P.C., Attorneys at Law, 1821 Logan Avenue, P.O. Box 568, Cheyenne, Wyoming 82003-0568. Telephone: (307) 634-2184; Facsimile: (307) 634-2199; E-Mail: obk@wyoming.com; Website: www.bklawfirm.com.

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Stacking Uninsured and Underinsured Motorist Coverage.

In *Mena v. Safeco Insurance Co.*, 412 F.3d 1159 (10th Cir. 2005), the 10th Circuit provided a great summary of Wyoming law pertaining to the stacking of uninsured and underinsured motorist coverage. In the *Mena* case, Mena was involved in a serious automobile accident. Mena settled for the other driver's policy limits. Mena then filed a claim against her insurance company, Safeco. She argued that under her single Safeco policy, since several vehicles were insured, she should be entitled to stack the underinsured motorist coverages on all vehicles. The sole issue before the 10th Circuit was whether Mena could stack the underinsured motorist coverage on each of the vehicles listed in the Safeco policy.

The Court started its analysis with a review of Wyoming law pertaining to stacking of insurance coverage. The first Wyoming case to address stacking was in the context of uninsured motor vehicle coverage in *Ramsour v. Grange Ins. Assoc.*, 541 P.2d 35 (Wyo. 1975). In *Ramsour* the plaintiff was driving a rental car covered by a policy which included uninsured motorist coverage when she collided with an uninsured motor vehicle. Ramsour also had a separate policy with a different insurance company that also contained uninsured motor vehicle coverage. The Wyoming Supreme Court reviewed Wyoming public policy which requires that all automobile insurance policies provide insureds the option of

purchasing uninsured motor vehicle coverage. The Court reasoned that because a premium had been paid for each of the endorsements, coverage had been issued, and because at least one insurance company would avoid providing such coverage if stacking were forbidden, the Court concluded that uninsured motor vehicle coverage could be stacked.

The next case to discuss stacking was *Commercial Union Ins. Co. v. Stamper*, 732 P.2d 534 (Wyo. 1987), where the Court discussed the related question of whether an insured under a single automobile insurance policy covering several vehicles may "stack" uninsured motorist coverage for injuries sustained in a single accident involving one of the covered vehicles. The Court concluded that Stamper's coverage for a single vehicle under a policy "met the statutory requirement as the minimum coverage, and there is no stated statutory or public policy requiring aggregating [policy coverages]." The Court stated that *Ramsour* involved stacking of benefits found in separate insurance policies, whereas the *Stamper* case involved a single insurance policy. The 10th Circuit noted that by reading the *Ramsour* and *Stamper* cases together, the Wyoming Supreme Court treats inter-policy stacking far differently from intra-policy stacking.

The first case pertaining to stacking of underinsured motorist coverage was *Aaron v. State Farm Inc. Co.*, 34 P.3d 929

(Wyo. 2001). In *Aaron*, the plaintiffs had five separate policies of insurance for which they paid separate premiums, including underinsured motorist coverage. Following a serious accident, the Aarons argued that they were entitled to stack the underinsured motorist coverages in each of the five policies. The Wyoming Supreme Court noted that there was no public policy that prohibited the aggregation of coverage by an insured who has purchased multiple insurance policies. The Court established the rule that courts should deny stacking of underinsured motorist coverage contained in separate policies for which separate premiums have been paid only if the policies contain "anti-stacking" provisions, which are clear and unambiguous. There is a presumption that the purchase of separate policies with the payment of separate premiums was intended to purchase "stackable" coverage. The Court in *Aaron* therefore created the rule that where a plaintiff has paid separate premiums for separate policies containing underinsured motorist coverage, such coverage can be stacked unless the policies contain clear and unambiguous stacking provisions.

In the case before the 10th Circuit, *Mena* claimed that her Safeco policy covered three vehicles and that the policy's declaration page broke down the total premium by each vehicle, therefore, resulting in separate coverage for each vehicle and entitling Mena to stack the underinsured motorist coverages. The 10th Circuit ruled that Mena had paid a single premium for a single Safeco policy. Therefore, the language of the policy controls and the policy clearly limited the uninsured motorist coverage to a single limit of \$100,000.

Duty to Defend. *Nautilus Ins. Co. v. Our Camp Inc.*, 10th Circuit Court of Appeals, Docket No. 03-8091 (2005). In *Nautilus*, the issue was whether the insurer had a

duty to defend or indemnify its insured, Our Camp, in a lawsuit brought by a child for alleged molestation that occurred during a function. The district court granted summary judgment in favor of Nautilus. The 10th Circuit Court of Appeals affirmed and noted that the insurance policy provided that "[t]his insurance does not apply to bodily injury, personal injury, or medical payments arising out of: (1) the actual or threatened abuse or molestation by anyone of any person while in the care, custody, or control of any insured." The Court recognized that parties to an insurance contract are free to incorporate whatever terms they desire and a court will not rewrite the terms of the policy. The underlying allegations clearly were based on or arose out of molestation which was clearly and unambiguously excluded from coverage.

Indispensable Parties. In *Grove v. Pfister*, 110 P.3d 275 (Wyo. 2005), the Wyoming Supreme Court addressed the issue of whether a passenger in a motor vehicle could be deemed an indispensable party for purposes of litigation. In *Grove*, a motorist and backseat passenger brought an action against a third party driver. The third party driver brought a motion to join a front seat passenger of the motor vehicle as an indispensable party. The Wyoming Supreme Court ruled as a matter of first impression that a front seat passenger was not an indispensable party and thus was not required to be joined in the action.

Motor Carrier. *Crosby v. Landstar, et al.*, 2005 W.L. 1459484 (D. Del. 2005), involved a suit by Crosby who was an owner/operator under lease to Landstar. Crosby alleged he was injured as a result of an equipment failure of the Landstar trailer. Crosby sued Landstar in federal court alleging jurisdiction based on 49 U.S.C. § 14704 of the Interstate Commerce Commission Termination Act.

That statute addresses motor carrier liability for injuries resulting from a carrier's violations of the Motor Carrier Act. Landstar brought a motion to dismiss alleging there was no independent jurisdiction under the Interstate Commerce Commission Termination Act. The provision pertaining to carrier liability was not a blanket extension of the Carmack Amendment and, therefore, federal domain over personal injury claims. The basis of Crosby's claims was not a violation of the Motor Carrier Act, but sounded in simple negligence. Because Crosby was a citizen of Delaware and Landstar was a Delaware corporation, there was no diversity of citizenship and, therefore, the federal court lacked jurisdiction.

Insurer's Duty to Begin Settlement Negotiations. In another recent 10th Circuit case, *Roberts v. Printup*, 422 F.3d 1211 (10th Cir. 2005), the Court of Appeals, based on Kansas law, held that an insurance carrier's duty to its insured to initiate settlement negotiations is triggered when the claimant contacts the insurer to inquire about a possible bodily injury claim.

Here Roberts was a passenger in Printup's vehicle and was injured when Printup struck a pole. Roberts contacted the carrier to inquire whether she was entitled to file a bodily injury claim and was told by the insurer she was not. Shortly before the statute of limitations expired, Roberts made a demand on the insurer for policy limits and asked for a reply within 10 days. The insurer did not respond and Roberts filed a lawsuit against Printup who settled with Roberts for an amount in excess of policy limits along with an assignment of rights against the insurer for breach of contract.

The 10th Circuit noted that Kansas law imposes a duty upon insurers to make reasonable efforts to negotiate a settle-

ment of a claim against the insured. When Roberts called to discuss whether she could bring a bodily injury claim, that triggered the insurer's duty to initiate settlement negotiations. The Court also noted that Kansas had adopted the Unfair Claims Settlement Practices Model Regulation, § 6(a), which states that an insurer must acknowledge a notification of a claim within 10 days. Here, the insurer failed to do so.

Independent Contractor Liability. In *Franks v. Independent Production Company, et al.*, 96 P.3d 484 (Wyo. 2004), the family of a deceased worker brought a wrongful death action against the operator of a coalbed methane well site, a company supervising the site, a partner in that company, and others seeking recovery for the fatal injuries sustained when well casings fell on the deceased worker. The Court went through an excellent discussion of the law of liability of owners and others for the conduct of independent contractors. The district court granted summary judgment in favor of the operator, the company, and the partner.

The Wyoming Supreme Court stated that an independent contractor is "one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work." Generally, the employer of an independent contractor is not liable for injuries caused to another by the act or omission of the independent contractor or his servants. Two limited exceptions to the non-liability rule have been established, including: (1) the owner of the workplace exercises control and a pervasive role over the independent contractor's work, or (2) the owner assumes affirmative duties with regard to safety. However, an owner may retain a

broad general power of supervision and control as to the results of the work of the independent contractor, including matters such as the right to inspect, the right to stop work, the right to make suggestions, and the right to alter or change the scope of the work, all without changing the relationship of owner and independent contractor. In order to determine whether the nature and extent of control is sufficient to impose liability on the owner, both the actual contract provisions between the owner and independent contractor must be considered, as well as the actual exercise of control by the owner.

Here, the Court concluded there was nothing to indicate that the relationship had changed from owner and independent contractor to that of a principal and agent, or employer and employee and, therefore, there was no liability on the part of the operator of the well site, the company supervising the site, or a partner in that company.

FIRM NEWS - Buchhammer & Kehl, P.C. is pleased to announce that Lisa M. Barrett has joined the firm as an associate. Ms. Barrett graduated from the University of Wyoming College of Law in 1995 and has been practicing law since 1996. Buchhammer and Kehl, P.C., are members of the Defense Research Institute (DRI); Trucking Industry Defense Association (TIDA); Association of Defense Trial Attorneys, (ADTA); Transportation Lawyers Association (TLA); Association of Transportation Law, Logistics and Policy; and the Defense Lawyers Association of Wyoming (DLAW).

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