WYOMING TORT AND INSURANCE DEFENSE NEWSLETTER

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2007 ISSUE III.

Insurance Policy Reformation. In *W.N. McMurry Construction Co., v. Community First Insurance*, Wyoming Supreme Court, Docket No. 06-271 (June 15, 2007), the State of Wyoming hired a construction company to build two buildings. Under the construction contract, the contractor was required to obtain insurance coverage for 100% of the contract amount. The construction cost of the buildings exceeded $5,000,000. The insurance agent for the contractor obtained insurance from Ohio Casualty Insurance Company, but employees of the construction company inadvertently related to Ohio Casualty that the cost of the buildings was less than $1,000,000 and a policy was issued by Ohio Casualty in that amount. The policy was delivered to the contractor showing coverage of approximately $970,000.

During construction, one of the buildings collapsed at a cost of approximately $950,000.00. Under the Ohio Casualty policy, the amount paid to the contractor was $175,000.00. The contractor then filed suit against his insurance agent and Ohio Casualty alleging breach of contract, negligence, imputed liability, and reformation of the insurance policy. The insurance agent and insurer filed motions for summary judgment raising the issue that the contractor's claims were barred based on its failure to read the policy. The trial court granted summary judgment and the Wyoming Supreme Court ultimately reversed.

The Wyoming Supreme Court stated that the issue as whether the equitable doctrine of reformation survives in the face of a clear violation of the rule requiring an insured to read the policy. The Court recognized the longstanding Wyoming rule that an insured has a duty to read his or her insurance policy. However, the construction company then argued that none of the cases relating to the failure to read arose in the context of a claim for contract reformation, "which is an equitable doctrine."

According to the Wyoming Supreme Court, reformation exists when a mistake occurred in the drafting of an instrument and that the mistake was reciprocal and common to both parties. The Court recognized that authority from around the country is split on whether reformation is available where an insured has failed to read a policy. The majority rule is that the insured is allowed to rely upon what was believed to be the intention of the parties, the intention of the parties was expressed in the written contract, and the insured is not required to examine the policy. The minority view is that the insured must act diligently in examining the policy and to notify the insurer if the contract is not satisfactory. The Wyoming Supreme Court adopted the majority view. Therefore, the failure to read a policy bars legal claims for relief by the insured, but does not bar an equitable claim for contract reformation.

Prior to this case, the Wyoming Supreme Court had always held that where a policy is clear and unambiguous, a claim based on the insured's "reasonable expectations" could not be maintained. It would now appear that by the insured styling the claim as one for "reformation" as opposed to "reasonable expectations," the insured's claims will be allowed to go forward. This obviously raises some potential for numerous claims based on policies that insureds have not read and that do not comport with their "understanding."

Low Speed Impacts. A significant amount of personal injury actions are filed by plaintiff's counsel arising out of relatively low speed rear-end accidents. A study was undertaken in 1995 by the Quebec Task Force entitled "Redefining Whiplash and its Management" with the full text of the article appearing in the April 15, 1995 issue of Spine Magazine.

The Quebec Task Force had several objectives including: (1) a tool to assist medical practitioners in diagnosing, classifying and treating patients with whiplash associated disorders (WAD); and (2) to provide guidance in the areas of rehabilitation and treatment of claimants with WAD.

The Task Force concluded that in general, whiplash injuries resulted in temporary discomfort, are usually self-limited, and have a favorable prognosis. Further, the findings were that the pain resulting from whiplash injuries is not harmful.

Specific findings from the Quebec Task Force Report concluded that more than 1/5 (22.1%) of people suffering whiplash injuries recover within one week of the collision. 50% of the claimants with whiplash injuries recovered within one month of the collision and that six months and one year after the collision, whiplash patients had recovered 87% and 97% respectively.

The report also indicated that being in a severe collision is associated with a more significant injury and a longer period of recovery.

There is certainly a common sense, as well as medically supported, relationship between speed of impact and injury potential. Low speed collisions causing little or no vehicle damage cause little or no occupant injury.

Of the commonly cited studies, one of the most widely used is that of volunteer subjects who were subject to vehicular rear-end collisions. The results indicated a threshold impact speed (the velocity of change of the vehicle being struck as opposed to the speed of the vehicle causing the impact) of 4 to 5 m.p.h. was necessary to produce injury. At a speed of 5 m.p.h. or more, the likelihood of neck and shoulder strain may increase for the average occupant; however, any injury to the lower back is unlikely as a result of a low velocity rear-end collision. Other studies have found the potential for injury in impacts of less than 8 m.p.h. is unlikely.

Clearly, in claims involving low speed rear-end impacts, if it appears plaintiff's counsel is seeking significant damages, it may be advisable to consider retaining a bio-mechanical expert or bio-mechanical physician. The findings of the Quebec Task Force, and other studies, may be used to impeach the plaintiff's medical experts.

Automobile Accidents and Recovery for "Diminished Value." Most insurance policies provide that the insurer's liability is limited to the lower of the actual cash value of the vehicle or the cost of repair. Occasionally the question arises whether an insured is entitled to recover for "diminished value" of a vehicle following an accident. When a vehicle is in an accident which results in significant damage, in most states the vehicle owner is required to report this damage when he trades in the car or sells it in a private sale. If there has been significant damage, this may result in a lower trade in value or a lower selling price. As such, some insureds have made claims for diminished value. This type of claim may also arise in the context of other property losses (i.e, building and contents) following a fire or flood.

In the first party context, most courts have ruled in favor of insurance companies although there are some exceptions. Cases which have ruled in favor of insurance companies include: *Davis v. Farmers Insurance*, 140 N.M. 249, 142 P.3d 17 (N.M.App.,2006); *O'Brien v. Progressive Insurance Co.*, 2000 WL 33113833, (Del.Super. 2001); *Carlton v. Trinity Universal Insurance Co.*, 32 S.W.3rd 454 (Tex. App. - Houston [14 Dist.], 2000); *Campbell v. Markel American Insurance Co.*, 805 So.2d 204 (La. 2002); *Camden v. State Farm Insurance Co.*, 66 S.W.3d 78 (Mo.App. E.D.,2001); *Siegle v. Progressive Insurance Co.*, 788 So.2d 355 (Fla. 2001). These cases hold that, based on the policy language, the insurer's obligation is limited to repair or replacement. The concept of repair means the "the best repair a shop can do" or a "full, adequate, and complete" repair of the vehicle. The plain language of the policy only requires the insurer to pay for repair or replacement and does not require payment for diminished value.

However other courts have concluded an insurer must pay for diminished value, i.e., *State Farm Insurance Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (Ga. 2001). Courts which have ruled in favor of insureds base their decision on the premise that the insurer promises to pay for the "loss" and loss includes both utility and value. A loss in value is an economic reality for the insured. It seems clear that allowing payment for "loss of value" or "diminished value" can lead to a windfall recovery by the insured.

This issue has never been addressed in Wyoming. However Wyoming case law makes clear that an insurer's obligations to its policy holder are limited to those duties set forth in the insurance policy. Wyoming Insurance Department Regulations, Chapter 30, Section 4, provides that insurers adjusting personal property losses, whether first or third party claims, shall adjust the loss by one of three options: (1) pay for the loss in its entirety in money, based on an appraisal of the damage sustained to the vehicle; (2) repair the damaged property; or (3) replacement of the damaged property.

In third party cases the situation may be different. If an insured damages a third party's vehicle, the law in most states is that the tortfeasor is responsible for all damage and most states recognize diminished value as an element of damage. For example, the Use Note for Wyoming Pattern Jury Instruction 5.01 provides that where repairs do not restore what was lost, damages include not only the cost of repair but diminished value as well. Proof of diminished value would likely require some form of expert testimony by a qualified appraiser or valuation expert.

Snow and Ice. In the upcoming months, many of our clients will receive claims based upon slip and fall accidents involving the accumulation of snow and ice.

Until recently, the law was that an owner or occupier of land is not liable for injuries resulting from a slip and fall on a natural accumulation of ice and snow. Likewise, there is no liability when the dangers surrounding such natural accumulations are obvious or as well known to the claimant as to the insured. Liability attaches only if the owner or occupier created an unnatural accumulation that is "substantially different in volume or course than would naturally occur."

In *Pinnacle Bank v. Villa,* 100 P.3d 1287 (Wyo. 2004), the Court set forth new law pertaining to slip and falls on snow and ice. Villa slipped and fell on ice on Pinnacle's sidewalk. There was a city ordinance requiring landowners to maintain sidewalks - i.e., to remove snow and ice.

In *Pinnacle*, the Court noted that for many years the question existed whether a municipal ordinance requiring land owners to remove snow and ice could establish a standard of care. In *Pinnacle,* the Court found that such an ordinance did create a standard of care. This case changed the law to be applied to slip and falls on snow and ice. The existence of such an ordinance creates a duty to keep sidewalks (and likely parking lots) clear of snow and ice. The Court did state, however, that the defense of an "open and obvious" danger would still apply.

In Wyoming, most cities and towns have ordinances on snow and ice removal and *Pinnacle* will change the way such cases are evaluated. The prior law will likely still apply in rural areas since most counties and the state itself do not have snow and ice removal laws.

Loss of Consortium. Loss of consortium claims are "derivative claims" and are therefore subject to "per person" as opposed to "per occurrence" policy limits. *National Farmers Union v. Zuber*, 824 F. Supp. 1017 (D. Wyo. 1993); *Worman v. Carver*, 44 P.3rd 82 (Wyo. 2002). Further, damages for loss of consortium are not recoverable where the claimant's injuries are only monetary (i.e., property damage or loss). *Verschoor v. Mountain West*, 907 P.2d 1293 (Wyo. 1995).

Workers' Compensation Liens. If an injured party was covered by workers' compensation, the Wyoming Workers' Compensation Division ("Division") has a "super lien" in the event the injured employee recovers a settlement from a third party. The Division has a statutory lien on the proceeds of any such settlement or judgment up to the total amount of monies paid to the injured employee. W.S. §27-14-105.

Before offering a settlement to an injured employee, the insurer must notify the Division of the proposed settlement and give the Division 15 days to object. If the Division's lien is not protected, the Division can assert a claim against the third party insurer for all payments made to the employee. This presents a real risk of an insurer having to pay the same amount twice.

New MCS 90 Case. In *Wells v, Gulf Insurance Co.*, 484 F.3rd 313 (5th Cir. 2007), the Court held that where an excess insurance carrier's coverage is not required to satisfy a carrier's minimum financial responsibility, the MSC 90 endorsement does not require the excess insurer to drop below its liability floor simply because it is the first solvent insurer.

Firm News. Buchhammer & Kehl, P.C., is pleased to announce that J. James Learned has joined the firm as an associate.

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