INSURANCE

Automobiles

Ace Fire Underwriters Ins. Co. v. Romero, 831 F.3d 1285 (10th Cir. 2016) (Moritz)

A commercial automobile insurer filed an action against the estate of a motorist who had died in an accident, seeking a declaratory judgment that its liability was limited to $1 million per accident in a settlement of an underlying wrongful death lawsuit against its insured, who owned and operated a tractor-trailer. After granting summary judgment to the insurer and holding that the liability was $1 million per accident, the district court granted the estate's motion to reconsider. It held that the policy was ambiguous and that the insurer's liability was actually $2 million. It reasoned that the $1 million limit was for each "covered auto" involved in the accident and that there were actually two "covered autos" involved in the accident.

The Tenth Circuit reversed and remanded. Applying a decision of the New Mexico Supreme Court, it held that the policy unambiguously limited the insurer's liability to $1 million per accident regardless of the number of covered autos involved.

Universal Underwriters Ins. Co. v. Winton, 818 F.3d 1103 (10th Cir. 2016) (Hartz)

This action arose out of an automobile accident that killed five people. The driver at fault had purchased a car two days before the accident from Marc Heitz Auto Valley automobile dealership (Heitz) and had been delivered to Heitz by another dealership earlier on the day of the purchase. The driver's estate settled personal injury cases for $3,000,000 and $5,000,000.

The insurer on the driver's personal automobile-liability policy contributed its policy limit of $50,000. The judgment limited execution to other applicable insurance policies.

Three insurance carriers (for the Heitz or Moore dealerships)—Universal Underwriters Insurance Company (Universal), Phoenix Insurance Company (Phoenix), and National Union Fire Insurance Company of Pittsburgh, PA (National), then filed declaratory judgment actions seeking a ruling that their policies did not cover the driver's liability for the accident.

The district court granted summary judgment to the insurers, and the Tenth Circuit affirmed. The Tenth Circuit held that (1) Universal was not liable under its garage coverage because it indemnifies a Heitz customer only to the extent that the customer's personal liability policy does not provide the statutory mandatory coverage of $50,000 (which the driver's policy provided), (2) the Universal umbrella policy does not cover customer liability, and (3) Phoenix and National are not liable under their policies because the Moore dealership did not own the car at the time of the accident.

Coinsurance

Boardwalk Apartments, L.C. v. State Auto Property and Cas. Ins. Co., 816 F.3d 1284, (10th Cir. 2016) (Bacharach)

An insured apartment complex sued its insurer after one of the buildings in the complex was destroyed in a fire. The complex contended that the insurer had underpaid on the policy. The insurer defended the action on the ground that the complex was underinsured in light of the policy's co-insurance provision. The coinsurance provision required the complex to purchase enough insurance to fully cover the value of the apartment complex. If the value of the apartment complex exceeded the policy limit ($7.4 million), the complex was deemed underinsured.

Before trial, the district court ruled that (a) under the coinsurance provision, the value of the complex did not include the cost of complying with laws and ordinances regulating the construction and repair of buildings; (b) the parties could not refer to the coinsurance

provision or the possibility that Boardwalk was underinsured.

At trial, the jury valued the Boardwalk complex below the policy limit. Based on this valuation, the district court concluded that the complex was not underinsured under the coinsurance provision. In addition to valuing the apartment complex, the jury found that State Auto had underpaid for the loss and awarded damages to the complex.

The Tenth Circuit reversed and remanded for a new trial. It held that (1) the trial court abused its discretion by excluding reference to the coinsurance provision and (2) the trial court had incorrectly construed the coinsurance provision.

Judge Bacharach explained, "The district court erred in its summary judgment order by holding that the "value" of the apartment complex under the coinsurance provision means replacement cost without law-and-ordinance costs. Based on this error, the district court instructed the jury to determine the replacement cost of the complex without law-and-ordinance costs. Instead, the court should have instructed the jury to include law-and-ordinance costs in the apartment complex's replacement cost. Had the jury included these costs, it might have found that the complex's replacement cost exceeded the policy limit of $7.4 million, triggering the coinsurance provision and reducing the amount owed by State Auto." 816 F.3d at 1298.

Commercial Policies

Century Surety Company v. Shayona Investment, LLC, 840 F.3d 1175 (10th Cir. 2016) (Kelly)

An insurer filed a declaratory judgment action against an insured, alleging that the insureds had submitted fraudulent claims on a commercial lines policy that covered commercial property and business income. The jury found in favor of the insurer, awarding it both the amount the company paid under the policy and the sums the insurer spent investigating the claims.

The Tenth Circuit affirmed. It held that the insurer's claim for declaratory judgment was subject to the preponderance of evidence standard, rather than the clear and convincing evidentiary standard for fraud claims that typically governs fraud claims.

Judge Kelly, explained, "Though the clear and convincing standard is typically used in civil cases involving allegations or fraud or some other quasi-criminal wrongdoing, this is because the interests at stake involve more than the mere loss of money. But in a breach-of-contract insurance action, what is at stake is precisely the mere loss of money, and so Oklahoma courts have long used the preponderance standard in such actions. The same is true, as Shayona admits, if the insurer raises breach of a fraud provision as an affirmative

defense. We simply fail to see why a different standard would apply to a party asserting the same argument as a claim instead of as a defense." 841 F.3d at 1177 (citations omitted).

Paros Properties LLC v. Colorado Casualty Ins. Co., 835 F.3d 1264 (10th Cir. 2016) (Hartz)

After a mudslide caused by an avalanche destroyed a commercial building, an insurer denied the building owner's claim based on a defense that mudslides were excluded from policy coverage. The Owner then filed a state-court suit seeking payment under the Policy and damages for bad-faith breach of the insurance contract. It argued that the mudslide caused the building to explode, bringing the incident within the scope of an explosion exception to the Policy's mudslide exclusion.

The insurer then removed the action to federal court, which granted summary judgment to the Insurer. On appeal the Owner argued (1) that the district court lacked subject-matter jurisdiction because the Insurer's removal from state court was untimely and (2) that the district court erred on the merits in holding that there was no coverage.

The Tenth Circuit held that the notice of removal was too late. However, because the district court correctly ruled on the merits and the jurisdictional requirements were satisfied at that time of the ruling, the court affirmed the judgment below rather than burden the state court and the parties by requiring relitigation.

Judge Hartz explained that "The [o]wner does not, and could not, make any argument that the avalanche was not a mudslide. And under the Policy it makes no difference whether any water causing the avalanche had been diverted by manmade features; mudslide damage is excluded whether the mudslide 'is caused by an act of nature or is otherwise caused.'" 835 F.3d at 1274-75. In addition, "[w]e disagree that demolition by an external cascade of water, mud, and debris is an explosion under the Policy." *Id.* at 1275. Therefore, the explosion exception to the mudslide exclusion did not apply.

Lexington Ins. Co. v. Precision Drilling Company, L.P., 830 F.3d 1219 (10th Cir. 2016) (Gorsuch)

An insurer filed an action seeking a declaratory judgment that it had no obligation under well-site manager's commercial general liability policy to indemnify oil rig owner for amounts it paid to settle oil rig worker's personal injury claim against it. The district court granted summary judgment to the insurer, *see* 2014 WL 11515822, and the owner appealed.

The Tenth Circuit reversed and remanded. The court held that:

1. A Wyoming anti-indemnity statute, " WYO. STAT. ANN. § 30–1–131(a)(iii)(B), did not bar the owner's claim. Judge Gorsuch explained, "[T]he state's Anti–Indemnity Statute

declares void as a matter of public policy '[a]ll agreements ... pertaining to any well for oil, gas or water ... to the extent [they] ... purport[ ] to relieve the indemnitee from loss or liability for his own negligence.' WYO. STAT. ANN. § 30–1–131(a)(iii)(B). . . . The trouble for Lexington is the statute doesn't stop there. In fact, the very next sentence adds that '[t]his provision shall not affect the validity of any insurance contract.' WYO. STAT. Ann. § 30–1–131(a)(iii)(B) (emphasis added). So while indemnity agreements are generally impermissible, insurance contracts supply an exception to the rule." 830 F.3d 1220.

2. The absurdity doctrine did not support a different reading of the Wyoming statute.

Judge Bacharach filed a concurrence in which Judge McHugh joined. "Though I agree that we should reject Lexington's argument based on the absurdity doctrine, I would approach the issue differently. In my view, Lexington waived this argument. And even if this argument had been preserved, I would reject it without defining the outer contours of the absurdity doctrine in Wyoming." 830 F.3d at 1224.

Christy v. Travelers Indem. Co. of America, 810 F.3d 1220 (10th Cir. 2016) (McHugh)

The plaintiff insured purchased a commercial general-liability insurance policy from Travelers in the name of his sole proprietorship, K & D Oilfield Supply (K & D). Subsequently, Mr. Christy registered his business as a corporation under the name K & D Oilfield Supply, Inc. (K & D, Inc.). Mr. Christy renewed his CGL Policy annually, but did not notify Travelers that he had incorporated his business. After Mr. Christy formed K & D, Inc., he was struck by an uninsured motorist while riding his bicycle, and he made a claim under the CGL Policy.

Travelers denied coverage based on Mr. Christy's failure to inform it of the change in the business form, and the plaintiff filed an action for breach of contract and bad faith.

The district court granted summary judgment to the insurer, and the Tenth Circuit affirmed in part and reversed in part.

The court held that it could not determine as a matter of law that the plaintiff insured had an affirmative duty to inform Travelers of the formation of K & D, Inc. In addition, the plaintiff raised genuine issues of fact that precluded a determination on summary judgment that the failure to inform Travelers of the incorporation was a material misrepresentation. However, the insurer was still entitled to summary judgment on the bad faith claim.

Rescission

PHL Variable Ins. Co. v. Sheldon Hathaway Family Ins. Trust, ex rel. Hathaway, 819 F.3d 1283(10th Cir. 2016)

A life insurer filed an action against an insured and a policy owner to rescind a policy based on misrepresentations in application connected with a stranger-originated life insurance scheme. A premium finance company intervened as a defendant. The district court

entered summary judgment in favor of the insurer and allowed it to keep the premium payments.

The owner and the premium finance company appealed, and the Tenth Circuit affirmed. The court held that (1) the insurer had not waived the right to rescind the policy; (2) the insured should have known that application contained misstatement about his net worth; and (3) insurer reasonably relied on the insured's misstatement about his net worth; and (4) as a matter of first impression, the district court had authority to allow life insurer to retain the premiums.

Title Insurance

BV Jordanelle, LLC v. Old Republic National Title Ins. Co., 830 F.3d 1195 (10th Cir. 2016) (Bacharach)

The plaintiff insured filed an action against an insurer for breach of a title insurance policy. The insured had obtained a mortgage on real property as security for a loan. After the borrower defaulted both the insured and a municipality foreclosed on the property. A state court ruled that the municipality's interests prevailed, and the municipality obtained title to the property.

In this federal court action, the insured alleged that the title insurer had breached the title-insurance policy by (a) refusing to compensate the insured for its loss of the property and (b) failing to defend its insured in the state-court litigation. The district court granted judgment on the pleadings to the title insurer.

The Tenth Circuit affirmed. It held that:

1. The policy did not cover (a) municipal assessments levied after the policy was issued, (b) losses caused by enforcement of a subdivision ordinance–because the insured had not been notified before the policy was issued of the intention to enforce the ordinance, (c) losses caused by a taking that occurred before the policy was issued, and (d) losses caused by the lack of priority of a lien.

2. The insurer had not properly raised the argument that the policy covered losses caused by physical improvements made by the municipality;

3. On appeal, the insurer had not properly raised an argument that the policy covered losses caused by unmarketable title in assessment;

4. On appeal, the insurer had not properly raised an argument that the insurer had failed to defend the insured in the state court litigation.

Fidelity National Title Ins. Co. v. Woody Creek Ventures, LLC, 830 F.3d 1209 (10th Cir. 2016) (Moritz)

An insurer filed an action against an insured landowner, seeking a judgment declaring that insured was not entitled to coverage for alleged losses under title insurance policy arising from lack of permanent access to a remote parcel of land. The insured filed a counterclaim for declaratory judgment on the existence of coverage, breach of contract, and bad faith breach of an insurance contract.

The district court granted summary judgment to the insurer. It held that a 30-year right-of-way fell within "the plain, unambiguous meaning of 'a right of access'" in the policy and that whether "Fidelity may be obligated to pay money or cure a lack of access in the future if Woody Creek ever loses that access. . . is a question for another day." The court further concluded that the possibility of future litigation regarding the right of access did not render title unmarketable. Finally, the court rejected as a matter of law the bad-faith-denial-of-coverage claim because there had been no denial of coverage.

The Tenth Circuit affirmed. The court held that (1) the policy did not insure a permanent right of access, (2) the right-of-way cured the lack of access to the parcel, and (3) the lack of permanent access did not render the title unmarketable.

Home Loan Inv. Co. v. St. Paul Mercury Ins. Co., 827 F.3d 1256 (10th Cir. 2016) (McHugh)

After an insurer denied an investment company's claim on the grounds that it had never been a mortgagee in possession of the property at issue, the investment company filed a suit in Colorado state court alleging breach of contract and violations Colo. Rev. Code §§ 10-3-1115 and 10-3-1116 for unreasonable delay or denial of insurance benefits.

The district court denied the insurer's summary judgment motions and returned a verdict in favor of the insured investment company.

The Tenth Circuit affirmed. It held that:

(1) Under Colorado law, denial of a fairly debatable claim may nonetheless be unreasonable; (2) liability under COLO. REV. STAT. § 10-3-1115 and 10-3-1116 is not limited to claims handling; (3) the district court properly calculated Home Loan's damages by awarding it the amount of the insurance benefit owed on the breach of contract claim and an additional two times that benefit under § 10–3–1116.

The court also ruled that (4) St. Paul neither preserved a sufficiency-of-the-evidence challenge before the district court nor argued sufficiency of the evidence to the appellate

court.

Judge Bacharach dissented. In his view, St. Paul's handling of the claim was reasonable as a matter of law, and it was therefore entitled to judgment in its favor.

Uninsured/underinsured motorist coverage

Peden v. State Farm Mutual Automobile Ins. Co., 841 F.3d 887 (10th Cir. 2016) (Bacharach)

After she suffered serious injuries in a car accident while riding in a car that her friend was driving, the plaintiff filed a bad faith action against her insurer under Colorado law, alleging that it had unreasonably delayed in paying her uninsured motorist benefits. The district court granted summary judgment to the insurer.

The Tenth Circuit reversed and remanded, holding that there were disputed factual issues as to the adequacy of the insurer's investigation. Judge Bacharach explained, "State Farm eventually paid the policy limits on Ms. Peden's underinsured-motorist coverage. But should State Farm have paid these benefits earlier? That depends in part on whether State Farm should have waited to reach a decision until after it had interviewed Ms. Peden [and other witnesses]. Viewing the evidence favorably to Ms. Peden, a rational trier of fact could find that State Farm acted unreasonably . . . ." 841 F.3d at 892.

Edens v. The Netherlands Ins. Co., 834 F.3d 1116 (10th Cir. 2016) (Phillips)

After their son was killed in a motorcycle accident, a father, mother, and a company of which the father was the chief executive officer, filed an action against the company's insurer after the insurer denied underinsured/uninsured motorist (UIM/UM) coverage. The plaintiffs asserted claims for breach of contract and bad faith. The district court granted summary judgment to the insurer, and the Tenth Circuit affirmed.

The court held that the (1) the son was unambiguously not an "insured" under the UIM/UM coverage provisions; (2) because there was no coverage, the insurer was entitled to judgment on the bad faith claim; and (3) the district court did not abuse its discretion in deeming the motions in limine moot after granting summary judgment.

Judge Phillips explained, "Where an executive officer or his family member is struck by an executive-officer-owned auto or a family-member-owned auto, the Policy leaves it to those persons to pay for their own UM coverage—if they want it—under their personal insurance." 834 F.3d at 1128.

Etherton v. Owners Ins. Co., 829 F.3d 1209 (10th Cir. 2016) (Matheson)

After his insurer refused to pay the policy limits on an uninsured motorist claim, the plaintiff insured filed a Colorado state law diversity action alleging breach of contract and unreasonable conduct in handling the claim. Although it initially excluded the plaintiff insured's expert, the district court granted his motion to reconsider and allowed the plaintiff's expert to testify.

The jury returned a verdict for the plaintiff insured, finding that his noneconomic losses were $375,000, his economic losses were $857,000, and his physical impairment and disfigurement damages were $150,000. The district court initially entered judgment for a total of $1,500,000—$750,000 in breach of contract damages for the remainder of his policy limit, and an additional $750,000 for the unreasonable delay or denial of the claim under Colo. Rev. Stat. § 10-3-1116.

The court then granted the insured's motion to amend the judgment, awarding an additional $750,000 on the unreasonable delay or denial claim pursuant to COLO. REV. STAT. § 10-3-1116(1).

The Tenth Circuit affirmed. It held that:

1. The district court did not abuse its discretion in admitting the testimony of the plaintiff's expert. "[The expert's] qualifications are not contested. His opinions about Mr. Etherton's injuries did not rely solely on generalized knowledge but also on his specialized experience treating musculoskeletal injuries and studying spinal injuries caused by motor collisions. Moreover, [the expert] testified the collision caused Mr. Etherton's injuries—a central issue. His testimony "fit" the case." 829 F.3d at 1223.

2. The district court correctly ruled that COLO. REV. STAT. § 10-3-1115 applies to first-party claims for benefits, including those where the amount owed is not yet determined. And sufficient evidence was presented to allow a reasonable jury to find in Mr. Etherton's favor on his unreasonable delay or denial claim.

3. The district court correctly interpreted COLO. REV. STAT.§ 10-3-1116 as permitting damages for a § 10-3-1115 claim in the amount of two times the plaintiff's covered benefit, in addition to any damages available to him under his breach of contract claim. We also conclude the court did not abuse its discretion by granting Mr. Etherton's motion to amend the judgment.

Judge Hartz filed a concurrence in which Judge Gorsuch joined. "[A]lthough it is a close case, that the jury could have found Owners' position on causation unreasonable." 829 F.3d at 1232.

Adamscheck v. American Family Mut. Ins. Co., 818 F.3d 576 (10th Cir. 2016) (McHugh)

An insured brought state court action against his automobile insurer to recover

underinsured motorist (UIM) benefits for injuries caused by rear-end collision while working as deputy sheriff. The insured also sought damages for the unreasonable handling of the claim. The jury returned a verdict in favor of the insured.

The Tenth Circuit affirmed in part, reversed in part, and remanded. The court held that

1. The district court erred in failing to perform its gatekeeping function under FED. R. EVID. 702 before excluding the insurer's expert. Judge McHugh explained, "In excluding Dr. Broker's testimony, the district court did not ask for or review his qualifications or proposed opinions. Rather, without the benefit of a motion to exclude Dr. Broker's testimony or a Daubert hearing, the district court made an off-the-cuff decision based solely on an equivocal, one-sentence description of Dr. Broker's testimony provided by the party opposing its admission. And the district court failed to make any findings of fact or to otherwise explain why it excluded Dr. Broker's testimony, stating only that all rear-end accidents are different." 818 F.3d at 587.

2 The district court properly held that the insured's receipt of workers' compensation benefits did not entitle insurer to set off those benefits against its liability for benefits.

The court vacated the jury verdict and directed the court to conduct a *Daubert* hearing and a new trial.