<u>March 2014 Issue</u>

RECENT DEVELOPMENTS IN ALABAMA AND THE ELEVENTH CIRCUIT
Selected Insurance Cases and Other Matters of Interest

This Alabama Update is highlighted by cases that address whether the estate of a deceased insured can maintain claims for negligent, wanton, or bad faith failure to settle a liability claim in *MetLife Auto. and Home Ins. Co. v. Reid*, 2013 WL 6844109 (N.D. Ala. Dec. 23, 2013) and whether an insurer in a federal declaratory judgment action is bound by the findings of fact made by the state trial court in the underlying liability case in *Nationwide Mut. Ins. Co. v. Sharif,* --- Fed. Appx. ---- 2014 WL 407386 (11th Cir. Feb. 4, 2014).

As always, we welcome your comments and hope that you find this edition useful.

<u>State Law Update</u>

Post-Judgment Motions
Alfa Mut. Ins. Co. v. Culverhouse, --- So.3d ----, 2014 WL 590268 (Ala. Feb. 14, 2014).

Facts: The insured filed a claim under a homeownerøs insurance policy after his house caught on fire on two separate occasions, the last of which destroyed the dwelling and swimming pool. The insurer investigated the cause of the fire and the specific basis for the insuredøs personal property claims. The insurer conducted two examinations under oath of the insured in which the insured admitted to misrepresenting the extent of his personal property losses. The insurer then attempted to settle the claim for the amount of the insuredøs dwelling repair of the structure estimate and $100,000 for õall other claims.ö The insured rejected the offer and filed a complaint against the insurer, asserting claims of fraud, bad faith, breach of contract, and negligent/wanton claims handling. The insurer filed a counterclaim, alleging that the policy was void due to the insuredøs misrepresentations regarding his personal property claim as admitted in the examinations under oath.

The insurer moved for summary judgment on all counts, and the insured moved to dismiss the insurerøs counterclaim. The trial court granted the insurerøs motion for summary judgment on all counts and dismissed the insurerø counterclaim as moot. The insured filed a motion to alter, amend, or vacate the order granting the insurerøs motion for summary judgment, raising new arguments for the first time in the motion. The trial court granted the insuredøs motion in part and amended its original order to deny the insurerøs motion for summary judgment on the breach-of-contract claim. Following Alabama Rule of Appellate Procedure 5, the insurer moved for an immediate judgment and appeal.

Issue: ***Whether the trial court, acting in its discretion, properly granted the insured's post-judgment motion to alter, amend, or vacate its prior order granting the insurer's motion for summary judgment, even though the insured raised a new***

argument in the post-judgment motion.

Holding: Yes. The Alabama Supreme Court recognized that its case law is not consistent in addressing whether a trial court can consider new arguments in post-judgment motions when the movant provides no explanation for the absence of the argument in its prior filings. However, all of the opinions do hold that the trial courts have broad discretion to rule on post-judgment motions. The Court found that maintaining the trial courtøs broad discretion is õparamountö when the trial court grants the motion containing a new argument. In this case, the trial court supported its ruling by reasoning it was õin the interest of justiceö to consider the new argument. The Court noted, however, that it would have also been in the trial courtøs discretion to deny the post-judgment motion because the movant had not raised the new argument previously.

<u>Alabama Federal Law Update</u>

Bad Faith and Negligent Failure to Settle and Coverage for Intentional Acts

MetLife Auto. and Home Ins. Co. v. Reid, 2013 WL 6844109 (N.D. Ala. Dec. 23, 2013)

Facts: The insured under a MetLife homeowners policy pleaded guilty to criminal charges for imprisonment and sexual assault of his then-girlfriend, Reid. Reid filed a civil suit against the insured, asserting claims of assault, battery, false imprisonment, intentional infliction of emotional distress, wanton misconduct, and negligence. The insured requested defense and indemnity from MetLife. MetLife ultimately agreed to defend the insured under a reservation of rights, split the claim files between defense and coverage, and retained separate defense and coverage counsel. MetLife then filed a declaratory judgment action in federal court seeking a declaration that it did not owe defense or indemnity to the insured.

In April 2011, during the underlying liability action, Reidøs attorney wrote to the insuredøs retained defense counsel and demanded õthe limitsö of the MetLife policy to settle the claim. The insuredøs policy limit was $100,000. Retained defense counsel communicated the demand to her contact at MetLife and left a voice mail message for the insured. MetLife told retained defense counsel that its õcoverage counselö had ultimate settlement authority and that he would õexclusivelyö control all settlement negotiations. Internal documents revealed that MetLife had extended $25,000 in settlement authority to coverage counsel. However, MetLife instructed coverage counsel to only offer $5,000 in response to the policy limits demand and to try and settle the case for between $5,000 and $10,000. The case did not resolve and coverage counsel never offered more than $5,000 to settle the case. Reidøs counsel later testified that Reid would have settled the lawsuit for between $25,000 and $35,000 had it been offered.

As the case progressed, retained defense counsel advised MetLife on several occasions that the insured could be exposed to an excess verdict if the case went to trial, and recommended paying up to the $100,000 policy limits to obtain a release for the insured. The record reflected that retained defense counsel wrote to MetLife on August 14, 2011, and advised MetLife that she did not see a chance of prevailing at trial, that she would not be surprised to see a verdict of up to $500,000, and that she recommended MetLife pay up to the policy limits to settle the case. This recommendation was communicated to the claims manager who had originally granted coverage counsel the $25,000 in authority, but it was not communicated to coverage counsel.

On September 3, 2011, the insured died and his mother, as executrix of his Estate, was substituted as a defendant. Eight months later, the jury returned a verdict in favor of Reid and against the Estate for $2,200,000 ó $1,000,000 in compensatory damages and $1,200,000 in punitive damages.

Following the verdict in the underlying litigation case, the Estate filed a counterclaim against MetLife in the federal coverage action, asserting claims for (1) breach of contract failure to inform the insured of settlement negotiations and to settle the case within policy limits; (2) breach of the enhanced obligation of good faith; (3) negligent, reckless, and wanton failure to settle; and (4) intentional bad faith failure to settle.

Despite the fact that MetLifeøs policy limits were only $100,000, MetLife ultimately settled with Reid on behalf of the insuredøs Estate, paying her $1,100,000 in exchange for a release of the Estate and satisfaction of judgment. MetLife then moved to dismiss its declaratory judgment complaint and also moved for summary judgment on all four counts of the Estateøs counterclaim, asserting that it had satisfied the underlying judgment so the counterclaim was moot. The parties agreed to dismissal of the declaratory judgment action and the breach-of-contract and breach-of-enhanced-obligation counterclaims. However, the insuredøs Estate contended that its last two claims ó for negligent/reckless/wanton and intentional bad-faith failure to settle ó remained viable.

Issue: ***Whether the Estate of an insured can maintain claims of bad faith and negligent, reckless, or wanton failure to settle when the insured did not assert the claims before his death.***

Holding: No. The district court granted MetLifeøs motion for summary judgment on the remaining two claims. Under Alabama law, an insured can recover against an insurer for failure to settle based on either a theory of negligence or bad faith. In order to recover for a claim of negligent failure to settle, the insured must show that the insurer failed to exercise such care as a reasonably prudent insurer would have exercised in failing to settle the claim. The insured can recover compensatory

damages under this theory, which can include recovery for mental anguish and economic loss, but not attorneyøs fees. If the insurer acted in bad faith in failing to settle the claim, it can be held liable for punitive damages.

However, in the present case, the Estateøs claims for bad faith and negligent failure to settle were tort claims that were personal to the insured. Because the insured did not assert the claims prior to his death, the court found that the claims could not survive. Importantly, the district court held that, even if the claims had survived, coverage for the underlying claims is a prerequisite for a claim of bad faith failure to settle. In this case, despite the fact that MetLife had decided to pay $1,100,000 in settlement of the underlying claims, the district court found no coverage under the MetLife policy. The facts established that the insuredøs actions were intentional, criminal, and of a sexual nature, all of which were excluded under MetLifeøs policy. Thus, MetLife owed no duty to defend or indemnify the insured under the terms of the policy, and the insuredøs Estate could not maintain a claim for negligent, reckless, wanton or bad faith failure to settle.

NOTE: The insured has filed a Motion to Alter, Amend, or Vacate arguing that the tort claims for MetLifeøs failure to settle did not arise until after the excess verdict was entered against the estate in the underlying case and, therefore, were claims that belonged to the estate. The Motion to Alter, Amend or Vacate remains pending.

Removal
Snellgrove v. Goodyear Tire & Rubber Co., 2014 WL 235367 (N.D. Ala. Jan. 22, 2014) (Hopkins, J).

Facts: The plaintiff sued his employer in state court for workers compensation benefits. The plaintiff then amended the complaint to add his employerøs workers compensation carrier and the third-party claims administrator as defendants, asserting claims of outrage regarding their handling of the injured employeeøs medical benefits. The plaintiff did not specify the amount of damages he sought in the amended complaint, but he sought recovery for pain and suffering, financial hardship, emotional distress, and punitive damages. The workers compensation insurer and the TPA filed a motion to sever the claims against them from the original workers compensation action, and the state trial court granted the motion, severed the claims, and assigned a separate case number. After the severance, the workers compensation carrier and the TPA removed the outrage case to federal court. The plaintiff filed a motion to remand, arguing (1) the outrage claim arose under the Alabama Workers Compensation Act and removal of the claim was prohibited; (2) the removal was untimely; and (3) the federal district court did not have subject matter jurisdiction because the amount in controversy was not present.

Issue: ***Whether the defendants carried their burden of establishing the amount in***

controversy exceeded $75,000 such that the case could be removed to federal court.

Holding: No. In their notice of removal, the defendants cited verdicts in previous outrage cases in support of their argument that the amount in controversy exceeded $75,000. The district court, however, held that the cited verdicts were insufficient to establish the amount in controversy without some showing that the facts of those cases were similar to the facts in the present case. Moreover, the district court held that the defendants could not rely on the plaintiff's claim for punitive damages to establish the amount in controversy when the defendants had not established the amount of compensatory damages upon which the punitive damages would be based.

Summary Judgment

Cofield v. Allstate Indem. Co., 2014 WL 310447 (N.D. Ala. Jan. 28, 2014).

Facts: After the April 27, 2011 storms, the insured submitted a claim to his manufactured home insurer for damages to his dwelling. The insurer inspected the loss and hired an engineer, who determined that the majority of the damage was caused by racking and warping of the frame due to improper support and was not related to the storm. Pursuant to the engineer's findings, the insurer sent the insured a check for only the portion of the damage it found was caused by the storm. The insured disagreed and returned the uncashed check. The insured filed suit against the insurer, asserting claims of breach of contract, fraud, bad faith, negligence, and wantonness. After removing the case to federal court, the insurer moved for partial summary judgment. The insured did not file a response to the motion, which the district court granted.

Issue: ***(1) Whether the insured's reliance on a representation contrary to the terms of the written policy was "reasonable" as a matter of law; (2) whether the insurer's investigation was adequate as a matter of law; and (3) whether claims of negligence and wanton claim handling were viable under Alabama law.***

Holding: The district court determined that, because the insured was charged with knowledge of the contents of the written policy, he could never establish reasonable reliance on a representation to the contrary as a matter of law. The district court also held that the insurer had not acted in bad faith as a matter of law when it made a coverage decision based on three different site visits and an engineer's report. Finally, the district court recognized that no cause of action for negligent or wanton claims handling exists under Alabama law. As a result, the court granted the insurer's motion for partial summary judgment on fraud, bad faith, and negligent/wanton claims handling.

Collateral Estoppel

Nationwide Mut. Ins. Co. v. Sharif, --- Fed. Appx. ---- 2014 WL 407386 (11th Cir. Feb. 4, 2014) (applying Alabama law).

Facts: The insured operated a grocery/convenience store. One of the insured's customers

was killed at the store when he and a store employee were playing with a gun and the gun accidentally discharged. The Estate of the customer sued the insured in Alabama state court for wrongful death, and the insured sought defense and indemnity from its general liability insurer. The insurer denied coverage and did not provide a defense. The underlying case was tried as a bench trial, and the Estate obtained a $950,000 judgment against the insured. In its findings of fact, the trial court found that the decedent was not an employee of the insured at the time of his death. After the verdict, the insurer filed a declaratory judgment action in federal district court, seeking a declaration that it did not owe defense or indemnity to the insured based on a late-notice defense and application of an employment exclusion in the policy.
Both the insured and the insurer moved for summary judgment. The district court denied both motions for summary judgment and found that the insurer **would be** bound by the state court trial courtøs findings of fact in the underlying liability case based on õestoppel.ö The case was transferred to another district court judge as the case progressed to trial. The new district judge ruled that the insurer **would not** be bound by the state court judgeøs findings of fact in the underlying liability action because the insurer had not been a party to the underlying lawsuit. The district court also rejected the insuredøs request to instruct the jury to reach conclusions consistent with the state courtøs factual findings in the liability action.

The district court bifurcated the breach-of-contract claims and bad-faith claims for purposes of trial. After a trial of the breach-of-contract claims, the jury returned a verdict in favor of the insured on the insurerøs duty to defend, but found in favor of the insurer regarding indemnity. The jury awarded the insured $9,000 in compensatory damages for attorneyøs fees incurred in defense of the underlying liability action.

At the trial of the bad-faith claims, the district court prohibited the insuredøs counsel from discussing the prior state-court judgment, which found the decedent was not an employee of the insured. The district court also refused to admit the state-court order into evidence. The jury returned a verdict in favor of the insurer on the bad-faith claims, and the insured appealed.

Issue: ***Whether the district court correctly held that the state court's findings of fact and orders in the underlying state court liability action were not binding on the parties in the federal court coverage action.***

Holding: Yes. The federal district court correctly held that the state courtøs rulings regarding the facts giving rise to the coverage issues were not binding on the parties to the separate coverage action. The Eleventh Circuit noted that the insurer had not been a party to the underlying liability action. Therefore, the insurer had the right to litigate the facts and coverage issues, independent of what occurred in the underlying action, unless the doctrine of collateral estoppel applied. Collateral estoppel requires:

õ(1) the issue in each proceeding be identical, (2) the issue have been actually litigated in the prior proceeding, (3) that the resolution of the issue was necessary to the prior courtøs final judgment, and (4) that either the litigant being estopped or a person in privity with that litigant have been a party to the prior proceeding.ö The Court focused on the fourth element, õprivity,ö and noted that õthe test for determining if two parties are in privity focuses on identity of interest.ö Here, the Court held that the insurer and the insured were not in õprivity,ö because their interests were divergent. The insurer had an interest in having the underlying state trial court find that the decedent was an employee (so that the exclusion in the policy applied), while the insured had an interest in having the underlying state trial court find the decedent was not an employee. Accordingly, the interests of the insurer and the insured were opposite. As such, the insurer and the insured were not in privity and collateral estoppel did not apply.