May 2014 Issue

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 issues of late notice and the burden of proof placed on an insured to prove coverage for an arbitration award against it in *Auto Owners Ins. Co. v. Guardian Builders Inc.*, 2014 WL 1233964 (N.D. Ala. Mar. 25, 2014) and diversity jurisdiction/ fraudulent joinder issues in *Broadway v. State Farm Mut. Auto. Ins. Co.*, --- F. Supp. 2d ----, 2014 WL 1044131 (M.D. Ala. March 19, 2014).

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

Alabama State Law Update

Forum Non Conveniens

Ex parte State Farm Mut. Ins. Co., --- So. 3d ----, 2014 WL 803174 (Ala. Feb. 28, 2014).

Facts: The insured was a resident of Mobile and Clarke Counties. She filed a complaint in Clarke County Circuit Court against Spray, a resident of Baldwin County, for wrongful, negligent, and/or wanton conduct in causing an automobile accident between them. The insured also sued her automobile insurer for UM/UIM benefits. The automobile insurer filed a motion to transfer the case to Mobile County, where the accident occurred and where the police officer who investigated the accident lived. The trial court denied the motion and the insurer filed a petition for mandamus with the Alabama Supreme Court.

Issue: ***Whether a UM/UIM case should be transferred to the county in which the automobile accident occurred.***

Holding: Yes. The Alabama Supreme Court held that the proper forum was the county in which the accident took place. The Court reasoned that witnesses, police, ambulance personnel, health care providers, and individual parties, including the insured, were all located in Mobile County, the county in which the accident occurred. Further, the Court held that it was in the interests of justice to move the case, as Mobile County had a stronger ñnexusò to the matter.

Public Employee Statutory Caps

Morrow v. Caldwell, --- So.3d ----, 2014 WL 982969 (Ala. Mar. 14, 2014).

Facts: After eight months of having no power, Alice Yu asked Alabama Power to turn her commercial propertyôs power back on. The City of Montgomery assigned a municipal inspector to inspect the electrical lines to ensure they were safe before restoring power. The inspector reported that the power could be safely restored, and the power was turned on. Five months later, Caldwell was electrocuted was playing on

Yuôs property. His mother, as next friend, filed a wrongful death action against numerous parties, including the individual inspector. The inspector filed a motion with the trial court, requesting an order limiting his liability to $100,000 liability according to Alabama Code Section 11-47-190 (the municipal cap). The trial court denied his motion, and the inspector filed an interlocutory appeal.

Issue: ***Whether an individual public employee's tort liability is limited to $100,000 pursuant to the municipal cap under Alabama Code Section 11-47-190.***

Holding: No. In a prior opinion, the Alabama Supreme Court held that the governmental cap in Alabama Code Section 11-47-190 did not apply to employees who are sued in their individual capacities. In this case, as a matter of first impression, the Court extended its prior holding and also held that the $100,000 municipal cap in Alabama Code Section 11-47-190 does not apply to employees sued in their individual capacities.

Alabama Federal Law Update

Stay of Federal Coverage Action Because of Parallel Action in State Court
General Fidelity Ins. Co. v. Garrett, --- F. Supp. 2d ----, 2014 WL 707164 (M.D. Ala. Feb. 25, 2014) (Albritton, J.).

Facts: Several members of Legacy Homes became the subject of an IRS criminal investigation. As a result, Legacy Homes and its members filed an action in Jefferson County Circuit Court alleging various contract and tort claims against Garrett, their certified public accountant. Garrett claimed to be an insured under General Fidelityôs liability policy issued to Legacy Homes, and General Fidelity agreed to provide Garrett a defense under a reservation of rights. In October 2013, General Fidelity filed a declaratory judgment action in the United States District Court for the Middle District of Alabama, seeking a declaration that it did not owe either a duty to defend or duty to indemnify Garrett for the claims in the underlying state-court action. In January of 2014, Garrett filed a third-party complaint in the state-court action for, *inter alia*, breach of contract and bad faith against General Fidelity. That same day, Garrett filed a motion to dismiss or stay in the Middle District case on the grounds that the state-court case included the same coverage issues.

Issue: ***Whether a federal-court coverage action can be stayed due to a later-filed parallel state-court action.***

Holding: Yes. Judge Albritton of the Middle District, relying on the *Wilton-Brillhart* Abstention Doctrine, stayed the federal-court action because of the pendency of the same coverage issues in state court. Judge Albritton held that a district court should use caution when asserting jurisdiction over a declaratory judgment action when another action is pending in state court that (1) has the same issues; (2) does not

involve federal law; and (3) is between the same parties. Applying a nine-factor test from the Eleventh Circuit, Judge Albritton found that, even though the state-court action was a later-filed action, a stay of the federal-court declaratory judgment action was appropriate. The court stayed the federal-court action, rather than dismissing it, in the event that the state-court action was dismissed before final resolution.

Motion to Dismiss Bad-Faith Claim in UIM Case.

Andersen v. Omni Ins. Co., 2014 WL 838811 (N.D. Ala. Mar. 4, 2014) (Hopkins, J.).

Facts: The insured filed a breach-of-contract and bad-faith action against her automobile insurer for failure to pay underinsured motorist (UIM) benefits following a car accident in which she was involved. In response, the insurer filed a motion to dismiss the bad-faith claim, arguing that the claim was not ripe.

Issue: ***Whether the insured's bad-faith claim against her UIM insurer should be dismissed for lack of subject matter jurisdiction.***

Holding: Yes. Citing controlling Alabama law, the court held, ñóWithout a determination of whether liability exists on the part of the underinsured motorist and the extent of the plaintiff's damages, a claim of bad-faith failure to pay or breach of contract is premature.ôò (citations omitted). Because liability had not been established and the insuredôs medical damages were fluid and speculative, the court lacked subject matter jurisdiction over the bad-faith claim. The court therefore dismissed the claim without prejudice.

Motion to Dismiss

Broadway v. State Farm Mut. Auto. Ins. Co., --- F. Supp. 2d ----, 2014 WL 1044131 (M.D. Ala. March 19, 2014) (Fuller, J.).

Facts: The insured, who was injured in an automobile accident with an underinsured motorist, sued State Farm, her UIM insurer for breach of contract and bad faith in state court. State Farm had previously paid the insured only $5,000 of the $25,000 UIM coverage limit. The insured also sued the insurance agent for fraud. State Farm and the agent filed a notice of removal to the United States District Court for the Middle District of Alabama based on a theory of fraudulent joinder of the agent. The defendants also filed a motion to dismiss. The insured, in turn, filed a motion to remand the case to state court.

Issue: ***(1) Whether the insured fraudulently joined the individual insurance agent such that the insured's motion to remand should be denied.***
(2) Whether the insured could maintain breach-of-contract and bad-faith claims against her UIM insurer when the damages were fixed.

Holding: (1) Yes. Although complete diversity did not exist, the defendants argued that the case was properly removed because the insured fraudulently joined the individual insurance agent, an in-state resident, to destroy diversity. The insured alleged that the agent committed fraud because, through advertisements, he represented that State Farm would treat the insured like a ñGood Neighbor,ò but the insurer did not do so. Holding that advertisement slogans are merely ñopinionò or ñpufferyò and cannot constitute a material fact, the court held that the insuredôs fraud claim could not survive. Accordingly, the court dismissed the fraud claim, held that the case had been properly removed, and denied and insuredôs motion to remand.

(2) Yes. Relying on the Alabama Supreme Courtôs opinion in *Ex parte Safeway Ins. Co. of Alabama, Inc.*, 20143 WL 5506557 (Ala. Oct. 4, 2013), the court analyzed whether the UIM insurerôs motion to dismiss the breach-of-contract and bad-faith claims should be granted. The court held that, if damages in the UIM context are uncertain, then the court would not have subject-matter jurisdiction over breach-of-contract and bad-faith claims in the UIM context, because the insured would not have shown that the insurer failed to pay a definite amount owed. However, in the present case, the court found that the insuredôs complaint alleged that the damages were certain. Therefore, despite that the UIM insurer disagreed with the insured as to the extent of the insuredôs injuries, the court held that it had subject-matter jurisdiction over the breach-of-contract and bad-faith claims in the UIM context, and denied the insurerôs motion to dismiss.

No Coverage By Estoppel
Colony Ins. Co. v. C & M Const. Co., 2014 WL 1053591 (S.D. Ala. Mar. 19, 2014) (Granade, J.).

Facts: Two 18-year-old employees of the insured caused an automobile accident that killed an individual working on the side of a road. The deceasedôs estate filed a wrongful death action against the insurer and the individuals in state court. Colony Insurance had issued a Garage Policy to the insured, and Colony filed a declaratory judgment action, seeking a declaration that it did not owe coverage under the policy. Colony then filed a motion for summary judgment based on an exclusion in the policy that excluded coverage for anyone operating a vehicle under 21-years old unless specifically identified on a schedule (which these drivers were not).

In opposition to the motion for summary judgment, the insured argued that the exclusion was ambiguous. The insured also argued that the insurance agent was Colonyôs agent, not the insuredôs agent; therefore, statements by the agent estopped Colony from denying coverage.

Issue: ***Whether an agent's alleged representations to an insured can support a claim of estoppel against an insurer in the absence of a fraud claim in the complaint.***

Holding: No. The court noted that the insureds argued that Colony should be estopped from denying coverage because of alleged representations by the agent attributable to Colony when the agent procured the policy. However, the court held that this type of estoppel defense only applies in the situation where the insured asserts a fraud claim against the insurer. Here, the insureds did not assert a fraud claim; therefore, the insureds cannot assert an estoppel defense. Also, the court found that the exclusion was unambiguous an applicable in this case. Therefore, the court granted summary judgment in favor of Colony.

Summary Judgment

Auto Owners Ins. Co. v. Guardian Builders Inc., 2014 WL 1233964 (N.D. Ala. Mar. 25, 2014) (Hopkins, J.)

Facts: The insured, Guardian Builders, constructed a home that was completed in February 2008. Shortly after the homeowners moved into the home that same month, they began to notice water intrusion into the home. Between February 2008 and April 8, 2008, the insured contractor performed additional work on the home in an attempt to remedy the water intrusion problem, expending $10,000 in repair efforts during that time. The insured did not notify his insurance carrier of the expenditures or the problems with the home at this time.

On April 4, 2008, insured contractor wrote to the homeowners and advised them that he would not perform any additional warranty work on the home until he was paid $18,000 that he claimed he was still owed for the construction of the home. However, the insured contractor admitted that he did additional warranty work after the April 4, 2008 letter in further efforts to remedy the waterproofing problems and incurred an additional $20,000 in costs as a result of this additional work.

On December 8, 2008, an attorney for the homeowners wrote the insured contractor advising him of the many problems with the home that had been discovered by a home inspector hired by the homeowners. The letter also sought mediation through the North Alabama Better Business Bureau and seeking to have the insured contractor voluntarily agree to repair the defects cited in the letter. As a result, on December 18, 2008, the insured contractor notified his insurance carrier. He testified that he did not notify his insurance carrier before this time because he believed that the work he was doing was warranty work for which he was responsible under the contract. He also testified that he was unaware that there was any damage to the home other than the failing waterproofing and to the sheetrock in one room when it became wet.

The homeowners ultimately obtained an arbitration award against the insured contractor in the amount of $307,111.05 plus $145,000 in attorneys fees. The arbitrator broke the award out into seventeen different categories of damage and placed a dollar figure on each. The insurer filed a declaratory judgment action and

requested that the court find no coverage for the insured based on: (1) the insuredôs failure to comply with the notice provisions of the policy, and (2) that arbitratorôs award was covered under the terms of the policy. The insurer filed a motion for summary judgment arguing that the insured had violated the notice provisions contained in the policy and that there was no coverage for the arbitration award under the insuring agreement and that the damages were excluded by the exclusions contained in the policy. The Magistrate Judge made the recommendation that the insurerôs motion for summary judgment be denied as it related to the ñlate noticeò argument but granted to the extent that the insured was unable to produce evidence establishing what portions of the arbitration award were covered under the policy.

Issue: ***1) Whether an insured's excuse that he did not realize that warranty work could actually constitute an "occurrence" under the policy was a sufficient excuse for a ten month delay in notifying the insurer.***
(2) Whether an insured can satisfy its burden of proof in establishing that damages awarded by an arbitrator fits within the coverage of the policy through a general reference to the award itself.
(3) Whether the insurer satisfied its burden of proof establishing that the arbitrator's award contained damages that were excluded under the "your work" exclusion.

Holding: (1) Yes. The Court agreed with the Magistrate and denied the insurerôs motion for summary judgment on late notice. Specifically, the Court found that the insuredôs testimony that he was unaware that his warranty work could trigger his notice obligations under the policy and that he believed the problems were as a result of another contractorôs work were sufficient ñreasonable excusesò precluding summary judgment in favor of the insurer on late notice.

(2) No. The Court disagreed with the Magistrate and granted summary judgment to the insurer on the basis that the homeowners had failed to satisfy its burden of proof establishing what damages in the arbitration award were covered under the policy. Specifically the Court held that a ñvague and conclusory reference to the arbitratorôs award and the policy language, does not satisfy the insuredôs burden to provide *evidence* showing how the damages awarded are for either property damage or personal injury *covered under the policy*.ò The Court also held that the homeowners had failed to carry their burden of proof showing that any of the damages occurred during the policy period.

(3) No. Although it granted the insurerôs summary judgment based on the homeownersô failure to satisfy their burden of establishing coverage, the Court also addressed the insurerôs alternative argument that the ñyour workò exclusion applied top preclude coverage. The Court noted that, when it comes to the application of an exclusion, the insurer bears the burden of proof and, in this case, the ñgeneral nature

of the arbitration award cuts both ways.ò The Court held that the insurer had likewise not satisfied its burden of showing that the ñyour workò exclusion applied to preclude coverage.