

January 2014

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

We hope you had a happy and healthy holiday season, and that your 2014 is off to a good start. In this month's issue, the Alabama Court of Civil Appeals issued an opinion of interest with regard to the analysis of an insurer's duty to defend in *Cool Temp, Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, --- So.3d ----, 2013 WL 6851531 (Ala. Civ. App. Dec. 31, 2013). Also, the United States District Court for the Southern District of Alabama in *Mobile Ass'n for Retarded Citizens, Inc. v. Arch Ins. Group, Inc.*, 2013 WL 6147137 (S.D. Ala. Sept. 18, 2013), *aff'd*, 2013 WL 6147108 (S.D. Ala. Nov. 22, 2013) held that a defendant insurer's time for removal began to run the date the complaint was filed where it was shown that the defendant insurer was in possession of claims documents indicating that the amount in controversy exceeded the jurisdictional minimum.

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

Alabama State Law Update

Indemnity

Parker Towing Co., Inc. v. Triangle Aggregates, Inc., --- So.3d ----, 2013 WL 6516390 (Ala. Dec. 13, 2013).

Facts: Parker Towing mined gravel and sand from the landowners' property through lease agreements. Parker Towing entered into a sales agreement with Triangle, in which it agreed to sell its real property, machinery, and assets to Triangle, including its remaining interest in the leases with the landowners. As part of the agreement, Triangle agreed to indemnify Parker Towing from any and all claims for breach of the leases, including reclamation of the leaseholders' land. Several landowners brought an action against Parker Towing and Triangle for their failure to reclaim the land as required by the assigned lease agreements. The landowners also asserted claims against Parker Towing and Triangle for torts committed regarding other property that was not part of the lease agreements. During the pendency of the litigation, Triangle performed the reclamation work on the leased property, making those claims moot and leaving only the tort claims relating to the damaged to the un-leased property. Parker Towing then contributed to a settlement of the un-leased land damage claims and then sought indemnification from Triangle for that settlement payment and also for the attorneys' fees and costs of litigation it incurred in defending the entire action.

Issue: *Whether an indemnitee's claim for indemnity for tort claims relating to property not specifically included in a sales contract was viable under Alabama law.*

Holding: No. The Alabama Supreme Court held that Triangle, the indemnitor, did not owe indemnity to Parker Towing, the indemnitee, for the settlement payment made for damages to the un-leased property. The Court held that the un-leased land was not

included in the contract; therefore, Parker Towing's claim was really a claim for contribution from a joint tortfeasor. Under Alabama law, absent a contractual indemnity obligation and/or a common law right to indemnity, claims for contribution among joint tortfeasors are prohibited under Alabama law, violating Alabama's principle of joint and several liability. The Court also held that, absent some right to indemnity, Parker Towing's payment to the plaintiffs constituted a voluntary payment, for which Parker Towing could not seek reimbursement. The Court, however, held that Parker Towing was entitled to attorney's fees and court costs because those costs were incurred defending the entire action, which included claims related to property that was part of the sales contract and, therefore contemplated by the indemnity agreement.

Duty to Defend

Cool Temp, Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., --- So.3d ----, 2013 WL 6851531 (Ala. Civ. App. Dec. 31, 2013).

Facts: An employee sued his employer for an on-the-job injury, asserting common-law tort claims (the "tort suit"). The injured employee also filed a separate workers compensation suit. The employer sought defense and indemnity for the tort suit from its commercial general liability insurer. The CGL insurer denied coverage, and the insured employer sued for breach of contract and bad faith. After the insured employer obtained summary judgment against the employee in the tort suit, the claims for indemnity against the CGL carrier became moot, but the issue of the duty to defend (for reimbursement of defense costs) remained. The insured employer and the CGL insurer filed cross-motions for summary judgment on the duty to defend. The trial court granted summary judgment for the CGL insurer, holding that it did not have a duty to defend because of the "employer's liability" exclusion.

Issue: *Whether a court can consider pleadings from another case, outside the four corners of the complaint itself, when determining whether a policy exclusion applies to relieve an insurer of a duty to defend.*

Holding: Yes. Citing Alabama Supreme Court precedent, the Alabama Court of Civil Appeals reiterated that, in order to determine the duty to defend, a court must examine the allegations in the underlying complaint against the insured. The court affirmed the trial court, holding that the CGL insurer did not have a duty to defend because the underlying allegations were for damages "aris[ing] out of and in the course of the" employee's employment, which were excluded under the policy. In reaching this conclusion, the court noted that the underlying plaintiff did not specifically allege that his injuries arose out of and in the course of his employment. However, this was not fatal to the insurer's position. Rather, the court held that it was sufficient that the underlying complaint established that the employee was employed at the time of the accident and that he was working within the line and scope of his employment when

he was injured. The court then went further, reviewing the allegations in the injured employee's separately-filed workers compensation complaint, and found allegations in that complaint that also established that the employee's injuries arose out of and were in the course his employment.

The court also affirmed the trial court's summary judgment on the bad-faith claim. Because the policy did not provide coverage for the allegations against the insured employer, and because no evidence supported the employer's contention that the injured employee's damages were outside of his employment, the CGL insurer did not have a duty to investigate further.

Alabama Federal Law Update

Insurable Interest

Nationwide Mut. Fire Ins. Co. v. Guster Law Firm, LLC, 944 F. Supp. 2d 1116 (N.D. Ala. 2013).

Facts: Based on information provided by the principal, the insurer issued commercial property and commercial general liability policies to the Guster Law Firm, LLC for a commercial building that was actually owned by another of the principal's companies, Guster Properties, LLC. After a fire destroyed the building, the principal insured made a claim for insurance benefits under both policies. Inconsistent facts resulting from an investigation into the claim led the insurer to file a declaratory judgment action seeking a declaration of its rights and liabilities to the insured.

Issue: *Whether the named insured (Guster Law Firm, LLC) had an insurable interest in the damaged property owned by the principal's other entity, Guster Properties, LLC.*

Holding: No. The court held that the fact that the same individual was the sole owner of both companies was insufficient to create an insurable interest in the law firm listed as the named insured in the policy, and granted summary judgment to the insurer. The court found that the named insured was not an occupant of the property, had not rented the insured space from the owner of the property, had no loan in connection with the property, had not improved the property, and no contract existed between the insured and the owner. Therefore, the named insured did not suffer a loss from the fire.

The court refused to grant the insurer's summary judgment based on the defense of fraud in the application, despite acknowledgments by all parties that misrepresentations had been made. Finally, the court rejected the insured's argument that the policy should be reformed to name the true owner (Guster Properties, LLC) as the named insured based on mutual mistake, noting that the principal provided improper information and amounted only to a unilateral mistake on his part.

Removal

Mobile Ass'n for Retarded Citizens, Inc. v. Arch Ins. Group, Inc., 2013 WL 6147137 (S.D. Ala. Sept. 18, 2013), *aff'd*, 2013 WL 6147108 (S.D. Ala. Nov. 22, 2013).

Facts: An employee of a third-party payroll company embezzled money from the insured, causing the insured to suffer financial loss. The following are the relevant dates:

- * August 2011 -- the insured submitted a claim to its insurer, including a sworn proof of loss estimating the loss between \$325,000 and \$350,000;
- * August and September 2011 -- the insurer acknowledged and denied the claim;
- * May 6, 2013 -- the insured filed a breach-of-contract and negligence suit in state court against the insurer;
- * July 3, 2013 -- the insured filed a motion for default judgment against the insurer in state court in the amount of \$442,747.55, plus interest, costs and attorney's fees;
- * July 9, 2013 -- the insured withdrew the motion for default;
- * August 1, 2013 -- The insurer removed the case to federal court.

The insured filed a motion to remand, arguing that the removal was untimely. The insurer argued that the removal was timely because it was not aware that the claim exceeded the jurisdictional minimum for removal based on diversity until the insured filed the motion for default on July 3, 2013. The insurer argued that its August 1, 2013 removal was timely because it was filed within thirty days from the date on which the insurer first learned the true amount in controversy. In response, the insured argued that the time for removal began to run on May 6, 2013, with the filing of the original complaint, because, at the time, the insurer was already in possession of claims documents indicating that the amount of money stolen easily exceeded \$75,000.

Issue: *Where insurer has internal documents reflecting an amount in controversy exceeding \$75,000, whether time for removal runs from service of the complaint, even if complaint is silent as to amount of damages.*

Holding: Yes. The court noted that there was a split of authority around the country whether pre-suit documents should be considered in determining whether an action was timely removed. The United States Magistrate Judge in this case held that such documents could be considered because the insurer was clearly in possession of documents that confirmed that the value of the damages exceeded \$75,000. The magistrate stated that the insurer "should not be allowed to ignore documents within its possession and claim ignorance in order to avail itself of this Court's jurisdiction." Accordingly, the magistrate held that the removal was untimely, as the time for removal began to run on the date of service of the complaint. The District Court adopted the magistrate's recommendations and remanded the case to state court.

Joinder

Sparta Ins. Co. v. Poore, 2013 WL 6243707 (N.D. Ala. Dec. 3, 2013).

Facts: An insurer who insured a termite inspection company filed declaratory judgment action seeking a declaration that it had no duty to defend or indemnify its insured, a defendant in an underlying action involving a termite re-treatment and termite bond contract. The underlying plaintiffs (also defendants in the declaratory judgment action) filed a motion to dismiss or, in the alternative, to stay the case until the court could consider whether indispensable parties had not been joined.

Issue: *Whether an individual who was listed on the original insurance policy application, but was not named as a defendant in the underlying litigation, is an indispensable party in a declaratory action.*

Holding: No. The court denied the motion to dismiss, holding that an individual named on the policy was not a necessary party to the declaratory judgment action because she had not been named as a defendant in the underlying litigation. Also, the court held that one's status as an insured did not necessarily make her an indispensable party. In this case, the court noted that because the individual's spouse was a named defendant, it was reasonable to assume the unnamed insured was aware of the lawsuit, and she had not sought to intervene in the litigation to protect her interests. Therefore, she was not an indispensable party and the insurer's declaratory judgment action could proceed without her.

Motion to Dismiss

Morton v. Travelers Ins., 2013 WL 6441805 (N.D. Ala. Dec. 9, 2013).

Facts: After a fire destroyed the insured's house, the insured submitted a claim to her homeowner's insurer. The insured alleged that the insurer effectively and wrongfully failed to honor the policy and brought breach-of-contract, negligence, wantonness, bad-faith, and conspiracy claims against the insurer. The insurer filed a motion to dismiss all of the claims except the breach-of-contract claim.

Issue: *Whether the insured's claims of negligence and wantonness were barred as a matter of law; whether the insured's claim for bad faith was barred by the statute of limitations; and whether the insured's conspiracy claims were due to be dismissed.*

Holding: Yes. The court granted the insurer's motion to dismiss all of the tort claims. The court acknowledged that negligence and wantonness claims against insurers are not cognizable causes of action under Alabama law. The court also dismissed the insured's bad-faith claim, finding that, because the insured filed the lawsuit more than two years after the insurer had denied the claim, it was barred by the applicable statute of

limitations. Finally the court dismissed the insured's conspiracy claim on several grounds. The court held that Alabama law does not recognize a conspiracy claim between agents or employees within the same company acting within the scope of their employment. The court also held that, because all of the other tort claims were due to be dismissed, the insured could not maintain a conspiracy claim, since such a claim must rest on a viable underlying tort. The court also held that, like the bad-faith claim, the conspiracy claim was due to be dismissed on grounds that the insured failed to file suit within the applicable two-year statute of limitations.