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

In this edition of our newsletter, we feature a number of cases from Alabama courts. Of particular interest is *Baldwin Mut. Ins. Co. v. Adair*, --- So. 3d ----, 2014 WL 4851516 (Ala. Sept. 30, 2014). In *Adair*, the Alabama Supreme Court clarified an insuredôs post-loss obligations during the appraisal process holding that, until the insured has supplied sufficient information for the insurer to investigate the loss and, thereby determine what, if any, dispute exists, appraisal cannot move forward.

We hope you find this information useful. If you have any questions or would like to discuss, please do not hesitate to let us know.

Alabama State Law Update

Subrogation

Pennsylvania Nat. Mut. Cas. Ins. Co. v. Bradford, --- So. 3d ----, 2014 WL 4798773 (Ala. Sept. 26, 2014).

Facts: Following an automobile accident, the insuredôs employee filed an action against his employee's insurer to recover underinsured motorist benefits and against the other driver to recover damages for negligence and wantonness. After the insurer and the employee reached a settlement, the insurer filed a subrogation cross-claim against the other driver involved in the accident. The trial court dismissed the cross-claim, as the accident occurred over three years ago and the statute of limitations had run. The insurer appealed the dismissal.

Issue: ***Whether the insurer, seeking subrogation from the alleged at-fault driver in an automobile accident, was time barred from bringing an action.***

Holding: Yes. In Alabama, the subrogee does not have greater rights than the subrogor. In earlier decisions, the Alabama Supreme Court specifically applied this rule to the statute of limitations. Although the insurer argued that this rule is ñgrossly inequitable,ò this Court disagreed and noted that insurers normally are reimbursed by the insuredôs award against the tortfeasor. Also, the Court found that the insurance policy at issue required the insured to work with the insurer in order to acquire subrogation rights.

Opt Out of Trial

Ex parte Electric Ins. Co., --- So. 3d ----, 2014 WL 4798736 (Ala. Sept. 26, 2014).

Facts: The insured was injured in an automobile accident an uninsured motorist allegedly

caused. As a result of the accident, the insured filed a liability suit against the uninsured motorist and his automobile insurer for uninsured motorist benefits. The insurer made a timely motion to opt out of the trial, the insured objected, and the motion was denied. Then, the insurer petitioned the Alabama Supreme Court for a writ of mandamus, and it was granted.

Issue: ***Whether the insurer may opt out of the trial within a reasonable time after service of process.***

Holding: Yes. In *Lowe v. Nationwide Ins. Co.*, 521 So. 2d 1309 (Ala. 1988), the Court stated, ñIf the insurer is named as a party, it would have the right, within a reasonable time after service of process, to elect either to participate in the trial . . . or not to participate in the trial . . .ò Although the *Lowe* decision involved an underinsured motorist and not an uninsured motorist, the Court pointed out that the Alabama Code includes ñunderinsured motoristò within the definition of ñuninsured motorist.ò The Court held that the insurer moved to opt out of trial within a reasonable time because the motion was filed the day before the period to amend its answer ended. Moreover, the Court thought it was ñinconsistentò of the trial court to allow the insurer to amend its answer but not allow it to opt out of trial.

It was also important to acknowledge that an insurer does not want to opt out of the trial before the discovery process progressed enough for the insurer to know whether it was in its best interest to opt out or not. Since the insurer in this case waited to opt out until after four of the treating physicians had been deposed in order to discover the strength of the insuredôs case, and the insurer filed the motion 56 days after the final deposition, the time taken was reasonable.

Damages Cap on Municipal Employee
Alabama Mun. Ins. Corp. v. Allen, --- So. 3d ----, 2014 WL 4798918 (Ala. Sept. 27, 2014).

Facts: While driving late to work, a police officer drove 103 mph on a 45 mph road and collided with a vehicle in which Holmes and Allen were riding. Although the officer was permitted to drive his police car to and from work, the officer tested positive for marijuana following the accident. Holmes and Allen sued the officer for negligence and their insurers for underinsured/uninsured motorist benefits. Holmes also sued Allenôs insurer for underinsured/uninsured motorist benefits, as Allenôs vehicle was the one involved in the accident.

Relying on Alabama Code § 11-47-190 and §11-93-2, the officer moved for partial summary judgment and argued that the plaintiffsô damages were limited to $100,000 as he was on duty at the time of the accident. After the trial court denied the police officerôs motion, the plaintiffs were awarded over $1 million in damages. Following the trial, the city (the officerôs employer), and the insurer for the police car that was

in the accident, moved to intervene and argued they were the real parties in interest. The trial court held that the insurer for the police car was required to pay the damages, and the trial court denied the cityôs motion to submit $100,000 to satisfy the subrogation obligation. The city and the insurer of the police car appealed.

Issue: ***Whether the damages awarded is limited to $100,000 based on Alabama Code § 11-47-190 when a police officer is sued in his individual capacity and was acting outside his employment.***

Holding: No. During the pendency of this appeal, this Court examined *Morrow v. Caldwell*, --- So. 3d ----, 2014 WL 982969 (Ala. Mar. 14, 2014) another case that involved Alabama Code § 11-47-190. In *Morrow*, the Court held that this statute was not intended to protect a municipal employee sued in an individual capacity. Instead, the statute is designed to protect the ñpublic coffers of the municipality.ò Moreover, the trial court found that the officer acted outside the scope of his employment, and this issue was not appealed. This statute does not apply when a municipal employee, who is not acting within the scope of his employment, is sued in an individual capacity.

Insureds' Post-Loss Obligations
Baldwin Mut. Ins. Co. v. Adair, --- So. 3d ----, 2014 WL 4851516 (Ala. Sept. 30, 2014).

Facts: The insurer filed a declaratory judgment action as well as an application for temporary restraining order and motion for a preliminary injunction in response to a letter from over 100 insureds represented by counsel demanding the insurer engage in an appraisal process. Counsel for the insureds alleged that the insurer acted in bad faith. The trial court entered a preliminary injunction stopping the appraisal process until the parties can determine whether there is ñan actual disagreement on the amount of the loss.ò Each insured was required to provide a basis for rejecting the insurerôs offer of settlement. In this same order, the action was transferred to another county where other related litigation was pending.

More than a year later, the insureds moved to alter, amend or vacate the injunction. The court lifted the injunction with regard to 14 of the insureds, as these insureds ñsatisfied the terms of the policy . . .ò In response, the insurer requested that the court stay its order. When the court denied this motion, the insurer appealed to the Alabama Supreme Court.

Issue: ***Whether the appraisal process as described in the insurance policy could begin with the 14 insureds, because the insureds complied with the terms of the insurance policy.***

Holding: No. The policies require insureds to provide a sworn statement of loss and cooperate with the obligations listed in each individual policy. The 14 insureds have not

submitted to an examination under oath, even though the insurer requested it. Also, these 14 insureds have not provided all the information the insurer requires in order to create an offer to settle the claims. Rather, the insureds must provide proper notice of the loss, the basis for the loss, and the value of the loss, and allow the insurer to ñinvestigate and verifyò the loss as it is permitted under the policy. The Court noted that the insuredsôfailure to follow these provisions may be ñparticularly problematic,ò as two years or more have passed since the alleged losses occurred. Also, a disagreement between parties cannot exist until enough information is exchanged for parties to arrive at different conclusions. The Court felt that the insureds have not provided enough information in order for a disagreement to exist.