WINTER 2015-2016 ISSUE

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

In this edition, we have included several cases we hope you find interesting. Included are cases from the Alabama Supreme Court addressing the application of five different exclusions in a CGL policy to claims for damage occurring during the insuredôs unloading/loading of a CT Scanner in *Mid-Continent Cas. Co. v. Advantage Medical Electronics*, LLC, --- So. 3d ----, 2015 WL 6828722 (Ala. Nov. 6, 2015) and whether a UIM carrier owed coverage for the punitive damages portion of a jury verdict that was not covered by the tortfeasorôs liability insurance policy in *State Farm Mut. Auto. Ins. Co. v. Brown*,--- So. 3d --- 2015 WL 5918750 (Ala. Ct. App. Oct. 9, 2015). We have also included several federal cases including *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Progressive Direct Ins. Co.*, 2015 WL 5719178 (N.D. Ala. Sept. 30, 2015) dealing with issues of contribution and equitable contribution between insurers and *Nationwide Nat. Mut. Ins. Co. v. Nall's Newton Tire*, 2015 WL 8207478 (S.D. Ala. Dec. 7, 2015), a case in which the trial court in the Southern District remitted the juryôs verdict to the actual cash value of the damaged property where there was no evidence that the insured had repaired or replaced the property.

We hope that you find these cases interesting and helpful. As always, we are always available to discuss any of the issues raised by these cases and there potential effect and the current state of Alabama law.

ALABAMA STATE LAW UPDATE

Uninsured Motorist Coverage and Punitive Damages

State Farm Mut. Auto. Ins. Co. v. Brown,--- So. 3d --- 2015 WL 5918750 (Ala. Ct. App. Oct. 9, 2015).

Facts: Jacqueline and Cleo Brown (ñBrownsò) were involved in an automobile accident with John Kramer (ñKramerò). The Browns sued Kramer and State Farm, their own UIM insurer. Kramerôs insurer tendered its $200,000 policy limits to State Farm to *Lambert v. State Farm Mut. Auto Ins. Co.*, 576 So. 2d 160 (Ala. 1991). State Farm advanced the $200,000 to the Browns and opted out of litigation. The trial court returned a verdict of $80,000 in compensatory damages and $10,000 in punitive damage verdict in favor of the Browns. Kramerôs insurance policy did not cover punitive damages, and so the Browns demanded that State Farm, their UIM insurer, pay the punitive damages award. The trial court entered a $10,000 judgment against State Farm, and State Farm appealed.

Issue: ***Whether a UIM insurer is required to pay a punitive damage award if the tortfeasor's insurer does not cover punitive damages.***

Holding: The Alabama Court of Civil Appeals held that the UIM insurer was not required to pay the punitive damages award because it had tendered its $200,000 policy limits and the Browns could accept the entire amount under *Lambert*. Therefore, the Browns

received a larger award than the judgment required. Accordingly, the UIM insurer did not need pay an additional amount for the punitive damages award.

Duty to Defend under a CGL policy for damages occurring during unloading of a CT Scanner
Mid-Continent Cas. Co. v. Advantage Medical Electronics, LLC, --- So. 3d ----, 2015 WL 6828722 (Ala. Nov. 6, 2015).

Facts: KEI Medical Imaging Services, LLC (ñKEIò) contracted with Advantage Medical Electronics, LLC (ñAdvantageò) to transport a CT scanner it had purchased from a physicianôs office in South Carolina to its own facility in Texas. Advantage was to de-install the CT scanner and load it into a box van it had rented to transport the CT scanner back to Texas. Advantage first had to load the 4,500 pound section of the CT scanner known as the ñgantry.ò In order to move the gantry, Advantage had to use a special dolly system that had been provided by KEI, which required castor wheels to be actually be bolted to the gantry. However, because the South Carolina physicianôs office did not have a loading dock, Advantage hired a tow truck company Eddieôs Towing Company (ñEddieôsò) to load the gantry, transport it across the parking lot to the box van, and then load it into the box van. Eddieôs successfully loaded the gantry onto the two truck and successfully transported it across the parking lot to the box van. Eddieôs then lowered the bed of the two truck to where it me the rear of the box van. Eddieôs then released the winch holding the gantry, allowing it to begin rolling towards the box van. As the two front wheels of the gantry entered the rear of the box van, witnesses described hearing a large ñsnap,ò at which time the gantry suddenly shifted to one side, struck the side of the box van, and fell off the bed of the two truck onto the ground causing damage to the gantry and ultimately making the CT scanner unusable.

KEI made a claim with its insurer, Mid-Century Insurance Company (ñMCICò), who paid the claim. Mid-Century then made a claim to Advantage asserting that Advantage had caused the CT scanner to fall and demanded to be reimbursed. Advantage notified its CGL insurer, Mid-Continent Casualty Company (ñMid-Continentò), of the claim and Mid-Continent denied the claim.

Advantage filed a declaratory judgment against Mid-Continent. During the pendency of the declaratory judgment action, MCIC, as subrogee for KEI, filed a negligence action in the Court of Common Pleas of Aiken County, South Carolina (ñSouth Carolina litigationò). Advantage filed a motion for partial summary judgment and asked the trial court to hold that Mid-Continent had a duty to defend and indemnify Advantage in the South Carolina litigation. Mid-Continent filed a cross-motion for summary judgment arguing that it had no duty to defend based on five different policy exclusions. The trial court granted Advantageôs motion for summary judgment and denied Mid-Continentôs motion. Mid-Continent appealed.

Issues and Holdings:

(1) Whether the auto exclusion applied and precluded coverage.

The Alabama Supreme Court acknowledged that the exclusion applied to ñuseò of any ñautoò that Advantage either ñowned or operated by or rented or loaned to any insured.ò The Court also noted that ñuseò included ñloading or unloading,ò but did not include movement of property ñby means of a mechanical device, other than a hand truck, that is not attached to the . . . óautoô.ò

Because the accident occurred while the gantry was damaged as it was being unloaded from one vehicle and loaded onto another that, the Court analyzed both vehicles and determined that Eddieôs tow truck was not ñautoò such as to trigger application of the exclusion. The Court did confirm that the box van would qualify as an ñautoò and might trigger application of the exclusion. However, the Court noted that the exclusion contained an exception with regard to loading such that it would not apply to ñthe movement of property by means of a mechanical device, other than a hand truck, that is not attached to the . . . óautoô.ò The Court found held that because Eddieôs tow truck was a ñmechanical device,ò and was loading the gantry into the van when the accident occurred, the exception applied to preclude application of the ñautoò exclusion.

(2) Whether the care, custody, or control exclusion applied and precluded coverage.

The Court acknowledged that policy excluded coverage for damage to personal property ñin the care, custody, or control of the insured . . .ò Relying on the complaint in the South Carolina litigation that ñAdvantage ólost controlôand failed to ómaintain proper controlôò of the scanner, Mid-Continent argued that Advantage was in control of the scanner when it was damaged. The Court noted that determining the exclusionôs application is judged on a case by case basis and also wether the damage occurred while insured exercised possessory control of the property relying on *Fidelity & Casualty Company of New York v. Landers*, 220 So. 2d 884 (Ala. 1969) (holding that the exclusion applies only when an insured exercises possessory control over the property) and Insurance Law & Practice § 4493.03 (noting that ñ[i]t is the exclusive possession of the property at the time damage occurs that is decisive of whether the exclusion is operative.ò).

In determining the question of the duty to defend, Mid-Continent urged the Court to look no further than the complaint to determine that the exclusion applied. However, the Court noted that it was not confined to the ñbare allegations of the underlying complaintò but stated that it would also look to the ñundisputed evidence of [Eddieôs] involvement in the incidentò to determine whether the exclusion applied. The Court

noted that it was undisputed that Eddieôs was lowering the gantry from its truck at the time of the accident and, therefore, sufficient evidence that Advantage may not have been exclusively in control of the scanner at the time of the loss such that the exclusion did not apply to relieve Mid-Continent of its duty to defend on that basis.

(3) Whether the your work exclusion applied and precluded coverage.

The policy excludes coverage for ñyour work,ò which is described as ñ[p]roperty damageôto . . . [t]hat particular part of any property that must be restored, repaired or replaced because óyour workô was incorrectly performed on it.ò Mid-Content argued that because loading the gantry into the box van was part of Advantageôs ñwork,ò the exclusion applied to preclude coverage. Advantage argued that the damage had nothing to do with its work on transporting the gantry but, instead, occurred as a result of a bolt supplied by a third party unexpectedly failed. The Court agreed that the loading of the gantry onto the box van qualified as ñyour workò under the terms of the policy. However, the Court noted that it was unclear whether the accident occurred as part of and while Advantage was performing its ñwork.ò The Court also noted that the exclusion only applied to that part of the CT scanner upon which Advantage was doing its work. Therefore, because the complaint in the underlying litigation alleged damaged to the entire CT scanner and potentially encompassed damage to other parts of the scanner besides just the gantry, the exclusion would not apply.

(4) Whether the contractual-liability exclusion applied.

Mid-Continent argued that because the damages arose out of a contractual relationship that the contractual liability exclusion would not apply. The Court determined that because the underlying litigation made no allegation that Advantage breached its contractual obligations, then the exclusion would not apply.

(5) *Whether the policy's no action clause prevented Advantage from bringing a declaratory judgment action against Mid-Continent.*

Mid-Continent argued that the ñNo-actionò clause required the insured to suffer a judgment against it before it could bring suit for declaratory judgment. The Alabama Supreme Court disagreed stating that it found the argument was ñuntenable and not supported by the policy language or authority.ò *See Eureka Fed. Sav. & Loan Ass'n v. American Cas. Co. of Reading, Pa.*, 873 F.2d 229 (9th Cir. 1989) (no-action clause does not bar insured's declaratory-judgment action).

Judgment as a Matter of Law - Cross-Examination on Effect of Release in UIM case.
Henley v. State Farm Mut. Auto. Ins. Co., --- So. 3d ----, 2015 WL 7889633 (Ala. Ct. App. Dec. 4, 2015).

Facts: Sandra Henley (ñHenleyò), an insured of State Farm Mutual Automobile Insurance Company (ñState Farmò), was injured and her vehicle was damaged in an accident caused by another State Farm insured (ñtortfeasorò). Henley settled with the tortfeasor, accepted the tortfesorôs liability insurance limits of $50,000, and executed a release that released the tortfeasor from any and all liability. Henley then filed a complaint seeking UIM benefits under her own State Farm policy. During the litigation, Henley filed a motion for partial summary judgment on the issue of liability and asserted that the only issue to be tried at the jury trial was whether the damages Henley requested exceeded the $50,000 settlement amount. State Farm did not oppose the motion. The court granted the motion and noted that the only remaining issues for trial were causation and damages.

During the jury trial, over the objections of Henleyôs counsel, State Farm cross-examined Henley on the release agreement and had the release admitted into evidence. During the cross-examination, State Farm moved the trial court for a judgment as a matter of law based on the release agreement. The court held that because the release did not mention Henleyôs reservation of right to pursue a claim against her insurer, the release prevented Henley from recovering from State Farm. Henley moved to vacate the judgment as a matter of law and moved for a new trial. After the court denied these motions, Henley appealed.

Issue: ***Whether judgment as a matter of law should have been granted against Henley based on the effect of the release that was not one of the triable issues identified by the trial court.***

Holding: No. Since it was clear that the trial court had limited the issues for trial to causation and damages related to the accident, the effect of the release was not an issue that had been identified for trial. As a result, the Alabama Supreme Court noted that Henley had not been provided an opportunity to prepare for this issue at trial. Moreover, Alabama Rule of Civil Procedure 50(a)(1) provides that in a jury trial, a witness must be ñfully heardò on an issue and because the release was not designated as an issue for trial and because the trial court granted the JML during Henleyôs testimony, she was not provided an adequate opportunity to be heard on the issue in accordance with Rule 50(a)(1). Therefore, the appellate court reversed the trial courtôs judgment as a matter of law and remanded the case for further proceedings in accordance with the opinion. The Court did not address the issue of the effect of the release on Henleyôs claim for UIM benefits.

ALABAMA FEDERAL LAW UPDATE

Equitable Contribution and Equitable Subrogation
Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Progressive Direct Ins. Co., 2015 WL 5719178 (N.D. Ala. Sept. 30, 2015).

Facts: After doing some errands after work, Gene Cheshire (ñCheshireò) was driving home in his personal truck when he collided with a vehicle that was stopped. The driver and the two passengers in the other vehicle were injured. Cheshire uses his personal truck in the course of his employment. His employer pays for his gas.

The driver and the passengers of the other vehicle filed a negligence action against Cheshire and his employer. His employerôs insurer undertook the defense of both defendants. After the court granted the employerôs renewed motion for judgment as a matter of law on the wanton hiring, training, and supervision claim, the jury found in favor of the plaintiffs on all remaining counts. On appeal, the Alabama Supreme Court reversed the punitive damages award due to the lack of evidence of wantonness. After the case was remanded to the state trial court, the state trial court sent the parties to mediation.

The employerôs insurer then filed an equitable subrogation and equitable contribution action against the employeeôs insurer in the United States District Court for the Northern District of Alabama. Both parties filed summary judgment motions.

Issues and Holdings:

(1) Whether the statute of limitations had expired on a claim for equitable subrogation.

The statute of limitations for claims involving contracts is six years, and the statute of limitations begins to run when the action accrues. An action accrues as soon as the party may file an action. The employeeôs insurer argued that the statute of limitations began to run when the plaintiffs filed their action, but the court held that it began to run after the jury returned a verdict in favor of the plaintiffs. Therefore, the period of limitations did not expire before this action was filed.

(2) Whether the employee's insurer is subject to equitable subrogation and/or equitable contribution for any liability the employer may face in the underlying action.

The employerôs policy provides that it is excess for any automobile the insured does not own. Equitable contribution only applies when both insurers have the same ñinsurable interest, subject matter, and risk.ò Since the employeeôs insurer is primary and the employerôs insurer is excess, equitable contribution does not apply.

In addition, the employeeôs policy required prompt notice of a claim or lawsuit. Alabama law allows a delay in notifying an insurer of a claim or lawsuit, but only if it is reasonable given the facts and circumstances of the case. If the delay is unreasonable, the insurer may deny coverage even if the insurer was not prejudiced

by the delay. The employerôs insurer did not notify the employeeôs insurer that it wanted to be reimbursed for defense costs until the parties were sent to mediation following the remand from the Alabama Supreme Court. Since so much time passed before notice was given, the employerôs insurer was barred from seeking equitable subrogation.

Remand
Amison v. Nationwide Mut. Ins. Co., Inc., 2015 WL 5935170 (N.D. Ala. Oct. 13, 2015).

Facts: An unknown gunman fired and struck the plaintiff while he was a passenger in a vehicle his father was driving. The plaintiff filed an action in state court against his UM/UIM insurer to recover for his injuries. The insurer removed the action to the United States District Court for the Northern District of Alabama, and the plaintiff moved to remand the action to state court.

Issue: ***Whether the plaintiff's denial of requests for admission regarding the amount in controversy was sufficient to establish diversity jurisdiction.***

Holding: No. In order for the court to have diversity jurisdiction, the amount in controversy must exceed $75,000. The plaintiff denied a request for admission in state court that ñhe will not claim and does not seek in excess of $75,000.00.ò However, the court held that a denial in a response to a request for admission does not ñequal an affirmative.ò The court held that the response to the request for admission does not ñóclearlyôand óunambiguouslyôestablish federal jurisdiction.ò Also, the complaint did not include a specific amount of damages. Therefore, the action was remanded to state court.

Choice-of-Law Provisions and Bifurcating Breach-of-Contract and Bad-Faith Claims
Brown v. Allstate Prop. and Cas. Ins. Co., 2015 WL 6739143 (M.D. Ala. Nov. 3, 2015).

Facts: The insured, a resident of South Carolina, was injured in an auto accident in Alabama when she swerved and lost control of he vehicle to avoid colliding with another vehicle parked on Interstate 85 in Montgomery. The insurance policy at issue was issued in South Carolina. After the insurer denied coverage, the insured filed a breach-of-contract and bad-faith action in the United States District Court for the Middle District of Alabama. The insured filed a motion for partial summary judgment seeking a determination that only Alabama law applied pursuant to a choice of law provision in the policy. The insurer opposed the motion and argued that South Carolina law applied to the determination of coverage under the policy because the parties had entered into the contract in South Carolina. The insurer also filed a motion to bifurcate the breach of contract and bad faith claims and stay any and all discovery relating to the bad faith claim.

Issues and Holdings:

(1) Whether the insured's motion for partial summary judgment with regard to choice-of-law provisions should be granted.

The insured argued that, based on the terms of the policy, Alabama law applied pursuant to a choice of law provision contained in the policy stating that all disputes relating to a covered loss occurring outside of South Carolina ñmayò be governed by the law of the state in which the accident occurred. The insurer argued that South Carolina law applied to the initial coverage determination and the interpretation of the policy terms because the contract had been made in South Carolina. The court agreed with the insurer and held that South Carolina law applied to the policy interpretation before the covered loss choice-of-law provision would apply.

(2) Whether the breach-of-contract and bad-faith claims should be bifurcated and the discovery for bad-faith claim be stayed while the breach-of-contract action is pending.

The insurer sought to bifurcate the breach-of-contract and bad-faith claims and stay the bad-faith discovery to avoid producing materials that are protected by the work product or attorney-client privilege. However, the court noted that the issues in the case were the requirement of affidavits, the interpretation of that requirement, and whether and at what point it may have been complied with were pertinent with respect to all of the insuredôs claims, including the bad faith claim. The Court also noted that the insurerôs argument that the recent submission of additional contradictory affidavits showed that there was no bad faith only served to highlight the factual overlap between all of the claims. The Court found this overlap sufficient to deny the motion to bifurcate.

Remittitur of Jury Verdict to ACV of Property in Declaratory Judgment/Breach of Contract claim

Nationwide Nat. Mut. Ins. Co. v. Nall's Newton Tire, 2015 WL 8207478 (S.D. Ala. Dec. 7, 2015).

Facts: After the insured made a claim for damages to property in a fire, the insurer filed a declaratory judgment action seeking a determination that no coverage was owed to the insured based on the arson defense. The insured filed a counterclaim alleging breach of contract and bad faith, and the insurer was awarded summary judgment on the bad-faith claim, leaving for trial only the contract issues. Prior to the start of the trial, the court ruled that any evidence of the replacement cost value of the building would be not be admitted since the policy required actual repair before replacement cost coverage was provided. Therefore, the court limited the amount of damages that the insured could submit to the jury: $168,500 for the appraised ACV of the building and $150,000 in claimed contents loss. During the trial, the court instructed the jury

consistent with its prior rulings and let the jury know that if it found for the insured, the amount of damages to which the insured claimed it was entitled was $318,500. The jury found for the insured, but awarded the insured over $510,000 in damages. The insurer filed a motion for a new trial or remittitur, and the insured filed a motion for prejudgment interest and costs.

Issues and Holdings:

(1) Whether the insurer was entitled to remittitur;

The court held that there was no basis for the $510,000 award. Since the action was limited to breach of contract, the insured was not entitled to emotional damages or other types of damages. Therefore, the trial court reduced the award to the amount the insured requested, $318,500.

(2) Whether the insurer owes prejudgment interest and costs to the insured.

The court determined that because the policy provided that the insurer would pay a claim, if covered, within 30 days of receiving a sworn, then pre-judgment interest was recoverable. The court noted that prejudgment interest should be awarded when damages are ñreasonably certainò when the breach occurs. Therefore, the insurer was required to pay prejudgment interest beginning 30 days after the insured submitted the sworn proof of loss. Since Alabama law sets prejudgment interest at 6% a year, the insurer was be required to pay at that interest rate.