**Fall 2015 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 priority of coverage in *Sentinel Ins. Co., Ltd. v. Alabama Municipal Ins. Corp.*, --- So. 3d ----, 2015 WL 5658755 (Ala. Sept. 22, 2015) and the scope of deposition discovery allowed in a bad faith case in *Ex Parte Newby*, --- So. 3d. ----, 2015 WL 5658736 (Ala. Sept. 25, 2015). Also included is a decision from the United States District Court for the Northern District of Alabama regarding the application of PEGL/PEML policy provisions to a Fifth Amendment takings claim and a substantive due process claim against the insured in the case of *St. Paul Fire and Marine Ins. Co. v. Town of Gurley*, 2015 WL 5286915 (N.D. Ala. Sept. 8, 2015).

## Alabama State Law Update

### Priority of Coverage

*Sentinel Ins. Co., Ltd. v. Alabama Municipal Ins. Corp.*, --- So. 3d ----, 2015 WL 5658755 (Ala. Sept. 25, 2015).

**Facts:** The City of Opelika (ñCityò) contracted with ESG Operations, Inc. (ñESGò) to perform certain municipal operations, including clean the city streets. An employee of ESG was involved in a motor vehicle accident while operating a street sweeper. The occupants of the other vehicle, Roger and June Clark (ñClarksò), were injured and filed an action against the employee, ESG, and the City.

Sentinel Insurance Company (ñSentinelò) issued a commercial automobile policy to ESG. Alabama Municipal Insurance Corporation (ñAMICò) issued a commercial automobile policy to the City, with ESG was named as an additional insured. AMIC refused to defend or indemnify ESG or the employee, so they filed a third-party complaint against AMIC. In turn, AMIC filed a third-party complaint against Sentinel, and Sentinel filed a counterclaim against AMIC. Both third-party complaints asked the court to determine which insurer was required to defend and indemnify ESG and the employee. The Clarks settled their claims against ESG and the employee, with AMIC and Sentinel each paying half of the settlement. Both insurers filed summary judgment motions on the priority of coverage, and the trial court held that Sentinel, ESGôs carrier, was primary and AMIC was excess. Sentinel appealed.

**Issue:** ***Whether the City's liability policy provides primary coverage for the contractor and the contractor's employee while operating a vehicle owned by the City.***

**Holding:** Yes. Based on the specific language of the policies, the Alabama Supreme Court held that AMICôs policy provided primary coverage to ESG as an additional insured. The

AMIC policy, like the Sentinel policy, provided coverage to ESG because the street sweeper was a ñcovered autoò and was used by an ñinsuredò (the ESG employee). The Court then quoted the ñOther Insuranceò language from the AMIC policy: ñ[f]or any covered óautoôyou own, this Coverage Form provides primary insurance. For any covered óautoô you donôt own, the insurance provided by this Coverage Form is excess over any other collectible insurance.ò The City, AMICôs named insured, owned the street sweeper. Therefore, the AMIC policy was primary.

**Deposition of an Insurer's Former Employee**
*Ex parte Newby*, --- So. 3d. ----, 2015 WL 5658736 (Ala. Sept. 25, 2015).

**Facts:** Insureds filed a breach-of-contract and bad-faith action against their insurer for failure to defend and indemnify them under a liability policy. As part of the discovery process, the insureds sought to depose the insurerôs former CEO and filed a subpoena. The former CEO was the acting CEO when the facts relevant to the litigation occurred, but the former CEO was not a party to the lawsuit action. In response, the insurer and the former CEO filed a motion to quash, arguing that the deposition would be a ñfishing expeditionò and that the former CEO had no information to provide that was relevant to the litigation. After the trial court denied the motion to quash, the insurer filed a petition for a writ of mandamus with the Alabama Supreme Court.

**Issue:** ***Whether an insurer's former CEO can be compelled to testify in a breach-of-contract and bad-faith action.***

**Holding:** Yes. The Alabama Supreme Court denied the insurerôs motion to quash. While the insurer stated that the former CEO did not have any knowledge about the claim, the insurer did not submit any evidence showing that. Therefore, the Court held that the trial court did not exceed its discretion in denying the motion to quash.

**<u>Alabama Federal Law Update</u>**

**Fraud in the Application and Expected or Intended Exclusion**
*Continental Cas. Co. v. Piggly Wiggly Ala. Distrib. Co., Inc.*, 2015 WL 4426030 (N.D. Ala. July 20, 2015).

**Facts:** Continental issued umbrella insurance policies to Piggly Wiggly in 2010 and 2011; the policies covered, among other things, tractor trailers for shipping, and personal passenger vehicles provided to certain employees. During the application process for the 2010 policy, Continental requested ñsafety controlsò information. Piggly Wiggly provided a ñDriver Safetyò document. Piggly Wiggly also confirmed that it checked motor vehicle records for drivers of private passenger company cars, that a personal use policy was in effect for said drivers, and that there may have been two drivers

over the age of 65. During the renewal process, Piggly Wiggly confirmed that the ñsafety controlsò were still in effect. Continental renewed the policy. A Continental underwriter testified that he believed the ñsafety controlsò were applicable to all drivers of company vehicles, not just the personal passenger vehicle drivers.

In 2009, Jason Stewart, the son of Piggly Wigglyôs then-CEO began working at Piggly Wiggly and was issued a company truck. In 2010, Stewart was issued prescription medication of which Piggly Wiggly became aware. Piggly Wiggly deemed him a safety risk in operating mobile equipment, but he was still allowed to drive. In June of 2012, Stewart, while operating the company truck, was involved in two accidents on the same night, the last of which resulted in the death of two people. Stewartôs blood tests revealed high levels of prescription medications, and he was ultimately convicted of criminally negligent homicide while driving under the influence.

After the June 2012 accident, Continental paid $420,000 on a separate claim under the 2010 policy. With regard to the victims of the June 2012 accident, Piggly Wigglyôs primary carrier investigated the accident, never disputed coverage, never reserved rights, and tendered its policy limits. Later, Continental and Piggly Wiggly entered into an agreement whereby Continental expressly reserved its right to seek rescission of the 2011 policy, while at the same time participating in and funding settlement of the underlying claims. This lawsuit followed.

***Issues:***

***(1) Whether Continental was entitled to summary judgment on recision of the 2011 policy based on fraud in the application.***

***(2) Whether Continental waived its right to seek recision.***

***(3) Whether Continental was entitled to summary judgment based on the expected or intended injury exclusion.***

**Holding:** (1) No. The District Court for the Northern District of Alabama held that ñ[a] genuine dispute of material fact exists regarding the nature and scope of Defendantôs representation to Plaintiff about its Fleet Safety Manual.ò The ñFleet Safety Manualò was the ñsafety controlsò provided during the application process. The court found that there was a dispute regarding whether the ñsafety controlsò applied to both tractor trailers and private passenger vehicles. The court also found that fact issues existed regarding materiality and whether Continental would have issued the policy in question had it known of the alleged misrepresentations.

(2) No. Piggly Wiggly argued that (a) because Continental paid the unrelated claim under the 2010 policy and (b) accepted premiums for a 2012 policy, all after Stewartôs accident, Continental should be precluded from attempting to rescind the 2011 policy. The court rejected these arguments. As to the payment under the 2010 policy, the court found that all events related to the claim in question occurred before the facts

at issue in this case were known. As to the 2012 policy, the court found that Continental could not have refused to renew the 2012 policy. Had Continental sought to not renew the 2012 policy at the time it discovered the alleged misrepresentations, it would have violated Alabama law by failing to provide Piggly Wiggly with sufficient notice. Further, the court found that Continental constantly maintained that it intended to seek a rescission of the policy, thereby allowing it to now seek a rescission.

(3) No. Under Alabama law, the expected or intended exclusion is governed by a subjective standard. Therefore, the court determined that, based on the record, a fact question existed as to whether the expected or intended exclusion applied.

**Inventory Shortage Exclusion**

*W.L. Petrey Wholesale Co., Inc. v. Great Am. Ins. Co.*, --- F. Appôx ð , 2015 WL 4646599 (11th Cir. Aug. 6, 2015).

**Facts:** The insured sold wholesale goods and supplies to convenience stores using nationwide sales personnel. One employee, who operated in central and southern Indiana, was fired after a customer requested the employee no longer service its store. After the employee was fired, the insured discovered that his storage unit was short approximately 82,500 bottles of Five Hour Energy drinks. The insured audited route inventory records and compared the numbers with a physical count in the storage unit. The insured also compared the employeeôs orders and sales, and those records showed that the employee routinely ordered more Five Hour products that was necessary. The insurer denied the claim based on the following exclusion: ñWe will not pay for . . . [l]oss, or that part of any loss, the proof of which as to its existence or amount is dependent upon: (a) An inventory computation; or (b) A profit and loss computation.ò The insured filed a breach-of-contract and bad-faith action in the United States District Court for the Middle District of Alabama. The court granted summary judgment in the insurerôs favor, and the employee appealed.

***Issue:*** ***Whether the insured's claim for missing inventory was excluded under the inventory shortage exclusion.***

**Holding:** Yes. The Eleventh Circuit affirmed the district courtôs grant of summary judgment in the insurerôs favor. The court noted that the insured provided no independent evidence of the employeeôs theft. The only evidence is based solely on inventory comparisons to prove the claimed loss. The court held that Alabama law required independent evidence of employee dishonesty, and that the insured could not provide any such evidence in this case. Therefore, the court held that the loss was excluded, and that the district court properly granted summary judgment.

**Fifth Amendment and Arbitrary and Capricious Due Process Violations**

*St. Paul Fire and Marine Ins. Co. v. Town of Gurley*, 2015 WL 5286915 (N.D. Ala. Sept. 8, 2015).

**Facts:** In 2003, M&N Materials purchased land outside of the Town of Gurley, Alabama to build a rock quarry. Many Town citizens opposed the quarry and, in April 2004, the citizens voted overwhelmingly to annex the property into the Townôs limits in order to regulate the quarry. The Town then issued a moratorium on the use of the property as a quarry. In December 2004, M&N submitted a claim to the Town claiming wrongful annexation of the property without consent, ñarbitrarily and capriciouslyò denying M&Nôs request for a license, and threatening to pass zoning laws to prevent M&N from operating a quarry. In January 2005, the Town passed an ordinance zoning all newly annexed land as agricultural, thereby preventing M&N from operating a quarry on its property.

M&N filed an action asserting a Fifth Amendment takings claim, a substantive due process claim, a declaratory judgment claim regarding the annexation and/or zoning restrictions, and seeking to enjoin the Town from exercising further control over the property.

St. Paul issued Public Entity Composite policies to the Town, which contained both Public Entity General Liability (ñPEGLò) and Public Entity Management Liability (ñPEMLò) portions. St. Paul filed this declaratory judgment action, seeking a declaration that its policies did not provide coverage for M&Nôs claims against the Town. The parties filed cross-motions for summary judgment.

***Issue:*** ***(1) Whether the actions of the Town were an "accident" such that a duty to defend existed under the PEGL portion of the policy.***
***(2) Whether the "public use of property" exclusion excluded all coverage so that the insurer did not have to defend under the PEML portion of the policy.***
***(3) Whether the duty to indemnify issue should be stayed pending the outcome of the underlying case.***

**Holding:** (1) No. The PEGL portion of the policy provides coverage for bodily injury or property damage that: (1) ñhappens while this agreement is in effect;ò and (2) ñis caused by an event.ò An ñeventò is ñan accident, including continuous or repeated exposure to substantially the same general harmful conditions.ò The Court held that the Townôs annexation of M&Nôs property; imposition of a moratorium on all licenses for quarry activities; and re-zoning of M&Nôs property were all intentional acts that did not qualify as ñaccidentsò or ñevents,ò as defined by Alabama law and the policies. Accordingly, no duty to defend existed under the PEGL portion of the policies.

(2) No. The PEML portion of the policy contained a ñPublic Use of Propertyò exclusion, which excluded coverage for losses resulting from ñany method or proceeding used in the taking or controlling of private property for public use; or the diminution in value or inverse condemnation of property thatôs caused by the taking

or controlling of private property for public use.ò The court applied this exclusion to exclude coverage for M&Nôs ñregulatory takingò under the Fifth Amendment. However, the court held that, based on the facts alleged in the complaint, M&Nôs substantive due process claim created a claim ñseparate and apartò from the Fifth Amendment takings claim. Therefore, the court held that the insurer had a duty to defend until the substantive due process claim is no longer in the underlying action.

(3) Yes. The court concluded that it was premature to address the issue of indemnification under the policies while the underlying action was ongoing. Thus, the court retained jurisdiction and stayed this issue until a judgment or settlement was reached in the underlying action.