Summer 2015 Issue

In this edition, we have included several cases of interest, highlighted by several opinions from the Eleventh Circuit Court of Appeals. *Pennsylvania National Mutual Casualty Ins. Co. v. Snider*, --- Fed. Appx. ----, 2015 WL 1544617 (11th Cir. Apr. 7, 2015), addresses the issue of whether a claimant can establish coverage in a subsequent coverage action based on a general jury verdict in its favor where it pursued two different theories of liability, one of which was covered, and one of which was not. Also, in a later opinion in *Pennsylvania National Mutual Casualty Ins. Co. v. St. Catherine of Siena Parish*, --- F.3d ---, 2015 WL 3609353 (11th Cir. June 10, 2015), the Eleventh Circuit addressed whether the ñcontractual liabilityò exclusion applies to preclude coverage for a breach-of-contract/implied warranty claim in the construction context. Also, in *Scottsdale Indem. Co. v. Martinez, Inc.*, --- F. Appôx ---, 2015 WL 3823728 (11th Cir. June 22, 2015), the Eleventh Circuit addressed the defense of fraud in the application and the proof required at the summary judgment stage.

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

Insurer's Ability to Opt Out in Uninsured/Underinsured Motorist Action

Ex parte Alfa Mut. Gen. Ins. Co., --- So. 3d ---, 2015 WL 3935203 (Ala. June 26, 2015).

Facts: The plaintiff was injured when a vehicle he occupied was struck by an uninsured motorist. The plaintiff filed suit against his insurer, seeking to recover uninsured/underinsured motorist (ñUIMò) benefits but did not name the tortfeasor driver as a defendant. The insurer then filed a third-party complaint against the tortfeasor driver, asserting a subrogation claim. The insurer then filed a motion to realign the tortfeasor as a direct defendant and to opt out of the action. The trial court denied the motion, and the insurer filed a petition for writ of mandamus.

Issue: ***Whether the trial court exceeded its discretion in denying the motion to realign the parties and allow the insurer to opt out.***

Holding: Yes. The Alabama Supreme Court held that an insurer is not required to waive subrogation before it can opt out and realign the parties. Because the insurer was not required to waive its subrogation rights before it continued to defend the uninsured motorist, the trial court abused its discretion.

Duty to Read Insurance Policy

Alfa Life Ins. Corp. v. Reese, --- So. 3d ---, 2015 WL 3964215 (Ala. June 30, 2015).

Facts: The plaintiff met with a licensed agent of the insurer to procure a life insurance policy for her husband. At the time the plaintiff filled out the application, her husband was in poor health and he remained in the car while the plaintiff met with the agent and

filled out the life insurance application. Prompted by the agent, the plaintiff answered ñNoò to questions whether the husband suffered from diabetes, kidney failure, or amputation due to disease, despite advising the agent that her husband suffered from all three ailments. The application contained specific language that failure to answer truthfully could result in loss of coverage. Nevertheless, according to the plaintiff, the agent assured her that the policy would be effective even if the answers to these questions were incorrect.

The insurer issued the policy based on the application and the plaintiff made two premium payments before her husband died. After the husbandôs death, the plaintiff made a claim for coverage under the policy. The insurer discovered that the plaintiffôs husband had suffered from diabetes, kidney failure, and amputation due to disease, and denied the claim.

The plaintiff filed a lawsuit against the insurer, asserting claims for breach of contract and fraud, and the insurer filed a cross-claim to void the policy based on misrepresentation. The insurer filed motions for summary judgment, which the trial court denied, and the Alabama Supreme Court accepted the case on permissive appeal.

Issues:

(1) ***Whether an agent's misrepresentation regarding the contents of a document be sufficient to excuse an insured's duty to read.***

(2) ***Whether a plaintiff is relieved of the duty to read where there is no evidence of a special relationship between the parties and no evidence that the plaintiff suffers from a disability rendering her unable to discern the contents of the document.***

(3) ***Whether information that an agent allegedly obtained in the application process be imputed to the insurance company where the application agreement states, "<u>No information or knowledge obtained by any agent . . . in connection with this Application shall be construed as having been made known to or binding upon the Company"</u>.***

Holding: (1) No. An insured cannot reasonably rely on oral representations when in possession of written documents that directly contradict oral representations. The plaintiff argued that she was not presented with a ñreasonable opportunityò to read the application because the agent completed it on a laptop. The Court rejected this argument because ñfor all that appears, [the plaintiff] decided to ôblindly trust[]ô the agentsô representations rather than taking even the most basic of precautions to ôsafeguard [her] interests.ôò

(2) No. The Court found that the ñspecial circumstances/relationshipò exception did not apply to the facts of this case. The plaintiffôs only argument in this regard was that the application was completed on a laptop and had to be signed on a separate

electronic pad, which, in her view, constituted ñspecial circumstances.ò The Court rejected this argument.

(3) No. The plaintiff received a document that clearly stated that information obtained by agents would not be imputed to the insurer. As a result, the Court held that she was charged with the knowledge of what was stated in the document and that the language in the document was binding on the plaintiff.

Alabama Federal Law Update

Burden of Proof of Allocation After General Jury Verdict

Penn. Nat'l Mut. Cas. Ins. Co. v. Snider, --- Fed. Appx. ----, 2015 WL 1544617 (11th Cir. Apr. 7, 2015).

Facts: Homeowners filed a lawsuit against their builder in state court under two different theories of liability: (1) breach of contract based on the builder abandoning the project and (2) breach of implied warranty based on construction defects the homeowners discovered in the home. As damages, the homeowners sought recovery for the cost of repairing the insuredôs work, the costs of repairing other conditions in the home caused by the insuredôs faulty work, and damages for emotional distress and mental anguish. The jury in the underlying case completed a general verdict against the insured based on a verdict form identifying four different claims and instructing the jury to indicate upon which of those claims they based a verdict for the homeowners: (1) breach of contract; (2) implied warranty; (3) emotional distress; and (4) mental anguish. The jury returned a verdict in favor of the homeowners for $700,000 and found for the homeowners on all four counts, but did not allocate the verdict among the separate counts despite its inquiry to the Court as to whether it should allocate the different damages.

After the verdict, the builderôs insurer filed a declaratory judgment action against the builder in the United States District Court for the Middle District of Alabama seeking a declaration that the insurer was not obligated to indemnify the insured in the action with the homeowners. The homeowners filed a counterclaim against the insurer and a crossclaim against the insured to recover the $700,000 award. The Middle District of Alabama granted summary judgment to the insurer, holding that it owed no duty to indemnify because the homeowners could not establish coverage based on the general verdict form which contained both covered and uncovered claims, and the homeowners appealed.

Issue: ***Whether the builder's insurer was obligated to indemnify claimant/homeowners for a general jury verdict that did not allocate damages to the specific claims.***

Holding: No. The Court held that the policy only provided coverage to property damage and

bodily injury when it arises out of an ñoccurrence.ò Recognizing previous holdings by the Alabama Supreme Court on the issue, the Eleventh Circuit determined that the insuredôs intentional acts of walking off the job and the faulty construction that resulted only in cost of repairing the faulty work did not amount to an accident or occurrence. The homeowners conceded that their breach-of-contract claim was based on the builderôs purposeful abandonment of the project. As a result, the Eleventh Circuit held that the breach-of-contract claim was not an ñoccurrenceò within the terms of the insuring agreement. However, the Court recognized that the policy did cover damages arising from conditions created by the faulty work.

The Eleventh Circuit then held that, because (1) the homeowners bore the burden of proof to show that the verdict met the insuring agreement, and (2) because the general verdict form failed to allocate damages between covered and uncovered claims, the trial courtôs grant of summary judgment in favor of the insurer was correct. The court noted that ñAlabama courts have held that when (1) the injured party in the underlying action pursues two theories of liability, (2) under one of the theories there is no coverage under the policy, and (3) the jury returned a general verdict, then it is impossible to establish coverage under the policy.ò

"Contractual Liability" Exclusion; Breach of Implied Warranty as an Occurrence
Penn. Nat'l Mut. Cas. Ins. Co. v. St. Catherine of Siena Parish, --- F.3d ---, 2015 WL 3609353 (11th Cir. June 10, 2015).

Facts: In 2003, a church hired the insured roofing contractor to replace its main roof. In 2005, the church again hired the insured, this time to repair leaks in a secondary roof. Eventually, the church began to suffer leaks to both roofs. The churchôs expert determined that the cause of the leaks in both roofs was the insuredôs faulty work.

The church sued the insured in state court, and the insurer defended the insured under a reservation of rights. After a trial on the merits, a jury awarded the church $350,000 on a general verdict form. The insurer then filed a declaratory judgment in the U.S. District Court for the Southern District of Alabama, seeking a declaration that it owed no duty to indemnify the insured. The parties filed cross-motions for summary judgment, and the trial court granted the insurerôs motion based on the ñcontractual liabilityò exclusion, and the insured appealed.

Issues:
(1) ***Whether the "contractual liability" exclusion excludes coverage for the church's claims.***
(2) ***Whether the insured's faulty work meets the definition of "occurrence" under a general liability policy.***

Holding: (1) No. The Court held that the ñcontractual liabilityò exclusion only bars coverage for claims based on an assumption of liability in an indemnity agreement. Because the

churchôs breach-of-contract claim was based on an implied warranty regarding workmanship and was not an indemnity agreement, the exclusion did not preclude coverage.

(2) Yes. The Court relied on Alabama law that the faulty work itself is not property damage caused by an occurrence. However, a claim for damage resulting from a condition caused by the contractorôs faulty work may arise out of an accident and be covered as an occurrence.

The Eleventh Circuit reviewed the trial court record and determined that the nature of the claimed damages was in the form of repair to conditions related to the faulty work as opposed to repairs to the faulty work itself.

Also, the Eleventh Circuit specifically rejected the insurerôs argument that the injuries were not covered because they were a result of the insuredôs intentional breach of the construction contract. The Court held that because the damages were for conditions created by the insuredôs faulty work, the claims would constitute an ñoccurrenceò under the policy.

Coverage for Fraudulent Conduct of Employee

Scottsdale Indem. Co. v. Martinez, Inc., --- F. Appôx ---, 2015 WL 3823728 (11th Cir. June 22, 2015).

Facts: The insured, a building-maintenance company, serviced commercial properties. The insuredôs CEO/CFO was authorized the make deposits and withdrawals from the company accounts. When the insured learned that the CEO/CFO had been embezzling funds from the insured for years, the insured fired her. The insured then submitted a claim to its insurer under a ñCrime Coverage Section,ò which provided coverage for employee theft. The insurer denied coverage for two reasons: material misrepresentations in the renewal application; and the loss was not discovered during the policy period, as the employee was aware of her fraudulent conduct and this was imputed to the company for purposes of determining when a loss is discovered. The insurer then filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, seeking a declaration of no coverage. The district court granted the insurerôs motion for summary judgment, and the insured appealed to the Eleventh Circuit.

Issue: ***Whether the insured made a material misrepresentation in the renewal application.***

Holding: Yes. The renewal application asked whether the insured had an independent CPA conduct an annual audit or review of books and accounts, and whether the insured had an independent entity reconcile the bank accounts. The embezzling employee

answered yes to both questions. These answers were not true.

The Court found that the undisputed facts established that the misrepresentations were material based on evidence from the insurerôs underwriters and evidence that a true independent reconciliation of the accounts would have exposed the embezzlement. Therefore, the Court held that the district court properly granted summary judgment in favor of the insurer. The Court did not reach the issue of whether the loss was discovered during the policy period, because the district court correctly ruled regarding the material misrepresentation issue.

Coverage Exclusions

Rabon v. Rabon, No. CA 13-00567-C, 2015 WL 1643479 (S.D. Ala. Apr. 14, 2015).

Facts: Lee and Jonathan Rabonôs mother applied for and acquired automobile insurance for her vehicle. The application required her to disclose all members of her household over the age of fifteen and other relatives over the age of fifteen who might drive the vehicle at issue. Mrs. Rabon did not disclose the fact that her sons were living at home at the time of the application.

A train struck the vehicle while Lee was driving, and Jonathan was injured. Jonathan filed an action against Lee and the train company in state court to recover damages for his injuries. Jonathan obtained a default judgment of $500,000 against Lee.

Jonathan then filed a declaratory judgment action in state court against his motherôs insurer, seeking a declaration that the insurer was required to defend Lee in the underlying suit and indemnify Jonathan against the judgment that was entered against Jonathan in state court. The insurer removed the action to the United States District Court for the Southern District of Alabama. The insurer then filed a motion for summary judgment, asking the court to declare that it had no duty to indemnify Jonathan based on fraud in the application and the application of the exclusion that precluded liability coverage for claims against one member of the household for bodily injury to another member of the household.

Issue: ***Whether the insurance policy excludes coverage to the named insured's sons, who resided with her but were not named on the policy.***

Holding: Yes. The policy excluded coverage for bodily injuries to individuals ñprimarily residing in the same household as [Cindy Rabon], and related to [Cindy Rabon] by blood, marriage . . ..ò Because Jonathan is the insuredôs son, he was specifically excluded from receiving benefits under the policy. The court was not persuaded by Jonathan and Leeôs argument that the Mandatory Liability Insurance Act invalidated that provision of the policy. Instead, the court reasoned that, although the Act requires every motor vehicle operating in Alabama to have liability insurance, there

are certain situations where the liability insurer does not have to provide coverage. Finding that the exclusion precluded coverage, the court declined to address the fraud in the application defense.

Definition of "Occurrence"

Penn. Nat. Mut. Cas. Ins. Co. v. Ret. Sys. of Ala., No. CV-14-S-248-NW, 2015 WL 1810463 (N.D. Ala. Apr. 21, 2015).

Facts: The insured contracted to assist in the construction of a hotel. Later, the insured was named as a defendant in a state-court action regarding allegedly faulty construction of a firewall that resulted in separation of the firewall and mold growing in the hotel. In the underlying litigation, the plaintiff sought recovery for the costs of remediating the defective firewall and damages associated with remediation of mold growth caused by the improper construction of the firewall. The CGL insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, seeking a declaration that it had no duty to defend or indemnify the insured in the underlying action. The insured and its sureties filed a counterclaim alleging breach of contract and bad faith and filed summary judgment on the breach-of-contract claim and a cross-motion for summary judgment on the declaratory judgment claim.

Issues: ***(1) Whether the remediation of the fire wall itself is an "occurrence."***
(2) Whether the mold exclusion in the policy excluded coverage for alleges costs of remediating "condensation" created by the construction of the firewall.

Holding: (1) No. The court determined that the separation in the firewall was not an occurrence under the policy, as it was improperly constructed by faulty workmanship and so the damage was not caused by an accident or occurrence. The insured argued that it incurred damage when it was remediating the firewall construction and should be covered under the authority of *United States Fidelity and Guaranty Co. v. Andalusia Ready Mix, Inc.*, 436 So. 2d 868 (Ala. 1983). In that case, the Alabama Supreme Court held that damage to a structure while remediating the damage caused by a defective product was not faulty workmanship and was covered. However, the Norther District Court found that no such damage occurred when making repairs to the faulty firewall. Instead, the court noted that the damage at issue occurred while remediating the condensation and not the firewall itself; therefore, the exception created in *Andalusia Ready Mix* did not apply.

(2) Yes. The allegations in the complaint related to mold growth in the hotel were excluded under the ñFungi or Bacteria Exclusion.ò Although the defendants argued that they incurred damages for the remediation of condensation and not mold, the court disagreed. The exclusion excluded property damage caused by mold that is ñactual, alleged . . . or *threatened*ò to exist; therefore, damage caused by condensation

is included in this exclusion. (emphasis added). As a result, the court found that the ñcondensationò damages could not be separated from remediation as a result of the threat of mold. Accordingly, the exclusion precluded coverage.