Fall 2016 Issue

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

In this edition, we have included a number of cases we hope you find interesting. Included is a case from the Alabama Supreme Court that considers whether the general aggregate limit and the products/completed work hazard limit in a Business Owners Special Policy can provide simultaneous coverage. *Pharmacists Mut. Ins. Co. v. Advanced Specialty Pharmacy*, --- So. 3d ----, 2016 WL 6819657 (Ala. Nov. 18, 2016). In addition, the Southern District of Alabama examines whether a non-party may be joined in an action when the principal place of business and registered agent are located within 100 miles of the courthouse where the summons was issued. *Crum & Forster Specialty Ins. Co. v. ARD Contracting, Inc.*, 2016 WL 5243399 (S.D. Ala. Sept. 20, 2016). The Northern District of Alabama addresses whether Inland Marine Computer Property and Business Liability sections of a policy create coverage when an insured seeks coverage for personal information stolen from its computer network. *Camp's Grocery, Inc. v. State Farm Fire and Cas. Co.*, 2016 WL 6217161 (N.D. Ala. Oct. 25, 2016). Finally, the Northern District of Alabama considers whether a business exclusion in a homeownerôs policy applies when the occurrence took place during the business operations of the insured. *Travelers Home and Marine Ins. Co. v. Garner*, 2016 WL 6873193 (N.D. Ala. Nov. 22, 2016).

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

Alabama State Law Update

Multiple Coverages Under Business Owners Special Policy
Pharmacists Mut. Ins. Co. v. Advanced Specialty Pharmacy, --- So. 3d ----, 2016 WL 6819657 (Ala. Nov. 18, 2016).

Facts: A number of individuals filed a wrongful-death and personal-injury action in Jefferson County Circuit Court against Advanced Specialty Pharmacy LLC and Meds I.V., Inc. (the ñinsuredò) after these individuals used total parenteral nutrition (ñTPNò) that was contaminated with bacteria. The insured manufactured the TPN and filed a claim with its insurer under the Business Owners Special Policy (ñBusiness Owners policyò) and Commercial Umbrella/Excess Liability Coverage Policy (ñexcess policyò). The excess policy provides $1 million in coverage when the claim exceeds the coverage limits in the Business Owners policy for each occurrence.

The insurer filed an interpleader complaint and requested a discharge of liabilities by submitting $4 million to the court as this amount, in the insurerôs opinion, constituted the policy limits for both policies. ($3 million was from the Business Owners policy under general aggregate limits and $1 million was from the Excess Liability policy.) These funds were to be distributed to the parties as the court saw fit.

However, the claimants interpreted the policies in such a way that the policy limits were $7 million and not $4 million. The claimants believed that an additional $3 million should be submitted due to additional coverage under the products/completed work hazard section of the Business Owners policy. $2 million of this amount would come from the Business Owners policy and $1 million would come from the excess policy. After the parties filed motions for summary judgment, the circuit court entered summary judgment in favor of the claimants. The insurer appealed.

Issue: ***Whether the Business Owners Policy provides coverage under both the general aggregate limit and the products/completed work hazard limit.***

Holding: No. The parties agree that coverage is limited to Coverage L, ñbodily injuryò . . . ñcaused by an óoccurrence.ôò ñThe General Aggregate Limit is the most [the insurer] will pay for the sum of: ña. all ódamages under Coverage L, except ódamagesô due to óbodily injuryô . . . included in the óproducts/completed work hazardô; . . . 3. The Products/Completed Work Hazard Aggregate Limit is the most [the insurer] will pay for ódamagesô due to óbodily injuryô . . . included in the óproducts/completed work hazard.ôò

The circuit court determined that the bodily injuries were caused by a ñproducts hazard.ò Products hazard is defined as ñóbodily injuryô . . . arising out of óproductsô after physical possession of the products has been relinquished to others. ñThe óbodily injuryô . . . must occur away from premises [the insured] own[s] or rent[s] unless [the insuredôs] business includes selling, handling, or distributing óproductsô for consumption on premises owned or rented to [the insured].ò

The Alabama Supreme Court held that a bodily injury can only be covered under either the general aggregate limit or the products/completed work hazard coverages ï not both. However, the circuit court determined that there was coverage under both sections of the policy because the court decided there were at least three occurrences. But, since a bodily injury can be caused by only one occurrence, the bodily injury falls under the general aggregate limit and not the products/completed work hazard portion of the policy. Therefore, the Supreme Court affirmed the $4 million policy limits, and reversed the circuit courtôs finding that an additional $3 million in coverage was available.

Alabama Federal Law Update

Remand

Jones v. State Farm Fire and Cas. Co., 2016 WL 4472980 (N.D. Ala. Aug. 5, 2016) (opinion adopted in *Jones v. State Farm Fire and Cas. Co.*, 2016 WL 4445245 (N.D. Aug. 23, 2016)).

Facts: The insured filed a breach-of-contract, bad-faith, negligent procurement of insurance,

fraud and estoppel case against his homeownerôs insurer, and his insurance agent. The insurer and agent removed the action to the United States District Court for the Northern District of Alabama, and the insured moved to remand the action to state court.

Issue: ***Whether the action should remain in federal court because the agent was fraudulently joined.***

Holding: No. The insured and the agent are residents of Alabama and the insurer has its principal place of business in Illinois. According to the complaint, the agent knew the insurer discriminated against African American policy holders by denying claims more often than other insurers, and knew that the insurer recently adopted ñan adversarial claims handling process.ò The insured offered an affidavit in support of his motion to remand, stating that the agent had not procured the correct insurance coverage for personal property. As a result, the insured claimed that the insurer accused him of fraud and denied his claim. Federal law requires remand when there is ñany possibility that the state law might impose liability on a resident defendant under the circumstances alleged in the complaint.ò The federal district court held that the insured articulated at least a ñplausibleò cause of action against the agent for negligent procurement of an insurance policy. Accordingly, the district court remanded the case to state court.

Motion to Reconsider

American Safety Indem. Co. v. Fairfield Shopping Ctr., LLC, 2016 WL 4732581 (N.D. Ala. Sept. 12, 2016).

Facts: We published a summary of the Northern District of Alabamaôs opinion of American Safety Indemnity Companyôs (ñASIò) motion for summary judgment in the summer edition of our newsletter. After the court denied ASIôs motion for summary judgment, ASI filed a motion to reconsider its motion for summary judgment. GE Commercial Property Finance Corporation (ñGEò) opposes the motion.

Issue: ***(1) Whether the court erred by holding that a phone call from the insurance agency served as notice of the claim to ASI;***
(2) whether the court erred by relying on the mortgage clause in the policy, as GE did not fulfill the conditions of the policy to receive protection from the clause; and (3) whether California law requires the court to hold that the insurance contract is void ab initio due to the misrepresentations Fairfield Shopping Center, LLC ("Fairfield") made during the insurance application process.

Holding: (1) No. The court acknowledged it made a mistake in stating that ASI received notice of the claim through the insurance agency, because the insurance agency is not listed on the insurance policy. However, the facts show that ASI received notice within

about four months of when GE learned of the loss. ASI did not cite authority stating that a four-month delay is unreasonable. Also, California law requires an insurer to show prejudice for the delay. Since ASI did not present evidence of prejudice, the motion to reconsider is denied.

(2) No. The policy provides that ñ[i]f [the insurer] den[ies] [Fairfieldôs] claim because of [Fairfieldôs] acts, the mortgageholder will still have the right to receive loss payment if the mortgageholder: . . . [h]as notified [ASI] of [a] substantial change in risk known to the mortgageholder. All of the terms of the Coverage Part will then apply directly to the mortgageholder.ò ASI argues that because GE did not tell ASI the property did not have power, the mortgage clause does not apply. However, GE did not learn that the power was off until two weeks before the policy was canceled. Nothing in the policy indicates that ASI required notice within two weeks. Moreover, GE did not learn of a change in risk until after the loss and so GE did not have a duty under the mortgage clause because there was no change in the substantial risk by that point. Therefore, the motion to reconsider this issue is denied.

(3) No. ASI argues that California law allows ASI to rescind the contract due to Fairfieldôs misrepresentations during the application process. However, the court disagreed, as ASI did not cite California case law that discussed whether a standard mortgage clause in an insurance policy is void due to an insuredôs misrepresentations during the application process. The majority view in this country is that a standard mortgage clause protects the mortgagee against a mortgagorôs actions during the creation of the policy. *See* 44 Am. Jur. 2d Ins. § 1043. Moreover, California law specifically allows an insurance policy to be void *ab initio* with regard to some insureds but still provide coverage to other insureds. Therefore, the motion to reconsider is denied.

Misrepresentations in the Application Process
Baker v Travelers Ins. Co., 2016 WL 4762543 (N.D. Ala. Sept. 13, 2016).

Facts: Soquetta Griffin (ñGriffinò) made a claim for stolen property and fire damages after someone broke inside the insured property. After an investigation, including multiple recorded statements and an EUO, the homeownerôs property insurer denied coverage, as the insured made numerous misrepresentations before the policy was issued and during the investigation of the claim. One of the misrepresentations was failing to tell the insurer that Griffin had already sold the property to Charles Baker (ñBakerò). Baker filed an action in state court for breach of contract and bad faith, and the insurer removed the action to the United States District Court for the Northern District of Alabama. After discovery, the insurer moved for summary judgment.

Issue: ***(1) Whether the action is due to be dismissed, as Griffin acted fraudulently through material misrepresentations during the application process.***

(2) Whether the action is due to be dismissed, as the insurance contract is void due to the misrepresentations Griffin made.
(3) Whether the action is due to be dismissed, as Griffin made numerous misrepresentations following the loss.

Holding: (1) No. Fraud based on misrepresentation involves a misrepresentation of a material fact upon which the insurer relied and sustained damages as a proximate result of the misrepresentation. The insurer argued that Griffinôs failure to inform the insurer that she intended to sell the property and use the property as a group home was a material misrepresentation because the insurer either would have not issued a policy or applied a different risk assessment when determining whether to issue a policy. The court noted that determining whether a misrepresentation is material is typically a jury question. Also, the insurer principally relies on the testimony of the Director of Underwriting Operations to show to the court the misrepresentation was material. In Alabama, an underwriterôs testimony that there was a material misrepresentation is ñnot necessarily dispositive.ò *See State Farm Fire and Cas. Co. v. Oliver*, 658 F. Supp. 1546 (N.D. Ala. 1987). The insurer did not cite case law to support its argument with similar facts as this case. Therefore, summary judgment is denied as to this issue.

(2) No. Alabama Code § 27-17-7(a)(3) provides that misrepresentations may void the policy if an insurer presents evidence that the insurer would not have issued the policy had it known the correct information as opposed to the misrepresented information from the applicant. *Allstate Ins. Co. v. Swann*, 27 F.3d 1539 (11th Cir. 1994). The insurer provided testimony that, if the insurer knew of the insuredôs intent to open a group home, the insurer would not have issued a policy. Also, if the insurer knew that Baker owned the property, the policy would have been underwritten for eligibility using Baker instead of Griffin. The court declined to apply this statute and award summary judgment, as the insurer did not provide evidence that there is a ñuniversal application of its underwriting policy or similar situations in which it denied coverage.ò

(3) Yes. Griffin initially did not tell the insurer that she and Baker intended to use the property as a group home or that Baker owned the home. Griffin only admitted that Baker owned the home after the insurer presented her with the quit claim deed she issued to Baker before she obtained the policy. Post-loss misrepresentations require the insurer to prove that Griffin made post-loss misrepresentations with an ñintent to deceiveò *See* Ala. Code § 27-14-28 (1975). Since Griffin stated she knew her statements about who owned the property were false, the court held that summary judgment was proper.

Joinder of a Non-Party
Crum & Forster Specialty Ins. Co. v. ARD Contracting, Inc., 2016 WL 5243399 (S.D. Ala. Sept.

20, 2016).

Facts: A condominium ownerôs association (ñownerò) filed a lawsuit against its contractor in Escambia County, Florida to resolve a conflict over alleged defective work in the construction of a condominium. Two CGL insurers filed a declaratory judgment action against their insured-contractor and the owner in the United States District Court for the Southern District of Alabama to determine the rights of the parties. The contractor moved to dismiss the owner from the action due to improper venue, as the ownerôs principal place of business and registered agent are in Pensacola, Florida and not Alabama. Instead of replying to the motion, the insurers moved to voluntarily dismiss the owner from the action. After the owner was dismissed, the contractor filed a second motion to dismiss for failure to join an indispensable party since the owner was no longer a party to the action. Instead of responding to this motion, the insurers filed a motion to join a non-party, the owner.

Issue: ***Whether the owner can be added to the action as an indispensable party, as the owner's principal place of business and registered agent are located within 100 miles of the courthouse where the summons was issued.***

Holding: Yes. According to the Federal Rule of Civil Procedure 4(k)(1)(B), personal jurisdiction is created over a defendant ñwho is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued.ò Federal courts have interpreted this provision to mean, if the party ñhas minimum contacts with the 100-mile bulge area,ò the court will gain jurisdiction over the party. *Quinones v. Pennsylvania General Ins. Co.*, 804 F.2d 1167 (10th Cir. 1986). Similarly, if the party is located within 100 miles ñas the crow flies,ò then personal jurisdiction is created over the party. *Sprow v. Hartford Ins. Co.*, 594 F.2d 412 (5th Cir. 1979). The summons in this case was issued in Mobile, Alabama. As the crow flies, Mobile, Alabama is within 100 miles of Pensacola, Florida. Therefore, the court has personal jurisdiction over the owner and the owner will be joined as an indispensable party.

Notice as Condition Precedent to Coverage/Default Judgment
Landmark American Ins. Co. v. White-Spunner Const. Inc., 2016 WL 5429661 (S.D. Ala. Sept. 26, 2016).

Facts: The insured installed an irrigation system for White-Spunner Construction, Inc. (ñWSCò). WSC thought the insured did not perform the work well and notified the insuredôs insurance agent that WSC would be filing a lawsuit if the insured did not correct the issues or pay WSC over $750,000 in damages. The insurer received notice of the claim and issued a reservation of rights letter to the insured, requesting information from the insured. However, the insured did not respond to the insurerôs request for information. WSC filed a state court action against the insured for failing

to properly install an irrigation system, but neither WSC nor the insured informed the insurer of the lawsuit. The insured did not appear, and the court entered a default judgment against the insured.

The insurer first learned of the lawsuit when WSC sent a copy of the default judgment to the insurer and demanded the insurer pay the $750,000+ judgment. The insurer then filed a declaratory judgment action against the insured and WSC in the United States District Court for the Southern District of Alabama seeking a declaration that it did not owe coverage. The insured did not respond to the DJ complaint, and the insurer filed a motion for default judgment.

Issue: ***Whether the insurer's motion for default judgment should be granted based on insured's failure to provide notice of lawsuit.***

Holding: Yes. As a condition precedent to coverage, the policy required that the insured provide notice of claims and lawsuits against the insured. Notice must be provided within a reasonable time. Since the insured never notified the insurer that a lawsuit was filed against the insured, and this notice is a condition precedent to coverage, a default judgment was appropriate.

Contributory Negligence and Merger Doctrine Regarding Policy Terms
Liberty Corporate Capital Ltd. v. Club Exclusive, Inc., 2016 WL 6157772 (N.D. Ala. Oct. 24, 2016).

Facts: The insurer issued a commercial building policy to the insured through an agent and a surplus lines-broker (ñbrokerò). After the insured filed a claim for damages caused during a fire, the insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama seeking a declaration that no coverage should be provided to the insured. The insured filed a counterclaim against the insurer and also asserted claims of negligent procurement of insurance and breach of contract to procure insurance against the agent and broker. The agent and broker moved to dismiss the claims against them, and the insured did not respond to the motion.

Issue: ***(1) Whether the insured's negligent procurement claims are barred by contributory negligence.***
(2) Whether the insured's breach-of-contract to procure insurance claims are barred by the merger doctrine.

Holding: (1) Yes. Negligent procurement claims against an agent and broker are barred by an insuredôs contributory negligence. An insured is contributorily negligent when the ñdocuments available to the insured clearly indicate that the insurance in fact procured for the insured is not what the insured subsequently claims he or she requested the

agent to procure.ò *Alfa Life Ins. Corp. v. Colza*, 159 So. 3d 1240 (Ala. 2014). Since the policy was in effect during the relevant points in this case, the insured had a duty to read the policy and cannot maintain a negligent procurement action against the broker or agent.

(2) Yes. An agent or broker who procures insurance for an insured may not do so negligently or unjustifiably, or the agent or broker can become liable for those actions in contract or tort. But, if the insured accepts the policy, the insured is bound by the terms of the policy, even if the oral negotiations are not aligned with the policy. The oral negotiations and the terms of the policy are merged into the policy. *See Langley v. Mut. Fire, Marine & Inland Ins. Co.*, 512 So. 2d 752 (Ala. 1987).

An exception to the merger doctrine exists where an agent or broker assumes additional duties through an express agreement. *First Alabama Bank of Montgomery, N.A. v. First State Ins. Co.*, 899 F.2d 1045 (11th Cir. 1990). However, in this case, the insured did not allege that any express agreement exists. Therefore, the merger doctrine bars the breach-of-contract to procure insurance claims against the agent and broker.

Duty to Defend and Indemnify/Inland Marine

Camp's Grocery, Inc. v. State Farm Fire and Cas. Co., 2016 WL 6217161 (N.D. Ala. Oct. 25, 2016).

Facts: Three credit unions sued the insured and the insuredôs franchiser in state court for damages caused when credit card, debit card, and check card information was stolen from the insuredôs computer network. These credit unions allege that the insured failed to maintain adequate computer systems and adequate encryption intrusion and prevention systems as well as failed to provide adequate employee training. The insured filed a declaratory judgment action in the United States District Court for the Northern District of Alabama and requested that its insurer provide a defense and indemnity in the underlying action. Both parties filed summary judgment motions.

Issue: ***(1) Whether the endorsement entitled " Inland Marine Computer Property Form" creates coverage for the insured.***
(2) Whether intangible computer data qualifies as "property damage" for purpose of coverage under the "Business Liability" section of the policy.

Holding: (1) No. The policy provides that the insurer will pay for ñaccidental direct physical loss to . . . 1. Computer equipment [and] 2. Removable data storage media.ò The Inland Marine Computer Property Form (ñIMCPFò) provides that the insurer will pay for ñaccidental direct loss to . . . (1) . . . (a) óComputer programs used in your business operations; (b) The óelectronic dataôthat exists in ócomputerômemory or on ócomputerôstorage media, used in your business operations; (2) That portion of your

customer ócelectronic dataôthat is supplied to you for processing or other use in your business operations.ò The form states that it provides coverage for a ñdirect lossò and therefore only applies to first-party coverage.

First party claims are limited to damage to the policyholderôs property. Third party claims are made by someone other than the policyholder claiming that the policyholder is liable for damage. *See Toffel v. Nationwide Mut. Ins. Co.*, 2016 WL 4271837 (N.D. Ala. Aug. 15, 2016). Since the IMCPF only applies to first party claims and the claims in the underlying action are third party claims, the insurer is not obligated to provide a defense and indemnity under this endorsement of the policy.

(2) No. Coverage L provides business liability insurance, but this section does not provide coverage for any of the claims asserted in the underlying lawsuit. Coverage is triggered under this section when there is ñbodily injury,ò ñproperty damage,ò or ñpersonal and advertising injury.ò However, the underlying lawsuit is limited to economic loss caused by cyber attacks. The insured argues that the ñproperty damageò includes damages for losses related to replacing customer debit and credit cards. The insured concedes that ñproperty damageò is limited to ñtangible propertyò and that electronic data is not tangible. Even if the cards are ñtangible property,ò the credit unions do not allege that the insuredôs acts or omissions caused physical damage to cards. Instead, damage was limited to intangible electronic data. Therefore, the insurer is not obligated to provide a defense and indemnity for the underlying lawsuit.

Business Exclusion in a Homeowner's Policy
Travelers Home and Marine Ins. Co. v. Garner, 2016 WL 6873193 (N.D. Ala. Nov. 22, 2016).

Facts: While on the way to the library for a field trip, the insured stopped by her home with a daycare student, J.F., to pick up some math papers for the daycare. J.F. was unsupervised and insuredôs daughterôs dog knocked her to the ground and bit her. J.F.ôs mother filed an action on her behalf to recover damages for her injuries in state court. The insured made a claim with Travelers, her homeownerôs insurer. Travelers, through this firm, filed a declaratory judgment action in the United States District Court for the Northern District of Alabama and requested that the court find that no coverage existed for the insured. Travelers filed a motion for summary judgment.

Issue: ***Whether the business exclusion precludes coverage in the underlying state court action, as the insured was involved in the operation of the daycare business.***

Holding: Yes. The policy does not provide coverage ñwhere the damages arise out of or in connection with a óbusiness conducted from an óinsured locationôor engaged in or by an óinsured,ô . . . unless the óinsuredô received no more than $2000 in total compensation from the óbusinessô for the consecutive 12 months before an

óoccurrence.ôò The insured owned and operated her daycare as a sole proprietorship. J.F. had been enrolled at the daycare for more than a year at the time of the occurrence. The insured admitted that J.F. would not have been on the field trip to the library that day had she not been enrolled in the daycare. The insuredôs failure to supervise J.F. is a breach of implied duty of a daycare provider, and a failure to supervise is still an action related to her business as a daycare provider. Since the daycareôs gross receipts for the twelve months before the occurrence are much greater than $2,000, the exception to the exclusion did not apply. Therefore, the federal court granted summary judgment in favor of Travelers.