<u>**Summer 2017 Issue**</u>

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

In this Alabama Update, we have included a summary of cases from the past several months. Notably, in *Arnold v. State Farm Fire and Casualty Company*, --- F. Supp. 3d ----, 2017 WL 3308990 (S.D. Ala. Aug. 3, 2017), the court analyzed whether insureds had standing and whether the depreciation of labor costs should be calculated when determining actual cash value. In *Canal Indemnity Company v. Carbin,* 2017 WL 3437655 (N.D. Ala. August 10, 2017), the court examined whether an insuredôs abandonment of a construction site caused bodily injury or property damage to the homeowner and created a duty to defend. Finally, the issue of whether an exclusion may be enforceable in an insurance contract that was not previously approved by the Alabama Department of Insurance was addressed in *Nationwide Property and Casualty Insurance Company v. Chism*, 2017 WL 2929505 (N.D. Ala. July 10, 2017).

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.

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

Medical Authorization/Proof of Loss

Thomas v. Safeway Ins. Co. of Alabama, Inc., --- So. 3d ----, 2017 WL 3326700 (Ala. Ct. App. August 4, 2017).

Facts: After the insured was injured when Erica Squareôs (ñSquareò) vehicle struck her vehicle, the insured made a claim with Squareôs insurer and her own automobile liability insurer. The insuredôs policy included a ñmedical paymentsò section that provided benefits up to $2,000 for medical expenses caused by an automobile accident. For almost a year, the insurer repeatedly requested she sign a proof-of-loss/medical authorization form and provide the insurer with medical bills. Ten months after the first request, the insuredôs lawyer informed the insurer that he was uncomfortable with some language in the form. Communication between the lawyer and the insurer continued for another year, including the lawyerôs question of whether the policy required that the form be signed. After the insured entered into a settlement with Square, the insured filed a breach-of-contract and bad-faith lawsuit against the insurer. The court entered summary judgment in favor of the insurer and the insured appealed.

Issue: ***Whether the insured was required to (1) provide medical bills or (2) sign and turn in the proof of loss/medical authorization form.***

Holding: Yes. The court held that the insured failed to meet the terms of the policy with regard to providing medical bills, as the policy requires the insured to provide all information the insurer requests. This is a post-loss obligation that is a condition precedent to coverage. Also, the insured admits that she did not sign and submit a proof of loss/medical authorization, even though it was requested numerous times, and the policy requires an insured to fill out and return all proof of loss forms. Therefore, the failure to submit a signed proof of loss/medical authorization, is another condition precedent to coverage.

Because the insured did not fulfill her obligations under the policy, the insurer did not have a duty to pay the claim. Although the insured argued that signing the proof of loss/medical authorization would cause her to lose standing to file an action against Square, the court disagreed. Instead, the court interpreted the document to mean that she was only assigning her claims and interests to be paid for medical services. Therefore, summary judgment is affirmed.

Alabama Federal Law Update

Coverage Dispute Between Commercial General Liability Insurer and Commercial Automobile Insurer

Star Ins. Co. v. Progressive Specialty Ins. Co., 2017 WL 2469958 (M.D. Ala. June 7, 2017).

Facts: While hauling a truck loaded with lumber, an employee of CR Owens Pulpwood, Inc. (ñOwens Pulpwoodò) collided with an individual and caused the individualôs death. Her family filed an action in state court against Owens Pulpwood and later added Gilow Wood, Inc. (ñGilow Woodò) in an amended complaint to recover damages. Gilow Wood entered into a settlement with the plaintiffs for $1,000,000 and was dismissed from the action. The funds for settlement were paid 50% by Gilow Woodôs commercial general liability insurer, Star Insurance Company (ñStarò), and 50% by its commercial automobile insurer, Progressive Specialty Insurance Company (ñProgressiveò). The CGL insurer filed a declaratory judgment action in the United States District Court for the Middle District of Alabama against the commercial auto insurer, seeking reimbursement of the funds provided to settle the underlying action. Both insurers moved for summary judgment.

Issue: ***Whether the auto policy or the CGL policy provided coverage and whether one insurer had to reimburse the other.***

Holding: The CGL policy provided coverage, while the auto policy did not; therefore, the CGL insurer had to reimburse the auto insurer for its contribution to the settlement.

The auto policy issued to Gilow Wood provided coverage to a ñnon-owned autoò ñused in connection with your business.ò The definition of ñyourò included named insured Gilow Wood, but did not include Owens Pulpwood. Gilow Wood, a timber dealership business, shared the same office with Owens Pulpwood, a harvesting and hauling timber business. However, Owens Pulpwood was the only entity to communicate with the employee, checks were drawn from the Owens Pulpwood account, and the employee did not know of Gilow Wood at the time of the accident. Therefore, the court held that the employee was not a ñdual employeeò of Owens Pulpwood and Gilow Wood. Instead, he was only an employee of Owens Pulpwood. As such, the vehicle involved in the accident was not an auto ñused in connection with [Gilow Woodôs] business,ò and the auto policy did not provide coverage.

However, the court found that the accident was covered by the CGL policy. The CGL policy excluded coverage for any occurrence that ñinvolve[d] the ownership, maintenance, use or entrustment to others of . . . óautoô that is owned or operated by or rented or loaned to any insured.ò Because the court found that the driver of the truck was an employee of Owens Pulpwood (and not a dual employee of Gilow Wood, the only insured), the court found that the vehicle was not owned, rented, or loaned to Gilow Wood. As such, the exclusion did not apply, the CGL policy provided coverage, and the CGL carrier owed the auto carrier reimbursement.

Motion to Dismiss - Claims against Insurance Agent
James River Ins. Co. v. Ultratec Special Effects, Inc., 2017 WL 2655069 (N.D. Ala. June 20, 2017).

Facts: Through its insurance agent, the insured acquired a commercial general liability policy, including excess coverage, and a workersô compensation policy. Following an explosion at the insuredôs plant causing the death of two individuals, several lawsuits were filed in state court seeking damages for those deaths. The insured requested a defense from the insurer, and the insurer agreed to provide a defense under a reservation of rights. The insurer then filed an action in the United States District Court for the Northern District of Alabama and asked the court to find that the Employerôs Liability Exclusion applied for damages caused by an explosion at the insuredôs plant. After the insured filed a third-party complaint against its insurance agent, the agent moved to dismiss the breach-of-contract, negligent misrepresentation, and fraudulent suppression claims.

Issue: ***(1) Whether the insured could maintain a breach-of-contract claim against its agent.***
(2) Whether the insured could maintain negligent misrepresentation and fraudulent suppression claims against its agent.

Holding: (1) Yes. Although the agent argued that the only contract between the agent and insured is the insurance proposal, the insured alleged that an oral contract existed between the parties. This contract required the agent to procure comprehensive coverage and communicate all alternative policies available to the insured. Because Alabama law recognizes oral contracts, and the insured alleged that an oral contract exists, the court denied the motion to dismiss the breach-of-contract claim against the agent. *See Lawler Mobile Homes, Inc. v. Tarver*, 492 So. 2d 297 (Ala. 1986).

(2) No. Federal Rule of Civil Procedure 9(b) requires fraud claims to identify ñ(1) the precise statements, documents or misrepresentations made; (2) the time and place of persons responsible for the statement; (3) the content and manner in which the statements mislead the plaintiff; and (4) what the defendants gain by the alleged fraud.ò *See American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010). Although the insured alleged that the agent stated three separate times it had obtained policies that would protect the insured if any bodily injury claims were made, the insured only provided information about one conversation. The court agreed with the agent that the insured failed to state the fraud claims with particularity, since the insured failed to identify ñthe precise statements, documents or misrepresentations made.ò The court dismissed the two counts without prejudice.

Motion to Dismiss- Parallel Action

James River Ins. Co. v. Ultratec Special Effects, Inc., 2017 WL 2652985 (N.D. Ala. June 20, 2017).

Facts: In the same case discussed above, the insurance agent moved to dismiss the third-party complaint claiming that the underlying state court tort action was a ñparallel action,ò and the federal court should dismiss the case or, in the alternative, stay the federal court action.

Issue: ***Whether the underlying tort case in state court is a "parallel action" requiring this lawsuit to be dismissed or stayed.***

Holding: No. A parallel action exists when ñsubstantially the same parties are contemporaneously litigating substantially the same issues in more than one forum.ò *Georgia v. U.S. Army Corps of Engineers*, 223 F.R.D. 691 (N.D. Ga. 2004). When a parallel state proceeding exists, a district court may exercise its judicial discretion and refuse to hear the case if there is a better alternative for the plaintiff. *See Angora Enterprises, Inc. v. Condominium Ass'n of Lakeside Village, Inc.*, 796 F.2d 384 (11th Cir. 1986).

Because the insurer was not a party in the underlying state court actions, and the insurer included a claim for money damages in this action, dismissal was not an option. The court also declined to stay the action with regard to the duty to defend issue, as the coverage issues will go unresolved even when the state court litigation ends. Also, if this issue were stayed, the issue would essentially be moot and cause the insurer to be unable to have this issue litigated in any court.

However, the court agreed to stay the duty to indemnify issue until a judgment is rendered in the underlying state court actions. This is because the court held that litigating a duty to indemnify is not ripe until a judgment is determined in the underlying state court action. *See Allstate Ins. Co. v. GMC Concrete Co., Inc.*, 2007

WL 4335499 (S.D. Ala. 2007).

Misrepresentation in Application/Insurable Interest

Liberty Corporate Capital Ltd. v. Club Exclusive, Inc., 2017 WL 2730504 (N.D. Ala. June 26, 2017).

Facts: Antineekia White (ñWhiteò) built a commercial building on land she owned. She personally owned the contents inside the building. White incorporated the insured, Club Exclusive, Inc. (ñthe insuredò) and is the owner, director, and president. The insured leased the building from White, and the insured applied for commercial property insurance coverage for the building. In the application, the insured stated that the insured, not White, owned the property. The insured is the only named insured, and there are no additional insureds or any other type of insureds listed in the policy.

During the policy period, a fire destroyed the building. After the insured made a claim for the loss, the insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama and asked the court to declare the policy void. The insured responded, and filed a counterclaim against the insurer and two individuals. After the individuals were dismissed from the action, the insurer filed a motion for summary judgment. The insured did not oppose the motion.

Issue: ***Whether summary judgment should be granted in favor of the insurer, as the policy is void.***

Holding: Yes. Alabama Code Section 27-14-7(a) provides that recovery under an insurance contract is impermissible when the insured misrepresents a material fact in the application. Alabama courts hold that misrepresentation of an ownership interest is a material risk and increases the risk of insurance. *See Camden Fire Ins. Ass'n v. Landrum*, 156 So. 832 (Ala. 1934); *Gunn v. Palatine Ins. Co.*, 114 So. 690 (Ala. 1927). The court held that the policy was void, as the insured made a material misrepresentation on the insurance application.

Also, Alabama Code Section 27-14-4 does not permit the enforcement of an insurance policy to anyone except the one who has an insurable interest in the property at the time of the loss. The Alabama Supreme Court noted that ña party cannot collect insurance upon property in which he has no insurable interest.ò *N. British & Mercantile Ins. Co. v. Sciandra*, 54 So. 2d 764 (Ala. 1951). Because White, and not the named insured, had an insurable interest in the building and its contents, the insured has no insurable interest and could recover proceeds for this loss. Moreover, because the policy was void, the court held that the insured could not maintain its breach-of-contract and bad-fath claims.

The court also held that the negligent hiring claim was not cognizable, as the claim requires an injury to the plaintiff. Since the insured has no insurable interest in the property, there has been no injury to the insured. Therefore, this action cannot be maintained, and summary judgment is granted in favor of the insurer.

Exclusion Not Approved by DOI
Nationwide Prop. and Cas. Ins. Co. v. Chism, 2017 WL 2929505 (N.D. Ala. July 10, 2017).

Facts: While driving his fatherôs car, Jeffrey Chism (ñChismò) was involved in an automobile accident and was injured. His medical expenses exceeded the other driverôs coverage limit. Chism filed a claim with Nationwide Property and Casualty Insurance Company (ñNationwideò), his motherôs automobile insurer, for underinsured motorist coverage. His fatherôs car is not a covered vehicle under the policy. His motherôs policy also states that Chism is ñexcluded from all coverages and all vehicles on the policy.ò Also, an endorsement entitled ñVoiding Automobile Insurance While A Certain Person Is Operating Carò is included in the policy, but the endorsement does not identify any people.

Nationwide filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, asking the court to hold that Chism was not entitled to UIM coverage. Nationwide then filed a motion for summary judgment.

Issue: ***(1) Whether the exclusion and endorsement conflict and create ambiguity in the policy.***
(2) Whether the exclusion is enforceable in Alabama.

Holding: (1) No. Chism argued that the blank endorsement created ambiguity as to whether the exclusion applied to exclude coverage for Chism. The court disagreed and said that, although the blank exclusion raises questions, it does not create ambiguity with regard to the validity of the exclusion. The exclusion applies as long as it is a valid part of the contract. Moreover, the exclusion is unambiguous because it clearly excludes coverage for Chism.

(2) No. Alabama Code Section 27-14-8 requires insurers to obtain approval from the Alabama Department of Insurance (ñDOIò) before including any document in a policy. In this case, the insurer failed to submit the exclusion to the DOI for approval before including it in the insurance contract. Alabama courts strictly construe the language in this statute, and therefore the exclusion is unenforceable.

Assault and Battery Exclusion- Liquor Liability Policy
Casher v. Hudson Specialty Ins. Co., 2017 WL 303756 (S.D. Ala. July 18, 2017).

Facts: After leaving the insuredôs nightclub, Darryl Casher was shot and killed by a minor who was served alcohol at the club. Diane Casher (ñCasherò) filed a wrongful death action in state court against the insured. The liquor liability insurer denied coverage and refused to defend the insured in the action. Eventually, the state court entered a consent judgment against the insured for $150,000.

Casher filed an action as a judgment creditor against the insurer for insurance proceeds in state court, but the insurer was improperly served and did not appear. After Casher obtained a default judgment against the insurer, the insurer removed the action to the United States District Court for the Southern District of Alabama. The Southern District set aside the default judgment, as it was improperly served and declined to remand the action. The insurer filed a motion for summary judgment, Casher did not respond.

Issue: ***Whether the assault and battery exclusion excluded coverage for the default judgment against the insured.***

Holding: Yes. Casher stands in the shoes of the insured and cannot recover insurance proceeds unless the insured is entitled to recover the proceeds. The court examined whether the assault and battery exclusion applied to bar coverage. The exclusion states that the policy ñdoes not apply to claims arising out of an assault and/or battery, whether caused by or at the instigation of, or at the direction of, or omission by, the [insured], and/or his employees.ò In *Robinson v. Hudson Specialty Ins. Group*, 984 F. Supp. 2d 1199 (S.D. Ala. 2013), the Southern District held that this same exclusion applies when there is ñassault/battery due to an omission by the insured and/or his employees.ò The allegations of negligence, wantonness, and Dram Shop Act violations led to the death of Darryl Casher. Therefore, the insuredôs failure to ñmaintain safety and orderò constitutes an omission and prevents coverage. The court awarded summary judgment to the insurer.

Standing and Failure to State a Claim in a Class Action/ "Actual Cash Value" Calculation
Arnold v. State Farm Fire and Cas. Co., --- F. Supp. 3d ----, 2017 WL 3308990 (S.D. Ala. Aug. 3, 2017).

Facts: The plaintiff filed a class action against the insurer in state court for breaching its contractual duty to pay actual cash value (ñACVò) by depreciating the cost of labor in an unlawful manner. The insurer removed the action to the United States District Court for the Southern District of Alabama and moved to dismiss for lack of standing and failure to state a claim upon which relief may be granted.

Issue: ***(1) Whether the plaintiff has standing and thus creating jurisdiction over the action.***

(2) Whether the definition of "ACV" includes depreciation of labor costs, and therefore the plaintiff failed to state a claim upon which relief may be granted.

Holding: (1) Yes. The insurer made a factual challenge to standing under Federal Rule of Civil Procedure 12(b)(1), and the court noted it could consider information outside the complaint. Standing occurs when (1) the plaintiff suffers an injury in fact which is ñan invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent . . .ò; (2) a causal connection exists between the injury and the conduct by the defendant; and (3) ñit must be likely . . . that the injury will be redressed by a favorable decision.ò *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Although the plaintiff received RCV, it took several years for the insurer to make the payment. The court held that the plaintiff suffered an injury in fact, as the plaintiff demands prejudgment interest for the period of time between the ACV and RCV payments. The second element is satisfied, as the insurer is the only one who failed to pay the plaintiff interest. Because payment of the prejudgment interest would correct the injury to the plaintiff, the third element is satisfied, and the plaintiff has standing.

(2) No. The policy does not define ACV. Moreover, the insurer was unable to provide case law that describes depreciation of labor as part of ACV. Instead, the court relied on *Ballard v. Lee*, 671 So. 2d 1368 (Ala. 1995), holding that the general understanding of ACV does not include depreciation at all. The court held that the insurer failed to prove that a reasonable insured would interpret ACV in the policy to include depreciation of labor costs within the ordinary meaning of ACV. Therefore, the motion to dismiss was denied.

Statute of Limitations for Extra-Contractual Claims
Toffee v. Nationwide Mut. Ins. Co., 2017 WL 3425532 (N.D. Ala. August 9, 2017).

Facts: Following a $15,000,000 judgment against Nineteenth Street Investments, Inc. (ñNineteenth Streetò) for dram shop law violations, the Trustee of the Bankruptcy Estate for Nineteenth Street filed a negligent and/or wanton failure to procure insurance coverage, breach-of-contract, bad-faith, and recovery of property of estate action against Nineteenth Streetøs insurer. This action was transferred from the United States Bankruptcy Court for the Northern District of Alabama. The United States District Court for the Northern District of Alabama dismissed the complaint on the grounds that the statute of limitations had expired. After the court denied the trusteeøs motion for leave to amend the complaint, the trustee filed a Rule 59(e) Motion to Alter or Amend.

Issue: ***Whether the statute of limitations for extra-contractual claims against the insurer had expired.***

Holding: Yes. The trustee argued that the statute of limitations for the bad-faith claims did not begin until after the underlying state court judgments against Nineteenth Street were affirmed by the Alabama Supreme Court. This argument incorrectly assumes that the trusteeôs claims, which are third-party claims, should be handled in a different manner than the insuredôs first-party claims. The court held that the trusteeôs claims all rely on the insurersô initial denial of coverage to Nineteenth Street; therefore, the statute of limitations had expired for the insured, and the same held true for any derivative claim by the trustee.

Duty to Defend in Construction Case
Canal Indem. Co. v. Carbin, 2017 WL 3437655 (N.D. Ala. August 10, 2017).

Facts: The insured contractor abandoned a construction project with only 88% of work completed, even though the owner had paid 96.8% of the amounts due under the construction contract. The insured filed a lien against the owners and, in response, the owners filed counterclaims against the insured. The insured sought defense and indemnity from its insurer, Canal Indemnity Company. The insurer then filed a declaratory judgment action in the United States District Court for the Northern District of Alabama seeking a determination that it did not have a duty to defend the insured. The insurer filed a motion for summary judgment.

Issue: ***Whether the alleged injuries arose out of bodily injury or property damage caused by an accident such that the insurer had a duty to defend.***

Holding: No. The policy provides coverage for ñthose sums that the insured becomes legally obligated to pay as damages because of ñbodily injuryò or ñproperty damageò to which this insurance applies. . ..ò ñBodily injuryò and ñproperty damageò are events caused by an ñoccurrence.ò An ñoccurrenceò is ñan accident, including continuous or repeated exposure to the substantially same general harmful conditions.ò The court relied on the Alabama Supreme Courtôs definition of ñaccidentò to mean ñan unintentional and unforseen injurious occurrence; something that does not occur in the usual course of events or that could be reasonably anticipated.ò *Hartford Cas. Ins. Co. v. Merchants & Farmers Bank*, 928 So. 2d 1006 (Ala. 2005).

The insured argued that the allegations in the complaint constituted an accident because the owners made oral changes and upgrades that exceeded the allowances designated for such changes. However, the court decided that, although these changes were unforeseen, they were not an accident. Moreover, oral changes are intentional conduct, even if they were made by the owners. Also, assuming the insured did not unjustifiably walk away from the job, the project was abandoned before it was completed, and this makes it an intentional act. Although the insured argued the claim of negligence, by its definition, lacks intent, and therefore establishes that it was an accident, the court disagreed. Although it may have been unintentional conduct, it does not mean it was an accident, and so the court granted summary judgment in favor of the insurer based on the allegations of the complaint.

Homeowner's Policy- Mold Endorsement
Singh v. State Farm Fire & Cas. Co., 2017 WL 3425521 (N.D. Ala. August 9, 2017).

Facts: A storm damaged the insuredôs house and caused water leakage and mold damage. After the insured made a claim with his homeownerôs insurer, the insurer prepared a ñpartialò replacement estimate cost of $25,912.92, which did not include repairs for mold damage. The insured denied having seen any endorsement to his policy that mentioned excluding mold damage. When the insurer denied coverage for the cost of mold remediation, the insured filed a breach-of-contract action against his insurer. The insurer filed a motion for partial summary judgment with regard to mold damage.

Issue: ***Whether partial summary judgment should be granted to the insurer, as the mold endorsement excludes coverage.***

Holding: Yes. Although the insured argued that he had never seen the mold endorsement before this lawsuit began, he did acknowledge seeing the declarations page of the policy. The declarations page and renewal certificate listed the mold endorsement. The declarations page also said that his policy is comprised of the policy form, the declarations page, and any endorsements. Therefore, the mold exclusion was part of the insurance contract, and the insurer is entitled to summary judgment on this issue.

Subject Matter Jurisdiction- Amount in Controversy
Employers Mut. Cas. Co. v. Huff, 2017 WL 3613043 (N.D. Ala. August 22, 2017).

Facts: The insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, asking the court to declare it had no duty to defend and indemnify its insured in an underlying action involving an employment contract. The insured moved to dismiss the action and argued that the court lacked subject matter jurisdiction, as the amount in controversy was not met.

Issue: ***Whether the amount in controversy exceeded the jurisdictional minimum of $75,000 and allowed the action to remain in federal court.***

Holding: Yes. A defendant may make a factual or facial attack of the complaint with regard to subject matter jurisdiction. *Willet v. United States*, 24 F. Supp. 3d 1167 (M.D. Ala. 2014). The court may consider facts provided outside the complaint if the defendant offers a factual attack. *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.2d 1159 (11th Cir. 2011). In order to determine the amount in controversy, the court should examine the underlying claim, including the cost of the defense and indemnification in the underlying action. *SUA Inc. Co. v. Classic Home Builders, LLC*, 751 F. Supp. 2d 1245 (S.D. Ala. 2010).

The insurer has paid $40,009.57 in the defense of the underlying litigation, and the insurer has a $71,943.00 budget for the defense of the action. In the underlying action, the plaintiff demanded $15,000 as well as additional damages for commission. When the court combined the amount owed if the insurer would be required to indemnify the insured, the amount exceeded the jurisdictional minimum and created subject matter jurisdiction. The court also noted that the insurerợs complaint sufficiently stated its claim. Therefore the complaint withstood a facial attack as well, and the motion to dismiss was due to be denied.