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RECENT SIGNIFICANT INSURANCE LAW DECISIONS

Reasonable Time for UIM Insurer to Consider Tortfeasor Settlement Offer Depends on Individual Circumstances

Morgan v. Safeway Insurance Company of Alabama, Inc., 13 So.3d 385 (Ala. 2009)

Morgan involved the question of whether the UIM insurer, Safeway, waived its right to consent to a proposed settlement between the insured and the tortfeasor after notice of the proposed settlement was provided to Safeway only ten days before settlement was concluded. The Supreme Court of Alabama agreed with the trial court, as well as the Court of Civil Appeals, in finding that Safeway's failure to respond within ten days did not constitute waiver. However, the Court declined to adopt the holding of the Court of Civil Appeals which had provided that 30 days should be established as a presumptively reasonable time for an insurer to respond to a settlement offer and claim.

The Supreme Court concluded that the reasonableness of the notice to the UIM insured depends upon the particular facts and circumstances of each case. In this instance, the notice to Safeway did not request a response by any particular date. In addition, the notice did not suggest that there were any compelling reasons requiring the Morgans to obtain approval by a given date. Moreover, even though the Morgans' attorney was told that Safeway intended to make a decision "within a few days," the Morgans failed to follow-up when they did not receive a response. Finally, the notice provided Safeway with information regarding conditions and ailments allegedly unrelated to the accident raising issues regarding liability, the amount of damages, and causation which required consideration.

UM Set Off for Med-Pay Benefits

McKinney v. Nationwide Mutual Fire Insurance Company, 2009 WL 3152230 (Ala.).

In *McKinney*, the Supreme Court of Alabama addressed whether an insurance carrier may enforce the med-pay off set used to reduce uninsured motorist payments by the amount of med-pay benefits paid to the insured. Such provisions prevent double payment for the same medical expenses. In this case, the Court did not rule that such an off-set is always unenforceable but, instead, voided the provision where the insured has only contracted for the minimum UM coverage and the total damages the insured is entitled to recover exceeds the total paid by any liability insurer, the UM (or UIM) coverage, and any medical benefit paid.

Nationwide Mutual Fire Insurance Company v. Austin, 2009 WL 3152387 (Ala.).

On the same day the above *McKinney* decision was released, the Supreme Court of Alabama addressed another case involving the enforcement of a med-pay set off provision by the uninsured motorist carrier. In *Austin*, unlike *McKinney*, the insureds contracted for more than the minimum statutory limit required by *Ala. Code* §32-7-23(a) (1975). Since the insureds had contracted for more than the minimum requirement, meaning that their uninsured or underinsured motorist recovery would not be reduced below the statutory limit because of the enforcement of the set off provision, the set off provision did not contravene public policy and was, therefore, enforceable.

In *Austin*, the Court also held that an insurer can enforce policy terms, such as the set off provision, even after opting out and agreeing to be bound by the fact finder's decisions on the issues of liability and damages.

UIM Insured Not Legally Entitled to Recover More Than County's Statutory Damage Cap

Kendall v. United Services Automobile Association, 2009 WL 1363536 (Ala.).

USAA's insured was involved in an accident with a county employee. By statute (*Ala. Code* §11-93-2), the county's liability is capped at \$100,000.00. After settling her claims with the county for that amount, the insured sought to recover underinsured motorist benefits from USAA.

Citing its prior *Ex parte Carlton*, 867 So.2d 332 (Ala. 2003) decision, the Supreme Court of Alabama held that since the insured had already recovered the statutory maximum of \$100,000.00, she was no longer "legally entitled to recover" damages from the county, or its employed driver, thereby preventing her from recovering UIM benefits. In *Ex parte Carlton*, the Supreme Court of Alabama overruled three prior cases in which it was held that uninsured motorist benefits were recoverable as a result of the inability of the injured party to bring a legal claim against the alleged tortfeasor. Specifically, in *Carlton* the court held that since the employee was not entitled to sue a co-employee for negligence given the limitations of the Alabama Workers' Compensation Act, the

injured employee could not recover uninsured or underinsured motorist benefits arising out of an accident involving a co-employee.

**Set Off Where Claims Against Tortfeasor Settled on
Per-Occurrence Basis**

Progressive Specialty Insurance Company v. Kyle, 2009 WL 3517596 (Ala. Civ. App.)

The Plaintiff was one of five individuals injured in an accident involving an underinsured motorist. The tortfeasor's liability carrier offered to settle all of the claims for the \$50,000.00 per occurrence policy limits. Several of the injured occupants, including the Plaintiff, then pursued underinsured motorist benefits under the policy issued by Progressive.

Progressive's policy provided that the amount the insured is legally entitled to recover would be reduced by the amount paid to the Plaintiff under the tortfeasor's policy. In this case, the Plaintiff was paid \$7,500.00. She and Progressive agreed that her damages were \$40,000.00. As such, Progressive asserted that it was entitled to a set off of the entire \$25,000.00 per-person limit of the tortfeasor's policy requiring it to pay \$15,000.00, since the policy provided that the difference between the amount paid by the tortfeasor's insurer and the limits of liability under that policy would, also, be set off. On the other hand, the Plaintiff argued that she should recover \$32,500.00, the difference between her share of the per-occurrence payment and the agreed damages.

In a case of first impression in Alabama, the Court of Civil Appeals affirmed the trial court's ruling in favor of the Plaintiff. In doing so, the Court noted that application of Progressive's policy provision, specifically as regards the difference between the amount paid on behalf of the tortfeasor and the limit of liability under that policy, was more restrictive than the statutory definition of underinsured motor vehicle as it did not consider the coverage actually available to Plaintiff in this scenario.

One practical issue to note is that Progressive agreed to waive its subrogation rights after being informed of the proposed settlement with the tortfeasor. The Court held that in doing so it was barred from arguing that it had not been given sufficient information about the proposed settlement so as to trigger its duty to investigate. This is noteworthy because the Plaintiff received a relatively small portion of the settlement with the tortfeasor yet had the most significant injury and corresponding medical expenses.

**Child Away at School Must First be Living with Parent to
Qualify as Insured**

State Farm Mutual Automobile Insurance Company v. Brown, 2009 WL 1818595 (Ala.).

Here, the Plaintiff was an unmarried and unemancipated minor whose parents were divorced. The parents shared joint custody, though Plaintiff lived primarily with her mother and attended a

local high school.

Following denial of State Farm's Motion for Summary Judgment in which it asserted that the Plaintiff was not an insured under her father's automobile insurance policy, the Supreme Court of Alabama addressed the following certified question:

Assuming that at the time of her accident Rachel "live[d] primarily" with her mother and not with [Mr. Brown], whether she nevertheless qualifies as [Mr. Brown's] "relative" as his "unmarried and unemancipated child away at school" so as to be entitled to UIM benefits under [Mr. Brown's] State Farm polic[y]?

Specifically, State Farm's policy defined an insured, in part, as relatives which included:

Relative - means a person related to you or your spouse by blood, marriage, or adoption *who lives primarily with you*. It includes your unmarried and unemancipated child *away at school*.

Finding that the Plaintiff was not an insured, the Court noted that the two-sentence definition of "relative" must be considered conjunctively. The Court first must determine with whom the child primarily lives before addressing whether or not she was "away at school". Specifically, the Court noted that "[a] child whose primary residence is not the policyholder's residence and who is attending a local high school is not 'away at school' under any reasonable interpretation of that phrase".

Timeliness of Request to Intervene

QBE Insurance Corporation v. The Austin Company, Inc., 2009 WL 1363568 (Ala.).

QBE insured a subcontractor who, among others, was sued relating to construction work. QBE had issued a general liability policy which included various exclusions affecting coverage, including one excluding coverage for damage to any part of the property that required repair or replacement because of "incorrectly performed" work. Apparently expecting that certain damages could be covered, while others not, QBE filed a Motion seeking to intervene for the purpose of participating in discovery and submitting special interrogatories. An objection was filed and the trial court denied the request to intervene.

On appeal, the Supreme Court of Alabama addressed the denial, particularly the timeliness of QBE's effort. Note that insurers do not have an absolute right to intervene and denial of such a request will be reversed only in the event of a finding that the trial court abused its discretion. Here there was no such finding by the Supreme Court.

Again, the Supreme Court addressed the timeliness of the request. In doing to, it considered factors identified by several United States Courts of Appeals. These included the following:

- (1) The length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene;
- (2) The extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest;
- (3) The extent of prejudice to the would-be intervenor if his petition is denied; and,
- (4) The existence of unusual circumstances mitigating either for or against a determination that the application is timely.

Here, the Supreme Court found that the insurer's decision to wait almost sixteen months after being notified that there were potential coverage issues weighed against it as regards the first factor. Further, the Court found that intervention, particularly the request to participate in discovery, would complicate and further delay the action, thus prejudicing the parties. The Court also noted, as regards the third factor, that an independent declaratory judgment action could be used to address the coverage issues. Significantly, the Court noted that even if the request to intervene had been timely, the trial court did not exceed its discretion, particularly since intervention would have further affected the already complex litigation.

In his dissent, as others have in the past, Justice Murdock concluded that the declaratory judgment action would not be an adequate substitution for intervention. He noted, for example, that the coverage issues in this case were "entirely fact based". As such, a separate declaratory judgment action would not determine the factual basis for damages awarded in the underlying case, and in particular, the extent of damages covered by the policy versus those not covered. Justice Murdock also noted the merit in QBE's argument that the separate declaratory judgment action would involve the parties in additional burdensome litigation which could result in a finding inconsistent with that in the underlying case.

Settlement Renders Appeal of Declaratory Judgment Ruling Moot

Colony Insurance Company v. Alabama Heat Exchangers, Inc., 2009 WL 1165301 (Ala. Civ. App.)

Colony defended its insured, Alabama Heat Exchangers, under reservation of rights. While

the liability claim against AHE was pending, Colony filed a declaratory judgment action in which the trial court declared that Colony owed a duty to defend AHE and to indemnify if necessary. Colony appealed the declaratory ruling though while the appeal was pending the underlying case was settled including contribution by Colony on behalf of AHE. The Court of Civil Appeals dismissed the appeal as the settlement rendered the coverage dispute moot. In unconditionally agreeing to the settlement of the claims against the insured, Colony had voluntarily agreed to indemnify against those claims and, further, the settlement negated any need for further defense.

**For Other Insurance Provisions to Conflict They Must Address
the Same Risk**

Colony Insurance Company v. Georgia-Pacific, LLC, 2009 WL 2343673 (Ala.)

Colony appealed from a declaratory finding that its coverage was primary to that provided by Lumbermen's Mutual Casualty Company. Colony insured Industrial Maintenance and Mechanical, Inc. which had contracted to perform roofing work at a Georgia-Pacific facility. Georgia-Pacific was insured by Lumbermen's. The IMMI contract with Georgia-Pacific required that IMMI add Georgia-Pacific as an additional insured on the Colony policy, which was done. The underlying suit arose out of the death of an IMMI employee who fell through the roof of the Georgia-Pacific facility.

Colony defended Georgia-Pacific though filed the declaratory judgment action seeking a determination that both Colony and Lumbermen's, whose policies included excess insurance clauses, should share the loss on a pro rata basis. Colony's commercial general liability policy provided that Colony's coverage was excess of various property interests such as fire coverage, builder's risk coverage, and the like. On the other hand, the Lumbermen's policy included a specific provision declaring that Lumbermen's coverage would be excess of any primary liability insurance covering damages arising out of the premises or operations for which the party had been added as an additional insured by attachment of an endorsement. Colony's policy contained no comparable provision. As such, the provisions were not mutually repugnant and the Colony policy provided primary coverage.