

Recent Significant Insurance Law Decisions

From the desk of Walter Price

December 2011

Faulty Workmanship is Not an Occurrence Under a Commercial General Liability Policy

Town & Country Property, LLC v. Amerisure Insurance Company, 2011 WL 5009777 (Ala.)

Here, the Supreme Court of Alabama addressed a direct action filed by Town & Country seeking to recover a judgment arising out of an action against a contractor for construction defects. In affirming summary judgment for the carrier, the Court confirmed that faulty workmanship is not an “occurrence” as commonly defined in CGL policies.

In reaching this decision, the Court considered prior Alabama case law addressing whether poor workmanship constitutes an occurrence. In doing so the Court confirmed that while faulty workmanship is not an occurrence, poor work may constitute an occurrence if it subjects personal property or other parts of a structure (or other product which is not the work of the insured) to “continuous or repeated exposure” to some other harmful condition. In other words, if the problem causes damage to property other than the insured’s product, coverage will attach.

Plaintiff’s Direct Action Claims are Not Collaterally Estopped by Default Judgment in Separate Declaratory Judgment Action

McDaniel v. Harleysville Mutual Insurance Company, 2011 WL 5110210 (Ala. Civ. App.)

The Alabama Court of Civil Appeals reversed summary judgment in favor of the insurer finding that a default judgment against the insured in a separate federal court declaratory judgment action was not binding on the plaintiffs who sought to collect a judgment pursuant to Alabama’s direct action statute. Specifically, the Court found that the default judgment did not collaterally estop the direct action claims since the plaintiffs were not parties to the declaratory judgment action.

Default Judgment Against Tortfeasor Not Binding on UM Carrier Which Has Elected to Participate in Action

Bailey v. Progressive Specialty Insurance Company, 2011 WL 1602068 (Ala.)

Previously, the Supreme Court of Alabama has outlined the process which must be followed where an insured seeks to make a claim for UM benefits in connection with an action by the insured against the tortfeasor. See *Lowe v. Nationwide Ins. Co.*, 521 So.2d 1309 (Ala. 1988). In *Lowe*, the court noted that the plaintiff is allowed to either join the uninsured or underinsured motorist carrier as a party or simply give the carrier notice of the suit. If the insurer is named as a party, it has the right, within a reasonable time, to decide whether or not to participate or “opt out”. On the other hand, if the insurer is not joined as a party, but is simply given notice of the filing of the action, it can then decide whether or not to intervene. Assuming that it does not intervene, the carrier will be bound by the results of the action.

In *Bailey*, the insurer, Progressive, elected to intervene in the suit. After doing so, a default judgment was taken against the tortfeasor. On appeal the Supreme Court of Alabama affirmed that in such a situation the default judgment against the tortfeasor is not binding on the insurer. Note, however, that had Progressive failed to intervene, that default judgment would have bound Progressive per *Champion Insurance Co. v. Denney*, 555 So.2d 137 (Ala. 1989).

Insured Obligated to Give Notice Before Settling with Uninsured Motorist

Downey v. Travelers Property Casualty Insurance Company, 2011 WL 2573364 (Ala.)

In answering a certified question from the United States District Court for the Northern District of Alabama, the Supreme Court of Alabama addressed the insured’s obligation to advise his or her underinsured motorist carrier before entering into a settlement with the tortfeasor. Here, the insureds failed to provide such notice even though they were in possession of the policy and, at the time of the settlement with the tortfeasor, were represented by counsel. Historically, Alabama courts have generally permitted enforcement of consent-to-settle provisions in underinsured motorist policies per the framework set forth in *Lambert v. State Farm Mut. Auto. Ins. Co.*, 576 So.2d 160 (Ala. 1991). In part, the *Lambert* procedure requires that the insured allow the underinsured motorist carrier a reasonable time to investigate the insured’s claim before entering into a settlement with the tortfeasor.

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Under the *Lambert* process, if the insured does not comply with the notice provision he or she must provide an acceptable reason for this failure. At that point, the burden shifts to the insurer to demonstrate that it has been prejudiced by the insured's failure to give timely notice. In *Downey*, the insureds maintained that they were not aware that they had UIM coverage available under their automobile coverage because at the time of the accident they were riding a separately-insured motorcycle and the motorcycle policy did not include uninsured or underinsured motorist coverage. The Court found that this excuse was not acceptable since, again, the insureds had possession of the auto policy which they did not read and in light of their representation by counsel at the time of the initial settlement.

Insurer May Not Retain Counsel for Underinsured Defendant

Ex parte Littrell, 2011 WL 1206012 (Ala.)

Alabama law provides that once an uninsured motorist carrier opts out of a case it may still retain counsel to defend the *uninsured* tortfeasor. However, in *Littrell*, the insurer sought to retain counsel for an *underinsured* motorist who was already being defended by counsel retained by his liability insurer. Thus, this matter was distinguished from a situation where the tortfeasor had no defense counsel or even failed to defend his case.

In *Littrell*, the Court further confirmed that once the carrier elects to opt out of the case it may longer participate in discovery.

Fee Owed to Insured's Attorney for UIM Carrier's Subrogation Recovery

Mitchell v. State Farm Mutual Automobile Insurance Company, 2011 WL 4790636 (Ala. Civ. App.)

State Farm sought to avoid payment of a fee to its insured's attorney although the insured's settlement with the tortfeasor resulted in recovery by State Farm its \$5,000.00 medical expense payment. The Court of Civil Appeals held that attorney's fees were owed as a result of the application of the common-fund doctrine which requires payment of a fee where a fund exists from which the attorney may be compensated and the attorney's service has directly benefitted the fund. The Court rejected State Farm's assertion that its pre-suit discussions with the tortfeasor's carrier constituted "active participation" in the creation or preservation of the subrogated fund. The Court also noted that an insurer may contractually negate the common fund doctrine, though this requires language demonstrating a clear intent to do so, and such language was absent from State Farm's policy.

Absent Statutory Restriction Policy May be Cancelled Per Contract Terms

Nationwide Mutual Insurance Company v. J-Mar Machine & Pump, Inc., 2011 WL 2420829 (Ala.)

The Supreme Court of Alabama reversed and rendered a judgment in favor of the plaintiff on claims of breach of contract and "bad faith" arising out of non-payment of a theft loss following cancellation of policy providing personal property coverage. In doing so, the Court confirmed that absent a statutory restriction, an insurer has a right to cancel consistent with the policy terms which, here, required 30 days notice when cancellation was made by the insurer. In such a case, the motive of the insurer in cancelling is immaterial, though the insurer bears the burden of proving that the policy was properly cancelled which occurred here. The Court further confirmed that Nationwide's acceptance of a post-cancellation premium payment did not constitute a waiver as, consistent with the policy terms, Nationwide refunded a pro rata portion of the premium payment

Permissive Intervention Denied

Employers Mutual Casualty Company v. Holman Building Co., LLC, 2011 WL 5110204 (Ala.)

Under Alabama law, intervention for the purpose of submitting special interrogatories to the jury to assess insurance coverage is permissive and the trial court has broad discretion to grant or deny such a request. Previously, the Supreme Court of Alabama has also held that the preferred means of addressing the dilemma faced by insurers in such situations, where the insured was being sued on claims that might or might not be covered, is to seek a bifurcated trial in which the insurance-related matters would be tried subsequent to the underlying tort claims. Here, Employers Mutual requested *both* forms of relief, i.e., a bifurcated trial or, alternatively, permissive intervention for the purpose of submitting special interrogatories. In appealing a denial of this request, Employers Casualty argued that seeking both types of relief removed the trial court's discretion. The appellate court disagreed holding that the trial court did not exceed its discretion in denying both requests, particularly where the underlying case involved complex class claims arising out of the sale and installation of drywall manufactured in China.

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Evidence of Payment by Collateral Source Held Admissible

Crocker v. Grammar, 2011 WL 3963008 (Ala. Civ. App.)

In this case, the Court of Civil Appeals reversed a trial court's finding that the Alabama Rules of Evidence abrogated *Ala. Code* §12-21-45 (1975) which provides that evidence of payment of the plaintiff's medical or hospital expenses is admissible in evidence. That statute further provides that the plaintiff is entitled to prove the cost of obtaining insurance and that re-payment upon recovery is required. Nonetheless, *Crocker* confirms that such may come before the jury and it will be left to the jury to decide whether or not any verdict should be reduced by the amount paid by a third party.

Claim Recognized for Wrongful Death of Non-Viable Fetus

Mack v. Carmack, 2011 WL 3963006 (Ala.)

Although not necessarily a question of insurance coverage, *Mack* presents a significant holding, that being that a wrongful death action may be brought for the death of an unborn, non-viable child. The *Mack* case arose out of an automobile accident and, certainly, presents the opportunity for similar future claims.

Statute of Limitations for Failure to Procure Claim Begins to Run When Application is Signed

Farr v. Gulf Agency, 2011 WL 2420844 (Ala.)

One of the issues addressed in this case, which arose out of destruction of a beach-front property by Hurricane Ivan, was the applicability of the Statute of Limitations. In part, the plaintiff alleged that his insurance agents and insurers acted negligently and fraudulently in failing to adequately insure the property. In affirming entry of summary judgment, the Supreme Court of Alabama confirmed that as regards such claims, the Statute of Limitations began to run when the insured signed the application for insurance coverage and was, therefore, effectively put on notice of the coverage.

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