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Huie, Fernambucq & Stewart, LLP

Alabama Insurance Law Decisions

2015 YEAR IN REVIEW

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UIM Subrogation/Attorney Fee Decision

State Farm Mut. Auto. Ins. Co. v. Pritchard, 2015 WL 3648174 (Ala. Civ. App.)

On June 12, 2015, the Alabama Court of Civil Appeals released a decision affecting the ability of counsel for the insured in an underinsured motorist (UIM) claim to obtain a fee on the amount advanced as the tortfeasor's policy limits per *Lambert v. State Farm Mutual Automobile Insurance Co.*, 576 So. 2d 160 (Ala. 1991). In *State Farm Mutual Automobile Insurance Co. v. Pritchard*, the Court of Civil Appeals affirmed a trial court order requiring State Farm to pay a portion of Pritchard's attorney's fee under the common-fund doctrine. There, the tortfeasor's policy limits were $50,000. State Farm insured the accident victim, including $100,000 in underinsured motorist coverage. After State Farm advanced to its insured the $50,000 UIM limits, and opted out of the litigation, a jury returned a verdict in favor of Pritchard for $400,000. The trial court granted a motion requesting that State Farm be ordered to contribute $20,000 toward the insured's attorney fee under the common-fund doctrine.

Relying on its own prior precedent, the Court of Civil Appeals held that the amount advanced was subject to subrogation in the event a verdict representing, or exceeding, that amount was returned. In doing so, the court found that the $50,000 fund was secured by the insured's attorney to the benefit of State Farm. This is ironic since had the verdict returned not exceeded the $50,000 threshold State Farm would have not been entitled to reimbursement for any amount of the advance. Judge Thomas concurred specially inviting the Alabama Supreme Court to address whether amounts advanced under *Lambert* are subject to true subrogation. On the other hand, Judge Moore offered a well-reasoned dissent stating that the Court of Civil Appeals has now on three occasions wrongly decided that the underinsured motorist carrier, by advancing funds to the insured, obtained subrogation rights against the proceeds of the tortfeasor's automobile liability insurance policy. In fact, Judge Moore noted that *Lambert* provided no such right of subrogation. One can say that recovery by the UIM insurer of amounts advanced in the event of a verdict exceeding the tortfeasor's limits is an exercise of the tortfeasor's carrier satisfying its obligation to its insured as opposed to subrogation as the UIM carrier is not obligated to pay any amount of the tortfeasor's limits. Subrogation would only come into play for sums paid by the UIM insurer in excess of the tortfeasor's limits of liability. Also noting that the insured's attorney is entitled to a fee on the entirety of the recovery, adding an additional fee based upon the supposed creation of a common-fund would result in a double-recovery by the attorney.

For the time being, this rule should be considered in deciding whether or not to advance the tortfeasor's limits recognizing that in the case of a verdict equal to, or minimally exceeding the tortfeasor's limits, the exposure to attorney's fees on the advanced amount may increase the UIM carrier's responsibility.

UIM Carrier's Advance of Tortfeasor's Limits

State Farm Mut. Auto. Ins. Co. v. Brown, 2015 WL 5918750 (Ala. Civ. App.)

The Court of Civil Appeals issued an opinion addressing the UIM carrier's decision to "front" the tortfeasor's liability limits. The case and ruling were straight-forward. State Farm's insured was involved in an accident with an individual insured by USAA. The USAA liability limits were $200,000. State Farm advanced that amount and opted out. A verdict was returned for $90,000, $10,000 of which was punitive damages.

USAA excluded punitive damages. The plaintiff argued that State Farm should pay the $10,000 punitive portion which was "uninsured". The court did not answer the question of whether the punitive award was an uninsured loss for which UIM coverage applied. It should not be as USAA had more than the minimum required liability coverage. In any event, the court held State Farm did not owe the amount as the insured had already recovered more than the verdict--$200,000.

That is why the decision is notable. It shows the mysterious *Lambert v. State Farm* process in action. Once the money had been advanced, the plaintiff could keep any portion exceeding the verdict. This is because USAA had offered $200,000 and State Farm had advanced that amount. State Farm maintained a subrogation interest and obviously thought the exposure was significant. While not addressed in the opinion, in that situation USAA owed State Farm the difference (at least the covered amount).

Had the verdict been $200,000 it would have been a wash. Plaintiff would have received $200,000. USAA would pay State Farm $200,000. And, State Farm owes nothing.

On the other hand, had the verdict been $225,000. Plaintiff would receive $225,000. USAA pays plaintiff $25,000 and State Farm $175,000. State Farm's subrogation interest is reduced by $25,000; yet, it is responsible only for the amount exceeding the liability limits.

Finally, had the verdict been $400,000, USAA pays the plaintiff $200,000 and State Farm receives no subrogation. But it saved defense costs as USAA had to defend and the jury would not know of State Farm's role.

This is the first time an appellate court has actually addressed (at least in part) how this process applies.

CGL Duty to Defend (1/2)

Mid-Continent Cas. Co. v. Advantage Medical Electronics, LLC, 2015 WL 6828722 (Ala.)

This decision involved application of various exclusions included in a commercial general liability insurance policy. In affirming the insured's motion for partial summary judgment, the Supreme Court of Alabama concluded that the insurer had a duty to defend its named insured.

Advantage was hired to inspect, de-install, and transport a CT scanner from South Carolina to Texas. Advantage employees rented a box van and traveled to South Carolina for the purpose of transporting the CT scanner. In order to move the main 4,500 pound section of the CT scanner known as the "gantry," Advantage used a specialized dolly system which required that castor wheels be bolted to each corner of the gantry. Advantage then retained a local wrecker service in an effort to use a roll-back flat-top tow truck to load the gantry into the box van. While this effort was underway, a bolt holding part of the dolly system to the gantry snapped causing the gantry to shift and fall from the tow truck.

The loss was initially paid by the insurer of the CT scanner purchaser which had retained Advantage to de-install and move the equipment. Ultimately, that insurer filed a negligence action against Advantage asserting that it was entitled to recover pursuant to its right of subrogation. In the interim, Advantage had filed suit seeking a declaration that Mid-Continent owed a duty to defend Advantage in any action seeking damages for the loss of the CT scanner and to further indemnify Advantage for any legal liability. The declaratory action followed Mid-Continent's denial of the claim based upon various policy exclusions.

The first of these exclusions was the "auto" exclusion which provided that the insurance did not apply to property damage arising out of the use of an auto owned, operated, rented, or loaned to the insured. While the exclusion specifically included "loading or unloading" as use, it further provided that "loading or unloading" did not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the auto. Of course, the appellate court noted that the purpose of this exclusion is to preclude coverage for liability that should more properly fall under an automobile-liability policy. Nonetheless, the court found that the exclusion was not applicable since, at the time of the damage, the gantry portion of the CT scanner was being lowered into the box van by a tow truck which was considered a mechanical device.

CGL Duty to Defend (2/2)

Mid-Continent Cas. Co. v. Advantage Medical Electronics, LLC, 2015 WL 6828722 (Ala.)

The second exclusion relied upon by Mid-Continent was the "care, custody, or control" exclusion which avoids coverage under a CGL policy for losses that should be more properly included under property insurance. It has generally been recognized that for this exclusion to apply, the insured must exercise exclusive possessory control over the property. In finding that such was not the case here, the court noted that at the time of the damage the tow truck operator was lowering the gantry and, therefore, "exercising some control over the gantry". Thus, the court found that this exclusion did not apply either.

Mid-Continent also relied upon the "your work" exclusion which prevents a commercial general liability policy from acting as a warranty or performance bond for the insured's work. The court first questioned whether movement of the property constituted work on the CT scanner but, further, held that the exclusion did not apply to the extent that parts of the scanner other the gantry (the portion that the insured's work on which allegedly incorrect work was performed) were damaged.

Finally, the court rejected the "contractual-liability" exclusion as the subrogation suit only alleged negligence and did not include a count for breach of contract.

Other Insurance

Sentinel Ins. Co., Ltd. v. Alabama Municipal Ins. Corp. 2015 WL 5658755 (Ala.)

ESG Operations, Inc. contracted with the City of Opelika to perform various services. As a part of the involved operations agreement, both parties were obligated to acquire insurance, including automobile-liability coverage. In doing so, the City added ESG to an existing policy with Alabama Mutual Insurance Corporation ("AMIC"). ESG obtained its own coverage from Sentinel Insurance Company, Limited ("Sentinel").

In 2010, an ESG employee was operating a street sweeper owned by the City which collided with another vehicle. A suit for damages followed, though ultimately only ESG and the driver remained as defendants. That matter was settled though AMIC and Sentinel (which had been third-party defendants) filed cross-motions for summary judgment seeking a ruling regarding which insurer was obligated to pay the settlement.

Noting that Alabama courts have previously held that the determination of which insurance coverage is primary and which, if any, is excess or secondary "depends upon the exact language of the policy," the court observed that the AMIC policy specifically provided that its coverage would be primary for autos owned by the insured and, as noted above, it was undisputed that the City of Opelika owned the street sweeper which was operated by an ESG employee. In addition, the court rejected AMIC's assertion that given ESG's status as an additional insured its coverage should be limited only to situations where the City of Opelika was negligent. The court confirmed that ESG was an insured with regard to the accident and, since the AMIC policy itself provided that its coverage was primary, the trial court ruling otherwise was due to be reversed.

Life Insurance Application – Duty-to-Read

Alfa Life Ins. Corp. v. Reese, 2015 WL 3964215 (Ala.)

This matter arose out of completion of a life insurance application. Plaintiff alleged that Alfa's agents misrepresented that certain information about the putative insured's health could be omitted from the application. Plaintiff further alleged that the misrepresentation relieved her from her obligation to read the application. This position was rejected by the Supreme Court of Alabama which, on interlocutory appeal, reversed an order denying Alfa's request for summary judgment on the claims made against it, as well as its affirmative effort to rescind the policy.

In addition, the court rejected the plaintiff's assertion that "special circumstances" existed thus relieving her from the duty-to-read rule. In doing so, the court noted that the claim application was completed on a laptop computer and was signed on a signature pad which failed to rise to the level of a "special circumstance" exception to the duty-to-read rule.

Finally, the court found that information about the insured's health allegedly known by Alfa's agents was not imputed for purposes of completion of the application given a provision in the application providing that such was not binding unless the information was in writing and made a part of the application.