

# Personal Injury Law Update and Developing Issues

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## 1. Tort Law Update – No Common Fund Created in UM Buy-Outs

State Farm Mutual Automobile Insurance Company v. Pritchard – Alabama Supreme Court, October 2015 term. Opinion released January 29, 2016.

When an automobile accident occurs and the plaintiff sustains damages in excess of the tortfeasor's policy limits, the plaintiff must turn to his or her own uninsured/underinsured motorist (UM) policy carrier for compensation. Pursuant to Lambert v. State Farm Mutual Automobile Insurance Co., 578 So. 2d 160 (Ala. 1991), when a tortfeasor's insurance carrier offers their policy limits, the plaintiff's attorney must turn to the UM carrier, who is then presented with 2 options.:

- 1) The UM carrier may allow the plaintiff's attorney to settle with and release the tortfeasor, thereby waiving its right to subrogation.
- 2) The UM carrier may "buy out" the tortfeasor's policy by advancing the amount of the policy and preserve subrogation rights against tortfeasor.

In most instances, the UM carrier chooses Option 1. They simply allow the plaintiff's attorney to accept the tortfeasor's policy limits and then make an offer to settle the UM portion of the claim at some point before trial. The negative for the UM carrier in this situation is that the plaintiff is now bringing a claim directly against his or her own insurance carrier. Juries are more prone to returning large verdicts when the defendant is an insurance company as opposed to John or Jane Doe.

When the UM carrier chooses Option 2, they are hiding behind the tortfeasor. By advancing the policy limits, any lawsuit progresses not as plaintiff v. insurance company but plaintiff v. John Doe. UM carriers haven't historically opted for this route due to the "Common Fund Doctrine." Prior to January 2016, When a UM carrier advanced the policy limits, say \$25,000, when a recovery is made in the case, the plaintiff's

attorney would be entitled to a fee out of the advanced \$25,000 based on his contingency fee percentage. This dissuaded UM carriers from choosing Option 2, which allowed plaintiffs to bring lawsuits directly against UM carriers for large verdicts after they chose Option 1.

However, the recent decision of Pritchard turns all of this on its head. The Alabama Supreme Court ruled a few weeks ago that no common fund is created in Option 2 because the advanced money does not create a subrogation right. Thus, plaintiffs' attorneys are not entitled to a fee on the advanced money. Therefore, it seems very likely that UM carriers will increase their use of Option 2 and will hide behind the façade of the tortfeasor, who has already offered their policy limits. It is probable that the only instances where a UM carrier will stick with Option 1 is when the tortfeasor would be an undesirable witness or there are facts suggesting aggravated liability. Now that UM carriers will not pay a "penalty" for using Option 2, plaintiffs will unfortunately have less direct lawsuits against their own insurance carrier.

## **2. Tips for Optimizing Personal Injury Recoveries**

### **A. Always Check for UM Waivers**

Personal injury clients may tell you they have "liability only" coverage. While many times they are correct, there are a handful of times every year that the client is mistaken. This is so because Alabama law requires auto insurance carriers to offer uninsured/underinsured motorist coverage to customers. If the customer wishes to decline to purchase UM coverage, he or she must sign a waiver that states they are foregoing UM coverage. If there has been no waiver signed, then the customer does indeed have UM coverage with the same policy limits that they carry in auto liability coverage. This can make a difference in a \$25,000 recovery and a \$325,000 recovery for your client.

### **B. Industrial Accidents - Look for Lack of Machine Safety Guards**

We see many people severely injured in on-the-job industrial accidents. Many people think workers' compensation is the only legal theory of recovery. Workers' compensation is usually a limited recovery due to the statutory scheme employed. Thus, smart plaintiffs' lawyers look to any other avenue of a recovery to fully compensate their clients. Ala. Code § 25-5-11 provides a cause of action against co-employees for willful conduct. That section defines willful conduct, and, among other definitions, includes the removal of a manufacturer-provided safety guard. Alabama courts have vacillated over the years in defining the term "removal", but in any industrial accident where a machine is involved, this cause of action must always be investigated as a potential for a large recovery. Sometimes it may be difficult to find the co-employee who was responsible for the removal of the guard and it may even be more difficult to find the co-employee who is insured for this type of failure. Thus, discovery should be initiated as soon as possible to ferret out the hierarchy of employees within the business and defining their job responsibilities.

### **C. Medicare Set-Aside Trusts and Medicaid Special Needs Trusts**

When a personal injury plaintiff is covered by Medicare or there is a substantial possibility that a personal injury plaintiff will be covered by Medicare due to their disability, a plaintiff's lawyer must always consider the necessity of a Medicare Set-Aside Trust. Regulations and the Medicare Secondary Payer Act require that plaintiff's attorneys keep Medicare's interests in mind and set aside money from any settlement/verdict for future medical care that Medicare would otherwise have to pay for. This trust acts to reimburse the government for future medical expenses related to the injury. You can get in very hot water when failing to take into account Medicare's interests. There are 3<sup>rd</sup> party contractors and lawyers who concentrate in elder law who will assist you in these matters.

When a personal injury plaintiff is covered by Medicaid, there is always the possibility that a monetary recovery can disqualify them from receiving Medicaid. This presents special problems

when the plaintiff will be receiving a moderate sum that is not enough to allow them to consistently purchase health insurance. If the money is given directly to the client, the client may lose access to healthcare. Therefore, a special needs trust must be considered. Once the trust is created, certain expenditures can be made out of the trust for the benefit of the plaintiff. Again, 3<sup>rd</sup> party contractors and lawyers who concentrate in elder law can assist you in these matters.

#### **D. Battling Medicare in Wrongful Death Suits**

If you are representing the estate of a deceased in a wrongful death case and the deceased was a Medicare recipient, Medicare will inevitably assert a claim for reimbursement of medical expenses. However, since Alabama law only provides for punitive damages in wrongful death suits, it follows that Medicare should not have a right of reimbursement since there is no recovery of compensatory damages (i.e. past medical expenses paid by Medicare). We rely on this common sense logic and the *Medicare Intermediary Manual Section 3418* which in essence states that Medicare may recover the payment of past medical expense if the State statute permits recovery of these medical expenses and that Medicare does not seek recovery from portions of court awards that are designated as payment for losses other than medical services. Alabama's wrongful death statute § 6-5-410 and Tatum v. Shering Corp., 523 So. 2d 1042 (Ala. 1988) make it clear that no compensatory damages, such as medical expenses, may be recovered by the plaintiff.

#### **E. Workers Compensation Carrier Cannot Subrogate Against UM Recovery**

See State Farm Mut. Auto. Ins. Co. v. Cahoon, 252 So. 2d 619 (Ala. 1971).

# **Recognizing and Benefitting From Tort Claims**

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## **I. HOMEOWNERS NEGLIGENCE/HOMEOWNERS COVERAGE**

Many practitioner erroneously presume that Homeowner's Coverage is only for claims for damage to your home. The standard Homeowner's Coverage also includes protection from Homeowner's negligence, WHETHER OR NOT that negligence occurs on the Homeowner's property. The standard Homeowner's Negligence Coverage for the Homeowner or any person living in the residence, is \$100,000.00, and there is, of course, the option to take out more coverage and many Homeowners do.

### **A. CLAIMS THAT ARISE AT HOME**

1. Negligent failure to maintain the premises
2. Animal attacks – one bite rule = notice  
vicious breeds – Pit Bull, Rotweiller,  
German Shepherd, etc.
3. Drug Overdose / children
4. Drowning
5. Negligent Supervision / trampolines, swimming

### **B. ACTS OF NEGLIGENCE OF HOMEOWNERS OUTSIDE THE HOME**

1. Shopping cart in grocery store
2. VFW – drunk dancing injuries
3. Bow & Arrow/pellet gun/rifle injury to others
4. Negligent discharge of a firearm (Jones Valley case/injury to girlfriend)
5. Negligent supervision/Nathan Roden/Monte Sano

### **C. IMPORTANCE OF INCREASING YOUR OWN LIABILITY COVERAGE FOR CAR, HOME, AND UM**

## **II. CRIMINAL ACTS/CRIMINAL ACTS OF THIRD PARTIES**

Generally, where there is a crime, there is a tort. Accordingly, if a criminal commits an act and the criminal is solvent or has assets or has the prospect of recovering assets, there is a tort claim that can be made and in more cases than many people believe, recoveries can be had.

- A. Assault/South Tennessee/ Shooting through door/covered by Homeowners
- B. Richard Kier
- C. College/Fraternity fights
- D. Criminal Acts of Third Parties – Commercial Parking lots with high crime experience
  - 1. Foreseeability is the key

## **III. INSURANCE BAD FAITH**

In any “first party” relationship, an insurer owes a duty of good faith to its insured.

Any type of Insurance Contract, whether it be car, homeowners, life, disability, or whatever, requires that an insurance carrier act in good faith in deciding a claim. In order to prove bad faith, the plaintiff must prove there is no arguable, legal, or factual basis for the claim’s denial.

- A. Med Pay
- B. Life Insurance – burden of proof of suicide is on the insurance carrier

## **IV. WORKER’S COMPENSATION and ON-THE-JOB INJURIES**

- A. Wrongful or Retaliatory Discharge for filing or pursuing a worker’s compensation claim
  - 1. Actual damages
  - 2. Punitive damages
- B. Third-Party Cases
  - 1. Guard cases – willful removal of a “safety guard or device”

- (a) Co-employee must be high enough up the food chain to be insured on the General Liability policy
- C. Independent Contractors/Real Third Parties
  - 1. Corporate vehicles/electrocution case/\$6.25 million
- D. Products Liability
  - 1. Metal Sheerer/Ny Design

**V. ELDER LAW – WILLS, TRUSTS, ESTATES**

Nursing Home or Assisted Living Abuse, Neglect

- A. Preventable injuries by the thousands –  
Bedsore, pressure ulcers, medication errors, falls, dehydration, UTI unevaluated or untreated, malnutrition, chemical sedation/restraints, overbilling

**VI. QUI TAM**

- A. Whistleblower actions
- B. Defrauding government out of money
- C. Tax evasion
- D. Other Federal laws

**VII. FAMILY LAW**

- A. Assault and Battery
- B. Child Support on certain cases on a contingency

**VIII. ETHICAL RULE FOR REFERRAL**

No longer requires “active participation” of referring attorney, but attorney must “remain” responsible and client must be advised. See Alabama Rules of Professional Conduct – Rule 1.5(e).