

INSURANCE AND REINSURANCE

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IN THIS ISSUE

In early 2020, the Eleventh Circuit will consider a tortfeasor's novel theory seeking to pursue claims against her liability insurer and her victim's uninsured motorist carrier. The trial court dismissed the tortfeasor's claims that victim's uninsured motorist carrier owed her a duty and that the insurers conspired to strip her liability protection. The Eleventh Circuit has granted oral argument in the case.

When the Tortfeasor Claims to be the Victim: Eleventh Circuit to Consider Claims that Uninsured Motorist Carrier and Liability Insurer Conspired to Strip Tortfeasor Insured's Liability Protection



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The Eleventh Circuit has granted oral argument in an appeal involving an alleged conspiracy between liability carriers and uninsured motorist carriers in situations where a UIM insured suffers catastrophic injuries and the tortfeasor has minimum limits or limits greatly exceeded by the insured's damages.

Donna Smith v. Nationwide Mutual Insurance Company, et al., Case No. 2:17-cv-01373-SGC, In the United States District Court for the Northern District of Alabama, involved a dispute between Donna Smith, who was the tortfeasor in a traffic accident, and two insurance carriers – her liability carrier and the uninsured motorist carrier of the accident victim. While driving a car, Smith collided with a bicyclist, Danial Voss. Voss suffered skull fractures and traumatic brain injuries. He underwent multiple brain surgeries and allegedly incurred serious and permanent changes to brain function. His medical bills exceeded \$725,000.

Nationwide was Smith's liability carrier. Smith's policy provided \$25,000 in coverage. Voss was covered by four State Farm policies, providing a total of \$100,000 in uninsured/underinsured motorist coverage. Voss's counsel advised Nationwide of his injuries and made a policy limits demand. Nationwide promptly tendered its \$25,000 limits to settle all claims against Smith in exchange for a release from further liability against her. Voss notified State Farm of Smith's underinsured status and Nationwide's tender of liability limits.

After an investigation which plaintiff contends was limited, State Farm notified Voss that it would not consent to his settlement with Smith. Instead, State Farm fronted Nationwide's policy limits pursuant to the procedures set forth in *Lambert v. State Farm Mutual Auto Insurance Co.*, 576 So. 2d 160 (Ala. 1991). The *Lambert* court held that an insured cannot settle a claim against a tortfeasor absent the uninsured motorist carrier's consent, and established general rules regarding the procedure for giving notice to the UIM carrier, notifying the UIM carrier of a proposed settlement and whether the insured intends to seek UIM benefits in addition to the tortfeasor's settlement benefits, and allowing the UIM carrier a reasonable time to investigate the claim. 576 So. 2d at 167. *Lambert* held that a UIM carrier's refusal to consent to settlement with the tortfeasor, denial of the claim of its insured without a good faith investigation, or failure to investigate within a reasonable time waives the UIM carrier's right to seek subrogation against the tortfeasor or her insurer. In order to protect its subrogation rights, the UIM carrier must advance to its insured an amount equal to the tortfeasor's settlement offer. *Id.* State Farm did not provide Voss with the rationale for its refusal to consent, and it refused to reconsider that decision. State Farm sent Voss a check for the fronted funds.

Voss subsequently filed a lawsuit against Smith in state court and notified State Farm of the suit. Voss did not name State Farm in the state court suit and State Farm did not intervene. State Farm did not pursue

subrogation against Smith or monitor the state court suit. The evidence showed that Smith had a history of speeding in the area of the accident, that she had been warned about her dangerous driving in the area, that her version of the events leading to the accident was not defensible, that she was on her cell phone at the time of the accident, and that Voss was in his lane at the time of the collision. A state court jury awarded \$1,900,000 to Voss against Smith.

Before the time period expired for Smith to file post-judgment motions, State Farm paid its remaining UIM limits to Voss. Nationwide sent Voss the \$25,000 limits of Smith's policy. Smith filed post-judgment motions which were denied. She did not appeal. Smith was left with a \$1,775,000 excess judgment after Nationwide paid its limits.

Smith then filed the federal suit against State Farm and Nationwide. Smith alleged that State Farm negligently and wantonly failed to settle, committed bad faith, and abused process. Smith alleged that Nationwide negligently and wantonly failed to settle, committed bad faith and breached its contract with her. Smith also asserted claims for outrage and civil conspiracy against both State Farm and Nationwide. Smith alleged that her liability in the tort case was clear and that the case against her was not defensible. She claimed that State Farm failed to investigate the accident, particularly in light of her exposure, and further claimed that State Farm routinely engages in such conduct in circumstances where its UIM insured is catastrophically

injured and the tortfeasor's limits are far less than the insured's damages. Smith claimed that State Farm uses the guise of protecting subrogation rights, which it rarely pursues, to refuse consent to its insured's settlements with tortfeasors and to deny its insured's UIM claims without investigating them. She claimed that State Farm fronts the tortfeasors' limits and opts out or chooses not to intervene in the liability case, and then blindly waits for a verdict. Smith ascribes financial motives to State Farm's alleged failure to investigate.

Smith claimed that Nationwide's tender of limits to Voss was insufficient because State Farm's fronting maneuver was foreseeable, and that State Farm, with Nationwide's assistance, misused the *Lambert* fronting procedure to essentially strip her of her liability protection. Plaintiff alleged that Nationwide and State Farm have conspired to never seek subrogation against each other's insureds, instead using the fronting procedure of *Lambert* and the alleged protection of subrogation interests to keep juries from learning of the existence of insurance and force liability insurers to provide a *de minimis* defense to underinsured tortfeasors.

Both Nationwide and State Farm filed Rule 12(b)(6) motions. The federal district court granted those motions. With respect to Nationwide, the court found that plaintiff failed to state a claim for tortious failure to settle because Nationwide in fact tried to settle Voss's claims by tendering limits, but was prevented from settling because State

Farm invoked the fronting procedure. The court noted that “it is difficult to imagine how [Nationwide] could be held liable for failure to settle where the settlement it negotiated – including a full release for [Nationwide’s insured] -- was thwarted by a third party.” Case No. 2:17-cv-01373-SGC, Doc. 45, p. 13. Smith contended that, as a liability carrier, Nationwide had broader duties than merely to offer limits. According to Smith, Nationwide breached its duty of care by failing to seek or obtain a “Taylor release,” under which Voss would have agreed not to pursue any verdict exceeding the combined liability and UIM limits; by failing to notify State Farm that by refusing to consent to settle and invoking *Lambert’s* fronting procedure it had acquired a duty of good faith and fair dealing toward Nationwide’s insured, Smith; by engaging in a pattern and practice of “hampering the ability” of defense counsel to its insured tortfeasors where UIM carriers front settlement funds; and, by failing to warn Smith that an excess judgment could result. See *Taylor v. Gov’t Employees Ins. Co.*, 978 P.2d 740, 742-53 (Haw. 1999). In support of these arguments, Smith relied on cases in which the liability insurer defended its insured under reserved its rights – a situation that the trial court readily distinguished. Further, the court noted that no Alabama court has required a liability insurer to condition a settlement offer on the victim’s agreement to collect only to the extent of insurance coverage. The court summarily rejected plaintiff’s proposition that Nationwide should have warned State Farm that it acquired a duty of good faith

when it invoked *Lambert*, holding that State Farm simply did not owe a duty of good faith to Smith, who was not its insured. In addition, the court found Smith’s claim that Nationwide provided subpar defense counsel in a fronting situation to be vague, conclusory and unsupported, and thus subject to dismissal under *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555 (2007). Finally, the trial court dismissed Smith’s claim that Nationwide should have warned her about the possibility of an excess judgment, noting that again, Smith relied on inapposite cases where the carrier defended under a reservation of rights and therefore had an enhanced duty of good faith. Further, because Nationwide attempted to accept Voss’s limits demand and obtain a full release for Smith, and when State Farm invoked *Lambert*, Nationwide defended Smith, ultimately paying policy limits, the court rejected Smith’s claim that Nationwide breached its policy with her.

With respect to Smith’s claims against State Farm, the court employed a similar analysis. While agreeing with Smith that an excess verdict was “foreseeable,” it explained that UIM insurance, and the *Lambert* fronting procedure, exist to protect a victim, like Voss – not to protect a tortfeasor from an excess judgment. Thus, the court found no support for Smith’s argument that the UIM carrier, State Farm, owed a duty to Smith as the tortfeasor. The court rejected the “hybrid duty” Smith argued should be imposed on State Farm and dismissed Smith’s claims for bad faith and negligent and wanton failure to settle. Likewise, the court found that

Smith failed to state a claim for “abuse of process” against State Farm due to its invocation of the *Lambert* procedure.

Last, the trial court rejected Smith’s claims of outrage and civil conspiracy against both defendants. To support her outrage claim, Smith alleged that State Farm and Nationwide stripped her of her liability protection and subjected her to financial ruin by purposefully misusing the fronting procedure, and that the insurers had agreed never to subrogate against each other’s insureds. The court held that Smith failed to state a claim for outrage. The court found that even if the defendants’ acts were egregious enough to constitute outrageous conduct, plaintiff could not show that her emotional distress was so severe that no reasonable person could be expected to endure it, given that she admitted engaging in the conduct which caused Voss’s life-altering injuries and which ultimately resulted in the excess judgment against her. The court dismissed Smith’s conspiracy claim simply because she failed to state a claim on which relief could be granted as to any of her substantive claims of underlying wrong. See *Avis Rent A Car Sys., Inc. v. Heilman*, 876 So. 2d 1111, 1124 (Ala. 2003).

The Eleventh Circuit has notified the parties that it will hear oral argument on this case in January. At this time, it is unclear what issues peaked the appellate court’s interest. However, without question, this is a case to watch.

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