

DIGEST OF INSURANCE LAW

ALABAMA

Courtesy of
Spain & Gillon, L.L.C.
Birmingham, Alabama

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

District Courts with jurisdiction up to \$10,000. Within District Courts may have Small Claims Courts with jurisdiction up to \$3,000. Ala. Code §12-12-30; Ala. Code §12-12-31.

Municipal Courts with jurisdiction for breach of municipal ordinances and violations of state laws. Ala. Code §12-14-1

Circuit Courts with concurrent jurisdiction of civil matters between \$3,000 and \$10,000, and exclusive jurisdiction for matters over \$10,000. Ala. Code §12-11-30.

Appellate Courts

Court of Civil Appeals (5 judges). This Court has appellate jurisdiction over certain judgments of trial courts that “[do] not exceed \$50,000,” and of appeals from administrative agencies, in workers’ compensation cases, and in domestic relations cases. Ala. Code §12-3-10.

Court of Criminal Appeals. (5 judges). This Court has jurisdiction of all misdemeanors, habeas corpus matters, and felonies. Ala. Code §12-3-9.

Supreme Court (9 justices). This Court has final jurisdiction on all appellate matters. Judgments appealed to Court of Civil Appeals for review are subject to review by Supreme Court on certiorari. Ala. Code §12-2-7.

LAW

Abbreviations

- Ala. – Alabama Reports.
- Ala. Civ. App. and Ala. Crim. App. – Alabama Appellate Court Reports.
- Ala. Code – Code of Alabama, 1975 or (Supp.).
- Ala. R. Civ. P. – Alabama Rules of Civil Procedure.
- F. Supp. – Federal Supplement.

- F.2d – Federal Reports, Second Series.
- F.3d – Federal Reports, Third Series.
- So. – Southern Reporter.
- So. 2d – Southern Reporter, Second Series.

ACCIDENT AND HEALTH INSURANCE

Included in “Disability Insurance” Ala. Code §§27-19-1 to 39.

Cancellation. Group insurer is required to notify individual employee-insureds of lapse of policy when employee-insured is adversely affected thereby. *Newton v. United Chambers*, 485 So. 2d 1147 (1986). Claims made pursuant to *Newton* may be preempted by ERISA. *Weems v. Jefferson-Pilot Life*, 663 So. 2d 905 (1995). If no rights of employee have vested, group policy may be canceled without consent of employee. Cancellation takes effect on stated termination date. *Blue Cross-Blue Shield v. Jackson*, 42 Ala. App. 594, 172 So. 2d 804 (Ala. Civ. App. 1965). Remedy for wrongful cancellation is only in contract; no tort action is available. *Watkins v. Life Ins. Co. of Ga.*, 456 So. 2d 259 (1984).

Renewal. There is no cause of action for non-renewal of non-guaranteed renewable policy at end of its term. Insurer can decide not to renew such policy at end of its term for any reason. *ALFA Mut. v. Northington*, 561 So. 2d 1041 (1992).

Disease Induced By Accident. Recovery may be had under accidental means policy when disease and accidental injury cooperate to cause loss. *Liberty Nat'l v. Reid*, 158 So. 2d 667 (1963). Consuming alcohol may not bar recovery under accidental means policy. *Hairston v. Liberty Nat'l*, 584 So. 2d 807 (1991). However, under accidental injury policy with illness exclusion there is no recovery when loss occurs from combined effects of accident and pre-existing disease. *Wilson v. Liberty Nat'l*, 331 So. 2d 617 (1976).

Excepted Risks. Illness exclusion in accidental injury policy is valid. *Wilson v. Liberty Nat'l*, 331 So. 2d 617 (1976). Intentional injury exclusion excludes acts committed or procured by insured and injuries inflicted



upon insured intentionally by another, as well as insured himself. *Vulcan Life v. McDuffie*, 57 Ala. App. 643, 331 So. 2d 280, cert. denied, 331 So. 2d 284 (1976). Insured must have voluntarily done act that he knew or intended to result in injuries, and injuries must have proximately resulted from act in order for exclusion to apply. *Hartford Fire v. Blakeney*, 340 So. 2d 754 (1976). Rider limiting benefits so there is no duplication with Medicare is valid. *Jackson v. Prudential*, 474 So. 2d 1071 (1985).

Notice and Proof of Loss. Ala. Code §27-19-8 requires notice of loss to be given to insurer within 20 days after loss, and proof of loss to be provided within 90 days after loss, and not more than one (1) year after loss. No duty to investigate until claim is submitted in form of written proof of loss, if policy requires such. *United Ins. Co. v. Cope*, 630 So. 2d 407 (1993); *Nationwide Ins. Co. v. Nilsen*, 745 So. 2d 264 (1998).

ACCIDENTAL MEANS

Defined. Voluntary act that leads to unforeseen, unusual or unexpected result invokes coverage under an "accidental means" policy as opposed to an "accidental results" policy. *Hairston v. Liberty Nat'l*, 584 So. 2d 807 (1991).

For liability coverage to apply, accident must arise out of the "ownership, maintenance, or use of the insured automobile." *Taliaferro v. Progressive Specialty Ins. Co.*, 821 So. 2d 976 (2001).

Recovery Allowed. Mishap or slip. *National Sec. v. Ingalls*, 56 Ala. App. 498, 323 So. 2d 384 (1975). Death occurring during high speed auto chase while trying to elude police. *Hearn v. Southern Life*, 454 So. 2d 932 (1984).

Recovery Not Allowed. Death during second operation necessitated because of wound opened during coughing spell. *Stokely v. Fidelity*, 193 Ala. 90, 69 So. 64 (1915). Death from injuries caused by pointing cocked gun at person and pulling trigger. *Armstrong v. Security Ins. Group*, 292 Ala. 27, 288 So. 2d 134 (1973). Asphyxiation secondary to aspiration of vomited food. *Liberty Nat'l v. Windham*, 529 So. 2d 967 (1988).

ADJUSTERS

Defined. Ala. Code §27-9-1.

Licensing Requirements. Ala. Code §§27-9-2 & 3.

Duty. Insurance adjuster has fiduciary duty to disclose to insured that two-year statute of limitation applied to claim against tortfeasor insured by same insurer. *Spooner v. State Farm*, 709 So. 2d 1157 (Ala. 1997). Plaintiff must prove that adjuster's misrepresentation

was intentional, reckless, or mistaken. *Sides v. Drake*, 719 So. 2d 853 (App. 1998).

AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE."

Age of Majority. 19 years. Ala. Code §26-1-1.

AGENTS AND BROKERS

Defined. "Agent" and "broker" in context of property and casualty insurance are defined in Ala. Code §27-7-1(a)(1) and (2).

There are generally three types of agents in Alabama: "general agent," who has authority to transact all business of principal of particular kind, or in particular case; "special agent," who is authorized to act for principal only in particular transaction, or in particular way; and "soliciting agent," who differs in that he has no power to bind his principal in contract. *Washington Nat'l v. Strickland*, 491 So. 2d 872 (1985). Existence and scope of principal-agent relationship is normally question determined by jury. *Bird v. Metro. Life Ins. Co.*, 705 So. 2d 363 (1997).

For Whom. Agent acts for insurer and may bind insurer for acts within his actual or apparent authority. *Protective Life v. Atkins*, 389 So. 2d 117 (1980). However, apparent authority cannot rest solely upon acts of agent, but there must be a holding out of agent by principal. *Bird v. Auto Owners*, 572 So. 2d 394 (1990). Limitations on scope of agency agreed to between insurance company and its agent cannot serve to limit agency as to third persons dealing with agent without notice. *Morris v. Cotton States Life & Health Ins. Co.*, 501 So. 2d 1192 (1986)).

Broker generally acts for himself or for insured. He may for some purposes be agent of insurer as well as insured, depending upon his authority. *Am. States Ins. Co. v. C.F. Halstead Developers, Inc.*, 588 So. 2d 870 (1991); *Washington Nat'l v. Strickland*, 491 So. 2d 872 (1985). Broker acting solely as middleman not liable for fraud of agent under respondeat superior. *Broadus v. Essex Ins.*, 621 So. 2d 258 (1993); *Gulf Gate v. St. Paul Surplus*, 646 So. 2d 654 (1994).

Fraud By Agent. Insurance company will be held liable for fraudulent acts or representations by its agent. *Allstate v. Hilley*, 595 So. 2d 873 (1992) (amount of damages); *Hicks v. Globe Life*, 584 So. 2d 458 (1991) (coverage); *Morris v. Cotton States*, 501 So. 2d 1192 (1986) (coverage). Not generally liable for negligence or fraud of independent contractor. *Bell v. Sugarwood Homes*, 619 So. 2d 1298 (1993). Language in contract

disavowing agency is not controlling; court looks to retained right of control by alleged principal. *Tomlinson v. G.E. Capital Dealers*, 624 So. 2d 565 (1993); *Cobb v. Union Camp Corp.*, 786 So. 2d 501 (App. 2000).

Knowledge By Agent. Knowledge of agent obtained prior to his agency is not imputed to subsequent principal. *Girard Fire v. Gunn*, 221 Ala. 654, 130 So. 180 (1930). Notice acquired by agent while pursuing other person's business is not constructive notice to principal. *Lakeshore Drive Recreation Club v. USF&G*, 398 So. 2d 278 (1981). When agent is agent for several companies, knowledge received by him while acting for one company is not notice to other companies. *Traders v. Letcher*, 143 Ala. 400, 39 So. 271 (1904). Insured has right to presume facts made known to agent are transmitted to principal. *Ala. Farm Bureau v. Moore*, 435 So. 2d 712 (1983). Knowledge of soliciting agent of misrepresentations made by insured is not imputed to insurer and is not a waiver of misrepresentations. *Herricks v. Mut. Life*, 294 Ala. 446, 318 So. 2d 683 (1975).

Liability of Agent. Agent who undertakes to procure insurance for client is liable to client for negligence in failing to secure insurance. *Crump v. Geer*, 336 So. 2d 1091 (1976); *Cox v. Pridgen*, 372 So. 2d 855 (1979); *Lewis v. Roberts*, 630 So. 2d 355 (1993). Agent may be liable to insurer for breach of duty or failure to follow instructions. *Progressive Cas. v. Blythe*, 350 So. 2d 1062 (App. 1977). Insurer may terminate agent who has replaced insurer's business. *Bosarge v. Bankers Life*, 541 So. 2d 499 (1989).

Liability of Company. Can be liable for negligent or wanton hiring and supervision of agent and can be subject to punitive damages. *Northwestern Mut. v. Sheridan*, 630 So. 2d, 384 (1993); *Ex parte Henry*, 770 So. 2d 76 (2000).

ARBITRATION

Permitted and governed by Ala. Code §§6-6-1 *et seq.* as to present disputes. General provisions to arbitrate cannot be specifically enforced, Ala. Code §8-1-41, *Ex Parte Warren*, 565 So. 2d 210 (1990); *Southern United Fire Ins. v. Purma*, 792 So. 2d 1092 (2001), unless they are subject to Federal Arbitration Act. *Ex Parte Merrill Lynch*, 494 So. 2d 1 (1986); *Ex Parte Alabama Oxygen*, 452 So. 2d 860 (1984); *Continental Grain Co. v. Beasley*, 628 So. 2d 319 (1993). Alabama law applies to determine if parties created enforceable agreement to arbitrate. *Crown Pontiac v. McCarrell*, 695 So. 2d 615 (1997). Party seeking to compel arbitration has burden of proving: 1) existence of contract containing arbitration agreement and 2) underlying transaction evidences a transaction affecting interstate commerce. *Allied Williams Co. v. Davis*, 901 So. 2d 696 (2004). It is

not necessary to prove specific transaction in and of itself involves interstate commerce; rather, it is sufficient if, in the aggregate, the economic activity in question would represent a practice subject to federal control. *Allied Williams*, 883 So.2d 621 (2003). Insurance agent's claim that insurers converted agent's client information is not subject to arbitration. *Old Republic v. Lanier*, 644 So. 2d 1258 (1994). Party cannot be compelled to arbitrate if no agreement has been executed. *Ex Parte Stallings*, 670 So. 2d 861 (1995). However, arbitration provision that is made part of health insurance policy by unsigned endorsement referenced in policy is valid and enforceable. *Ex Parte Rager*, 712 So. 2d 333 (Ala. 1998). Federal policy requires any ambiguity over applicability of arbitration be decided in favor of arbitration. *Kovllas v. Ramsey*, 683 So. 2d 415 (1996). Whether arbitration clause is unconscionable is a question for court and not arbitrator. *First Family Fin. Serv. v. Jackson*, 786 So. 2d 1121 (2000).

Physician's claims that arbitration provision was induced by fraud is subject to Federal Arbitration Act. *Ex Parte Lorange*, 669 So. 2d 890 (1995). Employee of company who signed agreement for company and who was sued can enforce arbitration provision. *Ex Parte Isbell*, 708 So. 2d 571 (1997). Can waive arbitration provision by proceeding with suit. *Companion Life v. Whitesell Mfg.*, 670 So. 2d 897 (1995); *Ex Parte Smith*, 706 So. 2d 704 (1997), *First Family Fin. Serv. v. Jackson*, 786 So. 2d 1121 (2000). No waiver if other party not prejudiced by delay. *Allied-Bruce v. Terminix*, 684 So. 2d 102 (1995). Waiver is determined on case-by-case basis. *Ex Parte Pendergast*, 678 So. 2d 778 (1996). Stay for arbitration may be proper for non-signatory to arbitration agreement. *Ex Parte Gray*, 686 So. 2d 250 (1996). *But see Ex Parte Jones*, 686 So. 2d 1166 (1996) (refusing to compel arbitration in favor of non-signator insurer). Non-compete agreement part of sales contract is subject to arbitration. *Northcom v. James*, 694 So. 2d 1329 (1997). Finance company entitled to enforce agreement of car buyer's sales contract that was assigned to finance company. *Nissan Motor v. Ross*, 703 So. 2d 324 (1997). Federal Arbitration Act preempts state law claims because automobile insurance policy was between corporations of different states. *Ex Parte Dyess*, 709 So. 2d 447 (1997). McCarran-Ferguson Act does not super-preempt Federal Arbitration Act and does not allow state of Alabama to bar arbitration agreements in insurance policies. *Am. Bankers Ins. v. Crawford*, 757 So. 2d 1125 (1999).

U.S. Supreme Court overturned *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (Ala. 2000), reasoning *Sisters* rested on Alabama Supreme Court's misreading of *U.S. v. Lopez*, 514 U.S. 549 (1995) and thereby resulted in restrictive interpretation

of Federal Arbitration Act. *See Citizens Bank v. Alafabco*, 539 U.S. 52 (2003). Specifically, *Sisters* erred when it endeavored to determine whether subject transactions, “by themselves, had a ‘substantial effect on interstate commerce.’” *Alafabco*, at 55 (emphasis added). *Alafabco* held that *Sisters*, “gives inadequate breadth to the ‘involving commerce’ language” of the Federal Arbitration Act (FAA). *Alafabco*, at 56; *see also* 9 U.S.C. §2. In holding that debt-restructuring agreements executed in Alabama by Alabama residents were nonetheless sufficient to trigger FAA, *Alafabco* reasoned that: “[T]he FAA [is not] defeated because the individual debt-restructuring transactions, taken alone, did not have a ‘substantial effect on interstate commerce.’ Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice...subject to federal control.’ Only that general practice need bear on interstate commerce in a substantial way...” *Alafabco*, at 56-57 (citations omitted).

Alafabco held that debt-restructuring agreements satisfied FAA’s “involving commerce” test for three reasons: 1) *Alafabco* engaged in business throughout southeastern United States using substantial loans from the bank that were renegotiated and redocumented in the subject restructuring agreements, 2) restructured debt was secured by all of *Alafabco*’s business assets, including inventory and equipment assembled from out-of-state parts, and 3) general practice of commercial lending has broad impact on national economy and Congress’ power to regulate that activity pursuant to Commerce Clause. *Alafabco*, at 55-58. *See also Serv. Corp. Intern. v. Fulmer*, 2003 883 So. 2d 621 (Ala. 2003) (discussing ramifications of *Alafabco*).

Alafabco has been used to uphold arbitration of fraud and fraudulent inducement claims relating to commencement of an insurance policy. *Liberty Nat’l Ins. Co. v. Ester*, 880 So. 2d 1112 (Ala. 2003). *See also SouthTrust v. James*, 880 So. 2d 1117 (Ala. 2003). Check drawn on out-of-state bank sufficient to trigger interstate commerce requirement of *Alafabco*; *Elizabeth Homes, L.L.C. v. Gantt*, 882 So. 2d 313 (Ala. 2003). Breach of warranty claims, *Adcock v. Adams Homes, LLC*, 906 So. 2d 924 (Ala. 2005); and claims related to the purchase of a house. *Allied Williams Co. v. Davis*, 901 So. 2d 696 (Ala. 2004).

Alabama courts have found an implied agreement to arbitrate in a number of cases. *Memberworks, Inc. v. Yance*, 899 So. 2d 940 (2004); *Bellsouth v. West*, 902 So. 2d 653 (2004); *Providian Nat’l Bank v. Conner*, 898 So. 2d 714 (2004).

In *Birmingham News Co. v. Horn*, 901 So. 2d 27 (2004), Alabama Supreme Court recognized doctrine of “manifest disregard of the law” as basis for overturning or modifying arbitration award. Party seeking to vacate arbitration award must establish: 1) arbitrators knew of governing legal principle yet refused to apply it or ignored it altogether; and 2) law ignored by arbitrators was well defined, explicit, and clearly applicable to case. *Birmingham News*, 901 So. 2d at 50.

ATTORNEYS

Appointment and Authority. Governed by Ala. Code §§34-3-1 to 25. All attorneys must take Alabama Bar Association examination and pass all sections; upon passing will become member of integrated bar. Out-of-state attorneys may appear in special cases *pro hac vice* by permission of court. Attorney has authority to bind his client by written agreement or by entry on minutes of court. *Martin & Martin v. Jones*, 541 So. 2d 1 (1989).

Conflict of Interest. Governed by Alabama Rules of Professional Conduct. Ala. R. Prof. Conduct 1.6-.10. *See L&S Roofing v. St. Paul*, 521 So. 2d 1298 (1987) (holding that when insurance company undertakes defense pursuant to reservation of rights, it does so under enhanced duty of good faith towards its insured in conducting such defense); *see also Aetna Cas. & Sur. Co. v. Mitchell Bros., Inc.*, 814 So. 2d 191, 195 (2001).

Legal Malpractice. All attorneys are subject to provisions of “The Alabama Legal Services Liability Act” (Ala. Code §6-5-570, *et seq.*). This act describes standard of care required of attorneys in Alabama and provides for remedies if standard is not met. It applies to actions based upon fraud. *Voyager Guar. v. Brown*, 631 So. 2d 848 (1993).

Fees. Alabama follows “American Rule,” which provides that fees may be recovered only when authorized by statute, when provided in contract, or by special equity, such as when efforts of attorney create fund from which fees may be paid. *Horn v. Birmingham*, 718 So. 2d 694 (Ala. 1998). Attorneys are given lien on papers and money of their clients in their possession for services rendered to clients, Ala. Code §34-3-61, and may by motion obtain court approval of his fee, Ala. Code §34-3-62. Standard is what is reasonable compensation for services rendered.

Alabama Litigation Accountability Act. Court has no jurisdiction to grant relief under the ALAA when it is requested for first time on appeal. *Walker v. Blackwell*, 800 So. 2d 588 (2001). Court may award, in addition to other costs, reasonable attorney’s fees against any attorney or party, or both, who has brought action without substantial justification. Ala. Code §12-19-272. In order



to award fees, however, trial court must make specific findings that action was brought without substantial justification. *Ex Parte S.C.W.*, 826 So. 2d 844 (Ala. 2001).

AUTOMOBILES

See "NEGLIGENCE."

See Law Digest Tables.

Age. Minimum age for operator's license is 16 years. Ala. Code §32-5-64. Learner's permit at age 15. Ala. Code §32-6-8.

Agency. Presumption exists that one in possession and control of vehicle is agent or servant of owner. *Sanders v. Roberts*, 563 So. 2d 1022 (1990); *Pryor v. Brown & Root*, 674 So. 2d 45 (1995). Employee in going to and from work is regarded as acting for his own purposes. *Red's Elec. Co. v. Beasley*, 272 Ala. 200, 129 So. 2d 676 (1961); *Cook v. Fullbright*, 349 So. 2d 23 (1977). There is no agency for one who lent car to one person but who did not give permission to person who was driving owner's car at time of accident. *Felder v. Hill*, 447 So. 2d 178 (1984). Alabama follows doctrine of negligent entrustment, imposing liability upon one permitting known incompetent driver to operate auto resulting in injuries to another. *Day v. Williams*, 670 So. 2d 914 (1995); *Liao v. Harry's Bar*, 574 So. 2d 775 (1990); *Mason v. New*, 475 So. 2d 854 (1985).

Comparative/Contributory Negligence. Alabama Supreme Court refused to adopt comparative negligence standard; instead holding contributory negligence will remain law in Alabama. It is a complete defense in action of simple negligence. *Williams v. Delta*, 619 So. 2d 1330 (1993); *Works v. Allstate*, 594 So. 2d 60 (1992) (applied contributory negligence to 13 year old).

Compulsory Insurance Coverage. Liability insurance policy, motor vehicle liability bond, or deposit of cash required. Ala. Code §32-7A-4. Liability insurance limits of \$25,000/50,000 for personal injuries and \$25,000 for property damages are minimum requirements. Ala. Code §32-7A-4; Ala. Code §32-7-6(c).

Alcohol/DWI. Person may be charged with driving "under the influence of alcohol" and it must be shown alcohol affected his ability to operate his vehicle in safe manner. If person operates vehicle with blood-alcohol level of 0.08% or more it is not necessary to show person's ability to drive was impaired. Ala. Code §32-5A-191; *Frazier v. City of Montgomery*, 565 So. 2d 1255 (Ala. Crim. App. 1990).

Damages. Compensatory damages, including pain and suffering, mental anguish, medical expenses, loss of income (past and future), and property damage are recoverable for simple negligence. Punitive damages may

be recoverable for gross, reckless, wanton, or intentional negligence. Insurer may be liable for excess of judgment over policy limits when insurer had opportunity to settle within or for policy limits and negligently or in bad faith failed to do so. *Waters v. American*, 261 Ala. 252, 73 So. 2d 524 (1953); *Turner v. Cont'l Cas. Co.*, 541 So. 2d 471 (1989). Insurer is not proper party in initial suit to determine liability. *Baggett v. Jackson*, 244 Ala. 404, 13 So. 2d 572 (1943). Judgment creditor of insured can only recover amount of policy coverage; no punitive damages. *Dumas v. Southern Guar.*, 431 So. 2d 534 (1983).

Family Purpose Doctrine. Not recognized. *Pitts v. Hulsey*, 344 So. 2d 175 (Ala. Civ. App. 1977); *Winfrey v. Austin*, 71 So. 2d 15 (Ala. 1954).

Guests. Have action against driver only for wilful or wanton conduct. Ala. Code §32-1-2. See *George v. Champion*, 591 So. 2d 852 (1991). Passenger for hire is one who accompanies driver on mutual business mission or to render benefit to driver at driver's request; is not guest under statute, *Sellers v. Sexton*, 576 So. 2d 172 (1991); *Dorman v. Jackson*, 623 So. 2d 1056 (1993). Usually a question of fact. *Fox v. Hollar Co.*, 576 So. 2d 223 (1991). Guest must exercise reasonable care for own safety. *Hamilton v. Kinsey*, 337 So. 2d 344 (1976); *Brown v. AAA Wood Products*, 380 So. 2d 784 (1980). Guest who protests speed of driver may have guest status changed. *Roe v. Lewis*, 416 So. 2d 750 (1982). Guest may recover compensatory and punitive damages. *Employers v. Brock*, 233 Ala. 551, 172 So. 671 (1937).

Imputed Negligence/Joint Enterprise. See *Sellers v. Sexton*, 576 So. 2d 172 (1991); *Carter v. Reed*, 638 So. 2d 833 (Ala. 1994).

Last Clear Chance. Is applied in Alabama. *Zaharavich v. Clingerman*, 529 So. 2d 978 (1988); compare to *Shows v. Donnell Trucking Co.*, 631 So. 2d 1010 (1994).

Ownership/Title. Every motor vehicle operator is required to have rear license tag on vehicle. Ala. Code §32-6-51. Alabama has adopted "Alabama Uniform Certificate of Title and Antitheft Act," requiring all owners to obtain Certificate of Title, Ala. Code §§32-8-1 *et seq.* Certificate is not conclusive evidence of ownership as ownership may be established by evidence of possession, bill of sale, and by evidence of payment of money for vehicle. *Crowley v. State Farm*, 591 So. 2d 53 (1991).

Pedestrians. Governed by Ala. Code §§32-5A-210 to 222.

No-fault. Not adopted in Alabama.

Motorized Bicycles. Ala. Code §32-12-20 describes “motor driven cycle” as “every bicycle with motor attached and every motor scooter.” Parent is charged with prohibiting his child to violate provisions requiring license to operate on public highway, Ala. Code §32-12-22, equipping with brakes, Ala. Code §32-12-24, and use of protective helmets Ala. Code §32-5A-245. *See also* Ala. Code §§32-5A-240 to -245.

Seat Belts. “Alabama Safety Belt Use Act of 1991” Ala. Code §§32-5B-1 to -5 requires all front seat passengers to wear seat belts. Child passenger restraint systems are required for all children under 6 years of age. Ala. Code §32-5-222. Failure to wear safety belts in violation of Safety Belt Act not evidence of contributory negligence nor does it limit the liability of the insurer. Ala. Code §32-5B-7.

Service of Process. Rule 4.2 (a), In-state Service. All process may be served anywhere in this state and, when authorized by law or by these rules, may be served outside this state

Speed Limit. General requirement is every person shall not drive vehicle at speed greater than is reasonable and prudent under existing conditions. Ala. Code §32-5A-170. Speed limits are 30 mph in urban areas, 55 mph on Alabama highways, and 70 mph on interstate highways. Ala. Code §32-5A-171. Violation of ordinance or statute does not constitute negligence as matter of law. *Odom v. Schofield*, 480 So. 2d 1217 (1985); *Brownell-O’Hear Pontiac v. Taylor*, 269 Ala. 236, 112 So. 2d 463 (1959). Statutory violation must be proximate cause of accident. *Smith v. Sherman Smith Trucking*, 569 So. 2d 347 (1990). Excessive speed alone does not necessarily constitute wanton conduct. *Knowles v. Poppell*, 545 So. 2d 40 (1989).

Trailers/Weight Limits. Established by Ala. Code §§32-9-20 to 31. *See Perry v. State*, 441 So. 2d 127 (Ala. Crim. App. 1983) (discussing legislative intent).

Uninsured/Underinsured Endorsements. Required in all automobile policies unless rejected by insured. There is no distinction between uninsured and underinsured motorist coverage. *Best v. Auto-Owners*, 540 So. 2d 1381 (1989); *Star Freight v. Sheffield*, 587 So. 2d 946 (1991). Reduction clauses providing that UIM benefits will be reduced by liability insurance payments are valid and enforceable. *Guess v. Allstate*, 717 So. 2d 389 (Ala. Civ. App. 1998). Corroborative evidence requirements contained in policy is void under any claim brought under Alabama’s uninsured motorist statute. *Walker v. GuideOne Specialty Mut. Ins. Co.*, 834 So. 2d 769 (2002), *overruling Hannon v. Scottsdale Ins. Co.*, 736 So. 2d 616 (Ala. Civ. App. 1999). Insured who releases tortfeasor and tortfeasor’s insurance carrier without ob-

taining permission from his own underinsured motorist carrier waives rights to any benefits from his carrier. *Allstate v. Beavers*, 611 So. 2d 348 (1992). Insureds’ acceptance of settlement from tortfeasor does not affect their rights under underinsured motorist policy. Thirty days is reasonable time to investigate once notified of settlement. *Lambert v. State Farm Mut. Auto. Ins. Co.*, 576 So. 2d 160 (1991).

Alabama Supreme Court held in *Ex parte Carlton*, 867 So. 2d 332 (2003) that an employee injured while passenger in vehicle driven by co-employee was not legally entitled to recover from owner or operator of uninsured vehicle for purposes of uninsured motorist statute, and thus employee was not entitled to uninsured motorist (UM) benefits under his family’s automobile liability insurance policy where Workers’ Compensation Act barred employee from suing co-employee based on negligence; thereby overruling *Hogan v. State Farm Mut. Auto. Ins. Co.*, 730 So. 2d 1157; *State Farm Mut. Auto. Ins. Co. v. Jeffers*, 686 So. 2d 248; and *State Farm Mut. Auto. Ins. Co. v. Baldwin*, 470 So. 2d 1230; Ala. Code §§25-5-53, 32-7-23.

AVIATION

Uniform Act. Not adopted in Alabama.

BROKERS

See “AGENTS AND BROKERS.”

BURGLARY

No reported cases.

CANCELLATION

See “ACCIDENT AND HEALTH INSURANCE”; “LIABILITY INSURANCE”; “FIRE INSURANCE.”

Ala. Code §§27-23-20 to 28 describe requirements for cancellation of automobile liability insurance. Proof of mailing of notice of cancellation to named insured at address shown in policy shall be sufficient proof of notice. *Strickland v. Ala. Farm Bureau*, 502 So. 2d 349 (1987); *Cornett v. Johnson*, 578 So. 2d 1259 (1991). Refund of premiums must be made by insurer. *Gulf Gate v. Alliance Ins.*, 638 So. 2d 862 (1994).

CHATTEL MORTGAGE

See “FIRE INSURANCE.”

CONSTRUCTION OF POLICY

Ambiguity of Terms. General rule is that insurance policies containing ambiguities are to be construed in

favor of insured, *Best v. Auto-Owners*, 540 So. 2d 1381 (1989), however, effect given to reasonably determined intent of parties. *Safeway v. Amevisure*, 707 So. 2d 218 (1997). But, unreasonable interpretation of words in contract may not be used to create ambiguity. *Fed. Guar. v. Dunn*, 439 So. 2d 1283 (Ala. Civ. App. 1983). Policy not ambiguous merely because parties interpret it differently. *Tate v. Allstate*, 692 So. 2d 822 (1997); *Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co.*, 817 So. 2d 687 (Ala. 2001). Court must decide whether policy is ambiguous. *Withers v. Mobile Gas*, 567 So. 2d 253 (1990); *Upton v. Miss. Valley Title*, 469 So. 2d 548 (1985). Ambiguous policies will not automatically be construed against drafter where both parties are sophisticated businessmen represented by counsel. *Western Sling v. Hamilton*, 545 So. 2d 29 (1989); *Pfarr v. Intercorp*, 577 So. 2d 1291 (1991). Person who signs contract is on notice of terms and is bound thereby even if contract not read before signing. *Locklear Dodge v. Kimbrell*, 703 So. 2d 303 (1997).

Conditional Receipt of Application. "Approval" type binding receipt is unconscionable and provides temporary binder when coupled with payment of premium. *Powell v. Republic Nat'l*, 337 So. 2d 1291 (1976). Effective date of policy is to be determined by binding receipt, provided conditions contained therein are met. *Barnes v. Atl. & Pac.*, 295 Ala. 149, 325 So. 2d 143 (1975). Mere delay in acting upon application does not amount to acceptance when conditions of receipt are not met. *Reserve Life v. Haster*, 500 So. 2d 1052 (1986). Beneficiary has no action against insurer for negligence in processing application. *Smith v. Equifax*, 537 So. 2d 463 (1988).

Inconsistent Policy Terms and Endorsements. Exceptions to coverage are to be interpreted as narrowly as possible in order to provide maximum coverage for insured. *State Farm v. Lewis*, 514 So. 2d 863 (1987), but see *Wakefield v. State Farm*, 572 So. 2d 1220 (1990) (recognizing that exceptions to coverage and inconsistent policy terms are to be interpreted as narrowly as possible, but noting that courts must still construe insurance contracts in a manner reflecting intentions of parties thereto). Exclusion provision against suits by employees is ambiguous when considered with coverage provisions of workers' compensation policy providing employers liability coverage. *Employers v. Jeff Gin Co.*, 378 So. 2d 693 (1979).

Provision excluding coverage for corporate employees is not ambiguous and will be enforced even though it applied to an injury arising out of employment. *Commercial Union v. Rose's Stores*, 411 So. 2d 122 (1982). However, an insurance company bears the burden of proving an exclusion in the policy bars coverage.

USF&G v. Armstrong, 479 So. 2d 1164 (Ala. 1985). There is no conflict between incontestability clause and pre-existing disease exclusion clause. *Nat'l Life v. Mixon*, 291 Ala. 467, 282 So. 2d 308 (1973). Contractual forum selection clauses not enforceable. *Distronics v. Disc Mfg.*, 686 So. 2d 1154 (1996). However, "Outbound Forum Selection" clause providing for trials outside state are not void as against public policy. *Prof'l Ins. v. Sutherland*, 700 So. 2d 347 (1997).

Oral Binders. Parol evidence rule does not permit inquiry into verbal agreements not incorporated in written policy agreement. *INA v. Thomas*, 337 So. 2d 365 (Ala. Civ. App. 1976). Contracts of insurance may be made by parol, and as such are not "policies" prohibited by Ala. Code §27-14-10. *Hartford Fire v. Shapiro*, 270 Ala. 149, 117 So. 2d 348 (1960); *Gulf Gate v. St. Paul Surplus*, 646 So. 2d 654 (1994).

DAMAGES

Appellate Review. Alabama has statutory and decisional system for post-judgment review of excessive verdicts. Trial courts and Supreme Court have power to order remittitur of excessive damage awards. *Prudential Ballard Realty v. Weatherly*, 792 So. 2d 1045 (2000) (\$2.75 million award reduced to \$1.0 million); *Aspinwall v. Gowens*, 405 So. 2d 134 (1981) (\$1,000,000 award reduced to \$250,000); *Intercontinental v. Lindblom*, 571 So. 2d 1092 (1990) (\$3 million award reduced to \$1 million). Ala. Code §6-11-23 requires trial judge to hold post-judgment hearing when motion for new trial alleges amount of damages to be excessive. Testimony and documentary evidence may be offered by both parties. Trial judge must make written findings supporting or attacking amount. *Armstrong v. Roger's Outdoor Sports*, 581 So. 2d 414 (1991). *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (1989) specifies seven (7) factors that must be considered by both trial and appellate courts in reviewing award of damages alleged to be excessive.

Arbitration Awards. Are binding, liberally construed, and bar further claims or action on same or related matter. Ala. Code §6-6-14. Only binding upon insured if party or privy to arbitration agreement. *Southeast Ala. Gas v. Taylor*, 416 So. 2d 1050 (App. 1982). If appeal is taken in proceeding to confirm arbitration award, circuit court is empowered to review deviations of arbitrator within. Ala. Code §§6-6-14 and 6-6-15; *Moss v. Upchurch*, 179 So. 2d 741 (Ala. 1965).

Comparative Negligence. Not adopted in Alabama. *Williams v. Delta*, 619 So. 2d 1330 (1993).

Indemnification. There is no right of contribution among joint tortfeasors. *Adler v. Pruitt*, 169 Ala. 213, 53 So. 325 (1910). But see *Mikkelson v. Salama*, 619 So. 2d

1382 (1993) carving out exception where both parties are at fault, but fault of one is proximate or primary cause of injury. However, there may be right of indemnification based upon written agreement, *Apel Mach. v. O'Toole*, 548 So. 2d 445 (1989), even for indemnitee's own negligence. *Nationwide Mut. v. Hall*, 643 So. 2d 551 (1994). Exception under common law principles as well See e.g. *Am. Southern v. Dime Taxi*, 275 Ala. 51, 151 So. 2d 783 (1963) (following principle that if servant is liable to master for tort committed by servant, then servant's insurer will also be liable).

Psychic Injuries - Mental Pain and Suffering. Cannot recover for mental anguish flowing from breach of contract, *Sanford v. Western Life*, 368 So. 2d 260 (1979) unless it could be reasonably anticipated. *Burns v. Motors*, 530 So. 2d 824 (Ala. Civ. App. 1987) cert. denied, 1988; *Sexton v. St. Clair Fed.*, 653 So. 2d 959 (1995). Damages for inconveniences, annoyance, mental anguish and suffering cannot be recovered for breach of insurance contract. *Ala. Farm Bureau v. Smith*, 406 So. 2d 916 (1981). Can be recovered for misrepresentation as to insurance coverage. *Alfa v. Northington*, 561 So. 2d 1041 (1990). Approved \$250,000. *Crown Life v. Smith*, 657 So. 2d 821, (1995). Reduced \$250,000 award to \$50,000 in *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333 (1994).

Alabama recognizes recovery for intentional infliction of emotional distress (tort of outrage). *Am. Road Serv. Co. v. Inmon*, 394 So. 2d 361 (1981); *Nat'l Sec. v. Bowen*, 447 So. 2d 133 (1983); *Anderton v. Gentry*, 577 So. 2d 1261 (1991). Can be recovered without physical injury by showing culpable tortious conduct amounting to wantonness. *Dockins v. Drummond*, 706 So. 2d 1235 (Ala. Civ. App. 1997). Including construction company as co-payee on check for payment of loss is not outrageous conduct. *Tyson v. SAFECO*, 461 So. 2d 1308 (1984). Nor is withholding of proceeds of life insurance policy. *Barrett v. Farmers & Merchants Bank*, 451 So. 2d 257 (1984). Cannot be recovered by employee claiming wrongful termination. *Hobson v. Am. Cast Iron Pipe*, 690 So. 2d 341 (1997). Damages are recoverable only for intentional acts, not for negligent infliction of emotional distress. *Allen v. Walker*, 569 So. 2d 350 (1990). No cause of action for negligent infliction of emotional distress, especially not for bystanders. *Gideon v. Norfolk Southern*, 633 So. 2d 453 (1994). FELA preempts state law claim for tort of outrage. *Walker v. Norfolk Southern*, 700 So. 2d 1195, (Ala. Civ. App. 1996).

Punitive Damages. Awarded to punish offender and deter others similarly situated. Must not exceed amount which will achieve this goal. *Green Oil v. Hornsby*, 539 So. 2d 218 (1989). Factors defined that are sufficient to warrant award of punitive damages. *BMW v. Gore*, 701

So. 2d 507 (1997). May be recovered on proof of nominal damages without proof of exact actual damages. *Nat'l Sec. v. Beasley*, 406 So. 2d 923 (Ala. Civ. App. 1981), writ. denied, 406 So. 2d 926 (1981). There need be no correlation or relationship between actual damage and punitive damages. *Southern Life v. Turner*, 586 So. 2d 854 (1991). But see *Pac. Mut. v. Haslip*, 111 S. Ct. 1032 (1991). In absence of actual injury, there can be no award of either compensatory or punitive damages. *Purcell v. Spriggs*, 431 So. 2d 515 (1983). Furthermore, there can be no recovery of punitive damages under claim grounded solely upon breach of contract. *Geohagan v. Gen. Motors Corp.*, 279 So. 2d 436, 438 (Ala. 1973). There are due process limits on amount of punitive damages that may be awarded against defendant for tortious conduct that affects multiple claimants. *Ex Parte Holland*, 692 So. 2d 811 (1997).

Bad Faith. May recover punitive damages for bad faith refusal of insurer to pay claim in absence of arguable or debatable reason for denial. *Gulf Atl. v. Barnes*, 405 So. 2d 916 (1981); *Nat'l Sec. v. Bowen*, 417 So. 2d 179 (1982); *Nat'l Savs. v. Dutton*, 419 So. 2d 1357 (1982); *Weaver v. Allstate*, 574 So. 2d 771 (1990). This cause of action applies only to insurance policies and not to other contracts. *Kennedy Elec. v. Moore Handley*, 437 So. 2d 76 (1983); *Gaylord v. Lawler*, 477 So. 2d 382 (1985). Bad faith may also exist where insurer intentionally fails to determine if claim is valid, *Cont'l Assur. v. Kountz*, 461 So. 2d 802 (1984), or where insurer fails to subject results of investigation to cognitive evaluation. *Thomas v. Principal Fin.*, 566 So. 2d 735 (1990). Bad faith does not consist of negligent mistake. *Prudential v. Coleman*, 428 So. 2d 593 (1983); mere non-payment of claim, *Bush v. Ala. Farm Bur.*, 576 So. 2d 175 (1991); delay, *Bowers v. State Farm*, 460 So. 2d 1288 (1984); failure to investigate answer in application, *Old Southern v. Spann*, 472 So. 2d 987 (1985); failure to contact treating physician listed on claim form, *Mordecai v. Blue Cross*, 474 So. 2d 95 (1985); or dispute of amount of damages, *INA v. Citizensbank*, 491 So. 2d 880 (1986); *Emanuelson v. State Farm*, 651 So. 2d 29 (Ala. Civ. App. 1994). Bad faith is preempted under ERISA. *Seafarer's v. Dixon*, 512 So. 2d 53 (1987). No bad faith when insurer interpleads benefits. *Gilbert v. Congress Life*, 646 So. 2d 952 (1994). There is no cause of action in Alabama for negligent or wanton investigation of insurance claim. *Kevin v. Southern Guar. Ins. Co.*, 667 So. 2d 704 (Ala. 1995).

Collateral Source Rule. Abolished in Alabama by Ala. Code §12-21-45. *Marsh v. Green*, 782 So. 2d 223 (2000), but see *Killian v. Messler*, 792 F. Supp. 1217 (N.D. Ala. 1992) (holding Ala. Code. §12-21-45 constitutes rule of evidence and is, therefore, not binding upon federal courts sitting in diversity).



Statutory Caps on Awards. Ala. Code §6-11-21 caps punitive damages in non-physical injury cases at three times compensatory damages or \$500,000, whichever is greater; in physical injury cases, punitive damages capped at three times compensatory damages or \$1,500,000, whichever is greater; any claim against “small business” (net worth of \$2,000,000 or less), award of punitive damages shall not exceed \$50,000 or 10% of net worth, whichever is greater.

DEATH

See Law Digest Tables.

Abatement and Survival. Generally pending action survives deaths of both plaintiff and defendant. See Ala. Code §6-5-462. If party dies during course of suit, action may be revived. Ala. Code §6-5-466. Contract actions survive in favor of personal representation regardless whether suit filed before death. *Benefield v. Aquaslide*, 406 So. 2d 873 (1981); *McMahan v. Old South*, 512 So. 2d 94 (1987); *McCulley v. Southtrust Bank*, 575 So. 2d 1106 (1991). Tort claims alleging conversion, suppression of material facts, *McCulley v. Southtrust Bank*, 575 So. 2d 1106 (1991); intentional misconduct, *Smith v. Equifax*, 537 So. 2d 463 (1988); tort, *Gillian v. Fed. Guar.*, 447 So. 2d 668 (1984); bad faith, *Ga. Cas. v. White*, 582 So. 2d 487 (1991); and fraud, *Davis v. Southern United*, 494 So. 2d 48 (1986), do not survive death of claimant.

Action for Wrongful Death. Action for wrongful death caused by negligent or intentional conduct of tortfeasor survives in favor of personal representative. If action for injuries was filed prior to death of injured party, it may be revived by personal representative, but action for wrongful death is under Ala. Code §6-5-410. Both actions may proceed together. *Patterson v. Hayes*, 623 So. 2d 1142 (1993). No action for wrongful death is created by Uniform Commercial Code for breach of warranty. *Geohagan v. General Motors*, 291 Ala. 167, 279 So. 2d 436 (1973). Either mother or father, but not both, may bring action for death of minor child Ala. Code §6-5-391. *Rainer v. Feldman*, 568 So. 2d 1226 (1990). Father is favored if he is custodial parent. *Gentry v. Gilmore*, 613 So. 2d 1241 (1993). Damages recoverable are solely punitive in nature. *Carter v. City of B'ham*, 444 So. 2d 373 (1983), *cert. denied*, 467 U.S. 1211 (1984). No cause of action for death of non-viable fetus. *Lollar v. Tankersley*, 613 So. 2d 1249 (1993).

Statute of Limitations. 2 years, Ala. Code §6-5-410 (d). *Dukes v. Jowers*, 584 So. 2d 524 (1991).

Unexplained Absence. Presumption of death after 5 years. Ala. Code §§43-2-230 to 233. *In re Estate of Dawson*, 346 So. 2d 386 (Ala. 1977).

DISABILITY

Classifications. Alabama has used terms “permanent” as distinguished from “temporary” disability, *Metro. v. Blue*, 222 Ala. 665, 133 So. 707 (1931), and “total” as distinguished from “partial.” *Mut. Benefit v. Bain*, 242 Ala. 471, 6 So. 2d 599 (1942). Total and permanent disability requires inability to perform substantial duties of his own occupation, or any other occupation by which he is qualified by education, training, and experience. Person need not be helpless in order to be considered totally disabled. *Key Life v. Burns*, 390 So. 2d 1064 (Ala. Civ. App. 1980). Insured’s ability to perform occasional acts as part of his business may not preclude him being totally disabled. *United States Cas. Co. v. Perryman*, 203 Ala. 212, 82 So. 462 (1919).

Proof of Condition. Disability must be determined by character of occupation, capabilities of insured, and circumstances of each case. Ordinarily it is question of fact for jury, but may be decided as matter of law in particular case. *New York Life v. Torrance*, 224 Ala. 614, 141 So. 547 (1932).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; “AUTOMOBILES, Compulsory Coverage.”

FIRE INSURANCE

Arson. Complete defense even though not specified in policy. *Mueller v. Hartford*, 475 So. 2d 554 (1985). Circumstantial evidence may be used to prove arson. *Bryant v. State Farm*, 447 So. 2d 181 (1984); *Great Southwest Fire Ins. Co. v. Stone*, 402 So. 2d 899 (Ala. 1981).

Appraisal. Fact that one appraiser refused or failed to join in award cannot serve to make same less binding upon parties. Award partakes of nature of judgment of court, and may be pleaded in bar of subsequent suit founded on same claim, whether award is made on arbitration under statute or at common law. *Glens Falls v. Garner*, 229 Ala. 39, 155 So. 533 (1934). Submission to arbitration is condition precedent to action on policy and absence of award bars action. Institution of suit pending award operates as revocation of submission. *Ex Parte Birmingham Fire Ins. Co.*, 233 Ala. 370, 172 So. 99 (1937).

Assignment. Oral assignment and delivery of fire policy to mortgagee invested him with equitable title thereto. *Montgomery v. Hart*, 225 Ala. 471, 144 So. 101 (1932). Likewise, under life policy where right to change beneficiary reserved and delivery made to one with insurable interest. *Jennings v. Jennings*, 250 Ala. 130, 33 So. 2d 251 (1947).



Binder. Contract is one of indemnity; it may be oral or written. *Commercial Fire v. Morris*, 105 Ala. 498, 18 So. 34 (1894). Verbal contract of insurance and verbal contract to insure can be made and will be enforced, when and if all terms of contract are agreed upon. *Globe v. Eureka*, 227 Ala. 667, 151 So. 827 (1933). It is completed when all its terms have been agreed upon and nothing remains but delivery of policy. *Stephenson v. Allison*, 165 Ala. 238, 51 So. 622 (1910). All prior and contemporaneous oral agreements are merged in policy. *Rutter v. Hanover Fire*, 138 Ala. 202, 35 So. 33 (1902). Contemporaneous writing becomes part of insurance policy if incorporated by reference into policy. *Peek v. Reserve Nat. Ins.*, 585 So. 2d 1303 (1991). Promise to insure that has not been consummated, under authority of *Royal Exch. v. Almon*, 202 Ala. 374, 80 So. 456 (1918), can only be made basis of action against agent.

Chattel Mortgage. Chattel mortgage on part of insured property would affect forfeiture as to entire insurance. *Security v. Laird*, 182 Ala. 121, 62 So. 182 (1913). Bailment lease, conditional sales contract, mortgage, or other encumbrance will avoid policy when so provided. *Hanover Fire v. Salter*, 254 Ala. 500, 49 So. 2d 193 (1950). Conditional vendee not "Sole and Unconditional" owner. *Fidelity v. Raper*, 242 Ala. 440, 6 So. 2d 513 (1941).

Exceptions. Loss caused by order of civil authority. *Bankers Fire v. Bukacek*, 123 So. 2d 157 (1960).

Mortgage Clause. Mortgagee, even though there is no loss payable clause, may be equitable assignee and his rights will be enforceable against insurer if known to it. *Houston v. Virginia*, 211 Ala. 232, 100 So. 104 (1924). When, after fire, mortgagee forecloses and purchases for full amount of mortgage debt, he has collected his debt and cannot then collect on policy as loss payee under New York Standard Mortgage Clause. *Aetna v. Baldwin*, 231 Ala. 102, 163 So. 604 (1935); *Nationwide Mut. Fire v. Wilborn*, 291 Ala. 193, 279 So. 2d 460 (1973); *Smith v. Stockton, Whatley*, 487 So. 2d 923 (Ala. Civ. App. 1985) *cert. denied*, (1986).

Ownership. "Interest" and "title" not synonymous. *Aetna v. Kacharos*, 226 Ala. 504, 147 So. 438 (1933). Insured purchasing at foreclosure sale was "unconditional and sole owner" though statutory redemption period had not expired when policy issued or loss occurred. *Id.* "Unconditional owner" means interest not contingent or speculative. *Am. v. Powderly*, 225 Ala. 208, 142 So. 37 (1932). Foreclosure and purchase by mortgagee, mortgagor remaining in possession, is not "change of ownership or occupancy." *Cont'l v. Rotholz*, 222 Ala. 574, 133 So. 187 (1931). Mortgagee is not "owner of legal title." *Westchester v. Green*, 223 Ala. 121, 134 So. 881 (1931). Insured occupying house under lease-sales

contract had "ownership" in house within policy covering furniture located in "building occupied by owner of dwelling." *Dixie Fire v. Flipppo*, 236 Ala. 116, 181 So. 117 (1938).

Foreclosure. Foreclosure of mortgage affects "interest" and "title" of mortgagor and bars recovery on fire policy providing for forfeiture on change of interest or title. *Nat'l Union v. Deas*, 229 Ala. 477, 158 So. 323 (1934). "Foreclosure after loss rule" explained. *Am. Fire v. Weeks*, 693 So. 2d 1386 (Ala. Civ. App. 1997); *Nationwide Mut. Fire Ins. Co. v. Wilborn*, 279 So. 2d 460, 465 (Ala. 1973). Tenant is one holding possession under insured, in recognition of his title, whose possession is possession of insured, and under usual contractual obligations of tenant. *Camden Fire v. Landrum*, 229 Ala. 300, 156 So. 832 (1934). Company may include as co-payee on loss check construction company doing repairs. *Tyson v. SAFECO*, 461 So. 2d 1308 (1984).

Insurable Interest. Husband may have insurable interest though wife has title. "Insurable interest" defined. *North British v. Sciandra*, 256 Ala. 409, 54 So. 2d 764 (1951); *Nat'l Sec. v. Minchew*, 372 So. 2d 324, *aff'd*, 372 So. 2d 327 (1979). Life tenant and remainderman have insurable interest. *Hunter v. State Farm*, 543 So. 2d 679 (1989). Failure to name one of them as insured does not invalidate policy written on property owned by both husband and wife nor diminish amount of recovery. *Id.*

Severable Contracts. Insurance contract, where property insured is covered in different items for specific amounts, is ordinarily divisible contract. *Rhode Island v. Walden*, 217 Ala. 510, 116 So. 693 (1928); *Liberty Mut. v. Parrish*, 630 So. 2d 438 (1993). However, where there are separate items of coverage but articles insured are so arranged that destruction of one item or part would of necessity involve loss of others, then violation as to either item would affect complete defense to action on policy. *Western Assur. v. Stoddard*, 88 Ala. 606 (1889).

Explosion. In Alabama, fire loss includes every loss proximately resulting from fire; and, likewise in absence of exception that excludes hazard, liability for loss is effected when explosives are used as means of stopping spread of fire, such loss being adjudged to be mere incident to fire like that resulting from use of water, chemicals, or other agencies. *Cook v. Cont'l*, 220 Ala. 162, 124 So. 239 (1928).

Friendly Fires. Alabama courts recognize difference between "friendly" and "hostile" fire, and hold that loss caused by smoke and soot produced by fire "out of place" is protected against by fire policy. *Hartford Fire v. Armstrong*, 219 Ala. 208, 122 So. 23 (1929); *St. Paul Fire & Marine Ins. Co. v. Armstrong*, 122 So. 25 (Ala. 1929).

Proof of Loss. Where policy provides that same shall be forfeited for failure to give immediate notice of loss, failure to give such notice constitutes policy violation defeating recovery. *Central City v. Oates*, 86 Ala. 558 (1888). Proof of loss provisions contained in New York Standard Fire Policy are operative only to abate and not in bar of action on policy, proof of loss not proof of damages. *Westchester v. Green*, 223 Ala. 121, 134 So. 881 (1931). Requirement of notice “as soon as practicable” means insured must give notice within reasonable time under circumstances. *USF&G v. Baldwin County Home Builders*, 770 So. 2d 72 (2000). Provisions respecting proof of loss in indemnity bond are not conditions precedent. *Nat’l Sur. v. Julian*, 227 Ala. 472, 150 So. 474 (1933). Insured must affirmatively prove value of property destroyed, *Nat’l Sec. v. Minchen*, 372 So. 2d 324, *aff’d*, 372 So. 2d 327 (1979). No duty on mortgagee under New York Standard Mortgage Clause to furnish proof of loss, and policy not void as to mortgagee for failure of mortgagor in this respect. *U.S. Fire v. Hecht*, 231 Ala. 256, 164 So. 65 (1935).

Replacement Value. Correct measure of damages is actual cash value at the time of loss, but not exceeding the cost of repair or replacement of the building with goods of like-kind within a reasonable time after loss. *Reliance Ins. Co. v. Substation Prods. Corp.*, 404 So. 2d 598 (1981). No duty to pay replacement cost/actual cash value until insured starts rebuilding. *Hilley v. Allstate*, 562 So. 2d 184 (1990).

Multiple Policies. Two policies insuring same building required to pay jointly despite “pro rata other insurance” clauses in each policy. *Reliance v. Substation*, 404 So. 2d 598 (1981).

FRAUD

See “REPRESENTATIONS AND WARRANTIES.”

GUEST CASES

See “AUTOMOBILES, guests.”

HOSPITALS

See Ala. Code §§22-21-20 through 23 regarding licensing.

See Ala. Code §22-21-7 regarding payment of expenses by insurance companies.

See Ala. Code §22-21-8 regarding confidentiality of quality assurance reviews of medical personnel.

See Ala. Code §§35-11-370 to 375 regarding liens for medical charges. *Guin v. Carraway*, 583 So. 2d 1317

(1991); *Ex parte Infinity Southern Ins. Co.*, 737 So. 2d 463 (Ala. 1999).

See Ala. Code §§12-21-5 to 7 regarding admissibility of copies of hospital records.

See Ala. Code §12-21-45 regarding admissibility of medical or hospital records for purpose of proving reimbursement in civil action for damages.

See Ala. Code §§6-5-480 to 485 regarding “Alabama Medical Liability Act.”

See Ala. Code §6-5-540 to 552 regarding “The Alabama Medical Liability Act of 1987.”

See Ala. Code §§27-26-1 to 43 regarding Medical Liability Insurance.

HUSBAND AND WIFE

Community Property. Not recognized in Alabama. *Wilkinson v. Wilkinson*, 905 So. 2d 1 (Ala. Civ. App. 2004)

Interspousal Immunity. Abolished in Alabama. *Bonner v. Williams*, 370 F.2d 301 (Cir. Ct. App. Ala. 1966).

Loss of Consortium. Each spouse has cause of action for loss of consortium caused by tortious acts of third party. *Mattison v. Kirk*, 497 So. 2d 120 (1986). Loss of consortium is derivative of and dependant on spouse’s underlying claim. *Ex Parte N.P.*, 676 So. 2d 928 (1996).

Antenuptial agreements are generally valid and enforceable. *Laney v. Lane*, 833 So. 2d 644 (Ala. Civ. App. 2002). Must be in writing. *LeMaster v. Dutton*, 694 So. 2d 1360 (Ala. Civ. App. 1996). Although independent counsel is preferred, there is no requirement of such for an antenuptial agreement to be valid in Alabama. *Rhynemorris v. Morris*, 671 So. 2d 750 (Ala. Civ. App. 1995).

INFANTS

See “AUTOMOBILES”; “NEGLIGENCE.”

INLAND MARINE

Coverage. No coverage for damage to pilings caused by barge hooking cable and pulling structure. *Pro Trans. Co. v. Oceanus*, 349 So. 2d 585 (Ala. Civ. App. 1977). Delay in delivery of floating dry dock not covered. *Bender v. Brasileiro*, 874 F.2d 1551 (11th Cir. 1989).

Loss. Defining “actual total loss” and “constructive total loss.” *Fuller v. State Farm*, 742 F. Supp. 1128 (M.D. Ala. 1989).

LIABILITY INSURANCE

Cancellation. See "CANCELLATION."

Compromise of Claims. Duty of good faith is imposed upon every party to contract. *World's Expo. Shows v. B.P.O. Elks*, 237 Ala. 329, 186 So. 721 (1939). However, action for bad faith refusal to investigate or pay claim is limited to insurance companies. *Kennedy Elec. v. Moore-Handley*, 437 So. 2d 76 (1983); *Brown-Marx v. Emigrant*, 527 F. Supp. 277 (N.D. Ala. 1981) *aff'd*, 703 F.2d 1361 (11th Cir. 1983). Primary insurer owes a duty of good faith to an excess insurer with respect to settling a claim against the insured. *Fed. Ins. Co. v. Travelers Cas. & Sur. Co.*, 843 So. 2d 140 (Ala. 2002). There is no prohibition against insurer settling claim which is arguable or debatable.

Contribution Among Joint Tortfeasors. General rule denies contribution or indemnity as between joint tortfeasors. *Crigler v. Salac*, 438 So. 2d 1375, 1385 (Ala. 1983); *Adler v. Pruitt*, 169 Ala. 221, 53 So. 315 (1910). However, one may agree in writing to indemnify another against one's own negligence. *Apel Mach. v. O'Toole*, 548 So. 2d 445 (1989); *see Nationwide v. Hall*, 643 So. 2d 551 (1994).

Cooperation of Insured. Where in policy, notice of accident and forwarding of any demand notice, summons, or process are specifically made condition precedent to any action against insurer, failure to give reasonable timely notice of accident or of receipt of any demand, notice, summons, or other process will release insurer from obligation imposed by contract, although no prejudice may have resulted. *Am. Fire v. Tankersley*, 270 Ala. 126, 116 So. 2d 579 (1959). *See State Farm v. Burgess*, 474 So. 2d 634 (1985). However, excess insurer must show prejudice in order to deny coverage for primary carrier's untimely notice. *Midwest Employer's v. East Ala. Health Care*, 695 So. 2d 1169 (1997). Notice to agent is notice to insurer. *Nat'l Sec. v. Coshatt*, 690 So. 2d 391 (Ala. Civ. App. 1996). "As soon as practicable" means within reasonable time under all facts and circumstances of case. *Stonewall Ins. Co. v. Lowe*, 291 Ala. 548, 284 So. 2d 254 (1973). *Sovereign Guar. v. Thomas*, 334 So. 2d 879 (1976). Delay of two years is unreasonable. *Aetna v. Spring Lake*, 350 So. 2d 397 (1977); *Watson v. Ala. Farm Bur.*, 465 So. 2d 394 (1985) (3 years unreasonable); *Big Three Motors v. Employers*, 449 So. 2d 1232 (1984) (3 years and 9 months unreasonable); *Reeves v. State Farm*, 539 So. 2d 252 (1989) (5 years and 9 months delay held unreasonable). Insurer cannot avoid its obligations by claiming failure of cooperation unless insured's failure to cooperate is both material and substantial. *Ex Parte Clarke*, 728 So. 2d 135 (Ala. 1998). *See also Nationwide Ins. Co. v. Nilssen*, 745 So. 2d 264 (Ala. 1998) (holding that failure of

insured to sit for examination under oath, as required by insurance contract, absolved insurer of any duty to compensate the insured).

Deliberate misstatements as to facts of accident and persistence therein constitutes breach of notice and cooperation conditions. *Ala. Farm Bureau v. Mills*, 271 Ala. 192, 123 So. 2d 138 (1960). Misrepresentation by insured of identity of driver of insured vehicle is material and substantial failure to cooperate. *Williams v. Ala. Farm Bur.*, 416 So. 2d 744 (1982).

Application. Applicant is not required to furnish adverse information when he is not asked to do so. *Allstate v. Shirah*, 466 So. 2d 940 (1985).

Construction of Terms. Insurance carriers of casualty risks are absolutely liable. Law converts indemnity policies into liability policies. Ala. Code §27-23-1. This section applies also to property damage. *Metro. v. Blue*, 219 Ala. 37, 121 So. 25 (1929). Statute is read into policy. *Employers v. Brock*, 233 Ala. 551, 172 So. 671 (1937). New car mechanical failure service contract held to be "insurance" even though not called insurance policy. *Schoepflin v. Tender Loving Care*, 631 So. 2d 909 (1993). Neither expected or intended from standpoint of insured. *Townsend Ford v. Auto-Owners*, 656 So. 2d 360 (1995). Tangible property defined. *Hines v. Riverside Chevrolet-Olds*, 655 So. 2d 909 (1995). Bodily injury includes loss of consortium. *Tate v. Allstate*, 692 So. 2d 822 (1997). "Excess Insurance" section of umbrella policy is subject to policy's general language. *Greene v. Hanover*, 700 So. 2d 1354 (1997).

Omnibus Coverage. Judgment rendered against permissive user of car, not named insured, is absolute liability against insurance carrier. *Metro. v. Blue*, 219 Ala. 37, 121 So. 25 (1929). Clause excluding unlicensed driver from coverage is ambiguous. *Progressive Ins. v. Case*, 571 So. 2d 307 (Ala. Civ. App. 1990).

Permission may be expressed or implied. *Crawley v. Ala. Farm Bur. Mut.*, 295 Ala. 226, 326 So. 2d 718 (1976). May be proved by circumstantial evidence. *Universal Underwriters v. Sherrill*, 544 So. 2d 923 (1989); *Ala. Farm Bureau v. Robinson*, 269 Ala. 346, 113 So. 2d 140 (1959) (discussing what constitutes implied permission by owner for another to use car so as to extend coverage to driver under omnibus clause). Leaving of keys in car is not implied permission. *Phifer v. Progressive Cas.*, 547 So. 2d 875 (1989). User of substitute vehicle has implied permission of owner to let third person drive substitute vehicle, *Harrison v. Densmore*, 279 Ala. 190, 183 So. 2d 787 (1966). *But see Felder v. Hill*, 447 So. 2d 178 (1984). Only named insured may give permission when policy requires "express permission" of named



insured. *Billups v. Alabama Farm Bur.*, 352 So. 2d 1097 (1977).

Provision excluding coverage of bodily injury to any member of family of insured residing in same household as insured is applicable even though insured's vehicle was driven by omnibus insured. *Hogg v. State Farm*, 276 Ala. 366, 162 So. 2d 462 (1964). Son of insured who lives on college campus in another town is not residing in same household as insured. *State Farm v. Hanna*, 277 Ala. 32, 166 So. 2d 872 (1964). Contrary result reached in *Crossett v. St. Louis Fire*, 289 Ala. 598, 269 So. 2d 869 (1972). Insured's daughter living with parents while her husband was overseas is resident. *Ala. Farm Bureau v. Preston*, 287 Ala. 493, 253 So. 2d 4 (1971).

Automobile owned by wife of insured is not nonowned automobile. *Johns v. State Farm*, 41 Ala. App. 615, 146 So. 3d 323 (1962). Another automobile owned by insured is not "temporary substitute" under insured's policy. *Campbell v. Ryan*, 342 So. 2d 912 (1977). Mere interest in another vehicle does not prevent it from being temporary substitute. *Nat'l Indem. Co. v. Bankhead*, 344 So. 2d 479 (1977). President, vice-president, and foreman of named insured may be entitled to coverage under provisions of general liability policy. *U.S. Fire v. McCormick*, 286 Ala. 531, 243 So. 2d 367 (1970). City traffic engineer is executive officer and entitled to coverage. *Northland Ins. v. City of Montgomery*, 418 So. 2d 881 (1982). Assistant manager of night club is not "insured", which is defined as executive officer, director, or stockholder of named insured. *McDonald v. Royal Globe*, 413 So. 2d 1046 (1982).

Occurrence. Defines "occurrence" in policy. *Cotton States v. Norrell*, 370 So. 2d 270 (1979). The Alabama Supreme Court originally held a policy that limited liability to occurrence, which produced injury within policy period, was void as against public policy. *Wixom Truck Ins.*, 435 So. 2d 1231 (1983). However, this holding was overruled in *USF&G v. Warwick*, 446 So. 2d 1021 (1984). This latter case holds that damage caused by faulty workmanship and non-complying materials does not constitute occurrence. Carrier with policy in effect at time of damage is responsible for defense and indemnity. *Mut. Fire v. SAFECO*, 473 So. 2d 1012 (1985). Under Alabama law, almost any event may constitute "occurrence" if "bodily injury" or "property damage" has been alleged, including claims of negligence (*USF&G v. Bonitz*, 424 So. 2d 569 (1982)), wanton conduct (*USF&G v. Nat'l Tank*, 402 So. 2d 925 (1981)), reckless, wanton, and innocent misrepresentation (*Am. States v. Cooper*, 518 So. 2d 708 (1987)), suppression (*Townsend Ford v. Auto-Owners*, 656 So. 2d 360 (1995)), intentional interference with business relations

(*Universal Underwriters v. Stokes*, 990 F.2d 598 (11th Cir. 1993)), and even slander (*ALFA v. Morrison*, 613 So. 2d 381 (1993)). Under Alabama law, damages for mental anguish will be included within definition of "bodily injury" unless such damages are specifically excluded by policy. *Am. States v. Martin*, 662 So. 2d 245 (1995). Purely economic damages do not constitute "property damage." *Reliance v. Wyatt*, 540 So. 2d 688 (1989).

Completed Operations Hazard. Completed operations hazard exclusion is valid. *Turner v. USF&G*, 440 So. 2d 1026 (1983). If occurrence causes damage to property other than insured's property, insurer is liable under "Products Hazard." *USF&G v. Andalusia Ready Mix*, 436 So. 2d 868 (1983). Work product exclusion prohibits recovery for contractor's failure to complete construction. *Berry v. S.C. Ins.*, 496 So. 2d 511 (1986).

Loading. Loading of truck by terminal operator's employees is not incidental to stated purpose of policy, which was transportation of merchandise for compensation, because truck not owned by terminal operator. *Mich. Mut. v. Carroll*, 271 Ala. 404, 123 So. 2d 920 (1960). "Use of automobile" applies to physical process of moving goods in or onto automobile while it is at rest. *Commercial Standard v. New Amsterdam*, 272 Ala. 357, 131, So. 2d 182 (1961). Injury caused by tripping over package left at door arose out of unloading and was covered under policy. *Pac. Indem. v. Run-A-Ford*, 276 Ala. 311, 161 So. 2d 789 (1964). Loading and unloading of firearms, which injured passenger, covered under policy. *Taliaferro v. Progressive Specialty Ins. Co.*, 821 So. 2d 976 (Ala. 2001).

Direct Action Against Insurer. Not permitted by injured third party. *Howton v. State Farm Mut. Auto. Ins. Co.*, 507 So. 2d 448, 450 (Ala. 1987); see also *Stewart v. State Farm Ins. Co.*, 454 So. 2d 513 (Ala. 1984); *Maness v. Ala. Farm Bureau, Inc.*, 416 So. 2d 979 (Ala. 1982).

Duty to Defend. Insurer's duty to defend is more extensive than its duty to pay. *Ladner & Co. v. Southern Guar.*, 347 So. 2d 100 (1977). When facts are alleged in complaint to support cause of action, it is facts, not legal phraseology, that determine whether liability insurer has duty to defend its insured in action. *Hartford Cas. Ins. Co. v. Merchants & Farmers Bank*, 928 So. 2d 1006 (Ala. 2005). If there is any uncertainty as to whether complaint alleges facts that would invoke duty to defend, liability insurer must investigate incident to determine whether it has duty to defend. *Hartford*, 928 So. 2d at 1012. If policy excludes coverage for intentional acts, and complaint alleges both intentional and unintentional acts, insurer may have to defend claims of unintentional acts. *Tapscott v. Allstate*, 526 So. 2d 570 (1988). Duty cannot be avoided by paying proceeds into court without

consent or settlement. *Samplly v. Integrity*, 476 So. 2d 79 (1985). Settlement of claim against insured by insurer without insured's consent or ratification does not bar insured's action against party who received settlement. *Austin v. Cox*, 492 So. 2d 1021 (1986).

Defense under reservation of rights does not constitute conflict of interest to enable insured to have personal attorney at expense of insurer. *L&S Roofing v. St. Paul Fire*, 521 So. 2d 1298 (1987). Insurer defending under reservation of rights has enhanced obligation to keep insured notified of status of case. *Shelby Steel v. USF&G*, 569 So. 2d 309 (1990). Insurer cannot require attorneys hired by insurer to represent insured to request special interrogatories or verdict forms to jury in order to designate certain claims not covered by policy. *Universal Underwriters v. East Central Ala. Ford-Mercury*, 574 So. 2d 716 (1990).

Liability Between Insurers. Additional insurance will not defeat recovery when there is no prohibition against such in policy. *Phoenix Ins. v. Leonard*, 270 Ala. 427, 119 So. 2d 217 (1960). "Other" insurance clause refers only to other insurance taken out by insured named in that policy. *Southern Guaranty v. Jones*, 279 Ala. 577, 188 So. 2d 537 (1966). "Other" insurance exists only where two or more policies cover same interest, same subject matter, and are against same risk. *U.S. Fire v. Hodges*, 275 Ala. 243, 154 So. 2d 3 (1963). *State Farm v. Auto Owners*, 287 Ala. 477, 252 So. 2d 631 (1971) overruling *United States Fire Ins. Co. v. Hodges*, 154 So. 2d 3 (Ala. 1963), which held that an escape clause is primary and driver's excess clause is secondary. However, specific escape clause in owner's garage liability policy is valid against driver's excess clause. *State Farm v. Auto-Owners*, 331 So. 2d 638 (1976).

Exclusions - Intentional Acts. Provision excluding damage resulting from criminal or intentional acts was unambiguous and would be enforced. *Hooper v. Allstate*, 571 So. 2d 1001 (1990). See also *Titan Imdem. v. Riley*, 679 So. 2d 701 (1996). No duty to defend or pay claims of sexual misconduct, *State Farm v. Davis*, 612 So. 2d 458 (1993), or sex discrimination. *Jackson County Hosp. v. Ala. Hosp. Assn. Trust*, 619 So. 2d 369 (1993). Subjective standard governs whether insured intended or expected to inflict bodily injury upon another for purposes of applying "intentional acts exclusion." *State Farm Fire & Cas. Co. v. Davis*, 612 So. 2d 458 (Ala. 1993).

Exclusions - Garageman. Automobile involved in accident while being returned by employee of repairman to insured not within exclusion from coverage of owned automobile while being used in automobile business. *St. Paul Fire v. Thompson*, 280 Ala. 67, 189 So. 2d 866 (1966). But, accident occurring while employee of ser-

vice station is driving customer's car with customer as passenger is within exclusion in customer's policy as to accidents arising out of operation of service station. *Md. Cas. v. Allstate*, 281 Ala. 671, 207 So. 2d 648 (1968). Proprietor of garage who deviates to pick up check for garage while driving customer's automobile to garage is within exclusion. *Employers Nat'l v. Hatcher*, 336 So. 2d 1104 (1976).

Exclusions - Off Premises. Exclusion from coverage if accident occurs away from premises owned by, rented to, or controlled by named insured will be strictly enforced. *Heinrich v. Globe*, 276 Ala. 518, 164 So. 2d 709 (1964).

Exclusion - Employment. If employer furnished transportation to and from work for his employees, accident occurring to or from work is within exclusion clause which applies to accidents arising out of and in course of employment. *USF&G v. Byrd*, 273 Ala. 207, 137 So. 2d 743 (1962). If transportation is mere convenience or gratuity supplied by employer, exclusion clause does not apply. *Ala. Farm Bureau v. Harris*, 279 Ala. 326, 184 So. 2d 837 (1966). Employee who raped woman not entitled to coverage because not acting in line and scope of employment, *Capital Alliance v. Thorough Clean*, 639 So. 2d 1349 (1994), but employer would be covered against claim of negligent hiring and supervision of rapist. See *Capital Alliance*, 639 So. 2d at 1353. Employee exclusion clause applies to employee of partner or partnership. *Kelly v. Royal Globe*, 349 So. 2d 561 (1977), and also applies to vice-president and day-to-day manager. *Southern Guar. v. Pittman*, 439 So. 2d 7 (1983). Such exclusion is valid and enforceable. *Carter v. Cincinnati*, 435 So. 2d 42 (1983).

Exclusion - Racing. Exclusion for use of automobile in competitive speed test is valid. *Ala. Farm Bureau v. Goodman*, 279 Ala. 538, 188 So. 2d 268 (1966); *c.f. United Servs. Auto. Ass'n v. Vogel*, 733 So. 2d 401 (1998) (policy covered insured's injuries resulting from go-cart operated at local park).

Exclusion. Term "sudden" is ambiguous as used in sudden and accidental exception to pollution exception clause in CGL policy. *Alabama Plating v. USF&G*, 690 So. 2d 331 (1996).

Exclusion - Obligations Assumed. Exclusion of "any obligation assumed under any contract of insurance" applies to claims arising under workers' compensation insurers for negligent inspection, *Employers' v. Fid. & Cas.*, 505 So. 2d 303 (1987).

Exclusion - Hit and Run. Uninsured Motorists. "Hit-and-run" provision that includes "physical contact" is void. *State Farm v. Lambert*, 291 Ala. 645, 285 So. 2d 917 (1973). Insurance policy's corroborative evidence

requirement stating insurer would only accept competent testimony of person other than claimant, if accident involved no physical contact with uninsured motorist, was void. *Walker v. GuideOne Ins.*, 834 So. 2d 769 (2002).

Third Party's Right to Sue. Third person has no cause of action against general liability insurer for failure to inspect premises on which work is being done by insured. *Starks v. Commercial Union*, 501 So. 2d 1214 (1987). Widow has no standing to sue as a third party with respect to policy purchased by her deceased husband. *Dennis v. Magic City Dodge, Inc.*, 524 So. 2d 616 (Ala. 1988). However, third party may sue directly for new and independent obligation undertaken by insurer. *Howton v. State Farm*, 507 So. 2d 448 (1987).

Uninsured Motorist Coverage. Provision that reduces uninsured motorist coverage by amount paid under workers' compensation laws is invalid. *Preferred Risk v. Holmes*, 287 Ala. 251, 251 So. 2d 213 (1971); *State Farm v. Cahoon*, 287 Ala. 462, 252 So. 2d 619 (1971). Upon interpleader of amount of coverage under uninsured motorist's policy, funds will be prorated based upon proportion that each claimant's special damages bears to total of special damages. *Sheehan v. Liberty Mut.*, 288 Ala. 137, 258 So. 2d 719 (1972).

Stacking of Uninsured Motorist Policies. Stacking of uninsured motorist policies is permissible. *SAFECO v. Jones*, 286 Ala. 606, 243 So. 2d 736 (1970). However, see *Lipscomb v. Reed*, 514 So. 2d 949 (1987). Ala. Code §32-7-23 limits stacking under any one policy to primary policy and coverage for two additional vehicles, extends to all persons who are insureds, whether named insureds or not. *Travelers v. Jones*, 529 So. 2d 234 (1988). Section does not apply when person is insured under five separate single vehicle policies. *State Farm v. Fox*, 541 So. 2d 1070 (1989); *State Farm v. Faught*, 558 So. 2d 921 (1990). No distinction between uninsured and underinsured motorist coverage. *Best v. Auto-Owners*, 540 So. 2d 1381 (1989). Permissive user and occupants of vehicle are not entitled to stack uninsured motorist coverages of two policies covering vehicle. *Billups v. Ala. Farm Bur.*, 352 So. 2d 1097 (1977); *Hines v. Home Ins. Co.*, 495 So. 2d 682 (Ala. Civ. App. 1986). Passenger cannot stack on vehicles not owned or operated by passenger. *State Farm v. Faught*, 558 So. 2d 921 (1990). But see *Travelers v. Jones*, 529 So. 2d 234 (1988). Language in policy may prevent stacking of medical payment benefits. *Ala. Farm Bureau v. Williams*, 365 So. 2d 315 (Ala. Civ. App. 1978).

Punitive Damages. Exclusion of automobile coverage for punitive or exemplary damages did not violate public policy and was valid in personal injury case, *Hill v. Campbell*, 804 So. 2d 1107 (2001), but exclusion will not apply in wrongful death case.

Title Insurance. Purpose of title insurance is to protect against defects in title and not to protect insured against loss arising from physical damage to property. *Holmes v. Ala. Title Co.*, 507 So. 2d 922 (1987).

Negligence of Agent. E & O policy covers negligence of agent in failing to secure replacement policy. *Nat'l Union v. Lomax Johnson*, 496 So. 2d 737 (1986); *Edwards Dodge v. Pa. Nat'l*, 510 So. 2d 225 (1987).

Excess Liability. Insurer liable for excess of judgment above policy limits when insurer had opportunity to settle for policy limits and negligently or in bad faith failed to settle. Question of negligence and bad faith are for jury. *Waters v. Am. Cas.*, 261 Ala. 252, 73 So. 2d 524 (1953); *Turner v. Continental Cas*, 541 So. 2d 471 (1989). Insured need not prove he has paid excess of judgment against him above policy limits to maintain suit against insurer for negligent or bad faith failure to settle within policy limits. *Ala. Farm Bureau v. Dalrymple*, 270 Ala. 119, 116 So. 2d 924 (1959).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTIONS

See Law Digest Tables.

Limitations in Contract. Agreements to limit times on which actions can be brought are invalid if they differ from general statutes of limitation. Ala. Code §6-2-15; *Hopkins v. Lawyers Title*, 514 So. 2d 786 (1986).

Accrual. Under Alabama Extended Manufacturers Liability Doctrine, statute of limitations commences running when plaintiff first suffers legal injury. *Fed. Mogul v. Universal*, 376 So. 2d 716 (1979), *cert. denied*, 376 So. 2d 726 (1979). Cause of action for injury to the person in the case of consumer goods shall accrue when the injury occurs. *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101 (Ala. 2003) citing Ala. Code §7020725(2) (1975). In medical malpractice actions, legal injury occurs at time of negligent act or omission whether or not it could be discovered within four year statute of limitation. *Street v. City of Anniston*, 381 So. 2d 26 (1980); *Jones v. McDonald*, 631 So. 2d 869 (1993). Actions against health care providers accrue when act complained of results in legal injury to person. *Mobile Infirmary v. Delchamps*, 642 So. 2d 954 (1994). Limitation period for negligence in obtaining policy of insurance starts running when loss occurred rather than when company fails to provide policy expected. *Hickox v. Stover*, 551 So. 2d 259 (1989), *overruling Armstrong v. Life Ins. Co. of Virginia*, 454 So. 2d 1377 (1984); see also *Bush v. Ford Life Ins. Co.*, 682 So. 2d 46 (1996) (denial of claim commenced limitation period). Cannot extend limitation period on theory of continuous tort when there has been no repeated acts of negligence.

Moon v. Harco, 435 So. 2d 218 (1983). Nor can injured employee extend negligence statute by claiming to be third party beneficiary of contract between his employer and workers' compensation insurer. *Brown v. Schultz*, 457 So. 2d 388 (1984). Cause of action accrued on date stroke was suffered which was one year after plaintiff took prescribed birth control pills. *Ramey v. Guyton*, 394 So. 2d 2 (1981). Action for wrongful death because of exposure to asbestos was barred when last exposure was 1969 and suit not filed until 1981. *Northington v. Carey-Canada*, 432 So. 2d 1231 (1983). Date of injury is last date of exposure when cause of action is based upon continuous exposure to hazardous substance. *Becton v. Rhone-Poulenc*, 706 So. 2d 1134 (1997). Bad faith action arises and statute commences to run when company pays part of benefits and denies balance of claim. *Sexton v. Liberty Nat'l*, 405 So. 2d 18 (1981), or when there is refusal to pay any part of claim. *SAFECO v. Sims*, 435 So. 2d 1219 (1983). Four year statute of limitations for medical malpractice actions is absolute bar and is not tolled by fraudulent concealment. *Bowlin Horn v. Citizens Hosp.*, 425 So. 2d 1065. Two year statute for legal malpractice may not be extended beyond four years. *Tonsmeire v. AmSouth Bank*, 659 So. 2d 601 (1995).

Contract. Limitation period begins to run from date contract is broken, although substantial damage from breach is not sustained until later date. *Stephens v. Creel*, 429 So. 2d 278 (Ala. 1983); *Miss. Valley Title v. Hooper*, 707 So. 2d 209 (1997).

Claim for bad faith refusal to pay claim has two year statute of limitations. *Dumas v. Southern Guar.*, 408 So. 2d 86 (1981). As does action for fraud. May be tolled if concealed and not discovered within 2 years. *Stafford v. Miss. Valley Title*, 569 So. 2d 720 (1990).

Six-year contract statute of limitations applies to uninsured motorist insurance claims. In addition, failure to make a claim within the statute of limitations applicable to the tortfeasor does not bar uninsured motorist claim. *State Farm Mut. Auto. Ins. Co. v. Bennett*, 974 So. 2d 959 (Ala. 2007). Note, however, statute of limitations for a subrogation claim by uninsured motorist carrier begins to run on date of accident. Therefore, two-year tort statute of limitations applies to subrogation claim and begins to run when insured's right to recovery arises. *Home Ins. Co. v. Stuart-McCorkle, Inc.*, 291 Ala. 601 (1973).

Action for fraud based on failure to provide coverage promised begins to run at time of delivery of policy. *Myers v. Geneva Life*, 495 So. 2d 532 (1986).

Discovery Rule. Fraud. Ala. Code §6-2-3 provides claim does not accrue until discovery of fraud, or when it should have been discovered in exercise of ordinary

care. *Haines v. Tanning*, 579 So. 2d 1308 (1991). The period of an action in such cases of concealment is extended to run for two years from and after the date of notice or discovery of the fraudulent concealment. *Hart v. First Nat'l Bank*, 373 F.2d 202 (5th Cir. 1967); *Belcher v. Birmingham Trust Nat'l Bank*, 348 F. Supp. 61 (N.D. Ala. 1968).

Fraud. Tolling. Fraud is deemed to be discovered in order to stop tolling of statute when it ought to have been discovered. *Ryan v. Charles Townsend*, 409 So. 2d 784 (1981). If there has been no concealment of fraud, there is no tolling. *Mason v. County of Mobile*, 410 So. 2d 19 (1982); *Tribble v. Provident Life*, 534 So. 2d 1096 (1988); *Kelly v. Conn. Mut.*, 628 So. 2d 454 (1993). Statute not tolled by failure to read documents. *Parsons Steel v. Beasley*, 522 So. 2d 253 (1988). Duty is imposed upon persons signing documents to read them. If not read, limitation period begins to run when contract is signed, *Locklear Dodge v. Kimbrell*, 703 So. 2d 303 (1997), or when applicant signs application and gives check for premium. *Booker v. United Am.*, 700 So. 2d 1333 (1997); *Foremost v. Parham*, 693 So. 2d 409 (1997). Burden is on plaintiff to show he comes within tolling provision. *Green v. Wedowee Hosp.*, 584 So. 2d 1309 (1991). Burden is reasonable reliance. *Foremost v. Parham*, 693 So. 2d 409 (1997). Withdrawal of premiums from insured's bank account is notice and statute is not tolled. *Gray v. Liberty Nat'l*, 623 So. 2d 1156 (1993). Documents in possession of plaintiff starts running of statute. *Jarzen v. Wright*, 679 So. 2d 1086 (Ala. Civ. App. 1996).

Waiver. Must be affirmative inducement in order to estop plea of limitation. *Campbell v. Consumer Warehouse*, 570 So. 2d 630 (1990). See *White v. Sims*, 470 So. 2d 1191 (1985) (discussing class action limitations).

MALPRACTICE

Medical. Statutory Requirements. "Alabama Medical Liability Act," Ala. Code §§6-5-480 *et seq.* and "The Alabama Medical Liability Act of 1987," Ala. Code §§6-5-540 *et seq.* govern practice of medicine and actions stemming therefrom.

Expert Testimony. Expert must be "a similarly situated health care provider." *Medlin v. Crosby*, 583 So. 2d 1290 (1991). "Community" standard means national community. *Bobo v. Bryant*, 706 So. 2d 763 (Ala. Civ. App. 1997). Plaintiff must ordinarily establish defendant's requirements through expert testimony. Exception exists when breach of standard of care is obvious to average lay person, *Pruitt v. Zeiger*, 590 So. 2d 236 (1991), or when it can be established through recognized medical text or treatise. *Complete Family Care v. Sprinkle*, 638 So. 2d 774 (1994). Not necessary to present



evidence prompt care would have prevented injury, but must present evidence showing condition was adversely affected by alleged negligence. *Thomas v. Ekambaram*, 706 So. 2d 1245 (Ala. Civ. App. 1997).

Informed Consent. Doctor's duty to obtain informed consent of patient must be measured by professional medical standard. *Fain v. Smith*, 479 So. 2d 1150 (1985). See *Phelps v. Dempsey*, 656 So. 2d 377 (1995).

Standard of Care. Measured by reasonable care, skill, and diligence as other similarly situated health care providers in same line of practice in same community. Ala. Code §6-5-548. *Leonard v. Providence Hosp.*, 590 So. 2d 906 (1991). In this case, "community" means the national hospital community. *Coleman v. Bessemer Carraway Methodist Med. Ctr.*, 589 So. 2d 703 (Ala. 1991). Cause of action exists for wrongful birth. *Keel v. Banach*, 624 So. 2d 1022 (1993).

Hospital Immunity. No immunity except for government agencies that are not subject to suit. *Ex Parte Cranman*, 792 So. 2d 392 (2000).

Damages. County-operated hospitals may be subject to \$100,000 cap under Ala. Code §11-93-2.

Informed Consent and Standard of Care. Same as described above under Medical.

Legal. See "ATTORNEYS."

Limitations. Period begins to run when wrongful act results in legal injury to patient. *Ex Parte Sonnier*, 707 So. 2d 635 (1997).

Other Professionals. Generally held to standard of care in their professions. Dental, *Sprowl v. Ward*, 441 So. 2d 898 (1983); Veterinarian, *Turner v. Benhart*, 527 So. 2d 717 (1988); *Janovski v. Greer*, 588 So. 2d 885 (1991); Podiatrist, *Craig v. Borcicky*, 557 So. 2d 1253 (1990) (not subject to Medical Liability Act); *Bodiford v. Lubitz*, 564 So. 2d 1390 (1990).

NEGLIGENCE

See Law Digest Tables.

Age. All persons 14 years of age and older are presumed to be capable of contributory negligence. Those between 7 and 13 are presumed to be incapable of contributory negligence. However, facts of particular case may permit judge to submit to jury whether person between 7 and 13 had discretion, intelligence, and sensitivity to danger to be subject to bar of contributory negligence. *King v. South*, 352 So. 2d 1346 (1977); *Works v. Allstate*, 594 So. 2d 60 (1992).

Attractive Nuisance. To children, doctrine discussed. *Earnest v. Regent Pool*, 288 Ala. 63, 257 So. 2d

313 (1972); *Mims v. Brown*, 49 Ala. App. 643, 275 So. 2d 159 (1973). Owner may be liable to trespassing child for harm caused by artificial condition. *Motes v. Matthews*, 497 So. 2d 1121 (1986). Restatement (Second) of Torts, §339 adopted regardless whether child is trespasser or licensee. *Gentle v. Pine Valley Apts.*, 631 So. 2d 928 (1994); *Lyle v. Bouler*, 547 So. 2d 506 (1989) (holding that §339 is the only authority for determining if a child may recover).

Assumption of Risk. Defined and distinguished from contributory negligence. *Kemp v. Jackson*, 274 Ala. 29, 145 So. 2d 187 (1962). Narrowly confined and restricted by requirement that party know and appreciate danger he is incurring and voluntarily consents to bear that risk. *Kelton v. Gulf States Steel*, 575 So. 2d 1054 (1991); *Slade v. City of Montgomery*, 572 So. 2d 887 (1991).

Contributory/Comparative Negligence. Alabama has not adopted comparative negligence and adheres to defense of contributory negligence. *Williams v. Delta Int'l*, 619 So. 2d 1330 (1993). Contributory negligence is a complete defense. *Carter v. Ne-Hi*, 146 So. 821 (1933), except as to subsequent negligence. *Zaharavich v. Clingerman*, 529 So. 2d 978 (1988). Requires more than mere heedlessness. *Campbell v. Ala. Power*, 562 So. 2d 1222 (1990).

Damages. See "DAMAGES." *Berry v. Fife*, 590 So. 2d 884 (1991).

Definition/Duty. Definition and discussion of negligence. *Baker v. Baker*, 124 So. 740 (1929). No liability for nonfeasance in absence of duty. *Morgan v. South Central*, 466 So. 2d 107 (1985). Ultimate test of duty to use due care is foreseeability of harm that would result if due care was not exercised. *Pope v. McCrory*, 575 So. 2d 1097 (1991). No cause of action for negligent or wanton investigation of insurance claim. *Kervin v. Southern Guar.*, 667 So. 2d 704 (1995). Whether legal duty exists is question of law. *Patrick v. Union State Bank*, 681 So. 2d 1364 (1996).

General contractor has duty to provide safe premises to employees of independent contractor, or to warn of hidden dangers. Not liable for open and obvious dangers. *Secrist v. Mark IV Contractors*, 472 So. 2d 1015 (1985). This duty is fixed when independent contractor comes on premises. *Elder v. E.I. Du Pont*, 479 So. 2d 1243 (1985). If owner warns general contractor of potential hazards, duty is on general contractor to warn each of his employees. *Armstrong v. Ga. Marble*, 575 So. 2d 1051 (1991).

Employer also owes to his employees duty to provide safe workplace. *Barnes v. Liberty Mut.*, 468 So. 2d 124 (1985). This duty may be delegated to employees.

Kennemer v. McFann, 470 So. 2d 1113 (1985). Co-employees may be liable for injuries to fellow employees. *Fontenot v. Bramlett*, 470 So. 2d 669 (1985); *Mullins v. Summers*, 485 So. 2d 1126 (1986). Mere supervisory authority is insufficient. *Walker v. Howell*, 565 So. 2d 18 (1990) Must show employee was delegated or assumed employer's duty to provide safe place to work and that co-employee's duty was personal to him. *Hawkins v. Miller*, 569 So. 2d 335 (1990).

Governmental Immunity. State cannot be sued. Ala. Const. Art I, §14. State officers or employees who have not exceeded their authority but have negligently performed their statutory duty have immunity. *Taylor v. Shoemaker*, 605 So. 2d 828 (1992). Officers and employees also have immunity for torts committed while engaged in discretionary function. *Id.*; *Ex parte Cranman*, *supra*.

Imputed Negligence. Negligence of operator not imputed to passenger. *Birmingham Elec. v. Turner*, 241 Ala. 66, 1 So. 2d 299 (1941). Wantonness of agent can be imputed to principal in same manner as can simple negligence. *Foster v. Floyd*, 276 Ala. 428, 163 So. 2d 213 (1964). Negligence of parent not imputed to child. *Nunn v. Whitworth*, 545 So. 2d 766 (1989).

Liquor Liability/Dram Shop Act. Ala. Code §6-5-71 creates cause of action based upon strict liability against those who unlawfully sell, give, or dispose of liquors or beverages. Cause of action runs in favor of person injured and family who has been deprived of means of support. Contributory negligence is not available defense, although assumption of risk is available. *McIsaac v. Monte Carlo Club*, 587 So. 2d 320 (1991).

Joint and Several Liability. When actions of two or more tortfeasors combine to produce injury, each tortfeasor's act is proximate cause of injury, and each tortfeasor is jointly and severally liable for entire injury. *Gen. Motors v. Edwards*, 482 So. 2d 1176 (1985).

Last Clear Chance. Sometimes referred to as subsequent negligence. Elements are that plaintiff was in perilous position of which defendant had actual knowledge and armed with this knowledge defendant failed to use reasonable or ordinary care to avoid accident, that use of reasonable care would have avoided accident, and that plaintiff was injured as result. *Zaharavich v. Clingerman*, 529 So. 2d 978 (1988).

Negligence Per Se. A cause of action for negligence per se will lie if defendant violates a statute intended to protect a class of persons and the injury was proximately caused by defendant. *Fox v. Bartholf*, 374 So. 2d 294 (Ala. 1979); 1 Ala. Pattern Jury Instr. Civ. 26.11 (2nd ed.).

Premises Liability. Trespasser, Licensee, and Invitee. Distinctions between these classifications remain viable. *Whaley v. Lawing*, 352 So. 2d 1090 (1977). Invitor has no duty to safeguard invitee against open and obvious danger or defect in premises, *Gray v. Mobile Greyhound*, 370 So. 2d 1384 (1979); *Shaw v. City of Lipscomb*, 380 So. 2d 812 (1980), nor does owner of premises have any duty to independent contractor for injury from defects or dangers that are open and obvious, *Herston v. Whitesell*, 374 So. 2d 267 (1979), nor to employee of independent contractor. *Beck v. Olin Co.*, 437 So. 2d 1236 (1983); *Breeden v. Hardy Corp.*, 562 So. 2d 159 (1990); *Bacon v. Dixie Bronze*, 475 So. 2d 1177 (1985), when independent contractor is aware of danger. *Pickett v. U.S. Steel*, 495 So. 2d 572 (Ala. 1986); *Ala. Power v. Williams*, 520 So. 2d 589 (Ala. 1990). Social guest is licensee for purposes of landowner tort liability. *Massey v. Wright*, 447 So. 2d 169 (Ala. 1984). City has duty to warn of dangerous condition at or near public roadway, such as railroad crossing. *Hale v. City of Tuscaloosa*, 449 So. 2d 1243 (Ala. 1984), and has duty to maintain roads in safe condition. *Jefferson County v. Sulzby*, 468 So. 2d 112 (1985). Duty of owner of recreational land defined. *Poole v. City of Gadsden*, 541 So. 2d 510 (1989).

Premises owner not liable for injuries to employee of independent contractor when owner had nothing to do with erection of defective scaffolding. *Pate v. U.S. Steel Corp.*, 393 So. 2d 992 (1980); *Columbia Eng'r v. Espey*, 429 So. 2d 955 (1983). Duty of owner to maintain premises in reasonably safe condition does not apply to conditions during course of work on contract. *Armstrong v. Aetna*, 448 So. 2d 353 (1983); *Terrell v. Ga. Power*, 567 So. 2d 290 (1990).

Premises Owner - Liability for Criminal Acts. Premises owner or lessee has no duty to protect customer or invitee from criminal attack by third party in absence of knowledge of prior criminal activity in or near premises, *Roberson v. Allied Foundry*, 447 So. 2d 720 (1984); *Stripling v. Armbruster*, 451 So. 2d 789 (1984); and *Henley v. Pizitz Realty Co.*, 456 So. 2d 272 (1984), and unless actual or constructive knowledge raises probability of danger to invitee. *Bailey v. Bruno's*, 560 So. 2d 509 (1990). Evidence of five other incidents of purse or jewelry snatching was insufficient as matter of law to show it was foreseeable as imminent probability. *Webster v. Church's Fried Chicken*, 575 So. 2d 1108 (1991). No general duty in absence of special relationship or circumstances. *King v. Smith*, 539 So. 2d 262 (1989). Insurer not liable to its insured for negligent inspections of insured's premises. *Ranger v. Hartford*, 410 So. 2d 40 (1982). However, insurer may be liable to third parties for its negligent inspections. *Beasley v. MacDonald Eng'r*, 287 Ala. 189, 249 So. 2d 844 (1971);

Barnes v. Liberty Mut., 477 So. 2d 1041 (1985). If volunteer assumes some activity, he is charged with acting with due care and is liable for negligence. *Parker v. Thyssen*, 428 So. 2d 615 (1983). No liability when insurer never undertook to inspect while plant was in operation. *Adams v. Travelers*, 494 So. 2d 401 (1986).

Proximate Causation. Proximate Cause. Defined. *Ala. Power v. Gladden*, 29 Ala. App. 438, 197 So. 374 (1940). If concurring negligence may be reasonably anticipated or foreseen, original negligence may be proximate cause of injury. *Marshall County v. Uptain*, 409 So. 2d 423 (1981).

Res Ipsa Loquitur. Presumption of negligence raised by res ipsa loquitur is not evidence, and does not serve in place of evidence when evidence to contrary is introduced. *DeBardeleben v. Tynes*, 290 Ala. 263, 276 So. 2d 126 (1973). Res ipsa loquitur does not apply in fall down cases. *Winn-Dixie v. Rowell*, 52 Ala. App. 1, 288 So. 2d 785 (1973), writ. of cert. denied, 292 Ala. 758, 288 So. 2d 792 (1974). Nor to injury to business invitee. *Howell v. Cook*, 576 So. 2d 227 (1991). Not applied in products liability suit. *Wear v. Chenault Motor*, 52 Ala. App. 382, 293 So. 2d 298 (1974); cert. denied, 292 Ala. 756, 293 So. 2d 301 (1974).

Sudden Emergency. *Jefferson County v. Sulzby*, 468 So. 2d 112 (1985); *Eason v. Comfort*, 561 So. 2d 1068 (1990); *Nichols v. Elixer*, 613 So. 2d 1259 (1993).

NO-FAULT INSURANCE

Not approved in Alabama.

PENALTY AND ATTORNEY FEES

§27-1-17 provides that insurance companies that do not pay claims under health and accident insurance policies within 45 days after receipt of proof of loss shall pay 1½ % interest per month on amount of claim until finally settled or adjudicated. *Engelhardt v. Paul Revere Life Ins. Co.*, 77 F. Supp. 2d 1226 (M.D. Ala. 1999). This section does not apply, however, when reasons for denying claim, although ultimately rejected by the court, are based on "legitimately debatable issue between the parties." *Jordan v. Nat'l Acc. Ins. Underwriters, Inc.*, 922 F.2d 732 (11th Cir. 1991).

PRIVILEGED COMMUNICATIONS

Attorney/Client. Privilege applies both to attorney and client as to matters discussed while client was consulting attorney on professional matters. *Ex Parte Great Am.*, 540 So. 2d 1357 (1989); *Richards v. Lennox*, 574 So. 2d 736 (1990); See Ala. Code §34-3-20.

Insurer/Insured. Communications between insurance company and its agent held not privileged. *Bryant v. Hartford*, 230 Ala. 80, 159 So. 685 (1935).

Clergy/Penitent. Privilege granted by Ala. Code §12-21-166. Must be penitential in nature and made to clergyman in his professional capacity. *Santmier v. Santmier*, 494 So. 2d 95 (Ala. Civ. App. 1986).

Doctor/Patient. Privilege granted to psychologists and psychiatrists, Ala. Code §34-26-2, but not to physicians in general. *Arthers v. State*, 459 So. 2d 972 (Ala. Crim. App. 1984) and *Duncan v. State*, 473 So. 2d 1203 (Ala. Crim. App. 1985).

Spousal. All private and confidential communications between husband and wife are privileged. *Cooper v. Mann*, 273 Ala. 620, 143 So. 2d 637 (1962). See Ala. Code §12-21-227; Ala. R. Evid. 504.

Waiver. All privileges may be waived by client, *Ex Parte Great Am.*, 540 So. 2d 1357 (1989) (attorney-client); *Henderson v. State*, 583 So. 2d 276, aff'd *Ex Parte Henderson*, 583 So. 2d 305 (1990) (husband-wife); and *Crowson v. State*, 552 So. 2d 189 (Ala. Crim. App. 1989); See *Ex Parte Rudder*, 507 So. 2d 411 (1987) and *Kirby v. State*, 581 So. 2d 1136 (Ala. Crim. App. 1990).

PRODUCTS LIABILITY

Strict Liability. Strict tort liability has not been adopted, *Atkins v. Am. Motors*, 335 So. 2d 134 (1976), but approval has been given to cause of action based upon §402A, Restatement of Torts Second, with allowance of certain affirmative defenses. Known as Alabama Extended Manufacturer's Liability Doctrine (AEMLD). *Casrell v. Altec*, 335 So. 2d 128 (1976). Manufacturer is not insurer against all harm from its product. *Yarbrough v. Sears, Roebuck*, 628 So. 2d 478 (1993).

Elements of Action. Fault is supplied by proof that defendant sold product in defective condition, *Sears, Roebuck v. Haven Hills*, 395 So. 2d 991 (1981), that it was substantially unaltered when used, and that product proximately caused injury to plaintiff. *Candle v. Patridge*, 566 So. 2d 244 (1990). For purposes of AEMLD, "defect" is that which renders product unreasonably dangerous, i.e. not fit for its intended purpose; and "defective" means that product does not meet reasonable expectations of ordinary consumer as to its safety. *Allstate v. Mitsubishi*, 709 So. 2d 1306 (Ala. Civ. App. 1998). No liability on distributor or manufacturer of non-defective component incorporated into defective product. *Sanders v. Ingram*, 531 So. 2d 879 (1988). If product is unreasonably dangerous, consumer does not have to prove defectiveness as separate matter. *Moore v. Kawasaki*, 703 So. 2d 990 (Ala. Civ. App. 1997). De-

defendant must be “seller,” as defined in Ala. Code §7-2-103, to be liable under AEMLD and Ala. Code §7-2-315. *Rutledge v. Arrow Aluminum Indus.*, 733 So. 2d 412 (App. 1998), *cert. denied*, April 1999.

Duty to Warn. Need to warn by manufacturer is not issue for plaintiff; defendant may assert it as defense under assumption of risk. *Ford v. Rodgers*, 337 So. 2d 736 (1976). Inadequacy of size of warning may impose liability upon manufacturer. *E.R. Squibb v. Cox*, 477 So. 2d 963 (1985). *But see McGee v. Corometrics*, 487 So. 2d 886 (1986). No cause of action for negligent failure to warn unless evidence shows warning would have been read and heeded, thereby preventing the accident from occurring. *Gurley v. Am. Honda*, 505 So. 2d 358 (1987). No duty to warn if item not dangerous when put to its intended use or danger is open and obvious. *Hawkins v. Montgomery*, 536 So. 2d 922 (1988). No cause of action when damage is only to product itself. *Lloyd Wood v. Clark Equip. Co.*, 543 So. 2d 671 (1989). Pharmacist does not have duty to warn of foreseeable injuries from use of the prescription drug he/she is dispensing under AEMLD. *Walls v. Alpha Pharma USPD, Inc.*, 887 So. 2d 881 (Ala. 2004).

Damages. May recover both compensatory and punitive damages. Economic loss rule prevents tort recovery when product damages itself but does not cause personal injury or damage to any property other than itself. *Harris Moran Seed Co. v. Phillips*, 2006 WL 1719936 (Ala. Civ. App. 2006).

Defenses. Defendant may assert defenses of contributory negligence and assumption of risk. *Gen. Motors v. Saint*, 646 So. 2d 564 (1994). Appreciation of danger is good defense. *Wallace v. Doege*, 484 So. 2d 404 (1986). Plaintiff may show negligence of seller even though user did not buy from seller. *Caterpillar v. Ford*, 406 So. 2d 854 (1981). Nonforeseeable alteration of product after it leaves manufacturer that causes injury relieves manufacturer of liability. *McDaniel v. French Oil Mill*, 623 So. 2d 1146 (1993). Product misuse and contributory negligence are separate defenses. *Haisten v. Kubota*, 648 So. 2d 561 (1994).

Whether danger is open and obvious becomes factual issue as does foreseeability of modification of product. *Beloit v. Harrell*, 339 So. 2d 992 (1976). Misuse of product is defense to manufacturer or supplier, *Carruth v. Pettway*, 643 So. 2d 1340 (1994), as is modification of product. *Fenley v. Rouselle*, 531 So. 2d 304 (1988). Change will not exclude liability if injury caused by defect in product not caused by change. *Indus. Chem. v. Hartford*, 475 So. 2d 472 (1985). Customary practices or standards are admissible as evidence of reasonable care, but do not furnish conclusive test of duty as matter of

law. *Dunn v. Wixom Bros.*, 493 So. 2d 1356 (1986); *King v. Nat'l Spa*, 570 So. 2d 612 (1990)

Indemnity. Manufacturer liable under AEMLD cannot recover indemnity from any person concurrently liable. *Bailey v. Collier*, 465 So. 2d 381 (1985). Manufacturer may be liable to injured third party when defect enhanced injuries and proof shows safer practical alternative design would have prevented or limited injuries. *Gen. Motors v. Edwards*, 482 So. 2d 1176 (1985). Under AEMLD, “manufacturer” is any seller engaged in business of selling products. *Huprich v. Bitts*, 667 So. 2d 685 (1995). Auto airbag system is complex technology requiring expert testimony to prove alleged defect. *Britt v. Chrysler*, 699 So. 2d 179 (Ala. Civ. App. 1997).

RELEASE

See Law Digest Tables.

Contract Law-General. Unambiguous release supported by valuable consideration will be given effect in absence of fraud. *Smith v. State Farm*, 494 So. 2d 7 (1986). Whether a release is ambiguous is a question of law. *Baker v. Blue Circle, Inc.*, 585 So. 2d 868 (Ala. 1991). General release that is unambiguous precludes subsequent actions against party released, *Ala. Power Co. v. Blount*, 445 So. 2d 250 (1983), including unknown injuries or damages, *State Farm v. Brackett*, 527 So. 2d 1249 (1988); *Nix v. Henry C. Beck*, 572 So. 2d 1214 (1990); *Hampton v. Liberty Nat'l*, 706 So. 2d 1196 (Ala. Civ. App. 1996), and claims for willful or intentional injuries, *Johnson v. Asphalt Hot Mix*, 565 So. 2d 219 (1990), and against third party joint tortfeasors. *Conley v. Beaver*, 437 So. 2d 1267 (1983), even though not named in release, *Baker v. Ball*, 473 So. 2d 1031 (1985). Pro tanto release is valid. *Am. Pioneer v. Sandlin*, 470 So. 2d 657 (1985); *Johnson v. Collier*, 567 So. 2d 1311 (1990). May plead release as bar or as partial payment of any judgment. *Tatum v. Schering*, 523 So. 2d 1042 (1988); *Campbell v. Williams*, 638 So. 2d 804 (1994). Release of tortfeasor by insured releases insurer's liability where insurer did not waive subrogation rights. *Lady Corinne Trawlers v. Zurich*, 507 So. 2d 915 (1987).

Covenant Not to Sue. Amounts to release. *Flinn v. Carter*, 59 Ala. 364 (1877); *see Bendall v. White*, 511 F. Supp. 793 (N.D. Ala. 1981) (covenant not to execute on judgment).

Fraud and Misrepresentation. Release obtained by fraud may be set aside upon return of consideration. *Taylor v. Dorrough*, 547 So. 2d 536 (1989). Tender is necessary to effect rescission of release, *Edmondson v. Dressman*, 469 So. 2d 571 (1985).



Infants/Capacity. Infants may contract, but are not bound by such contracts except for necessities. *Commercial Credit v. Ward*, 215 Ala. 31, 109 So. 574 (1926). Upon arriving at age of majority, infant may repudiate or avoid them. *Bell v. Burkhalter*, 176 Ala. 62, 57 So. 460 (1912). Ala. Code §27-14-5 provides minor of age of 15 years or more may purchase annuity or contract on his own life, body, or health and cannot by reason of his minority rescind, avoid, or repudiate contract.

Joint Tortfeasors. Although there is some authority that it is not necessary in release to reserve rights against joint tortfeasor, *Am. Pioneer v. Sandlin*, 470 So. 2d 657 (1985), there is also authority that if there is no specific reservation of rights against joint tortfeasor, such rights are lost. *Johnson v. Asphalt Hot Mix*, 565 So. 2d 219 (1990).

Mistake. If there is proof of mutual mistake, reformation is available to correct mistake. *Morgan v. Tate*, 445 So. 2d 273 (1984). Assertion of mistake rejected when 19 year old signed release of claim for personal injuries and thereafter asserted his condition became worse. *Hall v. Gaines*, 613 So. 2d 370 (1993). Insurance agent's mistake as to whether release would preclude plaintiffs from recovering from unrelated third parties as well as from insured and plaintiff's lack of understanding of the effect of the general release gave rise to mutual mistake warranting reformation of the general release to a pro tanto release. *Ala. Farm Bureau Ins. Co. v. Hunt*, 519 So. 2d 480 (Ala. 1987).

REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Ala. Code §27-14-7 provides that all statements in application will be deemed representations and not warranties. Ala. Code §27-15-5 applies to life insurance policies and contains same provision as Ala. Code §27-14-7 except that caveat "in the absence of fraud" is added.

Misrepresentations. Ala. Code §27-14-7 provides for rescission of policy by insurance company for misrepresentations in application if they are 1) fraudulent, 2) material to acceptance of risk or to hazard assumed by insurer, or 3) if company would not in good faith have issued policy as applied for if it had known true facts. Misrepresentation pursuant to Ala. Code §27-14-7 is an affirmative defense that must be pleaded pursuant to Rule 8(c), Ala. R. Civ. P. *Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769 (Ala. 2004). Misrepresentation in automobile insurance contract application could not insulate insurance company from having to indemnify insured when contract of insurance had been renewed. *Quality Cas. Ins. Co. v. Ruben*, 2006 WL 964516 (Ala. Civ. App.).

Materiality. In order to support claim for misrepresentation by company against insured, or by insured against company, misrepresentation must be material to risk or of material fact. Ala. Code §27-14-7 and Ala. Code §§6-5-101 to 103.

Rescission. Based upon provisions of Ala. Code §27-14-7, company can void policy even if insured made innocent misrepresentation if it falls into one of the categories of statute. *Duren v. Northwestern Nat'l*, 581 So. 2d 810 (1991).

Reformation. There can be reformation or modification of policy only if both parties agree, mutual mistake, or mistake on one side and fraud or inequitable conduct on the other. *Home Indem. v. City of Mobile*, 477 So. 2d 312 (1985).

SERVICE OF PROCESS

See Law Digest Tables.

Corporations. Foreign corporations must qualify in order to do business in Alabama, Ala. Code §10-2A-226, and must designate registered agent in Alabama to receive service of process.

Upon Superintendent of Insurance. All insurers who qualify to do business in Alabama are required to file appointment of Commissioner of Insurance as agent for service of process, Ala. Code §§27-3-24 & 25, and all insurers who have not qualified to do business in Alabama, but who issue or deliver policies of insurance to residents of Alabama are deemed to have appointed Commissioner of Insurance as agent for service of process. Ala. Code §§27-10-50 to 55.

Upon Non-Resident Motorists. Rule 4.2 (a)(2)(c), Alabama Rules of Civil Procedure provides for service of process in civil suits upon non-resident operators or owners whose motor vehicles are operated on public highways in this state. Service is by letter addressed to person to be served, certified return receipt requested, restricted delivery, or service may be had by personal service within state. Ala. R. Civ. P. 4.2 (b)(1)(A).

Personal Service. May be served by sheriff or other officer of county where person to be served resides, or by someone, not less than 18 years of age, especially appointed by court, or by certified mail. Ala. R. Civ. P. 4.1, 4.2

SUBROGATION

In General. Subrogation is either legal (equitable) or conventional. "Legal" arises by operation of law where surety having legal liability to do so, pays debt primarily owed by his principal. "Conventional" depends upon lawful contract. *Cont'l Bank v. Ala. Gen.*,



274 Ala. 622, 150 So. 2d 688 (1963); *City of B'ham v. Trammell*, 267 Ala. 245, 101 So. 2d 259 (1958). See Ala. Code §8-3-2. Insurer has no right to subrogation until insured has been made whole. *Alfa v. Head*, 655 So. 2d 975 (1995), *overruled, Ex parte State Farm*, 764 So. 2d 543 (2000), insurer may pursue subrogation claim against tortfeasor, regardless of whether insured has been "made whole," pursuant to contractual provision in insured's policy. But this rule is superseded by any contrary agreement reached by the parties. *Ex parte Cassidy*, 772 So. 2d 445 (Ala. 2000).

Parties to Action. Rule 17 (a), Alabama Rules of Civil Procedure provides that action be brought in name of subrogee if subrogor has no pecuniary interest in claim. See generally *Blue Cross & Blue Shield v. Sanders*, 138 F.3d 1347 (11th Cir. 1998).

Liability Insurance. *Paige v. State Farm*, 562 So. 2d 241 (1990) and *Progressive Specialty v. Hammonds*, 551 So. 2d 333 (1989).

Collision Insurance. *Fincher v. J.C. Penney*, 520 So. 2d 532 (Ala. Civ. App. 1988).

Life, Accident and Health Insurance. *Peck v. Dill*, 581 So. 2d 800 (1991); *McKleroy v. Wilson*, 581 So. 2d 796 (1990); *Sharpley v. Sunoco*, 581 So. 2d 792 (1990).

Uninsured Motorist Insurance. *Star Freight v. Shefield*, 587 So. 2d 946 (1991); *Economy Fire v. Goar*, 564 So. 2d 867 (1990); *Hardy v. Progressive*, 531 So. 2d 885 (1988); *River Gas Corp. v. Sutton*, 701 So. 2d 35 (Ala. Civ. App. 1997)

Surety. See Ala. Code §8-3-2.

Workers' Compensation. Subrogation is permitted under Ala. Code §25-5-11 (d) when injured employee or his dependents do not file action against tortfeasor.

Waiver. If policy contains "waiver of subrogation" clause, no right of subrogation inures to insurer. *Indus. Risk v. Garlock*, 576 So. 2d 652 (1991). Uninsured motorist carrier who unreasonably withholds consent to settle may be deemed to have waived right to subrogation. *Lambert v. State Farm*, 576 So. 2d 160 (1991). Insured may destroy insurer's right to subrogation by executing full release to tortfeasor. *Progressive Specialty v. Hammonds*, 551 So. 2d 333 (1989); *Lady Corrine Trawler v. Zurich*, 507 So. 2d 915 (1987).

WAIVER AND ESTOPPEL

In General. Waiver is voluntary and intentional surrender or relinquishment of known right. *Dominex v. Key*, 456 So. 2d 1047 (1984). There can be no waiver without knowledge. *Taylor v. Golden Rule*, 544 So. 2d 932 (1989). Insurance coverage cannot be created or

enlarged by waiver or estoppel. *McGee v. Guardian*, 472 So. 2d 993 (1985); *Allstate v. Moore*, 429 So. 2d 1087 (Ala. Civ. App. 1983). Cannot create or enforce contract by estoppel when coverage is prohibited by law or is against public policy. *Milton Constr. v. State Hwy. Dept.*, 568 So. 2d 784 (1990).

Waiver By Agent. Insurer is estopped to deny knowledge of agent of previous fire losses of insured and could not void policy because of failure of insured to disclose losses. *Ala. Farm Bur. v. Moore*, 435 So. 2d 712 (1983). If agent was responsible for wrong information on application, health insurer could not defend against insured's claim on basis of misrepresentation. *Union Bankers v. McMinn*, 541 So. 2d 494 (1989).

Non-Waiver Agreements. Letter to insured's attorney stating investigation would be conducted under "non-waiver agreement" is sufficient to reserve rights of insurer. *Shelby Steel v. USF&G*, 569 So. 2d 309 (1990). Not necessary that insured sign agreement. *Williams v. Alabama Farm Bur.*, 416 So. 2d 744 (1982). Insurer that defends under reservation of rights triggers "enhanced obligation of good faith." *L&S Roofing v. St. Paul*, 521 So. 2d 1298 (1987). Insurer that defends insured without reserving right to withdraw its defense, waives its right to withdraw. *Burnham Shoes v. West American*, 504 So. 2d 238 (1987) answer to certified question conformed to 813 F.2d 328 (11th Cir. 1987).

Premiums. If pattern or practice exists of collecting premiums beyond grace period, insurance company waives its right to lapse policy. *Intercontinental v. Lindblom*, 571 So. 2d 1092 (1990), *cert. granted and vacated*, 111 S. Ct. 1575. Retention of past-due premium with knowledge that accident and claim occurred during renewal period constitutes waiver of right to claim forfeiture of coverage, *Am. Cas. v. Wright*, 554 So. 2d 1015 (1989), unless insurer promptly refunds premium. *Henson v. Celtic Life*, 621 So. 2d 1268 (1993). But, acceptance of premiums for former employee who was not eligible for coverage does not constitute waiver since coverage cannot be created or enlarged by waiver or estoppel. *McGee v. Guardian*, 472 So. 2d 993 (1985).

Proof of Loss. *Continental v. Dotson*, 260 Ala. 499, 70 So. 2d 796 (1954); *Burchfield v. Aetna*, 230 Ala. 49, 159 So. 235 (1935).

WORKERS' COMPENSATION

Statutory Reference. Ala. Code §§25-5-1 to 318. Original jurisdiction is in Circuit Court, Ala. Code §25-5-81 (a), with right of review by writ of certiorari to Court of Civil Appeals whose scope of review is limited Ala. Code §25-5-81 (d). *Pike v. Heil Co.*, 529 So. 2d 1020 (Ala. Civ. App. 1988).



Benefits. Wages. Ala. Code §25-5-68.

Medical. Ala. Code §25-5-77.

Disability. Ala. Code §25-5-57.

Death. Ala. Code §25-5-60.

Employment. Casual. Carpenter hired on job-to-job basis and not carried on employer's payroll or part of maintenance crew was not employee and was not entitled to workers' compensation benefits. *Luallen v. Noojin*, 545 So. 2d 775 (Ala. Civ. App. 1989). Nor is employee of independent contractor working for employer. *Ex Parte Scott Paper Co.*, 634 So. 2d 546 (1993).

Employment. Dual. Working partner cannot be employee of partnership for purposes of workers' compensation act. *Ford v. Mitcham*, 53 Ala. App. 102, 198 So. 2d 34 (1974). Secretary-treasurer and stockholder of small corporation was "employee" for purposes of workers' compensation act. *Read v. Moman*, 383 So. 2d 840 (Ala. Civ. App. 1980) *cert. denied*, *Ex Parte Read*, 383 So. 2d 847 (1980).

Exclusive Remedy. Ala. Code §§25-5-52 & 53 provides that workers' compensation remedies are exclusive remedies to employee against employer for his injury or death. Thus fraud and bad faith claims are barred, *Glenn v. Vulcan*, 534 So. 2d 598 (1988), as well as claims under uninsured motorist policies. *Ex parte Carlton*, 867 So. 2d 332 (Ala. 2003); *but see Johnson v. Coregis Ins. Co.*, 888 So. 2d 1231 (Ala. 2004). No action accrues for delay in employment. *Lowman v. Piedmont*, 547 So. 2d 90 (1989). However, it is not a bar to claims of outrageous conduct and invasion of privacy. *Busby v. Truswal*, 551 So. 2d 322 (1989). Act approved settlement of workers' compensation claim and executed release barred wrongful discharge claim. *Ex Parte Aratax Services*, 622 So. 2d 367 (1993), *on remand*, 622 So. 2d 369.

Arising out of and in the Course of Employment. For injury to be compensable, worker must establish both "legal causation"—that accident arose out of and in course of employment—and "medical causation"—that accident caused injury for which recovery is sought. *Hammons v. Roses Stores*, 547 So. 2d 883 (Ala. Civ. App. 1989). "Arising out of" requires accident, to be compensable, arise out of workers' employment, involve causal connection between injury and employment; injury must have had its origin in risk or danger incidental to character of employment. *Patterson v. Opelika Foundry*, 561 So. 2d 234, *rev. Ex Parte Patterson*, 561 So. 2d 236, *on remand*, 561 So. 2d 239 (Ala. Civ. App. 1989). Accidental injury occurring while returning from job site to headquarters is covered. *Process Equip. v. Quinn*, 701 So. 2d 29 (Ala. Civ. App. 1997). Injury occurring while

going to or from work is not generally compensable, with some exceptions. *Terry v. NTN-Bower*, 615 So. 2d 629 (Ala. Civ. App. 1992).

Heart Attack. *Morgan v. Reynolds*, 655 So. 2d 1056 (Ala. Civ. App. 1995) and *Floyd v. Boyd Bros. Transp. Co., Inc.*, 671 So. 2d 92 (Ala. Civ. App. 1995). It is not enough to show that injury would not have occurred "but for" employer. *Pope v. Golden Rod*, 539 So. 2d 313 (Ala. Civ. App. 1989).

Occupational Disease. Covered under Ala. Code §§25-5-110 to 123. Exposure to radiation is covered under Ala. Code §§25-5-190 to 203. Exposure to "hazards of disease" defined. *Dueitt v. Scott Paper*, 695 So. 2d 40 (Ala. Civ. App. 1996). Contact dermatitis from exposure is accident, not occupational disease. *Sanders v. Dunlop*, 706 So. 2d 716 (Ala. Civ. App. 1996).

Mental Injury. Award for mental disability occurring after accident approved. *Fed. Mogul v. Campbell*, 494 So. 2d 443 (Ala. Civ. App. 1986). Slight physical injury followed by disabling neurosis of conversion hysteria supported determination employee was entitled to recover for psychological injuries. *Allen v. Diversified Prods.*, 453 So. 2d 1063 (Ala. Civ. App. 1984).

Claim for workers' compensation benefits on basis of occupational stress disorder is not compensable as occupational disease under Alabama law. *Herchenhan v. Amoco Chem. Co.*, 688 So. 2d 847, 848 (Ala. Civ. App. 1997).

Notice. Written notice not required if employer had actual notice of injury. *Steele v. Gen. Motors*, 705 So. 2d 402 (Ala. Civ. App. 1997).

Preexisting Injury. Employee able to perform his work duties in normal manner prior to disabling injury has no preexisting condition for compensation purposes. *Ala. Power v. Mackey*, 594 So. 2d 1238 (Ala. Civ. App. 1991). Actual aggravation of existing infirmity, caused by accident in the course of employment, is compensable even though accident would have caused no injury to normal person. *Mitchell Motor Co. v. Burrow*, 37 Ala. App. 222, 66 So. 2d 198 (1953). Fact that worker had preexisting disease does not affect award of compensation if job combined with disease to produce death. *Newman Bros. v. McDowell*, 354 So. 2d 1138 (Ala. Civ. App.), *cert. denied*, 354 So. 2d 1142 (1977).

Defenses. Misrepresentation as to physical condition or health on employee's application is defense and may preclude recovery of benefits. *Cox v. North River Homes*, 706 So. 2d 743 (Ala. Civ. App. 1997). Employee cannot receive total disability benefits and payment for vocational retraining. *Mutual Sav. v. Hogue*, 693 So. 2d 530 (Ala. Civ. App. 1997).



Fellow Employee Rule. Fellow employees may be liable for injuries sustained by co-employee only when such injury is caused by offending employee's wilful conduct. Ala. Code §25-5-11 (b) & (c). *Landers v. O'Neal Steel*, 564 So. 2d 925 (1990); *Bean v. Craig*, 557 So. 2d 1249 (1990).

Liens. Any decision or order filed with court on matter under workers' compensation act may be registered in probate court and thereby becomes a lien. Ala. Code §25-5-91.

Attorneys Fees. Must be determined by court and cannot exceed 15% of compensation awarded or paid. Ala. Code §25-5-90. Awarding employee costs, including expert fees, is within sound discretion of trial court. *Star Rails v. May*, 709 So. 2d 44 (Ala. Civ. App. 1997). Compensation of each attorney shall be based on compensation awarded his particular client. *Pate v. Millers Transporters, Inc.*, 301 So. 2d 64 (Ala. Civ. App. 1979), *aff'd*, 381 So. 2d 68.

