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RECENT DEVELOPMENTS IN ALABAMA AND THE ELEVENTH CIRCUIT
Selected Insurance Cases and Other Matters of Interest

Ely & Isenberg is pleased to announce the launch of our newsletter to provide you with information on recent developments in Alabama and Eleventh Circuit case law on matters that we hope will be of interest to you. Like our practice, the focus in this newsletter will be on cases related to insurance coverage issues. However, we will also plan to include references to cases that present a significant shift in Alabama law or address matters of first impression on other issues that may be of interest. We welcome your comments, and hope you find this newsletter and future editions useful. Of particular interest this month are the two cases from the Alabama Supreme Court: *Owners Ins. Co. v. Jim Carr Homebuilder, LLC* and *State Farm Fire and Cas. Co. v. Brechbill*. The *Jim Carr* opinion is yet another opinion by the Alabama Supreme Court on the issue of whether defective workmanship is covered under a CGL policy. The *Brechbill* opinion is potentially one of the most important pronouncements by the Alabama Supreme Court on bad faith in a number of years.

Alabama State Law Update

Construction Defect

Owners Ins. Co. v. Jim Carr Homebuilder, LLC, --- So. 3d ----, 2013 WL 5298575 (Ala. Sept. 20, 2013).

Facts: The insured general contractor sought coverage under a commercial general liability policy for an arbitration award arising from construction defects in the construction of a house.

Issue: ***Whether claims against the insured for faulty workmanship constitute an "occurrence" under the policy.***

Holding: The Court agreed with the insurer and held, because the claims against the insured were solely within the scope of the work the insured contracted to perform, the claims were for poor workmanship and did not constitute an ñoccurrenceò under the policy. The insured and the underlying homeowner have filed an application for rehearing with the Court, arguing that this opinion is inconsistent with the Court's prior opinion in Town & Country.

Bad Faith (Homeowners Policy)

State Farm Fire and Cas. Co. v. Brechbill, --- So. 3d ----, 2013 WL 5394444 (Ala. Sept. 27, 2013).

Facts: The insured submitted a claim to its homeowner's carrier for windstorm damage to his residence. The insurer obtained an expert opinion that the damage to the insuredôs residence was a result of long-term settlement and design issues, not the windstorm. As a result, the insurer denied the claim. The trial court granted partial summary judgment for the insurer on the insuredôs ñnormalò bad faith claim, but tried the case

to a jury on the insuredôs ñabnormalò bad faith claim. The jury found in favor of the insured, and the insurer appealed.

Issue: ***Whether the existence of an "arguable basis" for the denial precludes an insured's claim for (1) bad faith intentional denial and/or (2) bad faith failure to investigate.***

Holding: On appeal, the Alabama Supreme Court, in an opinion authored by Chief Justice Moore, reversed the jury verdict, and, for the first time, made clear that there is only one tort of bad faith (rather than two separate torts for normal and abnormal bad faith). Further, the Court held that a finding that the insurer had an arguable basis for denial precludes the plaintiff from maintaining a bad-faith claim based on a failure-to-investigate theory.

Bad Faith (Uninsured Motorist)
Ex parte Safeway Ins. Co. of Alabama, Inc., --- So. 3d ----, 2013 WL 5506557 (Ala. Oct. 4, 2013).

Facts: The insured was injured in an auto accident by a ñphantom driverò and submitted a claim for uninsured motorist benefits to his personal automobile insurer. The insurer denied the claim, and the insured sued for breach of contract and bad faith. The insurer filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the claim for uninsured motorist benefits was not ripe because the liability and damages had not been established. The trial court denied the motion and the insurerôs subsequent motion to re-consider. The insurer petitioned the Alabama Supreme Court for extraordinary mandamus relief, asking the Court to direct the trial court to grant the motion to dismiss the bad-faith claim.

Issue: ***Whether the courts have subject matter jurisdiction over a bad-faith claim arising out of the insurer's failure to pay an uninsured motorist claim before the insured demonstrates that he is "legally entitled to recover."***

Holding: The Court, through an opinion authored by Chief Justice Moore, denied the petition for writ of mandamus and held that the trial court did have subject matter jurisdiction to decide the case. The Court held that ñthe outcome of the case ought to depend on a Rule 12(b)(6) motion to dismiss [for failure to state a claim],ò not on a Rule 12(b)(1) motion based on subject matter jurisdiction. ñ[P]roving fault and damages ought to be an evidentiary or elemental prerequisite for showing an insurer's bad faith and not a jurisdictional prerequisite.ò

Breach of Contract/Bad Faith (Homeowners Policy)
Smith v. Cotton States Mut. Ins. Co., --- So. 3d ----, 2013 WL 5763292 (Ala. Civ. App. Oct. 25, 2013).

Facts: The insuredôs house was damaged in a fire, and the insured submitted a claim to her

homeownerôs insurer for coverage for a number of damaged items. The insured became dissatisfied with the cleaning and repair work performed on the house, and sued the insurer for breach of contract, bad faith, and fraud. The trial court granted summary judgment in favor of the insurer on all counts.

Issue: ***(1) Whether the insurer was responsible under the terms of the homeowner's insurance policy for the contractors' failure to perform proper repairs; (2) Whether the insured could maintain a fraud claim against the insurer where she had not complied with Ala. R. Civ. P. 9(b), which requires that fraud be pleaded with particularity; and (3) Whether the insured could maintain breach-of-contract and bad-faith claims where the insurer failed to present evidence that it had paid ACV for certain damaged items.***

Holding: The Alabama Civil Court of Appeals (not the Supreme Court) affirmed the trial court's summary judgment in favor of the insurer on the insured's breach-of-contract claim regarding the insuredôs claim that the contractor improperly repaired items. The court pointed to both the language of the policy and a letter written by the insurer that the insurer did not guarantee the workmanship of any contractors or vendors. Thus, the insured should he brought any claims for faulty repairs against the contractors, not the insurer. The court also affirmed the trial courtôs summary judgment in favor of the insurer on the insuredôs fraud, holding that the insured failed to plead the fraud claim with sufficient particularity in compliance with Alabama Rule of Civil Procedure 9(b).

However, the court reversed the trial courtôs summary judgment on the breach-of-contract claim to the extent that it applied to certain other damaged items, because the insurer failed to show that it had complied with the terms of the contract and paid for those items. The court also reversed the summary judgment on the bad-faith claim because the insurerôs sole argument on the bad-faith claim was that the insured had not met the ñdirected verdictò standard on the breach-of-contract claim. The court held that, absent evidence supporting the insurer's claim that it had paid everything owed under the policy, the insurer was not due summary judgment on the bad-faith claim.

Alabama Federal Law Update

Breach of Contract/Bad Faith (Uninsured Motorist)
Joiner v. USAA Cas. Ins. Co., 2013 WL 84935 (M.D. Ala. Jan. 8, 2013).

Facts: The insured was injured in an auto accident in which a third-party driver was at fault. The insured submitted a claim to her uninsured motorist insurer for certain damages relating to jaw pain. The insurer retained a medical expert who determined that the current jaw pain was not a result of the auto accident; instead, it was the result of a

pre-existing TMJ condition. In reliance on the expert's opinion, the insurer denied the claim. The insured sued the insurer for breach of contract and bad faith.

Issue: ***Whether the insurer's reliance on an expert to denial a claim is sufficient to defeat a bad-faith claim.***

Holding: The U.S. District Court for the Middle District of Alabama granted summary judgment for the insurer on the insuredôs ñnormalò bad-faith-failure-to-pay claim. Specifically, the court stated that ñ[u]nder Alabama law, where there is a genuine dispute of material fact on a plaintiff's breach of contract claim, the defendant [insurer]is entitled to summary judgment on a bad faith claim arising from the contract.ò

The court also granted summary judgment on the insuredôs ñabnormalò bad faith claim. Because the insurer hired an expert to investigate and evaluate the claim and acted in accordance with the expertôs opinion, the insured could not maintain a claim for bad faith failure to investigate.

Liability Insurance Coverage
Robinson v. Hudson Specialty Ins. Group, et al., 2013 WL 5739802 (S.D. Ala. Oct. 22, 2013).

Facts: Two unknown men shot the plaintiff as he exited a nightclub owned by the insured. The plaintiff sued the insured in state court, and the insured sought coverage from its general liability and liquor liability insurers, but both carriers denied the claim. The plaintiff obtained a judgment against the insured on his negligence and Dram Shop claims, but the insured prevailed on claims for assault and battery and wantonness. The plaintiff then sued the insurers to collect the judgment. Specifically, the plaintiff alleged that the insured was negligent by (1) failing to maintain the nightclub in a reasonably safe condition; (2) allowing disorderly patrons to remain on the premises; (3) violating Alabama's Dram Shop Act through negligent service of alcohol to visibly intoxicated patrons; and (4) allowing intoxicated individuals to bring weapons onto the premises.

Issue: ***Whether the assault and battery exclusion applies when the assault and battery is inextricably linked to the insured's negligence that caused injuries.***

Holding: The U.S. District Court for the Southern District of Alabama granted summary judgment to both insurers. The court held that the assault/battery exclusion in the CGL policy, which specifically excluded coverage for the exact theories asserted against the insured in the complaint, applied to preclude coverage. With regard to the liquor liability policy, the court held that a more general assault/battery exclusion excluded resulting losses ñeven when the only improper conduct of the insured is a purely negligent act or omission that simply made possible or facilitatedò the

assault/battery.

Breach of Contract/Bad Faith (Ambiguous Policy Terms)
Phillips v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA., 2013 WL 5974906 (N.D. Ala. Oct. 30, 2013).

Facts: The insured sought coverage under a personal Truckerôs Occupational Accident Insurance policy for injuries suffered as a result of an automobile accident while on his way to pick up his truck, which he used to haul materials. The insurer denied the insuredôs claim for disability benefits.

Issue: ***Whether a finding of an ambiguity precludes summary judgment for the insurer.***

Holding: The U.S. District Court for the Northern District of Alabama determined that the policy could reasonably be interpreted to deny coverage and, therefore, the insurer was entitled to summary judgment on the insuredôs ñnormal" bad-faith claim. However, the court distinguished the insuredôs ñabnormalò bad-faith claim from the bad-faith claim in the Alabama Supreme Courtôs opinion in *Brechbill* (discussed above). In *Brechbill*, the basis of the insuredôs ñabnormalò bad-faith claim was that State Farm had failed to consider all of the available information and, therefore had failed to properly investigate the claim. Here, the insuredôs ñabnormalò bad-faith claim was based on an alleged ambiguous term in the policy. The court held that the term ñunder dispatchò in the policy was ambiguous; therefore, the insurer was not entitled to summary judgment on bad faith under an ñabnormalò theory.

Declaratory Judgment
Tower Group Companies v. Ozark Housing Development Inc., --- F. Supp. 2d ----, 6162598 (M.D. Ala. Nov. 22, 2013).

Facts: An insurer filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify its insured in an underlying state court action, and that the underlying plaintiffs were not entitled to benefits under the policy. The insurer and insured filed a joint stipulation of consent judgment in which they agreed that the policy excluded coverage for all claims arising out of the underlying litigation, and that the insured was not entitled to defense or indemnity. Then, the insurer moved for summary judgment as to the insured and the underlying plaintiffs.

Issue: ***Whether the court should, in its discretion, dismiss the declaratory judgment action because the insured's liability has not been established in the underlying case.***

Holding: Using its discretionary power under the Declaratory Judgment Act, the U.S. District Court for the Middle District of Alabama dismissed the action, finding that, even

though the facts to determining the insurer's indemnity obligation appeared to be decided, it was ñnot unforeseeable that the facts could change in such a way that the declaratory judgment in this case would be meaningless.ò First, the court noted that a declaratory judgment will be meaningless if the insured prevails in the underlying action. Also, the court found that, if the insured was found liable in the underlying action, the court did not know the basis for such liability, and, therefore, the court could not determine whether the insurer's duty to indemnify would be triggered. The court concluded that it would not prejudice the insurer to dismiss this action because it can re-file the action if a judgment is entered against the insured. However, the court found that entering summary judgment in favor of the insurer could prejudice the underlying plaintiffs because it would preclude any claims brought by the underlying plaintiffs to recover under the insurer's policy should the underlying plaintiffs prevail.