Winter 2014-2015 Issue

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

In this edition of our newsletter, we feature a number of cases from federal courts in Alabama, including a case regarding an insuredôs lack of cooperation and a case regarding the ripeness of an insuredôs counterclaim for breach of contract and bad faith in an insurerôs declaratory judgment action. Of particular interest are three cases involving late notice: *State Farm Fire and Cas. Co. v. GHW*, --- F. Supp. 3d ----, 2014 WL 5591384 (N.D. Ala. Nov. 4, 2014) (denying summary judgment and finding an issue of fact as to whether a four-year delay in reporting a sexual assault was reasonable); *Owners Ins. Co. v. American Timber Invs.*, 2014 WL 7365865 (N.D. Ala. Dec. 24, 2014) (granting summary judgment to the insurer and finding the insuredôs ten-month delay unreasonable as a matter of law where the insured argued that it was attempting to resolve the claim on its own); and *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. J.F. Morgan General Contractors, Inc.*, 2015 WL82891 (N.D. Ala. Jan. 7, 2015) (holding that, while notice to the insurerôs agent was notice to the insurer for purposes of satisfying the notice condition, an additional insuredôs fifteen-month delay in forwarding the actual suit papers to the insurer was a violation of the conditions of the policy and was unreasonable as a matter of law).

We hope you find this information useful. If you have any questions or would like to discuss, please do not hesitate to let us know.

Alabama State Law Update

Default Judgment and Uninsured/Underinsured Motorist

Travelers Home and Marine Ins. Co. v. Gray, --- So. 3d ----, 2014 WL 7234897 (Ala. Dec. 19, 2014).

Facts: An uninsured motorist struck Mrs. Grayôs vehicle and allegedly caused damages to the vehicle and physical injuries to Mrs. Gray. Mr. and Mrs. Gray filed an action against the tortfeasor, Mrs. Grayôs uninsured motorist insurance carrier, and a fictitious party to recover for their damages, including loss of consortium. The insurer denied the allegations of the complaint with regard to uninsured motorist benefits.

The tortfeasor failed to respond to the complaint, and the court entered a default judgment against the tortfeasor. The Grays then moved for summary judgment against their uninsured motorist carrier based on the default judgment against the tortfeasor. The court granted their motion for summary judgment, and the uninsured motorist insurer appealed.

Issue: ***Whether an insured can obtain summary judgment against her uninsured motorist carrier based on a default judgment against the tortfeasor.***

Holding: No. As the Court previously held in *Bailey v. Progressive Specialty Ins. Co.*, 72 So. 3d 587 (Ala. 2011), an uninsured motorist carrier that elects to be involved in the lawsuit is not bound by a default judgment awarded against the uninsured/underinsured tortfeasor. There is no way an insurer can ñdefendò against a third-party tortfeasor who decides not to answer the complaint, as the insurer has no relationship with the third-party tortfeasor. Once an uninsured motorist carrier elects to be involved in the action, the insured must prove that she sustained damages by the tortfeasor, and a default judgment against the tortfeasor does not meet that requirement.

Alabama Federal Law Update

Removal

Spencer v. Safeway Ins. Co. of Alabama, Inc., 2014 WL 5335825 (S.D. Ala. Oct. 20, 2014).

Facts: After her automobile insurer refused to pay a claim for property damage to her vehicle, the insured filed a breach-of-contract and bad-faith action against her insurer. She claimed damages for the value of the loss, the lost benefit of her policy, mental anguish damages, other damages, and punitive damages, but she did not provide a specific amount in damages. The insurer removed the action, and the insured moved to remand the action arguing that she alleged less than $75,000 in damages in her complaint.

Issue: ***Whether the insured's stipulation via affidavit that she would never seek nor accept an award in excess of $72,500 would support remand.***

Holding: Yes. When the complaint does not contained a specific damage claim, the court may consider information the parties provide. In her motion to remand, the insured stated that the damage to her vehicle was $1,992.60; her initial settlement demand to the insurer was $62,500; and she would not seek or accept a judgment or settlement over $72,500. In response, without citation to evidence or authority, the insurer argued that a judgment in favor of the insured could exceed the amount in controversy, as mental anguish and punitive damages are alleged in the complaint.

The court held that, because attorneys are officers of the court, it would accept the insuredôs attorneys statements regarding the settlement demand and that she would not accept a settlement or judgment greater than $72,500. Therefore, the court found that the amount in controversy was not met, and remanded the case to state court.

Duty to Defend

State Farm Fire and Cas. Co. v. GHW, --- F. Supp. 3d ----, 2014 WL 5591384 (N.D. Ala. Nov. 4, 2014).

Facts: In 2007, while spending the night at a friendôs house, the insuredsô 14 year-old son sexually molested a nine year-old girl who was also at the friendôs house. The insuredôs son pled ñtrueò to the charge of first-degree rape and was sentenced to probation. The insureds did not provide any notice to any insurer at that time. In 2011, after the conclusion of the criminal case, the insureds received a letter from the claimantôs attorney advising that the claimant planned to file suit against them and seeking information about the identity of their homeownerôs insurance company. The insureds forwarded this correspondence to their homeownerôs and umbrella insurance carrier. In 2013, the claimants filed suit against the insuredsô son in Alabama state court.

The insurer filed a declaratory judgment action in federal court, seeking a declaration that it did not have a duty to defend or indemnify the insuredsô son because his acts were intentional and because the insureds had failed to give timely notice. The insurer filed a summary judgment motion on these issues.

Issue: ***(1) Whether Alabama's "inferred intent" rule could be applied to a minor who committed a sexual assault on another minor such that the intentional acts exclusion contained in the policy would apply; and***

(2) Whether the four-year delay in the insureds' providing notice of the incident to their insurance carrier was unreasonable as a matter of law.

Holding: (1) No. The court recognized Alabamaôs rule of ñinferred intentò in sexual assault cases involving victims who were minors, wherein the ñintent to injure is inferred as a matter of law regardless of claimed intent.ò However, the court noted that ñinferred intentò had only been applied where the perpetrator was an adult and the victim was a minor. No precedent existed whether ñinferred intentò would be applied when the perpetrator was also a minor. As a result, the court denied the insurerôs motion for summary judgment on this issue.

(2) No. The insureds claimed that they did not provide notice to their insurer in 2007 because (a) they were unaware that there would be any coverage under their policy since the assault took place away from their home; and (b) they were unaware that a civil claim could be made after the matter had been handled by the criminal courts.

The court found that reasonable minds could differ as to whether the four-year delay was reasonable under the circumstances and denied the insurerôs summary judgment motion.

Motion to Dismiss Insured's Counterclaim in a Declaratory Judgment Action

Progressive Specialty Ins. Co. v. Smith, 2014 WL 7204875 (S.D. Ala. Dec. 17, 2014).

Facts: The insuredsô RV was damaged by flood water, and the insureds submitted a claim seeking recovery of their damages under their auto policy with their insurer. The insureds claimed that the flood damage occurred on May 1, 2014 ï a day after the insurer had reinstated the policy. By contrast, the insurer determined that the damage happened over a period of time, beginning before the reinstatement of the policy. As a result, on May 13, 2014, the insurer sent the insureds a letter stating that it would not provide coverage for the claim, but inviting the insured to provide additional information if the insureds had any to provide. The insurer subsequently conducted an examination under oath of the insureds and then filed the subject declaratory judgment action in federal court, seeking a declaration regarding coverage under the policy. In response, the insureds filed a counterclaim alleging breach of contract, bad faith, and unjust enrichment. The insurer moved to dismiss the counterclaim, claiming that it was premature because the insurer had not denied the claim and because of the pending request for a declaration of coverage.

Issue: ***Whether the insureds' counterclaims for breach of contract, bad faith, and unjust enrichment in the insurer's declaratory judgment action should be dismissed as not ripe.***

Holding: No. The federal magistrate judge disagreed with the insurerôs characterization of its May 13, 2014 letter as a ñconditional denial.ò Rather, the court found that the insurer had denied the claim on May 13 and no action afterward changed the fact that the insurer had denied the claim at that point. As a result, the court held that the insuredsôcounterclaim was ripe and survived a motion to dismiss. The Court entered an Order in accordance with the Magistrateôs recommendation.

Notice

Owners Ins. Co. v. American Timber Investments, Inc., 2014 WL 7365865 (N.D. Ala. Dec. 24, 2014).

Facts: Claimants purchased property from the insured in January 2007. On January 21, 2007, the claimants faxed the insured a letter complaining about of a number of problems with their house. On February 28, 2008, the claimantsôattorney sent a letter to the insured advising that he was retained to address ñconstruction defectsò with the house. The letter enclosed a report from a construction company identifying the defects and also instructed the insured that, ñ[i]f you have insurance for such claim please forward this to your insurance carrier.ò Instead of forwarding the letter to its insurance carrier, the insured continued to communicate with the claimantsôattorney about resolving the issues. The claimants ultimately filed suit against the insured in September 2008.

The insured first notified the insurer on December 11, 2008, shortly before the insured was served with the complaint. In September 2013, a state-court jury returned a verdict in favor of the claimants for $125,000. The insurer filed a federal declaratory judgment action, seeking a declaration that it did not have a duty to defend or indemnify the insured because of the insuredôs failure to provide timely notice.

Issue: ***Whether the insured's ongoing efforts to resolve the construction defect problems is sufficient to excuse a ten-month delay in notifying the insurer of a potential claim.***

Holding: No. The insured argued that the delay was reasonable because it was trying to amicably resolve the issues between January 2008 and December 2008 when the insured filed suit. The court disagreed. The claimantsô attorneyôs letter on February 28, 2008 placed the insured on notice that a claim was possible. Thus, the insuredôs presumption was unreasonable and could not serve as a reasonable excuse for the delay. As a result, the court found that the insured violated the notice condition of the policy, and the insurer owed no obligation to indemnify the insured for the judgment under the terms of the policy.

Failure to Cooperate

Auto-Owners Ins. Co. v. Premiere Restoration & Remodeling, Inc., 2014 WL 7369391 (N.D. Ala. Dec. 29, 2014).

Facts: After the insured failed to properly construct a house for homeowners, the homeowners filed an action in state court to recover damages. The insured notified the insurer, and the insurer agreed to defend the insured under a reservation of rights. However, the insured failed to assist its counsel in responding to discovery requests, which resulted in a default judgment of $125,051.

The insurer filed a declaratory judgment action in federal court, seeking a declaration that it did not owe any further duty to defend the insured in the underlying litigation or indemnify the insured for the default judgment. The insured was served by publication, but did not appear in the case. The homeownersô counsel filed an answer and a counterclaim against the insurer. As a result, the insurer moved for a default judgment against the insured and for summary judgment against the homeowners on the coverage issue.

Issue: ***Whether the insured's failure to cooperate in the defense of underlying litigation constitutes a breach of the policy, thus relieving the insurer of its duty to defend and/or indemnify.***

Holding: Yes. The court held that the insuredôs failure to respond to ñmultiple requestsò from retained defense counsel ñamounts to material and substantial non-cooperation that prejudicedò the insurer. Therefore, the evidence was sufficient to relieve the insurer

of its obligation to defend and indemnify the insured and also entitled it to summary judgment against the underlying claimants.

Notice

Pennsylvania Nat. Mut. Cas. Ins. Co. v. J.F. Morgan General Contractors, Inc., 2015 WL 82891 (N.D. Ala. Jan. 7, 2015).

Facts: In March 2008, a general contractor entered into a contract with a subcontractor to assist in the construction of a school. The contract required the subcontractor to add the general contractor as an additional insured to the subcontractorôs CGL policy. On June 2, 2008, an employee of the subcontractor was killed while working for the subcontractor. The general contractor learned of the accident immediately, and advised the subcontractor to notify its insurance carrier. On June 3, 2008, the subcontractor notified its insurance agent of the loss; however, the agent only notified the subcontractorôs workers compensation carrier, which was a different company than its CGL carrier.

On October 29, 2009, about fifteen months after the accident, the employeeôs daughter filed suit naming the general contractor as a defendant. The general contractor notified its own CGL carrier and the subcontractor of the suit, but did not notify the subcontractorôs CGL carrier. The subcontractor forwarded the complaint to its agent and informed it about the suit. The agent reviewed the certificates of insurance and incorrectly noted that the general contractor was not to be an additional insured under the subcontractorôs CGL policy. Neither the agent nor the subcontractor notified the subcontractorôs CGL insurer.

On December 15, 2010, the general contractor wrote to the subcontractorôs agent demanding a defense and indemnity in the underlying lawsuit. The subcontractorôs CGL carrier received the letter on December 20, 2010, which was its first notice of the claim, thirty months after the accident and fourteen months after the filing of the lawsuit.

The subcontractorôs CGL insurer filed a declaratory judgment action against the general contractorôs CGL insurer and the general contractor seeking a determination that it did not owe coverage due to late notice.

Issue: ***(1) Whether notice to an agent is notice to an insurer; and***
(2) Whether an additional insured's failure to provide timely notice to an insurer relieves the insurer of a duty to defend or indemnify.

Holding: (1) Yes. The general contractor and its carrier argued that, under the particular facts of this case, the subcontractorôs notice of the June 2008 accident to the subcontractorôs agent was sufficient.

(2) Yes. The court held that, an additional insured under the policy, the general contractor was required to immediately forward the complaint in the wrongful death suit to the subcontractorôs CGL insurer. The contractor argued that its delay in forwarding the suit papers to the subcontractorôs CGL carrier of more than thirteen months was reasonable because (a) the general contractor was not aware of the subcontractorôs policy and its content; (b) as an additional insured, it was relieved of its obligations to forward suit papers because the named insured, the subcontractor, had already done so; and (c) because the agent had reviewed the coverage and determined that the general contractor was not an additional insured, that the CGL carrier had waived its late-notice defense. The federal court rejected each of these arguments, holding that the general contractor was charged with constructive knowledge of the CGL policy and its requirements. Because the general contractor had not ñimmediatelyò forwarded the suit papers to the subcontractorôs CGL carrier, the general contractor had violated the notice conditions of the policy.

Motion to Dismiss

Metropolitan Glass Co. Inc., v. National Trust Ins. Co., 2015 WL 74155 (S.D. Ala. Jan. 5, 2015).

Facts: After experiencing ongoing water intrusion that damaged a condominium, the developer (which was later substituted by the condominium association), filed a lawsuit against the general contractor and a subcontractor. The subcontractor sought coverage from its insurance carriers, QBE and FCCI. QBE provided a defense and eventually its $1,000,000 policy limits to settle the case. FCCI denied coverage and refused to provide a defense or indemnity. Following the settlement, QBE and the insured filed a separate action against FCCI for breach of contract, bad faith, declaratory judgment, reimbursement/contribution, unjust enrichment, and negligence/wantonness. FCCI moved to dismiss the action in part and strike certain sections of the complaint.

Issue: ***Whether an insured and its insurer can maintain claims for negligence/wantonness and unjust enrichment against another insurer.***

Holding: No. The federal court explained that the Alabama Supreme Court consistently refuses to recognize claims for negligent or wanton failure to investigate the claim in the context of negligent or wanton refusal to pay insurance claims. Therefore, the negligence and wantonness claims were due to be dismissed. Moreover, the Alabama Supreme Court only recognizes an unjust enrichment claim when no other legal remedy exists for the plaintiff. Since breach-of-contract and bad-faith claims exist to provide remedies for insureds, an unjust enrichment claim is not available to the plaintiffs.