Spring 2015 Issue

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

In this edition, we have included several cases of interest, highlighted by two opinions from the United States District Court for the Northern District of Alabama. In *Essex Ins. Co. v. J. & J. Masonry, LLC*, 2015 WL 424699 (N.D. Ala. Feb. 2, 2015), the Court granted a default judgment in favor of the insurer based on the allegations of the complaint in a coverage action where the insured failed to answer the complaint. Also, in *Lacey v. Allstate Indemn. Co.*, 2015 WL 875379 (N.D. Ala. Mar. 2, 2015), where the United States District Court granted summary judgment to the insurer based on the insuredsô failure to sit for an examination under oath.

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

Class Action Regarding Depreciation in First-Party Property Cases

Baldwin Mut. Ins. Co. v. McCain, --- So. 3d ----, 2015 WL 731161 (Ala. Feb. 20, 2015).

Facts: Following a windstorm and a lightning strike, the insured filed two claims with her property insurer for damages to her dwelling. The insurer paid the claims based on the terms of the actual cash value policy. She later filed a breach-of-contract, misrepresentation and suppression-of-material-facts action against her insurer. The insured argued that the insurer wrongfully depreciated the labor costs of installing materials and the labor costs of removing damaged materials. She reasoned that the labor costs should not be depreciated because they were not incurred at an earlier time. The insured also requested that her action be certified as a class action suit, representing thousands of homeowners in the State of Alabama.

On the day of the Alabama Code Section 6-5-641(d) class-certification hearing, the insurer filed a brief arguing that the insured did not meet the requirements of Alabama Rule of Civil Procedure 23 for class certification. The court gave the insured 30 days to respond and then granted the class certification after the insured filed a response and expanded its description of the class. The insurer appealed the class certification decision.

Issue: ***Whether the class certification should be reversed, as the trial court failed to conduct the necessary class-certification hearing.***

Holding: Yes. The trial court did not hold a hearing based on the class of homeowners it certified after the insured responded to the insurerôs motion. Without a hearing, the insurer was not given the chance to oppose the revised class description the insured

proposed. Since the trial court did not rigorously analyze the newly proposed class of homeowners as it is required in Alabama Code Section 6-5-641(d) and *Baldwin Mut. Ins. Co. v. Edwards*, 63 So. 3d 1268 (Ala. 2010), the action was reversed and remanded.

Default Judgment Against Insured When Insurer "Forgot" to Assign Defense Counsel.
Hilyer v. Fortier, --- So. 3d ----, 2015 WL 731136 (Ala. Feb. 20, 2015).

Facts: A minor, driving his motherôs vehicle, ran into a tractor trailer blocking both lanes of the road as its driver backed into the minorôs private driveway. The minor driverôs mother sued the owner/operator of the tractor trailer for negligence. The defendant failed to appear, and the court entered a $550,000 default judgment against him. The defendant then filed a motion to set aside the default judgment, including affidavits from his insurer and insurance agent attempting to explain that the failure to answer was not his fault, but was based on mistakes and misunderstandings by the insurance company. The court held a hearing on the motion, but never ruled, and the motion was ultimately denied as a matter of law. The defendant appealed.

Issue: ***Whether the defendant met his threshold showing that the default should be set aside and whether the court erred in allowing the motion to set aside be denied by operation of law without setting forth the reasons for the denial.***

Holding: Yes. The Alabama Supreme Court held that the trial court was required to consider and specifically set forth its findings on the following factors from *Kirtland v. Fort Morgan Authority Sewer Service, Inc.,* 524 So. 2d 600 (Ala. 1988): ñ1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendantôs own culpable conduct.ò

Based on the defendantôs affidavit, the affidavit of an eye witness, and available legal defenses, the Supreme Court held that the defendant met his threshold showing that his defense was meritorious. The Court also held that the defendant met his threshold showing that the plaintiff would not be unfairly prejudiced if the default judgment is set aside because the accident happened less than eight months previously; the witnesses lived in town; the vehicles were available for inspection; and, although the tractor trailer had been repaired, it was repaired before the plaintiff sent a preservation of evidence letter. Finally, the Court held that the defendant met his threshold showing that the default judgment was not the result of his own culpable conduct. The defendant presented affidavits that he had forwarded the notice of claim to his insurer, and the insurer had assigned the claim to a claim professional. That claim professional intended to transfer the claim to another adjuster, but forgot to do so. The claim professional testified by affidavit that, if he had realized that he had not transferred the claim, he would have immediately assigned counsel for the defendant.

Based on the above, the Supreme Court reversed and remanded the action to the trial court. The Court specifically held that it was not ordering the trial court to set aside the default judgment. Rather, it remanded the case to the trial court to fully consider and make a record of its consideration of the *Kirtland* factors.

Alabama Federal Law Update

Remand of UM/UIM Case

Harris v. Aghababaei, --- F. Supp. 3d ----, 2015 WL 350784 (M.D. Ala. Jan. 28, 2015).

Facts: The plaintiffs were injured when a commercial truck collided with the plaintiffsô vehicle. The plaintiffs filed suit in Alabama state court against the driver, the driverôs employer (and owner of the truck), and the plaintiffsôuninsured/underinsured motorist carrier. The defendant driver filed a notice of removal to federal court, and the plaintiffs filed a motion to remand.

Issue: ***Whether the UM/UIM policy limits fulfill the amount-in-controversy requirement for federal court jurisdiction when the plaintiffs specifically allege in their Complaint that they are seeking less than $74,500 in damages.***

Holding: No. In their Complaint, the plaintiffs specifically allege that they do not seek more than $74,500 in damages. Also, the plaintiffs state that they only included their uninsured/underinsured motorist carrier in the action because they did not know whether the defendants had insurance coverage or the specific amount of insurance coverage. Moreover, the plaintiffs moved to dismiss the UM/UIM insurer from the action. The plaintiffs also submitted evidence that their medical bills were below $25,000. Therefore, the Middle District court remanded the case to state court.

Coverage Determination after Default Judgment

Essex Ins. Co. v. J. & J. Masonry, LLC, 2015 WL 424699 (N.D. Ala. Feb. 2, 2015).

Facts: Homeowners filed a lawsuit in state court against their general contractor as a result of construction issues on their house. The general contractor then filed a third-party complaint against the insured subcontractor, claiming that the damages resulted from the subcontractorôs work. The subcontractorôs CGL carrier filed a declaratory judgment action in the United States District Court for the Northern District of Alabama and asked the court to declare that there is no duty to defend or indemnify the insured. The CGL carrier also named the underlying homeowners and the general contractor as defendants in the action. The CGL carrier served the insured subcontractor with the summons and complaint, but the insured failed to respond to the complaint within the time prescribed. As a result, the District Court entered a

default judgment against the insured.

Issue: ***Whether the District Court could make a substantive determination of no coverage for an insurer once the insurer obtained a default judgment against the insured.***

Holding: Yes. ñUpon default, the well-pleaded allegations of a complaint are taken as true.ò The district court therefore interpreted the insurance policy in conjunction with the facts the insurer pleaded in the complaint, and found that no coverage existed because the alleged damages were outside the applicable policy periods. Therefore, the district court made a decision on the substantive coverage issues, and held that the insurer had no duty to defend or indemnify the defaulting insured.

[***Important Note:** While not noted in the opinion, a review of the court docket shows that the insurer never served the other defendants ï the underlying homeowners and the general contractor ï with the summons and complaint. Therefore, the district court dismissed the insurerôs declaratory judgment action against them *without prejudice*. Accordingly, the insurer, by failing to serve the claimants, has left itself open to the possibility of having to re-litigate the coverage issues again if the claimants obtain a judgment against the insured in the underlying case and then bring a collection action as judgment creditors against the insurer.]

Refusal to Sit for EUO
Lacey v. Allstate Indemn. Co., 2015 WL 875379 (N.D. Ala. Mar. 2, 2015).

Facts: Insured homeowners filed a claim with their insurer after their home was damaged by a storm. Less than a month later, the insurer paid the full amount of ñDwellingò coverage and 25% of the personal property limits before the insurer received the contents inventory. The insurer reserved the right to require proof of the loss and conduct an EUO. Soon after, the insurer paid the full amount of ñOther Structuresò coverage.

When the insureds filed their completed contents inventory for the remaining personal property claim, the insurer found that some descriptions did not match the photographs taken of the house after the storm and during an earlier claim two years before. As a result, the insurer retained an attorney to request an EUO. The insurerôs attorney wrote to the insureds on October 11, 2011, and scheduled the Examinations for October 25, 2011. One of the insureds called the insurerôs investigator on October 24, 2011, and, after learning the purpose of the EUO, stated that neither he nor his wife would not submit to an EUO. After the insureds refused to submit to an EUO, the insurer denied the remaining claim personal property claim. As a result, the insureds filed a breach-of-contract, bad-faith, misrepresentation, negligence, and emotional distress action against the insurer in state court. The insurer removed the case to federal court and moved for summary judgment.

Issue: ***Whether summary judgment should be awarded in favor of the insurer, as the homeowners refused to submit to an EUO.***

Holding: Yes. The Court cited to the Alabama Supreme Courtôs holding in the case of *Nationwide Ins. Co. v. Nilsen*, 745 So. 2d 264 (Ala. 1998), where it held that failure to sit for an EUO was a failure to satisfy a condition precedent to coverage. The Court noted it was undisputed that the insureds had refused to sit for an EUO however, the insureds instead argued that the insurer did not have a ñreasonable basisò to invoke the EUO clause in the policy and, therefore, the insureds were not required to comply. The Court rejected this argument and found that, by refusing to sit for the EUO, the insureds failed to meet a condition precedent to coverage and, therefore, the insurer was entitled to summary judgment on the insuredsô breach of contract claim.

Summary judgment was also awarded to the insurer for the remaining claims. With regard to the bad faith claim, the Court held that a bad-faith action could not be maintained because breach-of-contract is an element of a bad-faith action, and the insurer did not breach its contract.