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Huie, Fernambucq & Stewart, LLP

2013

ALABAMA INSURANCE LAW DECISIONS

YEAR IN REVIEW

Faulty Workmanship is not an Occurrence

Assault-and-Battery Exclusion

Bad Faith Failure to Investigate

Ripeness of Bad Faith Claim

Coverage for Pollution Remediation Costs

2013 ALABAMA INSURANCE LAW DECISIONS

Faulty Workmanship is not an Occurrence

Owners Insurance Company v. Jim Carr Homebuilder, LLC, 2013 WL 5298575 (Ala.)

The Supreme Court of Alabama again addressed the question of whether poor workmanship constitutes an "occurrence" under a comprehensive general liability policy. Previously, the court has held that faulty workmanship itself is not an occurrence. On the other hand, where faulty workmanship subjects personal property or other parts of the structure to "continuous or repealed exposure" to some other "general harmful condition" an occurrence has been found. In *Owners*, the court clarified that damage to other parts of a structure, that were included in the scope of the construction or repair project, is not an occurrence. The separate damage must be to personal property or other parts of the structure separate from the scope of the project to constitute an occurrence.

Shane Traylor Cabinetmaker, LLC v. American Resources Insurance Company, Inc., 2013 WL 1858782 (Ala.)

Here, the Supreme Court of Alabama also addressed the question of whether faulty workmanship constitutes an occurrence. The insured was, in part, subjected to a claim that cabinet work and woodwork were defective and had to be repaired or replaced. Again, the Alabama Supreme Court has held that such does not constitute an occurrence. However, in this case the insured argued that repair and removal of the cabinets necessarily involved damage to other property in the home thereby triggering coverage. In doing so, the insured relied upon the prior *United States Fidelity & Guaranty Co. v. Andalusia Ready Mix, Inc.,* 436 So. 2d 868 (1983) decision, though the court distinguished *Andalusia Ready Mix* noting that there the plaintiff had alleged that repair and remodeling of a water treatment plant was required as a result of Andalusia Ready Mix's sale of defective grout. There was no such specific assertion that other repairs to the home were required in this case.

2013 ALABAMA INSURANCE LAW DECISIONS

Assault-and-Battery Exclusion

Admiral Insurance Company v. Price-Williams, 2013 WL 2149491 (Ala.)

Price-Williams filed suit against Admiral pursuant to Alabama's direct action statute seeking coverage for default judgments taken against two officers of a fraternity. Price-Williams had alleged that he had been assaulted at the fraternity house, and that assaulting parties included the two fraternity officers. In an effort to avoid the policy's assault-and-battery exclusion, Price-Williams alleged that another fraternity member had participated in the assault allegedly triggering coverage because the exclusion barred coverage for bodily injury arising out of an act of assault or battery "by any insured or additional insured." In other words, Price-Williams alleged that because the assault included the acts of a non-insured the exclusion did not apply. The Supreme Court of Alabama rejected this argument confirming that in the case of direct action, the plaintiff stands in the shoes of the party or parties against whom a judgment has been obtained. Thus, the participation of a non-insured in the assault had no effect.

Bad Faith Failure to Investigate

State Farm Fire and Cas. Co. v. Brechbill, 2013 WL 5394444 (Ala.)

In *Brechbill,* the Supreme Court of Alabama addressed the tort of bad faith, particularly the claim of bad faith failure to investigate. Historically, the elements of a claim for bad faith were stated as follows:

(1) Breach of the insurance contract;
(2) Refusal to pay the insurance claim;
(3) Absence of an arguable reason to refuse to pay the claim;
(4) The insurer's knowledge of such absence; and,
(5) If the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there was a legitimate or arguable reason to refuse to pay the claim.

Recent opinions have suggested that in the case of a claim for bad faith failure to investigate, the claim could proceed even if the insured was not entitled to judgment as a matter of law on the contract claim. Confirming that there is only one tort of bad faith, though two methods to establish bad faith refusal to pay, the court re-established that a bad faith failure to investigate the claim cannot survive where the trial court had found as a matter of law that the insurer had a reasonably legitimate or arguable reason for refusing to pay the claim.

2013 ALABAMA INSURANCE LAW DECISIONS

Ripeness of Bad Faith Claim

Ex Parte Safeway Insurance Company of Alabama, Inc., 2013 WL 5506557 (Ala.)

Here, the Supreme Court of Alabama, without stating so, impliedly reversed prior case law holding that in the uninsured motorist context, a bad faith claim is premature, and subject to dismissal, unless, and until, the insured establishes that he or she is legally entitled to recover from the tortfeasor. These prior decisions, *Pontius v. State Farm Mutual Automobile Insurance Company,* 915 So. 2d 557 (Ala. 2005) and *Ex parte Safeway Insurance Company,* 990 So. 2d 344 (Ala. 2008) held that the trial court had no subject-matter jurisdiction over the un-ripe bad faith claims. However, in the October 4, 2013 decision, the court held that the insured's proof of fault and damages should be an evidentiary or elemental prerequisite to a claim for bad faith, as opposed to a jurisdictional prerequisite.

Coverage for Pollution Remediation Costs

Certain Underwriters at Lloyd's, London v. Southern Natural Gas Company, 2013 WL 3242933 (Ala.)

This matter involved years-long, multi-phase litigation surrounding whether umbrella liability insurance policies covered pollution remediation costs. The key coverage issues included a finding that the presence of PCBs at multiple locations, associated with the use of a lubricating oil, constituted one occurrence. In finding so, the court relied upon prior Alabama authority holding that if the injuries stem from one proximate cause, there is a single occurrence. On the other hand, if the cause of injury or damage is interrupted or replaced by another cause, the chain of causation is broken, and more than one accident or occurrence has taken place.

The court further rejected the insurer's assertion that its policies did not provide coverage to Sonat's own property, including PCB-contaminated ground water on Sonat's property. Citing *Alabama Plating Company v. United States Fidelity & Guaranty Co.,* 690 So. 2d 331 (Ala. 1996), the court held that the owned-property exclusion did not exclude coverage for the cost of remediating ground water contamination. This ruling recognized that a landowner's interest in ground water beneath property is a limited right, and not one of ownership. Thus, the exclusion does not apply where there is a threat that contaminates in the soil will migrate to ground water or the property of others.

Lastly, the court confirmed that remediation costs were "damages" as covered by the policies which did not specifically define the term. Part of the rationale was the recognition that if such costs were not covered by insurance, the policyholder would have an incentive to not undertake a voluntary cleanup, potentially exacerbating the damage and increasing the ultimate cost of cleanup.