Rel: 10/11/2013

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2013-2014

1110738

Alabama Mutual Insurance Corporation

v.

City of Vernon et al.

Appeal from Lamar Circuit Court
(CV-10-1)

MAIN, Justice.

Alabama Mutual Insurance Corporation ("AMIC"), the defendant in an action pending in the Lamar Circuit Court filed by the City of Vernon on behalf of itself and other similarly situated entities, appeals from the trial court's

order certifying a class in the underlying action. We remand the case to the trial court for further proceedings.

The class-certification order states, in pertinent part:

> "The Plaintiff, the City of Vernon ('Vernon'), is a municipal corporation located in Lamar County, Alabama. The Defendant, Alabama Municipal Insurance Company ('AMIC'), is a mutual company licensed to do business throughout the State of Alabama. AMIC offers insurance to its members, which are local governmental entities, e.g., cities, towns, utilities, boards and other municipal associations. AMIC's insurance products include uninsured/underinsured motorist ('UM/UIM') coverage.
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> "On January 5, 2010, Vernon filed the present lawsuit on behalf of itself and a class of similarly situated entities that had purchased UM/UIM insurance from AMIC. Count II of the lawsuit alleged breach of contract, for which Vernon sought damages and/or injunctive relief. Vernon contended that AMIC had breached its insurance contract by adding an exclusion that was contrary to established Alabama law. Vernon further contended that, following the amendment, AMIC's UM/UIM coverage was illusory and AMIC continued to collect the full amount of the UM/UIM premiums. AMIC does not dispute that Vernon had a provision for UM/UIM insurance coverage in its contract with AMIC during the relevant period and paid a separate premium for UM/UIM coverage. AMIC can access and retrieve the amount of premium payments made by all of its UM/UIM policyholders during the relevant period and individualized testimony as to claimed damages is not required.
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> "On July 21, 2011, AMIC filed a motion for summary judgment. The Court entertained the briefs of the parties and heard oral arguments on September 1, 2011. On September 2, 2011, the Court denied

AMIC's motion, finding that Vernon had established an issue of material fact with regard to Vernon's contract claim.

"The Exclusion

"Evidence was introduced that on February 14, 2005, Doranne Newton, underwriting manager for AMIC, sent a letter to Vernon that stated AMIC was revising its Alabama Uninsured Motorist Coverage Form to exclude employees from collecting both Workers Compensation, which would be the employees' sole remedy, and Uninsured Motorist benefits when they were involved in an automobile accident. A similar letter was sent to all of AMIC's policyholders with UM/UIM coverage.

"The pertinent provision from the UM/UIM Endorsement states:

"'C. Exclusions

"'This insurance does not apply to:

"'4. Bodily Injury to:

"'(1). An Employee or volunteer of the insured arising out of and in the course of:

"'a. Employment by the Insured, or:

"'b. Volunteer services performed for or on behalf of the insured[.]

"'(2). The spouse, child, parent, brother, or sister of that Employee or volunteer as a consequence of (1) above.'

"The Endorsement further states:

> "'D. Limit of Insurance
>
> "'....
>
> "'2. ... We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law.'

"The evidence showed that AMIC maintained the position set out in its manager's letter throughout the relevant period and, in addition to excluding the employees referenced by Ms. Newton, AMIC's Endorsement also excluded volunteers and relatives. Vernon contends that, with the exclusion, AMIC essentially eliminated its UM/UIM exposure but did not eliminate Vernon's premium for UM/UIM coverage.

"Prior to amending the insurance policy, AMIC submitted the proposed endorsement to the Department of Insurance. In a letter to the Insurance Commissioner, Steven Wells, the President of AMIC, stated the following reasons for seeking approval of the exclusion:

> "'AMIC's experience with Uninsured Motorist coverage has been very negative. Also, every claim has been from a municipal employee who has already collected for their injury under Worker's Compensation, which has a two fold effect. First, it allows the Employee to collect twice for the injury since medical payments expense under Worker's Compensation is not deducted from the claim. Secondarily, the Municipality is providing benefits for employees who operate motor vehicles that are not available to its other employees.'

"After AMIC paid a $40.00 filing fee, the Commissioner approved the proposed exclusion. AMIC relied on the Commissioner's approval of the exclusion. Mr. Wells testified that AMIC did not seek or request a legal opinion from its own or outside counsel.

"Mr. Wells testified that the 2005 policy exclusion did not comply with the law of Alabama. In 2003, the Alabama Supreme Court specifically addressed an exclusion that was essentially identical to the exclusion that AMIC added in 2005. In Watts v. Sentry Ins., 876 So. 2d 440, 442 (Ala. 2003), the Court stated:

> "'The issue this case presents is whether an employee who is receiving workers' compensation benefits from his employer for injuries he sustained in a motor-vehicle accident that occurred while the employee was driving a vehicle belonging to the employer can recover underinsured-motorist benefits from the employer's automobile liability insurer (which is not the employer's workers' compensation insurer), if the employee's injuries were proximately caused by the negligence or wantonness of an underinsured driver, who was not a co-employee?
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> "'The answer to that question is yes, subject to the employer's right to reimbursement for the compensation paid on account of the employee's injury to the extent of the employee's recovery of damages against the third party tortfeasor. Ala. Code 1975, § 32-7-23 and § 25-5-11.'

"Vernon claims that the addition of the 2005 Endorsement rendered Vernon's UM/UIM coverage illusory and breached AMIC's contract to provide UM/UIM insurance. Coverage is illusory '[when

limitations or exclusions completely contradict the insuring provisions,' and such 'coverage' is not countenanced in this State. Shrader v. Employers Mut. Cas. Co., 907 So. 2d 1026, 1033 (Ala. 2005) (citation omitted). Other courts have responded similarly. See, e.g., Lincoln Nat'l Health & Cas. Ins. Co. v. Brown, 782 F. Supp. 110, 112-13 (M.D. Ga. 1992) (stating that an insurance policy that provides coverage for specifically enumerated torts, but only if they are committed unintentionally, is 'complete nonsense'). Vernon claims it contracted for UM/UIM insurance and paid premiums for UM/UIM coverage but received no actual UM/UIM coverage because AMIC excluded the only individuals who had a realistic possibility to collect UM/UIM benefits--municipal employees and volunteers.

"Class and Damages

"On June 10, 2010, approximately six months after Vernon filed this lawsuit, AMIC amended its policy to remove the exclusion and the issue of injunctive relief is moot.

"Vernon seeks to serve as class representative of policyholders that purchased UM/UIM coverage from AMIC while the exclusion was in place. The class period runs from July 31, 2004, the effective date of the filing of the exclusion with the Alabama Department of Insurance, to June 10, 2010, the effective date of its removal. The putative class consists of municipal entities, all located in Alabama, including but not limited to, cities, towns, utilities, boards and other municipal associations that purchased UM/UIM insurance from AMIC during the class period.

"Vernon is seeking contract damages from AMIC. 'As a general rule, damages in a breach of contract action are that sum which would place the injured party in the same condition he would have occupied if the contract had not been breached.' Ex parte

Steadman, 812 So. 2d 290, 295 (Ala. 2001), quoting Brendle Fire Equip., Inc. v. Electronic Eng'rs, Inc., 454 So. 2d 1032, 1034 (Ala. Civ. App. 1984). Rebecca Cantrell, Clerk for the City of Vernon, testified that Vernon paid the full amount of premiums due to AMIC for UM/UIM coverage for the applicable policy years. Exhibits show that Vernon paid a total of $14,258.78 in premiums for UM/UIM coverage during the relevant period which Vernon claims as damages.

"With regard to the claim of damages by other policyholders, Steven Wells testified that AMIC has records of the premium payments made by all of its UM/UIM policyholders during the relevant period and that AMIC can access this information without difficulty. AMIC submitted evidence to show that its removal of the exclusion was retroactive to November 1, 2009; and Mr. Wells testified that the company had paid all legitimate beneficiaries. However, Mr. Wells was not able to identify any specific beneficiary who had been paid, or state the amount of the payment, or indicate an exact number of beneficiaries who had been retroactively paid. In the absence of any specific evidence of retroactive payment, this Court finds that the class period extends to June 10, 2010, the date the policyholders were notified that the exclusion had been removed.

"STANDARDS FOR CLASS CERTIFICATION
UNDER RULE 23, ALA. R. CIV. P.

"The rationale behind the concept of a class action as a procedural device is to conserve the resources of the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. Jenkins v. Ravmark Industries, Inc., 782 F.2d 468, 471 (5th Cir. 1986). The certification of a class action is generally left to the broad discretion of the trial court. Ex parte Gold Kist,

Inc., 646 So. 2d 1339 (Ala. 1994), but only after the court has conducted a rigorous analysis of the relevant material that has been submitted. See § 6-5-641(e), Ala. Code 1975. The decision to grant class certification is not final in its nature and, depending upon evidence produced at a later date, the certification may be rescinded and/or amended as the facts dictate. Rule 23(c)(1), Ala. R. Civ. P.; see First National Bank of Montgomery, N.A. v. Martin, 381 So. 2d 32, 33-34 (Ala. 1980).

"Federal authority is persuasive in applying Rule 23 of the Alabama Rules of Civil Procedure, due to its similarity to Rule 23 of the Federal Rules of Civil Procedure. See Mitchell v. H&R Block, Inc., 783 So. 812, 816 (Ala. 2000); Shoney's, Inc. v. Barnett, 771 So. 2d 1015, 1029 (Ala. Civ. App. 1999). In order to determine whether an action is maintainable as a class action under Rule 23, Ala. R. Civ. P., this Court must engage in a two-step process. First, the Court must determine whether the plaintiff has met the burden of showing numerosity, commonality, typicality, and adequacy of representation, as required under Rule 23(a). Next, the Court must determine whether the Plaintiff has satisfied the requirements of at least one subpart of Rule 23(b). Reynolds Metal Co. v. Hill, 825 So. 2d 100, 103 (Ala. 2002); Compass Bank v. Snow, 823 So. 2d 667, 671 (Ala. 2001).

"....

"Rule 23(a) Adequacy Requirement

"The test for adequacy of representation has two aspects: (1) whether the named plaintiff has interests antagonistic to those of the rest of the class; and (2) whether plaintiff's counsel are qualified, experienced, and generally able to conduct the proposed litigation. Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987). The Alabama Supreme Court has explained the

'adequacy-of-representation' requirement of Rule 23(a) as follows:

> "'The adequacy-of-representation requirement "is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." General Tel. Co. v. EEOC, 446 U.S. [318] at 331, 100 S.Ct. 1698 [(1980)]. It also involves questions regarding whether the attorneys representing the class are "qualified, experienced, and generally able to conduct the proposed litigation." Griffin v. Carlin, 755 F.2d 1516, 1533 (11th Cir. 1985). Adequacy of representation requires that the class representative "'have common interests with unnamed members of the class'" and that the representative "'will vigorously prosecute the interests of the class through qualified counsel.'" [In re] American Med. Sys., 75 F.3d [1069] at 1083 [(6th Cir. 1996)](quoting Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir. 1976)); see also General Tel. Co. [of the Southwest] v. Falcon, 457 U.S. [147] at 157, 102 S. Ct. 2364 [(1982)].'

"Cutler v. Orkin Exterminating Co., Inc., 770 So. 2d 67, 71 (Ala. 2000).

"Adequacy of both the named plaintiff and counsel is clearly met here. There is no evidence that Vernon has any interest adverse to the class that makes it inadequate as class representative. The Court is familiar with counsel for Vernon and finds them adequate to serve as counsel for the class. Counsel are knowledgeable and possess extensive experience in litigation, they have effectively and efficiently litigated the case to this point, and they have sufficient resources and

> expertise to see it through to completion. AMIC has not raised any issue with regard to either aspect of the adequacy requirement. The Court finds that the adequacy requirement of Rule 23(a) has been satisfied."

After the parties had filed their briefs in this case, Vernon filed a motion with this Court to allow it to voluntarily dismiss its individual claims and to withdraw as class representative. Vernon stated that it had reached an agreement with AMIC regarding its individual claims and therefore no longer wishes to pursue those claims.

AMIC filed a response to Vernon's motion in which it argued that this Court should remand this case to the trial court with instructions to dismiss it. Without a named representative, AMIC argued, the requirements for a class action cannot be met.

Vernon responded, arguing that it has the right to withdraw from the pending litigation, but, it argues, the trial court has certified the class and the litigation remains viable. Vernon requests a reasonable time in which to allow the class to name a new representative.

The trial court should have the opportunity to determine whether a new named plaintiff should be certified. The trial

court is the proper entity to decide whether to allow the class members to amend their complaint to substitute a new named plaintiff and to determine whether that plaintiff meets the adequacy requirements in Rule 23(a), Ala. R. Civ. P., so as to represent the class. In Corbitt v. Manqum, 523 So. 2d 348, 351 (Ala. 1988), this Court held:

> "[I]t is well settled that '[w]hen the ... court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the named representative].' Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976) (citing Sosna v. Iowa, 419 U.S. 393, 399, 95 S. Ct. 553, 557, 42 L. Ed. 2d 532 (1975)). Consequently, the plaintiffs' class in the instant case had a legal status and interest separate from the interest asserted by Audrey Pinkston, and the claims of the class were not extinguished because her claim subsequently failed."

The above reasoning in a case in which the named plaintiff's claims were unsuccessful also applies to this case, in which the named plaintiff settled its claims with AMIC. If a new class representative is in place, we can proceed to review the merits of the order certifying the class.

We remand this case to the trial court for further proceedings consistent with this opinion. The trial court shall make a return to remand within 120 days of the date on which this opinion is released.

REMANDED WITH DIRECTIONS.

Moore, C.J., and Bolin, Murdock, and Bryan, JJ., concur.