

DEFAULTED DEFENDANT ALLOWED HEARING ON UNLIQUIDATED DAMAGES, EVEN THOUGH ISSUE WAS WAIVED

02.24.2011

Brad A. Catlin

On February 22, 2011, the Indiana Court of Appeals affirmed a denial of a defaulted defendant's attempt to seek relief 60(B) relief in *Allstate Ins. Co. v. Love*, Case No. 32A01-1005-CT-23. Then, even though it found that the defendant had waived the issue, the Court remanded the case so that the defendant could have a hearing on the unliquidated damages. Each aspect of the Court's decision is instructive (but the second part is more interesting).

In this case, Love was injured in an automobile accident and the tortfeasor offered Love policy limits to settle the case. Allstate, Love's UIM insurer, advanced Love the tortfeasor's policy limits to preserve its subrogation rights. Love then filed a UIM claim with Allstate.

During these proceedings, Love's counsel regularly communicated with Allstate's claim representatives. At no time did Allstate representatives advise Love's counsel that Allstate retained a defense counsel for this claim. Nevertheless, Love's counsel received a call from an Allstate attorney, who informed Love's counsel that Allstate had contacted him regarding Love's need to install a lift chair in Love's van to make it accessible. The two spoke on the phone and Allstate's attorney sent a confirmatory email, but no other communication between the two followed.

Love eventually filed suit against Allstate and Allstate failed to timely answer the complaint. Love moved for default judgment and the trial court granted that motion. After this, the Allstate attorney with whom Love's attorney had previously spoken appeared and moved for relief under Trial Rule 60(B)(3), arguing that Love had acted fraudulently by not notifying him before seeking default judgment. The trial court denied that motion. After Allstate appealed, it moved to set a hearing on damages, which the trial court also denied.

On appeal, the Court held that Love had no duty to notify Allstate's attorney before seeking a default judgment.

As such, we conclude that because Pierce had no clear knowledge that Dietrick represented Allstate throughout the whole claim and because Allstate did not clearly advise Pierce that Allstate retained Dietrick for this claim, Pierce had no duty to provide notice to Dietrick before seeking a default judgment.

The Court concluded that Allstate had not timely raised the issue of unliquidated damages and, therefore, that the issue had been waived on appeal. Nevertheless, it dealt with this issue anyway because of the preference to decide cases on their merits. It concluded that Love's UIM claims was for unliquidated damages and, therefore, could still be contested before the trial court despite the default judgment. The trial court's award of damages was interlocutory because it had held no hearing on damages.

While the portion of the opinion dealing with the 60(B) issue is interesting, it is the portion of the Court's opinion dealing with unliquidated damages that I suspect will be cited more frequently in the future. First, parties will likely use the Court's decision to address the substance of Allstate's waived argument to argue that their waived arguments should also be addressed. This is unlikely to be of much help, because the Court's ultimate conclusion in this case indicates that it did so here in order to avoid a subsequent appeal. The Court's finding that the trial court's award of unliquidated damages is interlocutory until a hearing is held will also counsel plaintiffs who have received a default judgment of unliquidated damages to seek a hearing on those damages at the earliest possible opportunity, so the judgment can be finalized.

Lessons:

1. A plaintiff has no duty to notify opposing counsel that it is seeking default judgment if the plaintiff has no clear knowledge who is representing the defendant in the case.
2. The Court of Appeals may address a waived issue, if so doing will avoid the need for a subsequent appeal.
3. UIM damages are unliquidated damages.
4. A trial court's award of unliquidated damages when awarding default judgment is interlocutory until a hearing on damages takes place.