Spring 2017 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 Alabama and its federal courts. Of particular interest are *Ex parte Allstate Property and Casualty Insurance Company*, --- So. 3d ----, 2017 WL 1787936 (Ala. May 5, 2017), *Auto-Owners Insurance Company v. Wier-Wright Enterprises, Inc.*, 2017 WL 1019535 (N.D. Ala. Mar. 16, 2017), *Broadway v. State Farm Mutual Automobile Insurance Company*, --- Fed. Appx. ----, 2017 WL 1149095 (11th Cir. Mar. 28, 2017), and *Sabbah v. Nationwide Mutual Insurance Company*, 2017 WL 1953432 (N.D. Ala. May 11, 2017). In *Allstate*, the Alabama Supreme Court held that the trial courts erred by allowing settlement agreements between insureds and the underinsured tortfeasors without first obtaining consent from the automobile liability insurers who had already tendered policy limits to the insureds. Next, in *Auto-Owners*, the Northern District of Alabama determined that a homebuilder was not entitled to a defense in an underlying action, since the damage occurred after the policy period ended, and a roofer was entitled to a limited defense for the damages that occurred during the policy period. In *Broadway*, the Eleventh Circuit Court of Appeals affirmed a district courtôs summary judgment award to the insurer, holding that the action against the insurer was premature since the claim and investigation were ongoing. Finally, in Sabbah, the Northern District of Alabama dismissed the insuredôs claim that the insurer breached its *L&S Roofing* enhanced obligation of good faith that placed on the insurer in the defense under a reservation of rights context. The court held that, since the insured accepted a gratuitous defense from the insurer after the insurer denied coverage, but never relinquished control over the litigation, including settlement negotiations, no enhanced obligation of good faith was triggered.

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

Uninsured Motorist Coverage in a Single Vehicle Accident
GEICO Indem. Co. v. Bell, 2017 WL 942598, --- So. 3d ---- (Ala. Civ. App. Mar. 10, 2017).

Facts: Kaysha Bell (ñBellò) and Shandarius Steiner (ñSteinerò) jointly owned a Honda and maintained automobile insurance for the vehicle. While Steiner was driving, the Honda was involved in a one-vehicle accident that killed Bell, who was riding as a passenger. Bellôs estate sought recovery under the Uninsured Motorist provisions of the auto policy issued by GEICO and covering the Honda. Following a trial, the court entered a judgment in favor of Bell for $1,000,000 against Steiner and GEICO specifically holding that the Honda was an uninsured auto as defined by the GEICO policy. The insurer appealed.

Issue: ***Whether the application of an exclusion in the policy precluding liability coverage converted the "insured auto" into an "uninsured auto" thereby triggering***

coverage under the underinsured motorist provisions of the policy.

Holding: No. The application of an exclusion to preclude liability insurance coverage under an auto policy does not convert the ñinsured autoò into an ñuninsured autoò for the purposes of uninsured motorist coverage. The Court pointed to the Alabama Supreme Courtôs decision in *Hall v. State Farm Mut. Auto. Ins. Co.*, 514 So. 2d 853, 855 (Ala. 1987) where it stated that ñwhen the insurance carrier of the vehicle involved in an accident denies liability coverage to an individual because of an applicable liability exclusion or exclusionary definition, that denial does not trigger the availability of uninsured motorist coverage to that individual under the same policy.ò Therefore, the Court held that coverage did not exist for Bell under the uninsured motorist portion of the policy and the judgment is reversed.

Underinsured Motorist Insurer- Enforcing Settlement between Tortfeasor and Insured
Ex parte Allstate Property and Cas. Ins. Co., --- So. 3d ----, 2017 WL 1787936 (Ala. May 5, 2017).

Facts: The Alabama Supreme Court combined three underlying cases with similar facts and the same issue. One of the cases was not timely filed and so the writ of mandamus was denied. In the remaining two cases, the insureds named the insurer in the lawsuit against the tortfeasor and alleged that the insureds were entitled to underinsured motorist benefits. The insureds notified their insurers of a settlement offer and requested the insurersô consent to settle. Both insurers refused to consent but tendered the policy limits available under the underinsured motorist coverage to the insureds. The insureds also opted out of participating in the proceedings to determine the tortfeasorôs liability and the insuredsôdamages. When the tortfeasors later moved to enforce the original settlement offer and dismiss the tortfeasors from the actions, the insurers opposed the motion. Both trial courts granted the motion to enforce the settlement offer, and one insurer filed a writ of mandamus. The other insurer filed a writ of mandamus after the court denied the insurerôs motion to alter, amend or vacate the order.

Issue: ***Whether the trial courts erred by allowing settlement agreements between insureds and the underinsured tortfeasors without the automobile liability insurers' consent.***

Holding: Yes. The court acknowledged that both insurers followed the procedure outlined in *Lowe v. Nationwide Insurance Company*, 521 So. 2d 1309, (Ala. 1988) and *Lambert v. State Farm Mutual Automobile Insurance Company*, 576 So. 2d 160 (Ala. 1991) by advancing the same amount of money as the tortfeasorôs settlement offer to the insured to protect their subrogation rights. This must happen when the insurer does not agree to settle or when it wants to maintain its subrogation rights. In *Pennsylvania National Mutual Casualty Insurance Company v. Bradford*, 164 So. 3d 537 (Ala. 2014), the court held that an insurer is not required to file an action

against the tortfeasor if the insurer wants to keep its right to reimbursement. An insurer may be reimbursed from the amount the insured is awarded from the tortfeasor. Since the insurers both advanced their policy limits to their insureds, the insurer becomes ñthe beneficial owner of ótheô case against [the tortfeasor],ô and, as such, ñhas the right to control the prosecution of that case.ò *quoting Bradford* 164 So. 3d at 541. Therefore, it did not matter that the period of limitations had expired for the insurer to file a direct action against the tortfeasor, the insurers were ñdeprived of their contractual rights as well as the benefit of the procedures set forth in *Lowe* and *Lambert*.ò The Court granted the insurersô writs of mandamus.

Alabama Federal Law Update

Discovery Involving the Claims File and Claims Notes
Lewis v. Amerisure Ins. Co., 2017 WL 890101 (S.D. Ala. Mar. 6, 2017).

Facts: Two days before the insuredôs home was destroyed in a fire, the homeownerôs insurer threatened to cancel the policy if an interior inspection was not completed. The insured filed a breach-of-contract and bad-faith action against the insurer, alleging that the insurer had denied coverage. During the discovery process, the insured requested the claims file, including correspondence and notes, for the insuredôs claim. Although the insurer produced the file, much of it was redacted and removed to protect information subject to the attorney-client privilege and work product doctrine. The insured moved to compel production of this information, and the insurer opposed this motion.

Issue: ***Whether the insurer could withhold from production claim materials once litigation became "imminent."***

Holding: Yes. Case law supports redacting and removing insurance claims documents from production in insurance cases when litigation is ñimminent.ò *See Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663 (N.D. Ga. 2008). The courtôs next step was to determine when litigation became ñimminent.ò The court held that litigation was not ñimminentò when the claim was made, even though the fire was considered suspicious from the beginning and, two days after the fire, the claim was referred to a special investigation unit. Therefore, the documents created during the course of the investigation were subject to production. The court then determined that, once the insurer completed its investigation of the claim and decided to explore recision of the policy, litigation became ñimminent.ò The court held that, at that point, the work-product doctrine and attorney-client privilege applied (except for one report that contained transcriptions of witness interviews recorded before the conclusion of the investigation).

Commercial General Liability Policy - Faulty Workmanship and Abandonment

Auto-Owners Ins. Co. v. Wier-Wright Enterprises, Inc., 2017 WL 1019535 (N.D. Ala. Mar. 16, 2017).

Facts: Homeowners Justin and Amy Bell alleged that they suffered damages to their home when their roof leaked during construction and after the home was built. The homeowners filed a breach-of-contract, fraud, negligence, and breach of implied warranty of habitability action against the homebuilder and a negligence and wantonness action against the sub-contractor roofer and others in state court. The homeowners also alleged that the homebuilder abandoned the construction project and did not pay sub-contractors.

Both the homebuilder and the roofer had general liability policies with Auto-Owners around the time of the construction of the home. After Auto-Owners agreed to provide a defense to the homebuilder and the roofer under a reservation of rights, Auto-Owners filed a declaratory judgment action in the United States District Court for the Northern District of Alabama regarding coverage. Neither the homebuilder nor the roofer made an appearance in this action, and the court entered partial default judgments against both parties holding that neither party would be permitted to appear and ñassert substantive positions.ò However, the court decided not to enter judgment on the merits against them until the question of insurance coverage was decided out of fairness for the homeowners. Auto-Owners filed a motion for summary judgment against the homebuilder and roofer.

Issue: ***(1) Whether Auto-Owners' CGL policy provided coverage for the faulty work of the homebuilder.***
(2) Whether Auto-Owners' CGL policy provided coverage for the faulty work of the roofer.

Holding: (1) No. The court noted that, when a homebuilder abandons the project, it is not unforseen or unintended and therefore cannot be an occurrence under the policy. *See Pennsylvania Nat. Mut. Cas. Ins. Co. v. Snider*, 607 Fed. Appx. 879 (11th Cir. 2015). Also, the court noted that, while the homebuilderôs faulty workmanship was not an ñoccurrenceò under the terms of the policy, any resultant damage to otherwise non-defective parts of the house and personal property of the homeowners could fall within the policyôs definition of an ñoccurrence.ò *See Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So. 3d 148 (Ala. 2014) (holding that ñ[w]hen the contractorôs faulty work creates a condition that in turn damages property, however, the conduct is considered an accident under Alabama law.ò)

The court found that the alleged faulty construction happened during the policy period but that, water did not damage the home and personal property until after the policy period ended. An occurrence happens when the damage occurs and not when the wrongful act happened. *U.S. Fidelity and Guar. Co. v. Warwick Development Co.*,

446 So. 2d 1021 (Ala. 1984). Therefore, the court held that the CGL policy did not provide coverage for the homebuilder, as the occurrence happened after the policy period ended. Thus, Auto-Owners did not have a duty to defend the homebuilder in the underlying action.

(2) Yes, in part. Auto-Owners argued that the roofer was not entitled to a defense because the roofer had failed to cooperate or be involved in the defense of the underlying action. Although it was undisputed that the roofer failed to cooperate and be involved in the underlying action, Auto-Owners did not present any evidence that this failure to cooperate caused any prejudice to the defense of the action. The court denied this portion of the motion for summary judgment.

Auto-Owners also argued that the roofer was not entitled to a defense because he failed to give notice of the action to Auto-Owners. Although the roofer did not personally provide notice of the lawsuit, the homebuilderôs attorney sent the rooferôs insurance agent notice of the lawsuit and the agent forwarded this information to the insurer. Auto-Owners hired an attorney to represent the roofer who filed an answer on the rooferôs behalf within three months after the second amended complaint was filed. Auto-Owners also received copies of these documents because it had already intervened in the state court case. The court held that it did not matter that the roofer himself did not provide notice, and the insurer has had ñample opportunityò to control the underlying state court action. Therefore, the court denied this portion of Auto-Ownersô motion for summary judgment.

Auto-Owners also argued that the damages to the house and personal property did not occur within the policy period. The court agreed that the homeowners reported damages well before the policy period began. However, evidence indicated that damages continued through the policy period. Therefore, the court held that Auto-Owners was required to provide a defense for the roofer for the portion of the lawsuit dealing with the times the policy period was in effect.

Homeowner's Policy - Business Exclusion
Auto-Owners Ins. Co. v. Small, 2017 958145 (N.D. Ala. Mar. 13, 2017).

Facts: An investor filed a lawsuit against the insured for inducing him to invest in a fraudulent investment scam. The insured notified Auto-Owners, his homeownerôs liability insurer, of the lawsuit more than a year after the lawsuit was filed. He said the delay in providing notice was because of his involvement in caring for his ailing wife. Auto-Owners provided a defense under a reservation of rights and filed a declaratory judgment action in the United States District Court for the Northern District of Alabama to determine the rights of the parties. Auto-Owners then filed a motion for summary judgment.

Issue: ***(1) Whether the delay in giving the insurer notice precludes coverage under the homeowner's policy.***
(2) Whether the mental anguish and emotional distress damages alleged in the underlying suit were "bodily injury" under the homeowner's policy.
(3) Whether the insured's affairs constituted "business activities" under the policy, such that the business exclusion precluded coverage.

Holding: (1) No. The policy required an insured to notify the insurer ñas soon as possibleò following bodily injury, property damage, or personal injury. However, the court held that notice provisions of policies similar to this one require that notice should be given ñwithin a reasonable amount of time in view of the facts and circumstances of the case.ò *Pharr v. Cont'l Cas. Co.*, 429 So. 2d 1018 (Ala. 1983). The court determined that there was an issue of fact as to whether the reason for the delay was reasonable and declined to grant summary judgment on this issue.

(2) Yes. The underlying complaint included allegations of mental anguish and emotional distress. The policy provided coverage for ñdamages because of or arising out of bodily injury or property damage.ò Although the policy did not explicitly state it provided coverage for mental anguish and emotional distress, Alabama courts have described mental anguish as ñbodily injury.ò *See American Economy Ins. Co. v. Fort Deposit Bank*, 890 F. Supp. 1011 (M.D. Ala. 1995). Therefore, the court held that as a matter of summary judgment, the mental anguish and emotional distress alleged in the underlying complaint constituted ñbodily injury.ò

(3) Yes. The policy excluded coverage for ñbodily injuryò arising out of a business, partnership, or joint venture ñowned or financially controlled by an insured.ò The underlying complaint alleged that the insured convinced the investor to make investments in an ñinternational trading platformò that would involve a financial investment that would create significant income for the investor. Although the insured argued that the business exclusion was ambiguous, the court disagreed. The court held the exclusion was not ambiguous and a person of ordinary intelligence would think that someone engaging in investments, presumably for a profit, is engaged in a business activity. Thus, the court awarded summary judgment in favor of the insurer.

Commercial General Liability and Umbrella Policies - Intentional Acts not "Occurrence"/Knowing Violation of Rights of Another Exclusion
Auto-Owners Inc. Co. v. McMillan Trucking, Inc., 2017 WL 992181 (N.D. Ala. Mar. 15, 2017).

Facts: Christopher Jones and Kenneth Jackson (ñthe driversò) had a trucking business that involved hauling wood chips from a mill in Alabama to Texas. Auto-Ownersôinsured, McMillan Trucking, was also in the business of hauling wood chips. In addition, the insured was responsible for assigning wood chip loads to drivers at the mill. The drivers alleged that a white employee of the insured demanded from the drivers, who

are black, a $100 cash kickback for certain loads and other white employees helped the scheme remain a secret. One of the drivers paid the fee and the other did not. When one driver reported this scheme to the insured, the insured allegedly told both drivers to leave the chip mill and were not permitted to haul any more loads from the mill. The drivers subsequently filed an action in the United States District Court for the Northern District of Alabama against the insured and several of the insuredôs employees, alleging that they were denied the right to contract under 42 U.S.C. § 1981, civil conspiracy, racketeering in civil violation of 18 U.S.C. § 1962, and unjust enrichment.

Auto-Owners provided a defense to the insured and the employees under a reservation of rights under its general liability policy. The insured also had an umbrella policy with a different insurer. Both Auto-Owners and the umbrella insurer moved for a judgment on the pleadings, or in the alternative, a motion for summary judgment.

Issue: ***(1) Whether the insurer has a duty to defend and indemnify the insured in the underlying lawsuit where the acts alleged in the underlying complaint were intentional.***
(2) Whether the umbrella insurer has a duty to defend and indemnify the insured in the underlying lawsuit where the acts alleged in the underlying complaint were intentional.

Holding: (1) No. The drivers alleged that they suffered economic harm and emotional distress caused by ñintentional acts of discrimination.ò The parties did not dispute that this type of injury fell in the scope of the definition of ñbodily injuryò in the policy. However, the parties disagreed as to whether the injuries sustained were caused by an ñoccurrence.ò The policy defined an ñoccurrenceò as ñan accident, including continuous or repeated exposure to substantially the same general harmful conditions.ò Both parties agreed that the underlying complaint only described intentional conduct. ñConduct is intentional if óthe actor desires to cause the consequences of an act of believes that the consequences are likely to result from it.ôò *Jackson Cnty. Hosp. v. Ala. Hosp. Ass'n Trust*, 653 So. 2d 233 (Ala. 1994). The court held that the acts described in the underlying complaint were intentional and that no occurrence had been alleged. Therefore, the court granted summary judgment in favor of Auto-Owners on the duty to defend and indemnify.

(2) No. Under the umbrella policy, liability coverage is provided for an injury caused by an ñincident.ò An ñincidentò was defined as either an occurrence or an offense, whichever is the basis of coverage. The court held that, because the conduct was intentional, there could be no coverage under the ñoccurrenceò section of the policy for the same reasons there can be no coverage in the CGL policy.

The court also considered whether coverage existed on an ñoffensive basisò under the Personal Injury coverage of the policy. ñPersonal injuryò was described as ñinjury . . . arising out of one or more of the following offenses: . . . [d]iscrimination or humiliation.ò However, the policy excluded coverage for personal injury ñ[c]aused by or at the direction of any insured with the knowledge that the act would violate the rights of another and would inflict personal injury . . .ò It was undisputed that the alleged acts were intentional; therefore, the court held that the insured had ñknowledge the acts would violate the rights of another and would inflict personal injury.ò The court granted summary judgment on both the duty to defend and indemnify.

Removal, Leave to Amend Complaint, Motion for Summary Judgment in UIM Case
Broadway v. State Farm Mut. Auto. Ins. Co., --- Fed. Appx. ----, 2017 WL 1149095 (11th Cir. Mar. 28, 2017).

Facts: The insured was severely injured in an automobile accident caused by another driver. After the other driverôs insurer paid the coverage limit to the insured, the insured made an underinsured motorist claim with his automobile insurer. The insured made a $25,000 demand. In response, his insurer disagreed with the amount of the claimed medical expenses and lost wages and made an initial $5,000 payment to the insured, but did not deny the claim. The insured filed a breach-of-contract, bad-faith, and fraud action against the insurer and the agent. The insurer removed the action arguing that the agent had been fraudulently joined. The insured moved to remand the case arguing that the fraud claim against the state resident agent was viable. The court denied the insuredôs motion to remand and dismissed the agent from the action. After the court denied the insuredôs motion for leave to amend the complaint to assert a fraud claim against the insurer, it granted the insurerôs motion for summary judgment on the breach of contract and bad faith claims, the insured appealed.

Issue: ***(1) Whether the district court properly denied the insured's motion to remand.***
(2) Whether the district court properly denied the insured's motion for leave to amend the complaint.
(3) Whether the district court properly granted the insurer's motion for summary judgment on breach of contract and bad faith.

Holding: (1) Yes. The basis of the insuredôs fraud claim against the agent was that the agent fraudulently represented to him that the insurer would act ñlike a Good Neighborò to him. The Eleventh Circuit agreed with the district court that the insurerôs advertising slogan constituted ñmere opinion or pufferyò and was not a ñstatement of material fact.ò Statements that are opinion or puffery cannot contain a misrepresentation of a material fact and so cannot meet the elements of a fraud claim. The district court correctly denied the motion to remand.

(2) Yes. The insured moved to add a fraud claim against the insurer and agent and a negligent procurement of insurance and fraudulent suppression claim against the agent. With regard to the fraud claim, the Eleventh Circuit held that it was too similar to the original fraud claim against the agent, relying on the insurerôs slogan. For both the negligent procurement of insurance an fraudulent suppression claims, the court held that the insured did not provide allegations for each of the elements of these claims. Therefore, the motion was correctly denied.

(3) Yes. The parties disagreed as to the amount of medical expenses and lost wages to which the insured was entitled. During the claims process, the insurer issued a $5,000 check to the insured and the insured cashed it. This check was intended to be an initial payment to the insured, but the insured then filed the action against the insurer. The Eleventh Circuit agreed with the district court and held that a breach-of-contract and bad-faith action was premature, as the insurer has not denied the claim and the investigation was ongoing. Therefore, the motion for summary judgment was properly granted.

Motion to Dismiss

Wesco Ins. Co. v. Southern Management Services, Inc., 2017 WL 1354873 (N.D. Ala. Apr. 13, 2017).

Facts: Following the loss of a 2015 Morbark Flail Chiparvestor chipper, Southern Management Services, Inc. (ñSMSò), through Raughton, filed breach-of-contract, bad-faith, and fraud claims against its insurer in a state court action. The insurer then filed the current declaratory judgment action against SMS and Raughton in federal court, asking the court to hold that the insurer did not owe coverage for the loss of the chipper. SMS and Raughton moved to dismiss arguing that the declaratory judgment action was a parallel action to the state court action filed by SMS.

Issue: ***Whether the motion to dismiss should be granted, as the declaratory judgment action is a parallel action to one in state court.***

Holding: Yes. A district court may decline to hear a declaratory judgment action when another pending action in a different court will resolve the controversy. *See Ven-Fuel, Inc. v. Dep't of the Treasury*, 673 F.2d 1194 (11th Cir. 1982). Because the claims SMS and Raughton alleged in the underlying action dealt with the same coverage issues as the declaratory judgment action, the court held that the two actions were parallel actions and dismissed the declaratory judgment action. The court cited to *Ameritas Variable Life Insurance Company v. Roach*, 411 F.3d 1328 (11th Cir. 2005) and found that dismissal of the declaratory judgment action avoided ñduplication of effort and the potential for inconsistent resultsò avoiding piecemeal resolution in two different courts. The court also noted that Alabama had a state interest in having the issues decided by the state court action because the claims involved an Alabama corporation

and exclusively Alabama state law.

Remand- Insurer Failed to Adequately Plead Jurisdiction of Plaintiff Unincorporated Association; Therefore, Federal Court Did Not Retain Jurisdiction
Church of Faith v. Hartford Cas. Ins. Co., 2017 WL 1709312 (M.D. Ala. Mar. 16, 2012) (opinion adopted in *Church of Faith v. Hartford Cas. Ins. Co.*, 2017 WL 1682541 (M.D. Ala. May 1, 2017)).

Facts: Following a property loss, an insured filed a breach-of-contract and bad-faith action against its insurer in state court. The insurer removed the case to the United States District Court for the Middle District of Alabama, based on diversity jurisdiction. The Notice of Removal was silent as to the type of legal entity Plaintiff was, the citizenship of Plaintiff, or the identity and citizenship of all the partners and members. The court entered a show cause order requiring the defendant to show cause why the action should not be dismissed ñspecifically because the citizenship of the Plaintiff is not evidenced.ò

Issue: ***Whether the action should be remanded to state court, where Defendant was unable to ascertain the identity of all members of an unincorporated association and establish their citizenship.***

Holding: Yes. The court noted that the burden was on Defendant to establish ñthe citizenship of all membersò of an unincorporated business entity. Because the insurer was unable to do so, the court could not determine whether it had jurisdiction and remanded the case to state court.

Improper Venue
Nationwide Agribusiness Ins. Co. v. Adkison, 2017 WL 1684547 (N.D. Ala. May 3, 2017).

Facts: The insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama and asked the court to hold that it did not owe coverage for alleged wind damage to poultry houses, as the insured failed to cooperate following the loss. The insured moved to dismiss or transfer the action due to improper venue arguing that because the damaged property was located and damaged in the Middle District of Alabama, the case should be transferred to that court. The insurer opposed the motion arguing that because the insurance contact was executed in the Northern District Of Alabama, the case should stay in that court.

Issue: ***Whether the motion to dismiss for improper venue should be granted where the property at issue was located in a different district.***

Holding: Yes. Venue is appropriate when the action is filed in ña judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated,ò 28 U.S.C.A.

§ 1391(b). Because the poultry farm at issue was located in the Middle District and because that property is the central focus of the lawsuit, the court held that the lawsuit should have been filed in the Middle District, where ña substantial part of the events or omissions giving rise to the claim occurredò and where ña substantial part of the property that is the subject of the action is situated.ò *See* 28 U.S.C.A. § 1391(b). The court dismissed the action without prejudice.

Uninsured Motorist Coverage-Breach of Contract/Bad Faith
Collins v. Nationwide Mut. Ins. Co., 2017 WL 1901630 (S.D. Ala. May 9, 2017).

Facts: After the insured was injured in a head-on collision, he submitted a claim to the tortfeasorôs insurer. The tortfeasor died in the collision, and the insurer of that vehicle denied coverage because the driver did not have permission to drive the vehicle. The plaintiff then made a claim to his own uninsured motorist carriers. The primary insurer paid its policy limits of $100,000. When the insured was unable to settle with his second insurer, he filed a negligence and wantonness action against the tortfeasor and breach-of-contract, bad-faith, and fraud action against the second insurer. The insurer filed a motion to dismiss all pending claims against it (breach of contract, bad faith, and fraud) arguing that those claims were not ripe.

Issue: ***(1) Whether the breach-of-contract and bad-faith claims should be dismissed, as they are not ripe and do not create a justiciable controversy.***
(2) Whether the fraud claim should be dismissed, as it is not ripe and does not create a justiciable controversy.

Holding: (1) Yes. The primary insurer paid its policy limits of $100,000, apportioning $36,239.71 for special damages (medical bills and lost wages) and $63,760.29 for general damages. The insured then made a policy limits demand of $200,000 from the second insurer for pain and suffering, mental anguish damages, and punitive damages and provided proof in the form of the accident report, an accident reconstruction report, evidence of lost wages, medical records and medical bills. The insured asserted that the wanton, aggravating conduct of the tortfeasor combined with the medical expenses, emotional distress, and pain all created a sufficient inference that the established damages were sufficient to support the policy limits demand. The court held that the insurerôs failure to pay the policy limits based on the demand was insufficient to establish a denial on the part of the uninsured motorist carrier. As a result, the breach of contract and bad faith claims were dismissed as unripe.

(2) No. The insurer failed to establish that a breach of the insurance contract is an element of the fraud claim. Therefore, the insurer had not established that the same reasoning would apply to support a dismissal of the fraud claim on the basis that it was not ripe.

First Party Bad-Faith Claims - Statute of Limitations; **Enhanced Obligation of Good Faith in Defense Context**

Sabbah v. Nationwide Mut. Ins. Co., 2017 WL 1953432 (N.D. Ala. May 11, 2017).

Facts: In 2007, after buying alcohol at the 14th Street BP, a minor drove under the influence and was in an accident. One teenager was killed and three others were injured. The families of these minors filed actions against the 14th Street BP, Nineteenth Street Investments (ñNineteenthò), Sabbah Brothers Enterprises, Inc. (ñSBEò) and the owner of SBE, Ibrahim Sabbah (ñSabbahò). SBE owned the property on which 14th Street was located, and the store was leased to Nineteenth from SBE. SBE is the sole shareholder of Nineteenth. A jury returned a verdict in excess of $15 million against Nineteenth in 2013 and a separate bench trial was scheduled for SBE and Sabbah. Following the second trial, the court entered a $15,150,000 judgment against Sabbah, SBE and Nineteenth in 2013.

Nationwide Mutual Fire Insurance Company (ñNMFICò) and Nationwide Mutual Insurance Company (ñNMICò) provided liquor liability coverage and business owners liability coverage respectively for SBE. The NMFIC policy listed SBE d/b/a 14th Street BP. SBE, 14th Street BP, Sabbah and Nineteenth all requested a defense and indemnity for each of the lawsuits involving the minors. An attorney retained to defend the case, wrote to the adjuster at Nationwide Insurance Company to confirm the assignment of the defense of SBE, but it did not clarify which insurer assigned the defense. In 2007, SBE and Sabbah received a letter from NMFIC and NMIC that denied coverage for the claims but offered a ñcourtesy defenseò to SBE on behalf of both insurers. When the families demanded a settlement that was within the policy limits of the policies, the insurers declined to provide any funds for a settlement.

Nineteenth Street filed for Chapter 7 Bankruptcy in 2011. In 2015, the trustee for the bankruptcy estate of Nineteenth Street, filed a negligence, wantonness, breach-of-contract, and bad-faith action against NMIC, the insurance agent, and the insurance agency. The court dismissed the action in 2016, as the period of limitations had run on all of the claims.

Sabbah and SBE d/b/a 14th Street BP filed a negligence, wantonness, breach-of-contract, bad-faith, breach of enhanced duty and obligation of good faith, and declaratory judgment action against NMFIC and NMIC in September of 2016. The insurers moved to dismiss the action for failure to state a claim upon which relief may be granted.

Issue: ***(1) Whether the bad-faith claims are due to be dismissed, as the bad-faith claims are first party bad-faith claims and the period of limitations has run.***
(2) Whether the negligence and wantonness claims are due to be dismissed, as the period of limitations has run.

(3) Whether the breach-of-contract claims are due to be dismissed, as the period of limitations has run.
(4) Whether the enhanced duty and obligation of good faith are subject to the motion to dismiss
(5) Whether the declaratory judgment claims should be dismissed, as the period of limitations has run.

Holding: (1) Yes. The court held that ñwhen an insurer expressly disclaims coverage and the Plaintiffs, not the insurers, control all aspects of the underlying litigation, the bad faith claims are first-party claims.ò In 2007, the insurers denied coverage on SBE and Sabbahôs claims and offered a ñcourtesy defenseò to SBE. In this denial letter, the insurers told SBE and Sabbah that they would be ñin chargeò of their own defense and be responsible for settlement offers and judgments. In 2009, the insurers sent Sabbah another denial letter that contained the same language. Because the allegations against the insurers focused on the insurersô first coverage denial, the court concluded that the asserted bad-faith claims were based solely upon a ñrefusal to honor insurance benefits.ò Since that refusal was first made in 2007, the statue of limitations for bad-faith claims is two years, and this action was filed in 2016, the claims were untimely and were dismissed.

(2) Yes. The Alabama Supreme Court held that the same two-year statute of limitations that applies in first-party bad-faith actions also applies in negligence and wantonness actions. *State Farm Mut. Auto. Ins. Co. v. Hollis*, 554 So. 2d 387 (Ala. 1989). Therefore, statute of limitations on the negligence and wantonness claims also began to run in 2007 (or at the latest in 2009) when coverage was denied. Since negligence and wantonness claims must be filed within two years of the occurrence, the period of limitations had run for these claims and they were also dismissed.

(3) No. The court acknowledged that the statute of limitations is six years for breach-of-contract claims. The court declined to grant the motion to dismiss for the breach of contract claims because the insurers did not cite case law to support their position. The court ordered further briefing for these issues and denied the motion to dismiss on these claims without prejudice.

(4) Yes. The court determined that, while the breach of the enhanced obligation of good faith claim was a contract claim and also subject to a six-year statute of limitations, the facts of the case warranted dismissal of these claims as well. The court noted that no breach of the enhanced obligation of good faith had occurred here because the insurer never controlled the defense of the underlying case. Instead, the insurer had denied coverage, offered a gratuitous defense that the insured accepted, and informed the insured that it, and not the insurer, was responsible for the conduct of the defense and settlement of the case. The court found that the criteria for establishing the enhanced obligation of good faith ñnecessarily assume that the insurer

is controlling the investigation, the defense of the lawsuit, and settlement negotiations.ò *Aetna Cas & Sur. Co. v. Mitchell Bros.,* 814 So.2d 191, 196 (Ala. 2001). As a result, the court dismissed the enhanced obligation of good faith claims with prejudice.

(5) No. The insurers did not provide an argument to support their motion to dismiss the declaratory judgment counts. Therefore, this part of the motion is denied.

Motion to Dismiss- Intentional Infliction of Emotional Distress and Outrage
Philippou v. American Nat'l Prop. & Cas. Co., 2017 WL 2129900 (M.D. Ala. May 16, 2017).

Facts: The insureds filed a breach-of-contract, intentional infliction of emotional distress or outrage, bad-faith, negligence, recklessness and wantonness, and gross negligence action against the insurer arising out of a property damage claim to their home. The insurer filed a motion to dismiss for several claims, including intentional infliction of emotional distress and outrage, and the insureds moved to amend their complaint. After the complaint was amended, the insurer again filed a motion to dismiss for the intentional infliction of emotional distress and outrage claims arguing that both claims failed to state a claim upon which relief can be granted.

Issue: ***Whether the insured's intentional infliction of emotional distress and outrage claims should be dismissed.***

Holding: Yes. The court noted that both torts require the defendant to engage in barbaric or extreme and outrageous conduct. This type of behavior must be more extreme than simply delaying payment of the insurance claim. *See Soti v. Lowe's Home Centers, Inc.*, 906 So. 2d 916 (Ala. 2005). The court noted that the insuredsôallegations were not much more than ña formulaic recitationò of the elements necessary to establish an intentional infliction of emotional distress and outrage claim. The amended complaint failed to include factual allegations that supported the claims. Thus, the court granted the insurerôs motion to dismiss.

Summary Judgment- Commercial Environmental Insurance Policy
Heartland Catfish Co. v. Navigators Specialty Ins. Co., 2017 WL 2116587 (S.D. Ala. May 15, 2017).

Facts: The insurer, a business that bought fat oil and grease (ñFOGò) and turned it into fuel, purchased commercial environmental policies from the insurer. During the policy periods, the insured leased land and a plant from Heartland Catfish Company (ñHeartlandò) and the insured and Heartland executed a FOG Extraction Agreement. The insured purchased catfish waste from catfish farms and used cooking oil from gas stations and restaurants and transported these items to the Heartland plant. Transferring the waste and oil was messy and, although unintentional, the waste and

oil spilled on the property. The insured tried to clean and contain the spills. After the insured ended operations at the plant, Heartland cleaned up the grease, fat, and oil and removed and disposed of the insuredôs equipment.

Heartland filed a breach of lease agreement action against the insured. In an amended complaint, Heartland also alleged negligence and/or wantonness due to the property damage and diminution in value of the property from the environmental damage caused by the spills. The court awarded a default judgment to Heartland including $859,205.53 in damages. Heartland then filed a declaratory judgment action and asked the court to require Navigators, the insuredôs insurer, to pay the judgment under the provisions of a Commercial Environmental policy. Heartland also asserted a breach-of-contract claim. Navigators filed for summary judgment.

Issue: ***Whether the commercial environmental policies provided coverage for the claims under "contractors jobsite" coverage or "transportation activities" coverage.***

Holding: No. The parties agree that Pennsylvania law applies. Coverage A under the environmental policy provides coverage for claims caused by a ñpollution incidentò resulting from ñcontracting operations.ò ñContracting operationsò is defined as ñthose operations or activities, conducted by you or on your behalf that you have been retained by a third party to perform at a jobsite.ò ò ñJobsiteò ñmeans a location where contracting operations are performed, but does not include,ò ñany insured site(s), waste disposal facility(ies) or non-owned location(s).ò The Heartland plant was an insured site under the first two policies, and not the third, only because the insured was not operating there any longer. Because a ñjobsiteò does not include the Heartland plant, and that is where the damage occurred, the damage was not caused by ñcontracting operations.ò Therefore, Coverage A does not apply.

Coverage B provides coverage when the loss was caused by property damage or environmental damage, and this damage ñ1) occurred óduring the policy period,ô 2) was ócaused by a pollution incident resulting from transportation activities,ô and 3) was óboth unexpected and unintended from the standpoint of the insured.ò ñUnexpectedò ñimplies a degree of fortuity.ò *IDS Prop. Cas. Ins. Co. v. Schonewolf*, 111 F. Supp. 3d 618 (E.D. Pa. 2015). The court held that Coverage B did not create coverage, as the property damage and environmental damage was not unexpected. This is because the insured was aware that transferring the oil and waste off the trucks was messy, happened regularly and was unavoidable. Therefore, the insured is not entitled to coverage, and so Heartland is not entitled to insurance benefits. The court granted summary judgment in favor of Navigators.

Consent to Removal
Tate v. Assurant Specialty Prop., 2017 WL 2274332 (M.D. Ala. May 24, 2017).

Facts: The plaintiff filed an action against ñAssurant Specialty Property AKA Standard Guaranty Insurance Companyò (ñAssurantò and ñStandardò) in state court, and Assurant removed the action. In its notice of removal, Assurant attached the policy declarations that listed the coverage limit as $372,000. Although the declarations page identified Standard as the insurer, Assurant claimed that no other defendant besides Assurant has been named and so no other defendant needed to consent to removal. Assurant stated that it owned Standard, and that Assurant was a Delaware corporation with the principal place of business in New York. Although Standard was served, Standard had not made an appearance at the time of removal. The plaintiff moved to remand arguing that the removal was flawed because Standard had not consented.

Issue: ***Whether the action should remanded to state court, as Standard did not provide consent to removal.***

Holding: Yes. The court held that, because Standard had been served, it was required to give its consent to removal. The court held that Assurant may not give consent to remove the action on Standardôs behalf. *See Lampkin v. Media General, Inc.*, 302 F. 2d 1293 (M.D. Ala. 2004) as there can be no implied consent. Since Standard did not give its consent, the action is due to be remanded to state court.