Spring 2018 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 *Safeway Ins. Co. of Alabama, Inc. v. Thomas*, --- So. 3d ----, 2018 WL 1548685 (Ala. Ct. App. Mar. 30, 2018), *Auto-Owners Inc. Co. v. Morris*, 2018 WL 1535216 (N.D. Ala. Mar. 29, 2018), *Cole v. Owners Ins. Co.*, 2018 WL 1535236 (N.D. Ala. Mar. 29, 2018), and *Balentine v. Direct Gen. Ins. Co.*, 2018 WL 1876351 (N.D. Ala. Apr. 19, 2018). In *Thomas*, the Alabama Court of Civil Appeals held that the trial courts erred by determining that the unlicensed driver exclusion violated Alabama public policy. Next, in *Morris*, the Northern District of Alabama concluded that reformation of an insurance contract was inappropriate, as the insurer did not intend to insure a sole proprietorship. In *Cole*, the Northern District of Alabama determined that the insureds were entitled to summary judgment for their breach-of-contract claim for the appraisal provision of the insurance contract, as the insuredsô breach was immaterial and the disagreement over the extent of the damage fell under the ñscope of lossò and was not a value dispute. Finally, in *Balentine*, the Northern District of Alabama declined to grant summary judgment in favor of the insurer and rescind the insurance policy, as the insurer failed to prove that the insured made a material omission in the insurance application.

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

Res Judicata in a Class Action

Baldwin Mut. Ins. Co. v. McCain, --- So. 3d ----, 2018 WL 1443878 (Ala. Mar. 23, 2018).

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. The court granted the insuredôs class-certification, and the insurer appealed. The Alabama Supreme Court reversed the trial courtôs certification order, as the class definition in the insuredôs brief following the certification hearing was different from the class definition in the original complaint. The insured filed an amended complaint and made the language identical to the brief. After the court denied the insurerôs motion for summary judgment, the court granted class certification. The insurer appealed.

Issue: ***Whether the trial court's order granting class certification should be reversed, as***

the insured's claims are barred by res judicata.

Holding: Yes. Three months after the insured filed this action against the insurer, the insurer filed an application for temporary restraining order, motion for a preliminary injunction, and complaint for declaratory judgment against the insured as well as 121 other insureds. The insured filed a breach-of-contract counterclaim against the insurer and alleged that the insurer failed to pay the policies in full. The court later granted summary judgment in favor of the insurer for the breach-of-contract counterclaim the insured alleged.

Res judicata exists where there is ñ(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions. *Equity Res. Mgmt. Inc. v. Vinson*, 723 So. 2d 634 (Ala. 1998). Class action certification is not permissible when res judicata bars the purported class representativeôs claims. *Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508 (3rd Cir. 1976). Since the same parties were in the other action, the same claims were in both actions, the other action ended with a summary judgment in favor of the insurer, and the other court had subject matter jurisdiction, the insureds claims are barred by res judicata.

The insured attempted to dismantle the insurerôs argument for res judicata with procedural arguments. Although the insured argued that the insurer should not be able to appeal on the grounds of res judicata, as the insurer made the same argument in a summary judgment motion that was denied, the court was unconvinced. Since an order denying summary judgment is not appealable, but the order granting class certification is appealable, the Court thought that this situation was unusual but permissible.

The court did not think that the fact that this action was filed before the other action eliminated subject matter jurisdiction over the other action. There is a difference between the ñproper exercise of subject-matter jurisdiction with the existence of subject-matter jurisdiction.ò Exercise of subject-matter jurisdiction focuses on the limits of power a court has over a case, but the existence of subject-matter jurisdiction focuses on whether the court has any power over the type of case.

Finally, the insured argued that Alabamaôs abatement statute, which prevents the prosecution of two actions in Alabama at the same time for the same cause and against the same party, applied to prevent res judicata. Ala. Code Ann. § 6ï 5ï 440. However, this statute does not eliminate a courtôs jurisdiction over the action that is filed second. It merely requires a defendant to use the other action as a defense in a motion to dismiss. *Washington Mut. Bank. F.A. v. Campbell*, 24 So. 3d 435 (Ala. 2009). This insured did not raise this defense in the other action, and so she waived this defense in the other action. *Regions Bank v. Reed*, 60 So. 3d 868 (Ala. 2010).

Therefore, the action is reversed and remanded.

Exclusion to UIM Coverage
Safeway Ins. Co. of Alabama, Inc. v. Thomas, --- So. 3d ----, 2018 WL 1548685 (Ala. Ct. App. Mar. 30, 2018).

Facts: Calvin Jones drove through a stop sign and collided with the vehicle in which Martez Thomas was a passenger. The vehicle in which Thomas was a passenger was owned by Safewayôs named insured, but was being driven at the time by an unlicensed driver. Thomasôinjuries exceeded Jonesôautomobile insurance coverage, and Thomas made a claim with Safeway for UIM coverage. Safeway denied coverage based on an ñunlicensed driverò exclusion, and Thomas sued. The trial court ultimately entered summary judgment in favor of Thomas, and against Safeway, finding that the ñunlicensed driverò exclusion violated Alabama Code § 32-7-23(a) (ñthe UIM statuteò) and public policy. Safeway appealed to the Alabama Court of Civil Appeals.

Issue: ***Whether an "unlicensed driver" exclusion in an automobile liability policy violates Alabama's UIM Statute and public policy.***

Holding: No. The policy specifically excluded an unlicensed driver as a ñnon-covered person.ò The policy prohibits coverage for anyone if the accident involves a non-covered driver of the insured vehicle. The Court noted that contracts may not be held unenforceable for violating public policy unless the ñillegality is clear and certain.ò *Milton Const. Co. v. State Hwy. Dept.*, 568 So. 2d 784 (Ala. 1990). Moreover, the UIM statute does not require insurers to provide coverage for all ñinnocentò individuals who are injured by an UM or UIM driver. Alabama courts have upheld exclusions from UIM coverage, and this provides enough evidence that exclusions from UIM coverage do not violate public policy. *See McCullough v. Standard Fire Ins. Co. of Alabama*, 404 So. 2d 637 (Ala. 1981) and *Safeway Ins. Co. of Alabama v. Hambrick*, 723 So. 2d 93 (Ala. Ct. App. 1998). Therefore, the trial court incorrectly granted summary judgment in favor of Thomas, and the Court of Appeals reversed the decision.

Compulsory Counterclaim- Coverage Issues
Ex parte Nautlius Ins. Co., --- So. 3d ----, 2018 WL 1548189 (Ala. Mar. 30, 2018).

Facts: Terry Williams was allegedly injured on the insuredôs property and filed an action to recover damages for his injuries in state court. The insuredôs commercial general liability insurer agreed to provide a defense under a reservation of rights. Over a year after the lawsuit was filed, the insurer filed a declaratory judgment action in the United States District Court for the Southern District of Alabama asking the court to hold that the insurer had no duty to defend or indemnify the insured. The insured moved to dismiss or stay the action, and no ruling has been made on this motion. Three months after the insurer filed the federal declaratory judgment action, the

insured filed a cross-claim in the original state court action against the insurer and the insurance agent for breach of contract, bad faith, fraud, negligence, and a declaratory judgment claim asking the court to hold that the insurer and agent are required to defend and indemnify the insured. Later, the insured amended the cross-claim to clarify that only the negligence and fraud claims are alleged against the agent. The insurer and the agent filed motions to dismiss, and the insured opposed the motions. The trial court denied both motions and both parties filed petitions for writs of mandamus to the Alabama Supreme Court.

Issue: ***Whether an insured's cross-claims in a state court case should be dismissed because they should have been filed as compulsory counterclaims in a previously filed federal case addressing the same coverage issues.***

Holding: Yes. Alabama Code Section 6-5-440 prohibits two actions to simultaneously exist against the same party, and the defendant can demand that the plaintiff pick one case the plaintiff wishes to dismiss. Federal actions are included in this statute. *Ex parte University of South Alabama Found.*, 788 So. 2d 161 (Ala. 2000). A compulsory counterclaim is an ñactionò as it is described in Alabama Code Section 6-5-440. According Section 6-5-440, if the insuredôs claims against the insurer in the federal action are compulsory counterclaims, the insured is a ñplaintiffò in the federal action. *See Ex parte Norfolk S. Ry.*, 992 So. 2d 1286 (Ala. 2008). Therefore, the statute does not allow the insured to assert its claims against the insurer in a later-filed state court action. *See Ex parte Brooks Ins. Agency*, 125 So. 2d 706 (Ala. 2013).

A compulsory counterclaim has a logical relationship between the counterclaim and the original claim. Courts should consider if 1) the trial in the original claim would ñavoid a substantial duplication of effortò or 2) both claims ñarose out of the same aggregate core of operative facts.ò *Ex parte Canal Ins. Co.*, 534 So. 2d 582 (Ala. 1988). The federal action and the cross-claim revolve around the rights and obligations of both parties in the insurance contract. Therefore, both actions ñarose out of the same aggregate core of operative factsò and maintaining both claims would create a ñsubstantial duplication of effort.ò The Court granted the insurerôs petition for writ of mandamus, and ordered the trial court to dismiss the insuredôs cross-claims in favor of the pending federal court declaratory judgment action.

Alabama Federal Law Update

Motion to Dismiss Insured's Crossclaims against Claimant in Coverage DJ for Lack of Jurisdiction

Acadia Ins. Co. v. Southernpointe Group, Inc., 2018 WL 529951 (N.D. Ala. Jan. 24, 2018).

Facts: The insured contracted with an individual and Encore Tuscaloosa, LLC (collectively ñEncoreò) to develop a restaurant chain. After the relationship soured, Encore filed

a lawsuit in state court against the insured, alleging numerous claims, including breach-of-contract, fraud, breach of fiduciary duty, and negligence. The insuredôs CGL insurer agreed to defend the insured under a reservation of rights, and then filed this declaratory judgment action regarding coverage in the United States District Court for the Northern District of Alabama. The insurer named Encore as a defendant as a necessary party for purposes of complete relief. The insured not only filed an Answer to the insurerôs complaint, but also filed a cross-claim against Encore for fraud. Encore filed a motion to dismiss the cross-claim for lack of jurisdiction.

Issue: ***Whether the insured's cross-claims against the underlying claimant should be dismissed for lack of jurisdiction.***

Holding: Yes. The claims in the declaratory judgment action are limited to coverage and any contractual obligations the insurer has to the insured with regard to underlying litigation. By contrast, the insuredôs cross-claims against Encore allege fraud. The insured did not file a claim against Encore in the underlying lawsuit. Federal Rule of Civil Procedure 13(g) requires that cross-claims have a logical relationship to the declaratory judgment request that is the original issue in the action. The fraudulent acts Encore allegedly committed against the insured are not relevant to ñthe main claim over which the court has an independent basis of federal jurisdiction.ò *Rever Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970). Therefore, the district court dismissed the insuredôs cross-claims.

Subject Matter Jurisdiction-Amount in Controversy
Cowart v. GEICO Ins. Co., 2018 WL 669700 (S.D. Ala. Feb. 1, 2018).

Facts: The insured filed a negligence and wantonness action in state court against an individual who ran over her with his vehicle and injured her leg. After the insured settled with the individual for $100,000, the insured amended the complaint and added her automobile liability insurer to recover underinsured motorist benefits. The insurer removed the action to the United States District Court for the Southern District of Alabama, and the insured moved to remand the action to state court.

Issue: ***Whether the UM carrier could meet the federal-court amount-in-controversy requirement.***

Holding: No. The policy limit for UM benefits listed on the policy was greater than $75,000; however, the complaint did not request a specific amount of damages against the insurer. Therefore, the court held that it was unclear whether the damages will be greater than $75,000. The insurer argued that the $100,000 settlement should not be factored into the amount in controversy, but the court disagreed. Relying on *Reed v. State Farm Mutual Automobile Insurance Company*, 2007 WL 2230586 (S.D. Ala. 2007), the court held that the total damages the insured seeks must be greater than

$75,000, independent of the $100,000 settlement, for the amount in controversy to be satisfied. Because the plaintiffôs medical expenses were less than $25,000, the amount of her lost income was unknown, and the insurer offered no way to measure the dollar value of her pain and suffering and mental anguish. Accordingly, the court held that the amount in controversy was not met. The district court remanded the case to state court.

Commercial Property Policy- Insurer's Performance and Insured's Nonperformance
Garcia v. Certain Underwriters at Lloyd's, London, 2018 WL 734680 (S.D. Ala. Feb. 6, 2018).

Facts: Following a tornado that damaged a warehouse, the insured filed a claim with his commercial property insurer. The insurerôs field adjuster prepared an estimate for damage that was less than the deductible, and the insurer sent a declination letter to the insured for that reason. Over three years later, the insuredôs counsel sent the insurer a letter with two estimates, both of which were far greater than the deductible. These estimates were prepared more than three years after the claim was denied. The estimates made no reference to the storm that caused damage years before, and one of the estimates included costs for constructing a kitchen in the warehouse. The insurer did not pay the additional amounts, and the insured sued the insurer for breach of contract. The insurer then filed a motion for judgment on the pleadings and motion for summary judgment.

Issue: ***(1) Whether the insurer's motion for judgment on the pleadings should be granted, as the insured failed to properly plead the second element of a breach-of-contract claim.***
(2)Whether the insured failed to perform under the contract such that the insurer is entitled to summary judgment.
(3) Whether the insurer proved its performance under the contract such that the insurer is entitled to summary judgment.

Holding: (1) No. Although the insurer argued that the insured failed to properly plead that the insured performed under the contract, the insured argued that Federal Rule of Civil Procedure 9(c) does not require great detail in the pleadings. Federal Rule of Civil Procedure 9(c) states that plaintiffs must ñallege generally that all conditions precedent have occurred or been performed.ò Although the court acknowledged that federal courts disagree about the interpretation of Rule 9(c), the court held that the law interpreting this rule was too scarce to grant a motion for judgment on the pleadings on this matter.

(2) No. The insurer argued that the insured failed to perform on the contract because the insured did not disagree with the denial letter for over three years. However, the court noted held that a question of fact existed as to whether the insured complied with all the conditions to the policy. The insured notified the insurer of the damage

immediately after the tornado, the insured allowed the insurer to inspect the property, and no information indicates that the insured failed to cooperate with the insurer. The district court held that, because the insured is only required to ñsubstantially performò under the contract, and not required to have ñexact performance,ò a genuine issue of material fact existed as to whether the insured substantially performed under the contract. *See Superior Wall and Paver, LLC v. Gacek*, 73 So. 3d 714 (Ala. Ct. App. 2011).

(3) Yes. In order to prevail on a breach-of-contract claim, the insured must show that the insurer failed to perform under the contract. Although the insured argued that the denial letter is enough evidence of nonperformance, the court disagreed. The estimates the insured submitted to the insurer over three years after the denial did not appear to have a connection to the original tornado damage, as the estimates do not contain any reference to the tornado. Because the district court found that there was no admissible evidence establishing a dispute over the amount the insured should receive for the tornado damage, the court granted summary judgment in favor of the insurer.

Commercial Lines Policy- Request for Admissions and Summary Judgment Motion
National Fire & Marine Ins. Co. v. Wells, 2018 WL 1305624 (N.D. Ala. Mar. 13, 2018).

Facts: Following a snowstorm, the insured filed a claim with his commercial lines insurer after his poultry houses were damaged. The insurer hired an engineer to inspect the buildings and determine the cause of damage. When the engineer concluded that the damage was not caused by a snowstorm but, rather, by wear and tear, the insurer denied the claim. The insured requested a review of the decision, and, after the insurer reviewed the decision and maintained its denial, the insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, asking the court to find that no coverage existed for the claim. The insurer served the insured with requests for admission, to which the insured failed to timely respond. The insurer then filed a motion for summary judgment.

Issue: ***Whether the evidence before the court established that the causes of loss were wear and tear, and weight of snow and ice on a building over 15 years old, which were not covered under the policy.***

Holding: Yes. Based on the information in the admissions and the insurerôs evidentiary submissions, the court concluded that no evidence indicated the insured suffered a direct physical loss or damage during the policy period. The policy excludes damage resulting from ñwear and tear.ò One admission states that any damage to the property was caused by wear and tear, and the insurerôs engineer also concluded that any damage to the property was from wear and tear. The policy also excluded coverage caused by the weight of snow, ice, or sleet for animal confinement on buildings that

are more than 15 years old. The admissions established that the buildings were greater than 15 years old. Therefore, no coverage existed for the insured, and the court granted summary judgment.

CGL Policy- Error or Omission Exclusion
AIX Specialty Ins. Co. v. H&W Tank Testing, Inc., 2018 WL 1378521 (M.D. Ala. Mar. 19, 2018).

Facts: While driving a propane tanker truck, Bobby Sullivan lost control and crashed, causing the propane tank to puncture and explode. Sullivan and his wife filed an action against the insured, the company that performed testing on the truck, in state court for negligence, seeking to recover damages for serious burns he sustained in the accident. The insured requested defense and indemnity from its insurer, but the insurer denied coverage based on an errors and omissions exclusion. The insurer then filed this action in the United States District Court for the Middle District of Alabama, asking the court to declare that it did not owe coverage in the underlying action. Both parties moved for summary judgment, and the Magistrate Judge recommended that the insurerôs motion for summary judgment should be granted and the insuredôs motion for summary judgment should be denied.

Issue: ***Whether the errors and omissions exclusion in a CGL policy excluded coverage.***

Holding: Yes. The exclusion excludes coverage for bodily injury or property damage arising out of ñ[a]n error, omission, defect or deficiency in [a]ny test performed; or [a]n evaluation, a consultation[,] or advice given[] by or on behalf ofò the insured.

The Sullivans argued that the Alabama statute requiring insurance coverage for propane tank trucks created a public policy situation that prohibited the application of the exclusion, as the policy could not protect the individuals the statute seeks to protect. The court, however, held that the statute merely requires those who wish to work with liquefied petroleum gas to seek insurance coverage, and it does not require a specific type of coverage. Moreover, the statute does not dictate what exclusions an insurer can or cannot include in such policies. *See* Ala. Code § 9-17-105(d). Therefore, the exclusion unambiguously excluded coverage, and no Alabama statute overrode this determination. The court granted the insurerôs motion for summary judgment, and denied the insuredôs motion.

Reformation of the Insurance Contract
Auto-Owners Inc. Co. v. Morris, 2018 WL 1535216 (N.D. Ala. Mar. 29, 2018).

Facts: While Brian and Cherise Morris were riding a motorcycle that Ms. Morris owned, they were injured when another vehicle collided with them. The other vehicleôs driver was at fault, but his insurance did not provide enough coverage for their injuries. Mr. Morris made a claim with the automobile insurer for his business ñB&C Industriesò

for underinsured motorist (ñUIMò) benefits. When the insurance policy was issued, the business was a sole proprietorship. However, Mr. Morris told the agent B&C Industries was a partnership. Before the accident, the business had been designated as an LLC, and the agent provided notice to the insurer of the change.

The insurer filed a declaratory judgment action and asked the court to hold that no coverage exists for the Morrises. The Morrises filed counterclaims alleging breach of contract and contract reformation. They also filed third-party claims against their agent, alleging that the agent negligently or wantonly told the insurer to change the named insured to BC Industries, LLC. The insurer and agent moved for summary judgment and the Morrises opposed the motions.

Issue: ***1) Whether the policy can be reformed and allow an individual to be named instead of the business.***
2) Whether the Morrises have coverage under the Comprehensive Automobile Liability endorsement.

Holding: 1) No. A sole proprietorship has the same legal rights as the individual who owns the business. *Carolina Cas. Ins. Co. v. Williams*, 945 So. 2d 1030 (Ala. 2006). A limited liability company has a separate legal identity from its owners. Ala. Code Ann. § 10A-5A-1.04. The parties agree that, if the policy lists a sole proprietor as the named insured, the policy named an individual. However, if the policy lists a LLC as the named insured, this is not an individual. Reformation can be used to change a contract to include the real intent between the parties and create the ñtrue agreement.ò *Highlands Underwriters Ins. Co. v. Elegante Inns, Inc.*, 361 So. 2d 1060 (Ala. 1978). There is no evidence that the insurer intended to insure a sole proprietorship. Instead, Mr. Morris told the agent, who told the insurer, that B&C Industries was a partnership. Because the insurer and Mr. Morris did not have a meeting of the minds that B&C Industries was a sole proprietorship, a reformation is not warranted.

2) No. The motorcycle is not listed in the declarations. The Morrises argued that the Comprehensive Automobile Liability endorsement provided coverage to ñany automobile where there is liability coverage.ò The policy excludes coverage for the insuredôs employees if the employee owns the vehicle. Because the Morrises were employees of B&C Industries, LLC and Mrs. Morris, a member of Mr. Morrisô household, owned the motorcycle, the policy excluded coverage.

Appraisal/Bad Faith in a Fire Loss
Cole v. Owners Ins. Co., 2018 WL 1535236 (N.D. Ala. Mar. 29, 2018).

Facts: The insureds sought coverage for damage to their insured dwelling and personal property suffered as a result of a fire. The insurer inspected the property and determined that the RCV of the dwelling damage was $46,551.74 with an ACV of

$34,006.20. The insurer issued payment of the insureds of the ACV amount on the dwelling.

With regard to the personal property claim, the insurer hired ServiceMaster to assess the extent of the damage. ServiceMaster determined that there were 13 items of personal property in the home that could be salvaged. The insureds then hired a third party-consultant, The Howarth Group, to perform an evaluation of the loss on their behalf who determined that the ACV of the damage to the dwelling was were $164,458.19 ACV. Ultimately, after restoration efforts were made, the insureds disputed that twelve of the items could be restored and were, in fact, due to be replaced. The insured demanded appraisal on the dwelling claim.

In response, the insurer stated that appraisal was premature. Owners included a second ñproof of lossò with its response and gave the insureds another thirty days to complete the proof. The insureds completed the proof, identifying an amount on the dwelling claim, but leaving the personal property and additional living expenses claim open.

The insurer responded and told the insureds that it believed they were claiming damages for items that were not damaged. In addition, the insurer rejected the appraisal demand, as the ñcoverage, scope, [and] amount of lossò had yet to be agreed upon and so determining the value of the loss was not yet appropriate.

Subsequently, a new adjuster inspected the home and issued a supplemental payment on the dwelling based on an increase in the RCV to $57,458.10 and ACV to $43,227.15. The insureds responded and agreed to accept the supplemental check as a partial payment, continued to dispute the value of the dwelling loss and demanding appraisal. The insurer again rejected appraisal reiterating that it continued to dispute the scope and coverage of the loss.

Two weeks later, the insureds provided their contents inventory and claim valuation. It was 43 pages long and was for $102,660.86 RCV or $88,563.44 ACV. The insurer continued to maintain that it would not consider an appraisal until coverage disputes were resolved, as the insureds possibly misrepresented whether the loss was covered and the insureds failed to timely submit the inventory. After the insureds sat for an EUO, the insurer stated that the amounts claimed on the ñproof of lossò might not be correct and so the insurer could not accept the ñproof of lossò until they received more information. The insureds filed an action shortly thereafter for breach of contract, bad-faith, misrepresentation, suppression, and deceit, and the insurer filed a counterclaim alleging breach of contract, fraud, spoilation, recovery of the amounts paid to the insureds, and a declaratory judgment action asking the court to find there is no liability for additional living expenses, debris removal, and no additional liability under the policy. Both parties filed for summary judgment.

Issues: ***1) Whether the insureds were entitled to summary judgment for their breach-of-contract claim for the appraisal provision in the policy. 2) Whether the insureds engaged in fraud, misrepresentation, and spoilation and thus breached the terms of the insurance contract.***

Holding: 1) Yes. Neither party disputed that the fire was a covered cause of loss. The insurer argued that appraisal was not appropriate because: (a) the insureds failed to satisfy their post-loss obligations which were pre-conditions to coverage; and (b) because any dispute related to the extent of the damage was a dispute as the ñscope of the lossò as opposed to ñvalueò and was not appropriate for appraisal based on *Rogers v. State Farm Fire & Cas. Co.,* 984 So.2d 382 (Ala. 2007).

The Court rejected the insurerôs first argument finding that the insureds had satisfied their obligations under the policy by providing documentation for the loss and sitting for examination under oath. The Court found that the insureds failure to provide a sworn proof of loss within the prescribed time, while it was a breach of the conditions, under these circumstances, was not a material breach.

The Court also rejected the insurerôs second argument that the policy did not require the insurer to enter into the appraisal process because the partiesô disagreement was over the extent of the of the damage to the real and personal property were ñscope of lossò and not value disputes. The Court noted the *Rogers* opinion and determined that because there was no dispute as to the *cause* of the disputed losses, the ñextent of loss disputes fall squarely within insurance appraisal provisions.ò The Court held that, while the insurer had no obligation to engage in the appraisal process until the insured complied with the pre-conditions by submitting the sworn proof of loss and the accompanying inventory, once the insuredôs had complied with the insurerôs requests for information, the insurer ñno longer had any legitimate excuse not to act on the [insuredsô] claim.ò

2) No. The insurer argued that the insureds engaged in fraud and breached the policy by submitting false values for items in their claim. Specifically, the insurer argued that the insured committed fraud by claiming that their furniture could not be salvaged and that the entire roof had been damaged, thereby increasing the amount of their claim above the insurerôs valuation of the loss. The court denied the insurerôs motion for summary judgment on the fraud counterclaim holding that representations of value are merely representations of opinion and not of fact under Alabama law.

Negligence, Breach of Fiduciary Duty and Fraud in Homeowner's Policy
Pickett v. State Farm Fire and Cas. Co., 2018 WL 1609634 (N.D. Ala. Apr. 3, 2018).

Facts: Following a fire that destroyed her house, the insured submitted a claim to her homeownerôs insurer. The insurer made payment for the claim, but the insured was

not satisfied with the amount paid. She filed an negligence, breach of fiduciary duty, misrepresentation, fraud, and deceit action against the insurer state court, and the action was removed to the United States District Court for the Northern District of Alabama. The insurer filed a motion to dismiss on the negligence, breach of fiduciary duty, and fraud claims, and the insured opposed the motion.

Issue: ***Whether the insured could maintain a negligence claim and a breach of fiduciary duty claim against her property insurer.***

Holding: No. An insured in Alabama cannot maintain a claim against an insurer for negligent claim handling. *See Kervin v. S. Guar. Ins. Co.*, 667 So. 2d 704 (Ala. 1995). In addition, the court dismissed the insuredôs breach of fiduciary duty claim, as the insured could not prove the existence of a fiduciary relationship between the insurer and insured simply because they entered into a contract together. Alabama law does not permit an insured to maintain a breach of fiduciary duty cause of action against a casualty insurer. *See Fed. Nat'l Mortg. Ass'n v. GNM II, LLC*, 2014 WL 1572584 (M.D. Ala. Apr. 17, 2014). The court also dismissed the fraud claim against the insurer, but only because it was not pleaded with the required particularity.

Subject Matter Jurisdiction & Duty to Defend and Indemnify
State Auto. Ins. Co. v. Mays Auto Service, Inc., 2018 WL 1583102 (N.D. Ala. Apr. 2, 2018).

Facts: Following an accident causing the death of two individuals, their estate representatives filed a wrongful death action against the insured. The plaintiffs later amended the complaint and added additional defendants. The insurer agreed to provide a defense for the insured and three individuals. The insurer then filed this declaratory judgment action in the United States District Court for the Northern District of Alabama against all the parties in the state court action and asked the court to declare that the insurer did not have a duty to defend or indemnify the insured and the individuals in the underlying action. The defendants moved to dismiss the amended complaint, two defendants also moved for a judgment on the pleadings, and the insurer opposed these motions.

Issue: ***1) Whether the insurer's duty to indemnify claim was ripe.***
2) Whether the court has subject matter jurisdiction over the duty to defend claim.

Holding: 1) No. The insurer conceded that the issue of indemnity was not ripe because the coverage issues depended on the outcome of the trial in the underlying action. However, the insurer asked that the district court stay the duty to defend issue until liability was determined in the underlying action. The district court noted that Alabama courts are divided as to whether staying or dismissing an duty to indemnify action is proper. The district court ultimately concluded that, because the duty to defend issue was not ripe (see below), it was inappropriate to continue to assert

subject matter jurisdiction over an unripe claim. Therefore, the district court dismissed the duty to defend claim without prejudice.

2) No. The defendants argued that the district court did not have subject matter jurisdiction because the insurer failed to establish greater than $75,000 is at stake. 28 U.S.C. Section 1332 requires that the amount in controversy exceed $75,000. The insurer neglected to include estimated defense costs in the underlying action, and the insurer is aware of this as a possible issue due to an earlier motion to dismiss. Therefore, the court held that the insurer had not established the amount in controversy was met, and dismissed the action without prejudice.

Material Omission in Insurance Application
Balentine v. Direct Gen. Ins. Co., 2018 WL 1876351 (N.D. Ala. Apr. 19, 2018).

Facts: While driving the insuredôs motorcycle, the insuredôs son and his girlfriend (ñthe coupleò) were injured in an accident with another vehicle. Although the other driverôs insurer paid the policy limits to the couple, their bills exceeded the amount paid. The couple filed an underinsured motorist (ñUIMò) claim with the insuredôs insurer and said they were ñfamily membersò according to the policy. The insurer denied the claim, as the insuredôs son was not listed on the policy, and the policy required that his name be included to have coverage. The couple filed an action in state court to recover benefits, and the insurer removed the action to the United States District Court for the Northern District of Alabama. The insurer moved for summary judgment and the couple opposed this motion.

Issue: ***Whether summary judgment should be granted and the policy rescinded, as the insured made a material omission in the insurance application.***

Holding: No. The application for insurance required the insured to list anyone 14 years-old or older who lives with the insured. Of note, the application stated that the policy may be ñnull and voidò and no coverage may be owed if the information in the application is incorrect or misleading and would ñmaterially affect acceptance or rating of the risk.ò Alabama Code Section 27-14-7(a)(2) or (3), provides that omissions in an application for insurance do not prevent the insured from recovering under the policy unless:

- the omission is material to the ñacceptance of the risk or to the hazard assumed by the insurer;
- ñin good faith, the insurer would not have issued the policyò;
- the insurer would not have issued a policy . . . at the premium rateò; or
- the insurer ñwould not have issued a policy . . . in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required . . . by the application . . .ò

This omission does not have to be fraudulent; it can be an innocent omission. *See Alfa Life Ins. Corp. v. Lewis*, 910 So. 2d 757 (Ala. 2005).

The court noted that determining whether the omission is material is almost always a question for a jury. *First Fin. Ins. Co. v. Tillery*, 626 So. 2d 1252 (Ala. 1993). The insurer submitted an affidavit from one of its underwriters that stated the policy would not have been issued if the insurer knew of this omission. The court did not find this evidence compelling, as an insurer cannot ñavoid coverage simply because its own employee testified that the company would not have undertaken the risk had it known the truth as to a particular fact.ò *Tillery*, 626 So. 2d at 1255.

Even if the omission is not material under the Alabama statute, an insurer may rescind the contract if, in good faith, the insurer would not have issued the policy or given the same premium rate had the insurer known about the omission. But, in these circumstances, an insurer must provide evidence that its underwriting guidelines show that the insurer would not have issued the policy, at least at the same premium rate, for similar omissions. *Mega Life and Health Ins. Co. v. Pieniozek*, 516 F.3d 985 (11th Cir. 2008). Because the insurer did not submit any universal underwriting practices to the court, the district court denied the insurerôs motion.

Judgment Satisfied and Mental Anguish Damages
Sabbah v. Nationwide Mut. Ins. Co., 2018 WL 1856173 (N.D. Ala. Apr. 18, 2018).

Facts: The insureds filed a breach-of-contract action against insurers to recover damages for failing to indemnify the insureds, seeking indemnification and mental anguish damages. The district court had already dismissed a number of claims against the insurers, and the insurers filed a motion to dismiss the remaining claims for failing to state a claim upon which relief may be granted. The insureds opposed the motion.

Issue: ***Whether the action should be dismissed, as the judgments in the underlying actions have been satisfied, and mental anguish damages are not viable for this cause of action.***

Holding: Yes. The court agreed that the claims demanding indemnification for the judgments in the underlying actions should be dismissed as the judgments had already been satisfied, and so they were moot. Although certain causes of action allow damages for mental anguish, Alabama law does not allow recovery for mental anguish in actions involving a breach of an insurance contract, except in very limited, personal circumstances. *Vincent v. Blue Cross-Blue Shield of Alabama, Inc.*, 373 So. 2d 1054 (Ala. 1979). Because this action involved breach of a liability insurance policy, the district court dismissed the claim for mental anguish damages.