Summer 2018 Issue

RECENT DEVELOPMENTS IN ALABAMA AND THE ELEVENTH CIRCUIT
Selected Insurance Cases and Other Matters of Interest

In this Alabama Update, we have summarized a number of cases from the past several months. This Update includes the Northern District of Alabamaôs opinion in *Thompson v. Allstate Insurance Company*, 2018 WL 2431328 (N.D. Ala. May 30, 2018). The Northern District held that the insurer was not entitled to summary judgment against the claimant, since there was a question of fact as to whether the insurer made a misrepresentation and whether the claimant reasonably relied on it. Also, in *Cunningham v. USAA Casualty Insurance Company*, 2018 WL 3368890 (N.D. Ala. July 10, 2018), the Northern District of Alabama held that Alabamaôs Uninsured Motorist Statute did not apply and therefore internal stacking was not permitted, as the automobile policy was delivered outside of Alabama, it was not issued for delivery in Alabama, and the vehicle was not principally garaged in Alabama. Next, in *Hopkins v. Nationwide Agribusiness Insurance Company*, 2018 WL 3428610 (N.D. Ala. July 16, 2018), the Northern District of Alabama held that the action must be remanded to state court, since the one year period as defined in 28 U.S.C. Section 1446(c) to remove the case passed, and the plaintiff did not act in bad faith to avoid removal. Finally, in *Evanston Insurance Company v. Yeager Painting, LLC*, 2018 WL 3708555 (N.D. Ala. Aug. 3, 2018), the Northern District of Alabama awarded summary judgment in favor of the insurer, as a seven month delay to notify the insurer of a lawsuit filed against the insured was untimely.

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

Damages and Statute of Limitations - Action Against Agent
Beddingfield v. Mullins Ins. Co., --- So. 3d ---, 2018 WL 2997849 (Ala. June 15, 2018).

Facts: In an underlying personal injury action involving rental property, the insureds were found liable for $600,000 in damages. Their liability insurance policy only had limits of $100,000. As a result, the insureds filed a negligence and wantonness action against their insurance agent and agency, arguing that the agent and agency failed to obtain the requested liability insurance on the insuredsô properties. The $600,000 judgment was ultimately reversed and later settled and dismissed. The agent and agency moved for summary judgment, and the trial court granted the motion. The insureds appealed.

Issue: ***1) Whether the trial court properly granted summary judgment on the negligence claim on the basis that insureds did not sustain damages and did not meet the elements of negligence.***
2) Whether the insureds' negligence claims were time barred, as the statute of limitations had expired.
3) Whether the insureds' wantonness claims were time-barred, as the statute of limitations had expired.

Holding: 1) No. Without damages, a negligence action cannot be maintained. *See Campbell v. Naman's Catering, Inc.,* 842 So. 2d 654 (Ala. 2002). However, in this action, the insureds produced evidence of damages, including attorneysôfees and business losses related to the underlying litigation. Therefore, the trial court should not have granted summary judgment on the negligence claim on this ground.

2) Yes. Negligence claims are subject to a two-year statute of limitations. In particular, negligent-procurement claims accrue at the time of the loss that triggers liability and when the insurer informs the insured that the claim will not be paid. *Hickox v. Stover*, 551 So. 2d 259 (Ala. 1989) *overruled on other grounds by Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997); *Weninegar v. S.S. Steele & Co.*, 477 So. 2d 949 (Ala. 1985). The insureds filed this action over three years after the underlying litigation was filed and over three years after the insureds learned that their coverage was much less than they thought. Therefore, the negligent-procurement claim was time barred.

3) No. In *Ex parte Capstone Building Corp.*, 96 So. 3d 77 (Ala. 2012), the Alabama Supreme Court held that wantonness claims are subject to a two-year statute of limitations and not a six-year statute of limitations. However, because the Court had previously applied a six-year statute of limitations to wantonness claims in some instances, the Court set a holding specifically for wantonness claims accruing on or before June 3, 2011. For those specific wantonness claims, litigants have two years after June 3, 2011 (the date of the *Capstone* opinion) to file an action unless the six-year period would have expired earlier than June 3, 2013. Here, the insuredsôclaims began to accrue when the underlying lawsuit was filed in May 2008. Since the claims accrued before June 3, 2011, and the insureds filed their claims in July 2011, they timely filed their wantonness claim within the time period set out by *Capstone*. Therefore, the wantonness claims are not time-barred. Summary judgment is reversed in favor of the insureds.

Alabama Federal Law Update

Auto Policy: Insurer Misrepresentation in Claims Process
Thompson v. Allstate Ins. Co., 2018 WL 2431328 (N.D. Ala. May 30, 2018).

Facts: Married couple Danny Thompson and Erica Mixonôs vehicle was damaged in an automobile accident with a vehicle driven by Justin Curry. Thompson and Mixon filed a claim with Curryôs insurer and requested a rental car. Mixon told the insurer that the rental car company required a deposit before renting the car and he could not afford to pay the deposit. Although the insurer said they do not pay deposits for renting a car, the claims representative said he would send Thompson and Mixon a check for the rental car ñand inconvenience.ò Thompson and Mixon said that their necks were

sore, but they were not injured. The claim representative offered to pay them each $300, and documented that they accepted the offer. When they received the checks, Mixon called the claim representative on speaker phone, with Thompson present, because the checks said that the payments were for a final payment on their claim. The claim representative assured Mixon that all checks look that way, and that the check was to be used to rent a car. Based on this representation, Thompson and Mixon cashed the checks and rented a car. The insurer did not have a record of this telephone call.

A couple of days after the accident, Thompson went to a medical center and was prescribed painkillers. A month later, he received physical therapy and was given prescriptions at a different medical center due to a fractured ankle broken in the accident. Thompson then wanted the insurer to pay for his treatment. When the insurer declined to pay for his treatment because it had made a final payment and Thompson had negotiated the check, Thompson filed a fraud action against the insurer. The insurer moved for summary judgment and filed a motion to strike, and Thompson opposed.

Issue: ***Whether the insurer was entitled to summary judgment because either it did not make a misrepresentation, or, even if one was made, the claimant did not reasonably rely on it.***

Holding: No. While accord and satisfaction is a defense available to enforce a release with full payment, Thompson here claimed that the insurer made a fraudulent misrepresentation regarding the payment and release. A fraudulent misrepresentation is a misrepresentation of a material fact on which the plaintiff reasonably relied to his detriment by ñexecuting a document or taking a course of action.ò *Ala. River Grp., Inc. v. Conecuh Timber, Inc.*, 2017 WL 4324889 (Ala. Sept. 29, 2017). A release signed because of fraud is void. *Taylor v. Dorough*, 547 So. 2d 536 (Ala. 1989). If an individual signs a release and endorses a check without reading it, it is not necessarily binding if an agent misrepresented information.

The court examined whether the claim representativeôs statement to Mixon regarding the check as a payment for an ñinconvenienceò applied to Thompson, and whether the adjuster told Thompson to not worry about the release language on the check were genuine issues of material fact. The insurer acknowledged that there was a dispute about whether the adjuster used the word ñinconvenience.ò Because both sides presented evidence about the claim representativeôs statements, a genuine issue of material fact existed that could not be resolved at summary judgment.

In addition, Thompson argued that, even if the claim representative made the alleged statements, the insurer argued that Thompson could not reasonably rely on the statement that the check was to pay for his ñinconvenience,ò because the check stated

on its face that it was a full and final settlement of the claim. However, because Thompson alleged the claim representative assured him all checks included that language and this was not a final payment, a genuine issue of material fact existed as to whether this misrepresentation voided the release.

The trial court denied the insurerôs motion for summary judgment.

Case or Controversy - Duty to Defend and Indemnify
Associated Indus. Ins. Co. v. Four Four, LLC, 2018 WL 2946397 (M.D. Ala. June 12, 2018).

Facts: Residents of an apartment complex filed an action in state court against the apartment owner to recover damages for mold, pet infestations and other problems. As an additional insured of Ballard Realty, the owner requested defense and indemnification with Ballard Realtyôs CGL insurer. The insurer agreed to a defense under a reservation of rights, and the insurer then filed a declaratory judgment action in the United States District Court for the Middle District of Alabama and requested that the court hold that the insurer was not obligated to defend or indemnify the owner. Two other insurersôdeclaratory judgment actions were consolidated into one declaratory judgment action, and the insurers moved to intervene in the underlying state court action. The state court denied the motion. The owner and the residents of the apartment complex move to dismiss or stay the declaratory judgment action, and the insurer opposed the motion.

Issue: ***1) Whether the issue of the duty to defend the owner in the underlying action should be dismissed or stayed.***
2) Whether the issue of the duty to indemnify the owner in the underlying action should be stayed.

Holding: 1) No. The issue of duty to defend is not moot simply because the insurers are currently providing a defense. If the insurers are providing a defense and wish to no longer provide a defense, a controversy exists. *See Accident Ins. Co. v. Greg Kennedy Builder, Inc.*, 159 F. Supp 3d 1285 (S.D. Ala. 2016).

Moreover, the underlying action and the present action were not parallel, as the insurers unsuccessfully requested to intervene in the underlying action, and the same issues presented in this action will not be resolved in the underlying action. In analyzing the factors of whether to stay a federal case in favor of a state case, the federal court held: Alabama state courts do not have a strong interest in resolving this conflict in state court; this action would resolve a legitimate conflict; there is no evidence that the insurer was trying to avoid state court; this court will not create friction with the state court by deciding this issue; the facts in the underlying case are not very important to the facts in this action; and the state court is not in a better position than this court to decide this issue, as the court already denied the insurerôs

motion to intervene. *See Pennsylvania Nat'l Mut. Cas. Ins. Co. v. King*, 2012 WL 280656 (S.D. Ala. Jan. 30, 2012). Therefore, the federal court denied the insuredôs motion to dismiss or stay the coverage action.

2) Yes. The federal court noted that certain authority indicate that the duty to indemnify meets the ñcase or controversyò requirement while the underlying litigation is in progress. However, it is possible that the issue of duty to indemnify will be resolved if the court finds that the insurer has no duty to defend. *See Employers Mut. Cas. Co. v. Evans*, 76 F. Supp. 2d 1257 (N.D. Ala. 1999). Therefore, the court stayed the indemnity issue while it considered the duty to defend. The court held ñdiscretion and common senseò require this court to retain jurisdiction and stay the duty-to-indemnify claim rather than dismissing it.

Duty to Defend and Indemnify- CGL and Umbrella Policies

Monroe Guaranty Ins. Co. v. Pinnacle Manufacturing, LLC., 2018 WL 335265 (N.D. Ala. July 9, 2018).

Facts: A former independent sales agent filed a case against the insured in state court, alleging that the insured wrongfully solicited business from the agentôs clients and did not pay the agent what he was owed under their contract. After the insured requested a defense and indemnification under its CGL and commercial umbrella policies from the insurer, the insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama. The insurer asked the court to hold it had no duty to defend or indemnify the insured. The insured did not appear or file a response, and the insurer moved for a judgment on the pleadings.

Issue: ***Whether the motion for judgment on the pleadings should be granted, as no coverage exists under either policy.***

Holding: Yes. Both policies have an employment-related practices exclusion that excludes coverage for ñbodily injuryò and ñproperty damageò caused by employment-related practices, which includes termination. The agentôs economic injuries were caused by the termination of his contract with the insured, therefore there can be no duty to defend or indemnify the insured. Also, the court noted that no coverage exists since there was no occurrence under the policy terms, because the agent did not suffer ñbodily injury,ò ñproperty damage,ò or ñpersonal and advertising injury.ò The agent only alleged economic loss, and not any of the types of covered injuries listed in the policies. Finally, the court held that no coverage existed because the damages alleged in the underlying complaint were caused by intentional conduct. Because the policies also excluded coverage for expected or intended injury, no coverage exists. Therefore, the federal court granted the insurerôs motion on the pleadings, holding that the insurer has no duty to defend or indemnify the insured.

Alabama's Uninsured Motorist Statute- Internal Stacking
Cunningham v. USAA Cas. Ins. Co., 2018 WL 3368890 (N.D. Ala. July 10, 2018).

Facts: The named insured was killed when his vehicle was struck by an uninsured vehicle. His wife, Mrs. Cunningham, filed a uninsured motorist claim with their insurer. At the time of the accident, the insuredôs family lived in Alabama, and the insured had recently been transferred from a station in Kansas to one in Georgia. Their automobile policy lists a Kansas address as the first address and shows the three insured vehicles were garaged in Kansas. Mrs. Cunningham testified that the garage location for the minivan was changed to Alabama. The insurer paid $100,000, but Mrs. Cunningham asked the insurer to internally stack the coverage limits for each vehicle under the policy, creating $200,000 more in coverage. When the insurer refused, Mrs. Cunningham filed an action in the United States District Court for the Northern District of Alabama and asked the court to hold that Alabama law requires internal stacking. The insurer moved for summary judgment, and Mrs. Cunningham opposed the motion.

Issue: ***Whether Alabama's Uninsured Motorist Coverage Statute requires the insurer to internally stack coverage limits given the insured's stated address and the garage location of the vehicles on the policy.***

Holding: No. Alabama Code Section 32-7-23(a) allows insureds to receive the coverage limits as well as up to two more additional coverage limits for vehicles listed under the same policy. This statute, however, only applies when the policy was delivered in Alabama or issued for delivery in Alabama and when the vehicle involved in the accident is principally garaged in Alabama. *See Smith v. State Farm Mut. Auto Ins. Co.*, 952 So. 2d 342 (Ala. 2006).

Mrs. Cunningham argued that the insurer knew that the insuredôs permanent address was in Alabama because the same insurer provided homeownerôs insurance on the family home in Alabama. Also, Mr. Cunningham had an Alabama driverôs license and was an Alabama domiciliary. Alabama courts determine the meaning of ñissued for deliveryò by looking at the mailing address of the policy. Here, the policy was not delivered or issued for delivery in Alabama; rather, it was mailed to Kansas, and there is no evidence indicating that the insurer received notice that the insured resided in Alabama. Therefore, the statute did not apply.

Even if the insurer had been aware that the insured resided in Alabama and issued the policy for delivery in Alabama, the statute would not apply because there is no evidence that the insuredôs vehicle was principally garaged in Alabama. Although Mrs. Cunningham argued that the location of the insuredôs domicile should also be considered the location where the vehicle is principally garaged, the court was not persuaded. The court noted that the plain meaning of ñprincipally garagedò is the

location where the vehicle is parked most of the time. This does not mean a personôs domicile. Therefore, the statute did not apply. The court noted that Kansas and Georgia law do not have similar uninsured motorist statutes, and, even under those laws, the insured cannot internally stack. Therefore, the court granted the insurerôs motion for summary judgment.

Homeowner's Policy-Motion to Dismiss
Chamblin v. Liberty Mut. Fire Ins. Co., 2018 WL 3475433 (N.D. Ala. July 19, 2018).

Facts: The insured filed a claim with his homeownerôs insurer after a tornado damaged his house and water damage caused mold to grow inside the house. Applying the appraisal process as the contract requires, the insurer paid $66,288.32 and $79,492.53 for storm and water damage. The insured felt $29,825.14 was not adequate to cover his personal property and additional living expenses, and filed an action *pro se* in state court against the insurer to recover compensatory and punitive damages. After the insurer removed the action to the United States District Court for the Northern District of Alabama, the insurer moved to dismiss the action.

Issue: ***Whether the action should be dismissed because the appraisal process completely resolved the issues between the insurer and the insured.***

Holding: Yes. The insurance policy provided that the insurer and insured each choose an appraiser and together they agree upon an appraisal for the damage. The insured admitted he, with the assistance of an attorney, agreed to have the damage to his home appraised. He does not contest the validity of the storm and water damages he was awarded during this process. The insurance contract provides that the amount the two independent appraisers agree upon is final. The insured did not allege that the appraisal was obtained through fraud. Because this award was determined pursuant to the policy terms, and the insured did not provide any evidence that the insurer breached the contract, the insured could not maintain his claims against the insurer.

Bad Faith Exception- Removal
Hopkins v. Nationwide Agribusiness Ins. Co., 2018 WL 3428610 (N.D. Ala. July 16, 2018).

Facts: The insureds, who are poultry farmers in Alabama, filed a claim with two of their insurers after 20,000 chickens died in three poultry houses. These chickens died because the temperature in the houses became too hot and an alarm failed to go off that would have alerted the insureds to the conditions in the houses. The alarm systems failed after Total Radio Service (ñTRSò) performed maintenance on the systems. When the insurers denied the claims, the insureds filed an action in state court against the insurers, TRS, and Jones & Associates. TRS and Jones & Associates were Alabama companies. After minimal discovery to TRS and Jones & Associates, the insureds voluntarily dismissed TRS and Jones & Associates, the only non-diverse

defendants, without any settlement over a year after the action was filed. The insurers then removed the action to the United States District Court for the Northern District of Alabama. The insureds opposed the removal.

Issue: ***Whether the case should be remanded to state court, as the one year period to remove the case passed, and the bad-faith exception to the statute does not apply in this situation.***

Holding: Yes. 28 U.S.C. Section 1332 requires complete diversity of citizenship for removal. 28 U.S.C. Section 1446(c) does not allow removal more than a year after the action is filed, unless the plaintiff acted in bad faith to avoid removal. In *McAdam Properties, LLC v. Dunkin' Donuts Franchising, LLC*, 290 F. Supp. 1279 (N.D. Ala. 2018), the Northern District Court concluded that Congress intended ñbad faithò to mean ñintentional misconductò and not simply fraudulent joinder. Thus, a finding of ñintentional misconductò was required to rely on the bad-faith exception. Because claims against TRS and Jones & Associates were ñclearly intertwinedò with the claims against the insurers, and the insureds could decide how much discovery to conduct against defendants, the federal court held that no bad faith existed in this case. Because there is limited case law on this issue, the court declined to require the insurers to pay the insureds costs and fees incurred in filing the motion to remand. The court remanded the case to state court.

Insurable Interest/Innocent Misrepresentation
Liberty Corporate Capital Ltd., v. Club Exclusive, Inc., 2018 WL 3574931 (N.D. Ala. July 25, 2018).

Facts: Antineekia White built a commercial building on land she owned. She personally owned the contents inside the building. Ms. White incorporated the insured, Club Exclusive, Inc. (ñthe insuredò) and is the owner, director, and president. The insured leased the building from Ms. White, and the insured applied for commercial property insurance coverage for the building. In the application, the insured stated that the insured, not Ms. White, owned the property. The insured is the only named insured, and there are no additional insureds or any other type of insureds listed in the policy.

During the policy period, a fire destroyed the building. After the insured made a claim for the loss, the insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama and asked the court to declare the policy void based on misrepresentations in the application. The insured responded, and filed a counterclaim against the insurer and two individuals. After the individuals were dismissed from the action, the insurer filed a motion for summary judgment, the insured did not oppose the motion, and the court dismissed the action with prejudice. The court granted the insuredôs motion to set aside the judgment by following the excusable neglect standard provided in Federal Rule of Civil Procedure 60(b). The

insured filed an opposition to the insurerôs motion for summary judgment, the insurer moved to strike Ms. Whiteôs affidavit in part, and the insured opposed the motion to strike.

Issue: ***1) Whether the insured has an insurable interest in the property or business personal property.***
2) Whether the insured's innocent misrepresentation of its ownership interest voids the policy.
3) Whether the insurer is entitled to summary judgment on the insured's counterclaims.

Holding: 1) No. Alabama Code Section 27-14-4(a) states that a policy is not enforceable if the insured does not have an interest in the property. *See North British & Mercantile Ins. Co. v. Sciandra*, 54 So. 2d 764 (Ala. 1951). It is undisputed that the insured did not own the property at issue, and the lease between Ms. White and the insured expired before the fire. Thus, Ms. White, and not the insured, had the insurable interest in the building and its contents. Therefore, the policy was not enforceable, and the court rescinded the policy.

2) No. Alabama law provides that, with regard to pre-claim misrepresentations (such as in the application process), the insurer may void the policy even if the insured innocently makes a misrepresentation that is material to the risk the insurer is assuming or would cause the insurer not to issue the policy. *See Alfa Life Ins. Corp. v. Lewis*, 910 So. 2d 757 (Ala. 2005). If an insured reviews the application that another individual fills out, the insured is bound by the information contained in the application. *Nationwide Mut. Fire Ins. Co. v. Pabon*, 903 So. 2d 759 (Ala. 2004). Although determining whether a fact is material is generally left for the jury to decide, misrepresentation about an insuredôs ownership interest can be determined by the court. *Camden Fire Ins. Ass'n v. Landrum*, 156 So. 832 (Ala. 1934).

However, in *State Farm Fire & Casualty v. Oliver*, 854 F.2d 416 (11th Cir. 1988), the Eleventh Circuit held that an insurer could waive its right to rescind a policy for an innocent misrepresentation under the Alabama Code Section 27-14-4 if language in the insurance contract is more restrictive to the insurer than the statute. Here, the insurance application states that anyone ñwho knowingly and with intent to defraudò the insurer commits a fraudulent act and is subject to criminal and civil penalties. The court held that this language contractually restricted the insurer to only void policies that involve knowing or intentional fraudulent conduct. Therefore, the court denied the insurerôs summary judgment on this issue.

3) Yes. The insured filed a counterclaim against the insurer for breach of contract, bad faith, and negligent hiring. Because the court held that the policy was void, there was no contract; therefore, the insured could not maintain breach-of-contract and bad-faith

claims. The insured had also asserted a negligent hiring claim with regard to the agent, but the court held that the insured failed to prove that the agent was an employee or agent of the insurer. Therefore, the court granted summary judgment in favor of the insurer and dismissed the case with prejudice.

Homeowner's Policy- Earth Movement/Water Exclusion/Mental Anguish
Brown v. State Farm Fire and Cas. Co., 2018 WL 3569939 (N.D. Ala. July 25, 2018).

Facts: During a storm, lightning struck a tree in the insuredôs neighborôs yard, and a week later, another storm produced heavy rainfall. After the second storm, the insured noticed that water was in a basement closet, and the weight of the clothing on the rack caused the paneling to pull away from the wall. Behind the wall, the insured saw that the concrete wall foundation was beginning to collapse. The insured made a claim with his homeownerôs insurer, and the insurerôs expert, Hal Cain, a structural engineer, concluded that the damage was caused by hydrostatic pressure on a concrete block wall that was inadequately reinforced. After the insurer denied the claim based on the expertôs report, the insured hired his own expert, David Carlysle. Mr. Carlysle concluded the damage to the wall was likely caused by a shock wave produced by the lightning and thunder. Mr Cain filed a supplemental report questioning the lack of scientific proof, and the insurer maintained its denial. The insured filed an action against the insurer, and the only remaining claim at this stage in the proceedings against the insurer is breach of contract. The insurer filed a motion for summary judgment, and also moved to strike portions of the insured and his contractorsô affidavits.

Issue: ***1) Whether the motion to strike should be granted in part, as lay witnesses cannot testify regarding causation.***
2) Whether summary judgment should be granted, as the concrete wall was defectively constructed and the water damage exclusion or earth movement exclusions applied.
3) Whether summary judgment should be granted for all mold damage, as the policy excludes coverage for mold damage.
4) Whether the insured can request mental anguish damages against the insurer.

Holding: 1) Yes. The insured identified contractors as lay witnesses and not experts. The court held that the insured and the contractors could testify about what they actually saw. However, any witness testimony relating to causation was not permitted because it is inadmissible lay opinion testimony. *See Nix v. State Farm Fire & Cas. Co.*, 444 F. Appôx 388 (11th Cir. 2011).

2) No. The burden is on the insurer to prove that an exclusion applies in the policy. The policy excludes coverage for defective construction, water damage, and earth movement. The insurer relies on its expertôs report. However, the insured also has

an expert report that conflicts with the conclusions the insurerôs expert reached. Therefore, this is an issue for the jury to decide.

3) Yes. Mold damage is excluded in this policy, ñregardless of . . . the cause of the excluded event.ò Although the insured argued that the mold damage was foreseeable because of the lightning strike, it is irrelevant. This is because the policy specifically excludes mold damage, even if the occurrence is a covered cause of loss. Therefore, the federal court granted insurerôs motion for summary judgment on this issue.

4) Yes. Alabama law allows the recovery of mental anguish damages for breach of an insurance contract when ñthe contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering.ò *Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449 (Ala. 1991). The Eleventh Circuit noted that it is foreseeable in ñegregiousò breach of contract situations, involving oneôs home, will cause ñsignificant emotional distress.ò The damages are not aesthetic, but serious foundation issues that allow water into the home. The court concluded that these damages are significant enough for the insured to ask the jury for mental anguish damages if the jury concludes that the insurer breached the contract.

Duty to Defend and Indemnify- Pollution Exclusion
Grange Mut. Cas. Co. v. Indian Summer Carpet Mills, Inc., 2018 WL 3536625 (N.D. Ala. July 23, 2018).

Facts: The Water Works and Sewer Board of the City of Gadsden and the Water Works and Sewer Board of the Town of Center filed two lawsuits against the insured and other defendants alleging the insured and others contaminated the Coosa River water by releasing toxic chemicals. The insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, asking the court to declare it had no duty to defend or indemnify its insured in two underlying actions. The insurer and insured filed a consent motion to enter declaratory relief in favor of the insurer.

Issue: ***Whether the insurer should be awarded declaratory relief, as the insurer has no duty to defend or indemnify the insured.***

Holding: Yes. The court found that it had diversity jurisdiction, as the parties are diverse, and the amount in controversy exceeds $75,000. Both the insurer and the insured agree that the insurer does not have a duty to defend the insured in the underlying actions. The policy does not provide coverage for bodily injury or property damage arising out of ñactual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ópollutantsô . . .ò Because the insurer did not have a duty to defend the

insured, the insurer also did not have a duty to indemnify the insured. Therefore, the court granted the consent motion to enter declaratory relief in favor of the insurer.

CGL Policy - Total Liquor Liability Exclusion; Estoppel
Catlin Specialty Ins. Co. v. Johnson, 2018 WL 3708554 (N.D. Ala. Aug. 3, 2018).

Facts: After the insured served Terrance Walker alcoholic beverages when he was allegedly visibly intoxicated, Mr. Walker allegedly caused a car accident that killed two individuals. The family and administrator of the two individuals filed actions against the insured to recover damages in state court. Then, the insuredôs CGL insurer filed an action in the United States District Court for the Northern District of Alabama, asking the court to declare it had no duty to defend or indemnify the insured in the underlying actions. The insurer moved for summary judgment. The insured did not oppose the motion, but the plaintiffs in the underlying actions opposed the motion.

Issue: ***1) Whether the Total Liquor Liability exclusion excluded coverage in the underlying actions.***
2) Whether the insurer is estopped from denying coverage.

Holding: 1) Yes. The Total Liquor Liability exclusion excludes ñbodily injuryò or ñproperty damageò ñfor which any insured may be held liable by . . .: (1) . . . contributing to . . . the intoxication of any person; (2) . . . sale of alcoholic beverages to a person . . . under the influence of alcohol; or (3) [a]ny statute, ordinance, regulation or law relating to the sale . . . or use of alcoholic beverages.ò The exclusion applied not only to Dram Shop claims, but also any claims that ñare inextricably intertwined with . . . alcohol claims.ò *Robinson v. Hudson Spec. Ins. Co.*, 984 F. Supp. 2d 1199 (S.D. Ala. 2013). The exclusion also applied to claims that ñhave a direct nexus to the sale or service of alcohol or the causing or contributing to any personôs intoxication.ò *Catlin Spec. Ins. Co. v. Philon*, 2013 WL 12123743 (S.D. Ala. Feb. 20, 2013). The underlying plaintiffs allege that the insured negligently served Mr. Walker alcohol when he was visibly intoxicated, and his intoxication directly contributed to the accident that killed two people. Because the negligent sale of alcohol was directly connected to the claims alleged against the insured, the exclusion applied.

2) No. The underlying plaintiffs argued that the insurer was estopped from denying coverage based on the Total Liquor Liability Exclusion. They argued that the insurer violated Alabama Code Section 27-14-19 by failing to prove it mailed or delivered the policy to the purchaser and named insured within a reasonable time after the policy was issued. If the insurer violates this statute, the insurer can be estopped from asserting exclusions in the policy. *Brown Mach. Works & Supply Co. v. Insurance Co. of N. America*, 659 So. 2d 51 (Ala. 1995). However, the underlying plaintiffs neglected to provide any evidence that the insurer violated this statute. Therefore, the court granted the insurer summary judgment.

CGL Policy- Timely Notice and Subcontractor Exclusion
Evanston Ins. Co. v. Yeager Painting, LLC, 2018 WL 3708555 (N.D. Ala. Aug. 3, 2018).

Facts: The insured, Yeager Painting, entered into an agreement to sandblast water tanks for the City of Pelham. The insured then subcontracted the work to Delgado Painting. While sandblasting the tanks, one of Delgadoôs employees was injured. Yeager Paintingôs CGL insurer learned of the accident, hired an independent adjusting company to investigate, and denied coverage because the injury involved a sub-contractor, and subcontractor injuries were excluded from coverage.

The employee subsequently filed a lawsuit against the insured (although the insuredôs name was not properly listed), Delgado Painting, and the original contractor to recover damages for his injuries. The employee corrected the insuredôs name and served the insured with an amended complaint. The insured then waited seven months to notify the CGL insurer of the lawsuit. The insurer tried to contact the insured multiple times, but the insured did not respond. However, the insurer agreed to provide a defense under a reservation of rights.

Thereafter, the CGL insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, seeking a declaration that it owed no duty to defend or indemnify the insured, and the insurer moved for summary judgment.

Issue: ***1) Whether the insured violated the notice conditions of the policy such that the insurer did not have a duty to defend and indemnify.***
2) Whether the subcontractor employees exclusion excluded coverage.

Holding: 1) Yes. The policy required the insured to notify the insurer ñas soon as practicable of an óoccurrenceôò that could be a claim. If a lawsuit is filed, the insured was required to provide written notice ñas soon as practicable.ò Alabama law interprets the phrase ñas soon as practicableò to mean ñwithin a reasonable 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 noted that it did not have enough evidence to determine if the insured provided timely notice of the occurrence. However, the insured waited seven months to notify the insurer of the filing of the lawsuit. Alabama courts hold that five and six month delays arere unreasonable. *See Nationwide Mut. Fire Ins. Co. v. Estate of Files*, 10 So. 3d 533 (Ala. 2008); *Southern Guar. Ins. Co. v. Thomas*, 334 So. 2d 879 (Ala. 1976). Therefore, the insured failed to meet a condition precedent to coverage, and the court granted summary judgment for the insurer.

2) Yes. The court noted that, even if notice were timely, the subcontractor employees provision excluded coverage. This exclusion states that no coverage will be provided for ñbodily injuryò . . . ñsustained by any . . . subcontractor . . . hired by you or on

your behalf.ò The insured subcontracted the sandblasting job to Delgado Painting, and the individual who was injured was an employee of Delgado Painting. Because the individual was the employee of a subcontractor, the exclusion applied, and no coverage existed under this policy.

Reformation of the Insurance Contract
Auto-Owners Ins. Co. v. Morris, --- Fed. Appx. ---, 2018 WL 3831242 (11th Cir. Aug. 13, 2018).

In a one paragraph *per curiam* opinion, the Eleventh Circuit affirmed the Northern District of Alabamaôs decision. The Eleventh Circuit held that the Northern District correctly entered summary judgment in favor of the insurer, as the policy excluded coverage for employees of the insured. We included a summary of the Northern Districtôs opinion in the 2018 Winter Newsletter.

Remand- Amount in Controversy
Tuskegee University v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2018 WL 3873584 (M.D. Ala. Aug. 15 2018).

Facts: Students at Tuskegee University filed negligence actions in state court against Tuskegee and the insured alleging that Tuskegee and the insured did not properly remove mold from some dormitories. The insured contracted with Tuskegee to provide maintenance and repairs to campus buildings, and the insured listed Tuskegee as an additional insured on its insurance policy. Tuskegee filed a declaratory judgment action in state court against the insurer and asked the court to declare that the insurer owed a duty to defend and indemnify Tuskegee. The insurer removed the action to the United States District Court for the Middle District of Alabama, Tuskegee opposed removal, and the magistrate judge recommended to remand the case to state court.

Issue: ***Whether the action should be remanded to state court, as the insurer did not prove the amount in controversy exceeds $75,000.***

Holding: Yes. The amount in controversy is determined by deciding what the ñpotential liabilityò is under the policy at issue. *First Mercury Ins. Co. v. Excellent Computing Distribs., Inc.*, 648 Fed Appôx 861 (11th Cir. 2015). The insurer argued that the potential value of the underlying lawsuits exceeded $75,000 because the plaintiffs claimed serious physical injury, mental anguish damages, and the defendantsô intentional wrongdoing. The underlying complaints were not specific, and the insurer did not provide any additional evidence about exact amounts at issue.

Because the only evidence the insurer presented was a law review article discussing the amount the average insurer spends to defend a claim, the court adopted the recommendation of the magistrate judge in part and ordered the case to be remanded to state court.

Remand- Amount in Controversy
Henrikson v. Travelers Home and Marine Ins. Co., 2018 WL 3873583 (M.D. Ala. Aug. 15, 2018).

Facts: After the homeownerôs insurer and insured could not agree on the amount the insurer owed after a fire destroyed the insuredôs home, the insureds filed an action in state court against the insurer. The insurer removed the action to the United States District Court for the Middle District of Alabama, the insured moved to remand, and the magistrate judge recommended denying the motion to remand.

Issue: ***Whether the action should be remanded to state court, as the amount in controversy was not met.***

Holding: No. The insurer submitted a demand letter that the insureds sent before they filed the lawsuit. The letter asked the insurer to pay $698,836.88 for the dwelling. The insureds opposed the use of this letter as evidence, claiming that the letter would not be admissible at trial. However, the evidentiary standard used in motions to remand is not as stringent as the trial standard. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744 (11th Cir. 2010). The insureds also argued that the demand letter was satisfied in an appraisal award. However, the insuredsôcomplaint states that the insurer failed to pay the amount the umpire awarded the insureds. Finally, the amount in controversy was met even without the demand letter, as the insurer noted a dispute existed regarding $70,500 of the award, and the insureds paid the umpire $6,591.61. Together, these amounts exceeded $75,000. Therefore, the district court adopted the magistrate judgeôs recommendation, and denied the motion to remand.

Removal - Fraudulent Joinder
Alexander v. State Farm Fire and Cas. Co., 2018 WL 3956952 (N.D. Ala. Aug. 17, 2018).

Facts: The insured filed an action in state court against the insurer and an employee of the insurer, Darius Alexander, after the insurer declined coverage for damage to a business property. When the insurer removed the action to the United States District Court for the Northern District of Alabama, the insured moved to remand the action to state court for lack of diversity.

Issue: ***Whether the insured fraudulently joined the insurer's employee to destroy diversity and avoid removal to federal court.***

Holding: No. An insurer can prove fraudulent joinder if there is no way an insured could establish a cause of action in state court. *See Coker v. Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983). If there is any possibility an Alabama court would hold that the insured stated a claim for misrepresentation, the action must be remanded. The complaint alleged that Alexander made unspecified misrepresentations to the insured, and that Alexander knew or should have known that the insurer would not pay the

damages to the insured.

After removal, the insured filed an amended complaint and alleged that Alexander repeatedly said the insurer would pay the claim. But, the court may only consider pre-removal pleadings and evidentiary submissions. *Legg v. Wyeth*, 428 F.3d 1317 (11th Cir. 2005). The court concluded that the affidavits and pre-removal complaint provided enough specificity to create a possibility an Alabama court would hold that the insured has a claim against Alexander.

Although the insurer argued that the misrepresentation claim is time barred since it was filed more than two years after the misrepresentation, the court disagreed. The insured alleged that a year ago, Alexander made a misrepresentation to the insured. Also, the court may not consider evidence outside of the complaint when deciding whether a claim is time barred. Therefore, the court ruled that the action should be remanded to state court.