End of Year 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. Some of the cases that you might find of particular interest are *Somnus Mattress Corp. v. Hilson*, --- So. 3d ----, 2018 WL 6715777 (Ala. Dec. 21, 2018), *GEICO Gen. Ins. Co. v. Curtis*, --- So. 3d ----, 2018 WL 6729032 (Ala. Ct. App. Dec. 21, 2018), *Progressive Spec. Ins. Co. v. Estate of Jack William Mock*, 2018 WL 4088048 (M.D. Ala. Aug. 27, 2018), and *Catlin Syndicated Ltd. v. Ramuji, LLC*, 2018 WL 6303776 (N.D. Ala. Nov. 29, 2018). In *Hilson*, the Alabama Supreme Court held that, because no special relationship existed between the agent and the insured, the agent did not assume a duty to advise the insured to add business income coverage. Next, in *Curtis*, the Alabama Court of Appeals held that the UIM insurer lost its right to recover fronted funds because the insured died after the UIM insurer fronted the tortfeasorôs limits but before the insured filed suit against the tortfeasor. In *Progressive Specialty Insurance Company*, the Middle District of Alabama held that the named insuredôs rejection of UM/UIM coverage applied to all insureds under the policy. Finally, in *Catlin Syndicated Limited*, the Northern District of Alabama held that a mortgagee added to a policy after a loss is not a third-party beneficiary of the policy.

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- 24 Hour Notice Rule

Dailey v. State Farm Auto. Ins. Co., --- So. 3d ----, 2018 WL 4090563 (Ala. Ct. App. Aug. 24, 2018).

Facts: The insuredôs vehicle was damaged when another vehicle forced her off the road. After her automobile insurer denied her UM claim, the insured filed an action against the insurer seeking coverage for her damages. The trial court granted summary judgment in favor of the insurer, and the insured appealed. This court affirmed the trial courtôs judgment, and the insured filed an application for a rehearing.

Issue: ***Whether the policy did not provide coverage because the policy required the insured to report an accident involving an UM to the police within 24 hours.***

Holding: Yes. When the owner and driver of the vehicle that caused the accident is unknown, the policy required the insured to report the accident to the police within 24 hours and to the insurer within 30 days. The insured reported the accident to the local sheriff 10 days after the accident. Because the insured failed to follow the policy requirements, and the policy provision is consistent with Alabama public policy, the trial court properly granted summary judgment in favor of the insurer.

Agent's Voluntary Assumption of Duty to Advise Insured
Somnus Mattress Corp. v. Hilson, --- So. 3d ----, 2018 WL 6715777 (Ala. Dec. 21, 2018).

Facts: Somnus Mattress Corporation (ñSomnusò) filed suit its insurance agent after a fire destroyed its warehouse. Somnus claimed that it relied on its agent to ensure it was fully insured, but Somnus did not have business income coverage. A disagreement arose about whether the agent told Somnus that business-income coverage was unnecessary, and the agent testified that Somnus always declined business-income coverage when it was time to renew the policy. The trial court granted summary judgment in favor of the agent, and Somnus appealed.

Issue: ***1) Whether an issue of fact existed regarding whether the agent gave advice to not have business income coverage.***
2) Whether the agent voluntarily assumed a duty to provide advice to Somnus about the amount of coverage, and whether the agent was negligent in fulfilling the duty.

Holding: 1) No. Although a disagreement existed as to whether the agent advised Somnus not to add business income coverage, the court found it to be irrelevant, as the policy renewed after this conversation, and the fire occurred after the renewal. At each renewal, the agent testified he recommended business income coverage for Somnus. The owner of Somnus testified that he could not remember what was said during these conversations. An inability to remember conversations does not create ñsubstantial evidenceò that the conversation did not happen, it only means that an individual cannot remember what was said. *Giles v. Brookwood Health Services, Inc.*, 5 So. 3d 533 (Ala. 2008). Because the agentôs testimony was unrefuted, the trial court correctly held that no genuine issue of material fact existed for this issue.

2) No. Even if a genuine issue of material fact existed as to whether the agent advised Somnus to purchase business income coverage, Somnus also had to prove that the agent was under a duty to advise Somnus. Most courts hold that an agent ñowes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage.ò *Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481 (Alaska 2001). Summary judgment was properly granted in favor of the agent and agency.

UM/UIM - UIM Insurer Loses Rights to Recover Fronted Funds If Insured Dies after UIM Insurer Fronts the Tortfeasor's Limits but Before the Insured Files Suit Against the Tortfeasor
GEICO Gen. Ins. Co. v. Curtis, --- So. 3d ----, 2018 WL 6729032 (Ala. Ct. App. Dec. 21, 2018).

Facts: After the insured was injured in an automobile accident and, prior to suit, the tortfeasorôs insurer offered its limits in settlement. The UIM insurer refused to consent to settlement and fronted the funds. Prior to filing suit against the tortfeasor, the insured died.

The UIM insurer filed an action against the tortfeasor and sought reimbursement of the fronted funds. The tortfeasor filed a motion to dismiss, or in the alternative, motion for summary judgment. The court granted the tortfeasorôs motion to dismiss on the ground that the UIM insurer did not file the action within the required statute of limitations. The UIM insurer appealed.

Issue: ***Whether an UIM insurer may recover advanced funds from a tortfeasor where the insured died prior to suit.***

Holding: No. The court first noted that the UIM insurer did not file the action outside the statute of limitations. However, the court found that the UIM insurer lost right of recovery against the tortfeasor upon the death of the insured because an unfiled tort claim expires upon death. Although the UIM insurer argued that an unfiled contract claim does not expire when the claimant dies, the court disagreed that the UIM insurerôs claim sounded in tort. *See Nationwide Mut. Ins. Co. v. Wood*, 121 So. 3d 982 (Ala. 2013). The court stated that the ñcontractual rights to which our supreme court referred in *Ex parte Allstate Property & Casualty Insurance Company*, 237 So. 3d 199 (Ala. 2017) are those arising out of the contract between an insurer and its insured and do not refer to a right to recover advanced funds from a tortfeasor or the tortfeasorôs insurer.ò The court found that the Alabama Supreme Court did not provide a basis to hold that an UIM has a contractual right to recover against the tortfeasor. Therefore, the court upheld the dismissal of the claim against the tortfeasor, finding that the right to recover the fronted funds against the tortfeasor sounded in tort and expired upon the death of the insured.

Alabama Federal Law Update

Rejection of UM/UIM Coverage

Progressive Spec. Ins. Co. v. Estate of Jack William Mock, 2018 WL 4088048 (M.D. Ala. Aug. 27, 2018).

Facts: The insured maintained an automobile policy for years and rejected UM/UIM coverage. He later added his wife to his policy, and they signed a UIM/UM motorist coverage rejection. The insured loaned his vehicle to another individual who was not named in the policy. A passenger and the individual were killed in an accident, and a third person was injured. The accident happened after the insured added his wife to the policy, but before the insured and his wife signed the UIM/UM motorist rejection.

The insurer filed a declaratory judgment action in the United States District Court for the Middle District of Alabama, asking the court to hold that it did not owe coverage to the estates of the two individuals who were killed in the accident and the injured person. The insurer filed a motion for default judgment against two of the defendants, and the insurer filed a motion for summary judgment against the third defendant.

Issue: ***Whether the named insured's rejection of UM/UIM coverage applied to all insureds under the policy, such that the policy did not provide coverage.***

Holding: Yes. It was undisputed that the named insured rejected UM/UIM coverage since the first year his policy was in effect. The policy states that the rejection of UM/UIM coverage is binding on everyone insured under the policy, and the rejection applies to any renewal, modification, amendment, reinstatement, alteration, or replacement policy. This rejection ñindicates that the policy does not require the signatures of all the insureds for a rejection of [UM/UIM] coverage to be valid.ò *Progressive Spec. Ins. Co. v. Naramore*, 950 So. 2d 1138 (Ala. 2006). When the insuredôs wife was added to the policy as a named insured, the policy was ñamended, altered [or] modified,ò and the rejection remained valid unless a named insured requests coverage and pays the additional premium. Therefore, the insurer was entitled to summary judgment, as it did not owe UM/UIM coverage.

Employment Practices Liability Insurance - Punitive Damages Coverage
American Chemicals & Equip., Inc., v. Continental Cas. Co., 2018 WL 4539464 (N.D. Ala. Sep. 21, 2018).

Facts: An employee sued his employer for promissory fraud arising out of the employerôs alleged misrepresentations in salary negotiations. In his complaint, the employee claimed compensatory damages and ñsuch other damages as are available by law.ò The employer sought defense and indemnity from its liability insurer, which declined coverage. The employer then sued the insurer for breach-of-contract, bad-faith, negligence, and wantonness. The court asked the parties to brief the issue of whether the policy provided coverage for punitive damages in the underlying action that would create a duty to defend for the insurer.

Issue: ***Whether the punitive damages section in the policy creates a duty to defend the insured in the underlying action.***

Holding: Yes. The policy provides coverage for loss that includes ñpunitive and exemplary damages and the multiplied portion of multiplied awards (subject to this Policyôs other terms, conditions and limitations).ò The insurer argued that the underlying complaint did not contain a claim for punitive damages. The court, however, noted that, in Alabama, punitive damages are available for promissory fraud. *See Kennedy Elec. Co. v. Moore-Handley, Inc.*, 437 So. 2d 76 (Ala. 1983). Because punitive damages are

available for the claim asserted in the underlying action, and because the employee requested ñsuch other damages as are available by law,ò the court held that it must ñliberally construe the allegations in the complaint in an underlying action in favor of coverage,ò and that the insurer owed a duty to defend.

Insurer's Failure to Settle- Breach of Contract, Bad Faith & Outrage
Voss v. State Farm Mut. Auto. Ins. Co., 2018 WL 4635747 (N.D. Ala. Sep. 27, 2018).

Facts: While driving on the wrong side of the road, Donna Smith collided with a bicyclist, Daniel Voss, and caused significant injuries to him. Smith reported the accident to her insurer, Nationwide Mutual Insurance Company (ñNationwideò), and Voss made a claim for UIM coverage under four policies with State Farm Mutual Automobile Insurance Company (ñState Farmò). The Nationwide policy provided $25,000 in potential liability coverage, and the State Farm policies provided $100,000 in potential UIM coverage. Voss informed State Farm that Nationwide offered the policy limits, $25,000, to settle all claims and obtain a release from further liability.

State Farm took an EUO of Voss and his parents and did not investigate the claim further. Then, following the guidelines offered in *Lambert v. State Farm Mutual Automobile Insurance Company*, 576 So. 2d 160 (Ala. 1991), State Farm fronted Nationwideôs policy limits. Counsel for Voss informed State Farm that Voss did not wish to sue Smith directly and simply wished to have the UIM policy limits. Voss filed a lawsuit against Smith shortly after that and did not name State Farm. A jury returned a $1,900,000 verdict against Smith. Before the deadline past to file post-judgment motions, State Farm sent a check to Voss for the remainder of the UIM coverage limits.

Voss then filed a breach-of-contract, bad-faith, fraud, and outrage action against State Farm in state court, and State Farm removed the action to the United States District Court for the Northern District of Alabama. State Farm moved to dismiss the action.

Issue: ***1) Whether the breach-of-contract and bad-faith claims should be dismissed, as the complaint fails to state a claim upon which relief may be granted. 2) Whether the fraud claim should be dismissed, as the complaint fails to state a claim upon which relief may be granted. 3) Whether the outrage claim should be dismissed, as the complaint fails to state a claim upon which relief may be granted.***

Holding: 1) No. Voss argues that State Farm acted in bad faith by refusing to agree to the settlement and failing to quickly pay the UIM claim. Further, State Farm would have learned that there was no contributory negligence if State Farm had properly investigated the claim. State Farm argues that Smithôs liability was not determined until a verdict was reached in the underlying lawsuit.

When deciding a motion to dismiss, the allegations of the complaint are accepted as true. Since the complaint alleges that State Farmôs only investigation was to conduct EUOs of Voss and his parents, and Voss did not remember the accident and was brain damaged and his parents did not witness the accident, this was not a ñgood faith investigation.ò State Farm failed to ñdiligently investigate the facts, fairly evaluate the claim, and act promptly and reasonably.ò *LeFevre v. Westberry*, 590 So. 2d 154 (Ala. 1991).

Although Smith contested liability in the underlying litigation, this action was filed after State Farm declined to pay the limits of each policy. Smith also did not informally contest liability until after State Farm declined to pay the limits of each policy. State Farm argued that Voss could not receive UIM benefits until a judgment was entered against Smith in the underlying action. However, Alabama law does not require an insurer to wait for a judgment to be rendered against a tortfeasor in underlying litigation. Instead, benefits should be available after liability and damages are decided. *LeFevre*, 590 So. 2d 154. State Farm does not contest that the damages were greater than the UIM policy limits, so the issue is simply whether a proper investigation would have proven liability. The court held that liability would have been known had a proper investigation been conducted. The breach-of-contract and bad-faith claims are not due to be dismissed, as the complaint states a claim for failure to promptly pay the claim and agree to the settlement with the tortfeasor.

2) Yes. Voss argues that State Farm acted fraudulently when it misrepresented to Voss that it conducted an investigation. Failing to fulfill the requirements of the contract does not equal fraud. This claim is directly connected to Vossôs allegations for failure to fulfill contractual allegations, and the same bad conduct cannot be made into an additional tort claim when breach-of-contract and bad-faith claims already exist to provide a remedy for Voss. *See Hunt Petroleum Corp. v. State*, 901 So. 2d 1 (Ala. 2004); *Holmes v. Behr Process Corp.*, 2015 WL 7252662 (N.D. Ala. Nov. 17, 2015). The fraud claim is dismissed.

3) No. Voss alleges that State Farmôs failure to conduct a proper investigation was motivated by its own financial interests and is an act in which State Farm regularly engages. The complaint alleges that Voss experienced emotional distress so severe due to his injuries, medical bills, his emotionally vulnerable state, and State Farm denied him the funds to which he was entitled. Although the Alabama Supreme Court has not examined a case with similar facts as this case with regard to outrage, Alabama law does not limit the use of the tort to certain types of conduct. *Potts v. Hayes*, 771 So. 2d 462 (Ala. 2000). In *Johnson v. Safeway Insurance Company*, 2012 WL 473293 (N.D. Ala. Sept. 27, 2012), the court held that ñcertain conduct involving poorly handled insurance claims may fit within Alabamaôs outrage tort.ò The court held that the motion to dismiss should be denied, as Voss properly alleged the tort of outrage and the facts alleged in the complaint align with the elements of outrage.

Fixed Damages in UIM Insurance before Bad-Faith Claim
Broadway v. State Farm Mut. Auto. Ins. Co., 2018 WL 4677779 (M.D. Ala. Sept. 28, 2018).

Facts: The insured originally filed a breach-of-contract, bad-faith, and fraud action against his UIM insurer arising out of a dispute about the amount of UIM benefits. The fraud claim was dismissed with prejudice and the breach-of-contract and bad-faith claims were dismissed without prejudice. The insured then filed the current action for breach-of-contract, bad-faith, and benefits under the policy against the UIM insurer, and the insurer filed a motion to dismiss.

Issue: ***Whether the insured could maintain a bad-faith claim against his UIM carrier before he established he was entitled to a fixed amount of damages.***

Holding: No. To prevail on a bad-faith claim in the UIM context, damages must be fixed before the action is filed. *See Ex parte Alfa Mut. Ins. Co.*, 799 So. 2d 957 (Ala. 2001). Because the insured had not already proved that he was entitled to a fixed amount of damages that the insurer failed to pay, the insured could not maintain a bad-faith claim against the UIM insurer.

Trucker's Insurance-Trailer Exclusion
Peace v. Rock, 2018 WL 4816486 (N.D. Ala. Oct. 3, 2018).

Facts: After her husband was killed in an accident involving the insuredôs truck, Tamara Peace filed a lawsuit to recover damages against numerous parties, including the insured. At the time of the accident, the insuredôs truck was towing a trailer. The insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, asking the court to declare that it did not have a duty to defend or indemnify the insured. The insured and all but one defendant did not appear, and the insurer moved for default declaratory judgment. Only Ms. Peace appeared in the action and did not oppose the motion for default declaratory judgment.

Issue: ***Whether the insurer was entitled to a default declaratory judgment because of a trailer exclusion on the policy.***

Holding: Yes. Because the clerk already entered a default against the defendants, the court had to decide whether judgment should be entered based on the facts alleged in the complaint. The policy included an endorsement excluding coverage for the truck when it is towing or transporting a trailer, unless the insured owned the trailer and it was listed in the policy. The policy does not list any trailers; therefore, no coverage existed at the time of the accident as it is described in the underlying complaint. Therefore, the insurer did not owe a duty to defend or indemnify any party in the underlying lawsuit.

Homeowner's Policy- No Requirement for an Insured to Prove Specific Cause of Loss under All-Risk Policy

Brown v. State Farm Fire & Cas. Co., 2018 WL 5095178 (N.D. Ala. Oct. 19, 2018).

Facts: In the summer edition of our Newsletter, we published a summary of the courtôs order responding to the insurerôs motion for summary judgment and motion to strike. After the homeownerôs insurer denied coverage for damage to the insuredôs home, the insured filed an action against the insurer and other defendants. Eventually, the insurer was the only remaining defendant, and only the insuredôs breach-of-contract claim remained against the insurer. The court granted in part and denied in part the insurerôs motion for summary judgment and motion to strike, and the insurer moved for clarification of the courtôs memorandum opinion and order.

Issue: ***Whether the insured must prove a specific cause of loss to prove coverage exists under an all risk policy.***

Holding: No. For an all-risk policy, the Alabama Supreme Court holds that an insured is only required to prove the claim is covered under the policy. *St. Paul Fire & Marine Ins. Co. v. Britt*, 203 So. 3d 804 (Ala. 2016). All that is required is for an insured to provide evidence that he had a policy with the insurer, he made a claim with the insurer, and the insurer denied the claim in order to meet the insuring agreement of the all-risk policy. It is then up to the insurer to prove the application of any exclusion.

Policy Cancellation - Proof of Mailing

Nelson v. Adkinson, 2018 WL 4997685 (S.D. Ala. Sept. 19, 2018) (opinion adopted in *Nelson v. Adkinson*, 2018 WL 4964368 (S.D. Ala. Oct. 15, 2018)).

Facts: Following a car accident, the insured filed suit against its automobile insurer and other defendants to recover damages. Because the policy cancelled before the accident due to failure to pay premiums, the insurer denied coverage. The insurer filed a motion to dismiss for failure to state a claim upon which relief may be granted.

Issue: ***Whether a fact question existed regarding proof of mailing of a cancellation notice that would defeat the insurer's motion to dismiss.***

Holding: Yes. The insurer mailed a cancellation notice to the insured about a month before the accident. Although the insurer submitted a ñMailing Proof Sheetò verifying that the cancellation notice was mailed to the named insured, the insurer failed to provide evidence that the cancellation notice was effective pursuant to Alabama Code Sections 27-23-21 and 27-23-23. Under these section, a cancellation notice is not effective unless the notice is mailed at least 20 days before the cancellation date, or at least 10 days before the cancellation date when the reason is for nonpayment.

Because the insurer did not submit evidence that it complied with Alabama Code Sections 27-23-21 and 27-23-23, the court denied the motion to dismiss.

Duty to Defend and Indemnify- Amount in Controversy/Ripeness
Axis Surplus Ins. Co. v. Valles, 2018 WL 5617818 (N.D. Ala. Oct. 30, 2018).

Facts: After sustaining injuries at a construction site, Domingo Valles filed an underlying lawsuit against the insured and the additional insured. While providing a defense for the insured and additional insured, the CGL insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama and asked the court to declare it had no duty to defend or indemnify either insured. Both insureds filed counterclaims against the insurer, and both insureds moved to dismiss the insurerôs claims against them.

Issue: ***Whether the insureds' motion to dismiss should be granted, as the court lacks subject matter jurisdiction over the claims.***

Holding: Yes. In support of its argument that the amount in controversy exceeds $75,000, the insurer submitted an affidavit stating that providing a defense for each insured would collectively exceed $75,000. However, in *Jewell v. Grain Dealers Mutual Insurance Company*, 290 F.2d 11 (5th Cir. 1961), the Fifth Circuit held that the amount in controversy cannot be met by combining multiple claims and multiple defendants. At the most, each claim will likely cost the insurer between $50,000 and $60,000. Therefore, the amount in controversy is not met. Additionally, the court noted that the claims related to the duty to indemnify were unripe, as the underlying action is still pending. *See Allstate Ins. Co. v. Employers Liab. Assur. Corp.*, 445 F. 2d 1278 (5th Cir. 1971).

The insurer also argued that the court should exercise supplemental jurisdiction over the declaratory judgment in light of the insuredsô counterclaims. The court declined, finding that it did not have jurisdiction over certain counterclaims asserted by the insureds for the same reasons that the insurerôs claim was subject to dismissal. In addition, the court declined to exercise supplemental jurisdiction because of the insuredsô breach of contract and tort claims. The court found those claims were not ripe because the insurer was providing a defense. The court concluded that it did not have subject matter jurisdiction over the declaratory judgment by the insurer or the insuredsô counterclaims. Therefore, it dismissed the matter in its entirety.

Removal- UIM Insurer that Opted Out is Not a Real Party in Interest
Morgan v. Hillbilly Haulin', LLC, 2018 WL 5986751 (M.D. Ala. Nov. 14, 2018).

Facts: The plaintiffs filed a negligence lawsuit against Hillbilly Haulinô, LLC (ñHillbilly Haulinô) and Jason Arnett (ñArnettò), and included a count for UIM benefits against

ALFA Mutual Insurance Company (ñALFAò) in the complaint. The defendants removed the action to the United States District Court for the Middle District of Alabama and ALFA filed a motion to opt out of the case. The plaintiffs then moved to remand due to lack of diversity.

Issue: ***Whether ALFA is a real party in interest, and therefore ALFA's citizenship destroys diversity and eliminates subject matter jurisdiction.***

Holding: No. The plaintiffs were residents of Alabama and Arnett and Hillbilly Haulin were citizens of Arkansas. ALFA is a citizen of Alabama. Therefore, if ALFAôs citizenship is considered, it would destroy federal-court diversity.

A real party in interest has a ñreal and substantial stake in litigation and who exercises substantial control over the litigation . . ..ò If an UIM insurer is a defendant and engages in ñsubstantial participation during trial, an insurance companyôs citizenship should not be considered for diversity purposes.ò However, because ALFA opted out of litigation, ALFAôs liability is ñcontingent and indirect.ò Accordingly, ALFA is only a nominal party, and its citizenship does not defeat diversity.

Removal- Dispensable Parties

Parker v. Morton, 2018 WL 6059525 (S.D. Ala. Oct. 26, 2018) (opinion adopted in *Parker v. Morton*, 2018 WL 6055508 (S.D. Ala. Nov. 19, 2018).

Facts: The plaintiffs filed an action to recover damages for their injuries against the tortfeasor who collided with the plaintiffs as well as both of the plaintiffsô UIM carriers for UIM benefits. At the scheduling conference, the court found that the plaintiffs and one of the UIM insurers were citizens of Georgia, and asked the plaintiffs to show cause why the action should not be dismissed for lack of subject matter jurisdiction. The plaintiffs moved to dismiss the UIM insurers without prejudice, and no party objected to this motion. However, in response to the plaintiffsô motion for leave to amend the complaint to remove all references of the UIM insurers, the tortfeasor argued that the insurers are indispensable parties and will be prejudiced if dismissed.

Issue: ***Whether the UIM insurers are dispensable parties and should be dismissed from the action to avoid destroying subject matter jurisdiction.***

Holding: Yes. An UIM insurer is not required to be included in its insuredôs action against a tortfeasor. Under Alabama law, an UIM insurer may opt out of being involved in the action. Since the UIM insurers are permitted to opt out of litigation in this action, they are dispensable parties. Even if the UIM insurers were required parties, Federal Rule of Civil Procedure 19(b) still permits dismissal. This is because both UIM insurers are allowed to participate in the litigation, and although they have not opted out, they

have not objected to being voluntarily dismissed from the action. There will be no impact on the tortfeasor if the UIM insurers are not parties. Therefore, the UIM insurers are dismissed without prejudice.

Collateral Estoppel/Issue Preclusion
Sellers v. Nationwide Mut. Fire Ins. Co., 2018 WL 6198996 (N.D. Ala. Nov. 28, 2018).

Facts: The insured, a subcontractor, subcontracted with the builder to provide foundation work to a home. After the homeowner discovered construction defects, the homeowner filed an action against the builder and the insured in state court. After the builder assigned its cross-claims against the insured to the homeowner and paid $100,0000, the homeowner dismissed the builder from the action.

The insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama against the insured and homeowner, seeking a declaration of coverage. The court entered a default judgment against the insured, and the court entered summary judgment against the homeowner because the damage first occurred before the policy was in place.

The homeowner and insured entered into a $250,000 consent judgment against the insured and this judgment was limited to recovery from the insuredôs insurance policy. The homeowner then filed a collection action against the insurer in state court, seeking recovery on its own behalf and as assignee of the builder.

The insurer removed the collection action to the United States District Court for the Northern District of Alabama, and moved to prevent the homeowner from presenting evidence that had previously been determined in the declaratory judgment action ï that property damage did not occur when the policy was in effect.

Issue: ***Whether collateral estoppel/issue preclusion precludes a judgment creditor (here, the homeowner) from litigating facts established in a prior declaratory judgment action.***

Holding: No. Federal preclusion law is described as: ñ(1) the same issue was raised in the prior action, (2) the issue was actually litigated, (3) the determination of the issue was essential to the judgment reached, and (4) the party to be precluded had a full and fair opportunity to litigate the issue in the prior action.ò *See CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.*, 327 F.3d 1309 (11th Cir. 2003). The court assumed, without discussing, that the first three elements were met and focused on the fourth element. Typically, issue preclusion only applies when the same parties were also parties in the earlier action. Although the homeowner was a party in the insurerôs earlier declaratory judgment action, the builder was not. Because the homeowner was also proceeding

as the assignee of the builder, and the builder was not a party to the prior coverage action, issue preclusion did not apply.

Commercial Insurance Policy - Mortgagee as Third-Party Beneficiary
Catlin Syndicated Ltd. v. Ramuji, LLC, 2018 WL 6303776 (N.D. Ala. Nov. 29, 2018).

Facts: After the insuredôs motel was destroyed in a fire, the insured made a claim with its commercial insurer. Although the bank was the mortgagee to the motel, the insured neglected to list the bank as an entity with an ñadditional interestò in the insurance application. The bank was not listed on the declarations page or in an endorsement. Three weeks after the fire, and a claim was filed, the insured requested that the bank be added to the policy as a mortgagee. Although the insurer declined to add the bank as a mortgagee, the insurer did add the bank through an endorsement with an effective date after the fire. Several months later, the insurer denied the claim.

Catlin Syndicated Ltd., (ñCatlinò), one of the underwriters, filed a declaratory judgment action in the United States District Court for the Northern District of Alabama against the insured and the bank. Catlin asked the court to declare that the bank did not have standing to present a claim under the commercial property policy. The bank filed a counterclaim against Catlin and several other underwriters and asked the court to declare that it is a third-party beneficiary to the policy. The underwriters moved for summary judgment and argue that the bank did not have standing to present a claim under the commercial property policy.

Issue: ***Whether a mortgagee added to a policy after a loss is a third-party beneficiary of the policy.***

Holding: No. Alabama law requires a party to prove the following in order to be considered a third party beneficiary: ñ(1) that the contracting parties intended, when they entered the contract, to bestow a direct, as opposed to an incidental, benefit upon a third party, (2) that the plaintiff was the intended third-party beneficiary of the contract, and (3) that the contract was breached.ò *Aliant Bank, a Div. of USAmeribank v. Four Star Investments, Inc.,* 244 So. 3d 896 (Ala. 2017). When determining intent, a court should first examine the contract when the language is unambiguous. *H.R.H. Metals, Inc. v. Miller ex rel. Miller*, 833 So. 2d 18 (Ala. 2002). The policy states that the amount payable will be made to the mortgagee listed in the declarations or in an endorsement. If the underwriters and the insured wished to confer any benefit to the bank, the bankôs name would have been named in the policy. Although there is other language in the policy that discusses mortgagees, it is not possible to ñrefine away the terms of the contract that are expressed with sufficient clarity to convey the intent and meaning of the parties.ò *Kinnon v. Universal Underwriters Ins. Co.*, 418 So. 2d 887 (Ala. 1982). Therefore, the bank was not a third-party beneficiary, and the court granted summary judgment in favor of the underwriters.

Homeowner's Policy- Sworn Proof of Loss
Philippou v. American Nat'l Prop. & Cas. Co., 2018 WL 6331691 (M.D. Ala. Dec. 4, 2018).

Facts: After the insuredsô home suffered damage from a fallen tree, the insureds submitted a claim with their homeownerôs insurer. During the claims process, the insurer asked the insureds to submit a sworn proof of loss nine times over the course of almost two years. The insureds never submitted one. During the claims process, the insurer provided payments to the insureds, but the insureds disagreed over the amount that should be paid.

The insureds filed a breach-of-contract, intentional infliction of emotional distress, bad-faith, negligence, recklessness, wantonness, and gross negligence action against the insurer. After some time, all but the breach-of-contract and bad-faith claims were dismissed. The insurer filed a motion for summary judgment on the remaining two claims, and the insureds conceded that the bad-faith claim should be dismissed.

Issue: ***Whether the insured's failure to submit a sworn proof of loss is a violation of the conditions precedent to coverage.***

Holding: Yes. In order for an insured to receive coverage for a claim, the insured must comply with the conditions precedent to coverage. Alabama courts have repeatedly granted summary judgment in favor of insurers where conditions precedent are not met. *See Pittman v. State Farm Fire & Cas. Co.*, 868 F. Supp. 2d 1335 (M.D. Ala. 2012) (*aff'd Pittman v. State Farm Fire & Cas. Co.*, 519 F. Appôx 656 (11th Cir. 2013)); *Hillery v. Allstate Indem. Co.*, 705 F. Supp. 2d 1343 (S.D. Ala. 2010); *Baldwin Mut. Ins. Co. v. Adair*, 181 So. 3d 1033 (Ala. 2014). The insureds did not dispute that they failed to submit a sworn proof of loss. Instead, they argued that the insurer waived the requirement for the sworn proof of loss. Because the insurer repeatedly requested the sworn proof of loss for almost two years, the court held that the insurer did not waive the right to require a sworn proof of loss, and granted summary judgment in favor of the insurer.

Homeowner's Policy- Arson, Misrepresentation, Proof of Loss
Brooks v. Allstate Indem. Co., 2018 WL 6574786 (M.D. Ala. Dec. 13, 2018).

Facts: After two fires one day apart destroyed the insuredôs home, the insured made a claim for damages with his homeownerôs insurer. The fire investigator concluded the fires were incendiary. Before the fires, the insured had failed to make payments according to his bankruptcy plan. After the fires, the insured waited over six months to submit a sworn proof of loss that the insurer repeatedly requested to be turned in within 60 days of the fires. Also, the sworn proof of loss did not contain enough information for the insurer to properly calculate the loss. After the insurer denied the claim, the insured filed a breach-of-contract, bad-faith, negligence, gross-negligence, and

wantonness action against the insurer and the insurerôs adjuster. After the insurance adjuster was dismissed, the insurer filed a partial motion for summary judgment. The insured agreed to dismiss the negligence, gross, negligence, and wantonness claims, leaving the bad-faith claim.

Issue: ***Whether the insurer was entitled to summary judgment on a bad-faith claim, as there was evidence to indicate arson, the insured misrepresented information, and the insured failed to comply with a condition precedent to coverage.***

Holding: Yes. An insurer may deny an insurance claim if the damage was caused by arson. *State Farm Fire & Cas. Co. v. Balmer*, 672 F. Supp. 1395 (M.D. Ala. 1987). If there is conflicting evidence as to whether arson caused the fire, the insured cannot maintain a bad-faith claim. *See Balmer.* The insured was experiencing financial difficulties, the fire investigator concluded the fires were incendiary, and the insured made conflicting statements about where he was on the day of the first fire. At a minimum, the insurer had a debatable and arguable reason to deny the claim, which precluded a bad-faith claim.

Also, a claim for bad faith cannot be maintained when there is conflicting evidence as to whether the insured made a misrepresentation. *See Balmer.* Because the insured admitted he gave information to the insurer that could be perceived as conflicting during the investigation, a bad-faith claim could not survive summary judgment.

Finally, even though the insurer repeatedly requested a sworn proof of loss within 60 days of the loss, it took the insured over six months to provide one. The proof of loss he submitted was not detailed and did not provide enough information for the insurer to calculate the claim. Because an insurer is not obligated to pay or evaluate a claim until the insured follows the terms of the policy for submitting claims, and the insured did not provide a timely or sufficient sworn proof of loss, the bad-faith claim could not survive. *See Nationwide Ins. Co. v. Nilsen*, 745 So. 2d 264 (Ala. 1998).

Media Tech Policy- Exclusions

Jackson, Key and Assoc., LLC v. Beazley Ins. Co., Inc., 2018 WL 6710041 (S.D. Ala. Nov. 30, 2018) (opinion adopted in *Jackson, Key and Assoc., LLC v. Beazley Ins. Co., Inc.*, 2018 WL 6706689 (S.D. Ala. Dec. 20, 2018)).

Facts: The insured, a software development and data hosting company, contracted with a third-party data hosting firm to assist in moving electronic medical records for Elk River Health Services, Inc. (ñElk Riverò) to a new platform. About two years after the services were performed, a patient filed an action against Elk River and certain practitioners to recover damages for being incorrectly prescribed medication. Elk River added a third-party claim against the insured and alleged that the insured improperly moved medical records and caused information to be omitted from his

medical records. Elk River argued that if it was held liable, Elk River was entitled to contribution and indemnification from the insured.

The insured made a claim with its media-tech insurer, and the insurer denied coverage based on two exclusions. After the insured filed a declaratory judgment, breach-of-contract, and bad-faith action against the insurer, the insurer moved to dismiss the action, and the insured opposed the motion.

Issue: ***Whether the exclusions to the media-tech policy excluded coverage.***

Holding: Yes. The Medical Services Exclusion precluded coverage for claims ñbased on or arising out of medical professional malpractice, including, . . . the rendering o[r] failure to render medical professional services, treatment or advice.ò Because Elk Riverôs claims against the insured involved a demand for indemnification for any medical malpractice claims against Elk River, the exclusion was unambiguous, and the exclusion precluded coverage arising out of medical malpractice, the exclusion applies.

The Physical Injury Exclusion precluded coverage for claims ñ[f]or or arising out of or resulting from: . . . physical injury, sickness, disease or death of any person, including any mental anguish or emotional distress that results from such physical injury[.]ò The insured did not provide an argument for this exclusion, as the insured noted that either both exclusions apply or neither exclusion applies. Therefore, the claim by Elk River ñarises out of and results fromò ñphysical injuryò and also excluded coverage.

The declaratory judgment, breach-of-contract, and bad-faith claims each failed because there is no breach of the insurance contract, as the insurer correctly relied upon two exclusions to deny coverage. Therefore, the insurer was entitled to dismissal.

Amount in Controversy

Scottsdale Ins. Co. v. Calhoun Hunting Club and Lounge, 2018 WL 6788045 (M.D. Ala. Dec. 26, 2018).

Facts: A security guard employed by the insured fired multiple shots into a car in which Nakia Rivers and Tiffany Miller were sitting. The shots killed Rivers and damaged Millerôs car. Riversô estate made claims against the insured and its owner, and the insurer paid the $300,000 policy limits and settled the claims against the insured. Then, Miller filed an action against the insured and its owner, seeking damages for severe mental anguish, emotional distress, damages to her car, and punitive damages.

The insurer filed a declaratory judgment action in the United States District Court for the Middle District of Alabama and asked the court to declare that it had no duty to defend or indemnify the insured, as it had already paid the policy limits for the occurrence. Miller and the owner moved to dismiss the action for lack of subject matter jurisdiction.

Issue: ***Whether the amount in controversy exceeds $75,000 and subject matter jurisdiction exists.***

Holding: No. The court noted that when the issue at hand is whether the insurance policy applies to an occurrence, the amount in controversy is decided by determining the ñvalue of the underlying claim - not the face amount of the policy.ò *See Hartford Ins. Grp. v. Lou-Con Inc.*, 293 F.3d 908 (5th Cir. 2002). Although the court can consider defense costs in this equation, the insurer did not submit its expected defense costs for the insured and the owner. The only repairs to the car listed were $200-$300 to replace the rear window. Punitive damages may be considered when calculating the amount in controversy, but they may not be considered when it is ñapparent to a legal certaintyò that they cannot be recovered. *Holley Equip. Co. v. Credit All. Corp.*, 821 F.2d 1531 (11th Cir. 1987). Because the policy specifically excluded coverage for punitive damages, punitive damages could not be considered in calculating the amount in controversy. Miller has also stipulated that she does not intend to seek or accept an amount greater than $50,000 in the underlying lawsuit. Therefore, the court lacked subject matter jurisdiction and dismissed the declaratory judgment without prejudice.