Spring 2019 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 Alabama Court of Civil Appealsô opinion in *Beeman v. ACCC Ins. Co.*, 2019 WL 1576802 (Ala. Civ. App. Apr. 12, 2019). The Alabama Court of Civil Appeals held that an individual who is simply listed as a ñdriverò on the renewal certificate is not a named insured and is not entitled to reject UM coverage. Also, in *Robinson v. Liberty Mut. Ins. Co.*, 2019 WL 527374 (N.D. Ala. Feb. 11, 2019), a federal court in the Northern District of Alabama granted the homeownerôs insurerôs motion to dismiss, as the ordinary meaning of spiders includes insects or vermin, and a loss caused by insects or vermin is excluded under the policy. Finally, in *Broadway v. State Farm Mut. Auto. Ins. Co.*, 364 F. Supp. 3d 1329 (M.D. Ala. 2019), a federal court in the Middle District of Alabama was highly critical of Alabamaôs UM/UIM law. However, the court followed precedent and held that the UIM insurer was entitled to summary judgment on the bad-faith claim, as Alabama law does not allow an insured to file an action before damages have been determined.

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

UM Coverage - Rejection of Coverage

Beeman v. ACCC Ins. Co., 2019 WL 1576802 (Ala. Civ. App. Apr. 12, 2019).

Facts: Lester Beeman (ñBeemanò) was injured in an automobile accident caused by Kimberly LaChance (ñLaChanceò), an uninsured motorist. Beeman filed a negligence and wantonness action against LaChance and later added the automobile insurer of the car Beeman was driving to recover UM benefits. Beemanôs mother purchased the policy and was the only named insured. Beeman was listed as a ñdriverò on the renewal certificate. The trial court entered a default judgment against LaChance after she did not appear at trial. Then, the trial court granted the insurerôs motion to dismiss, and Beeman appealed the judgment.

Issue: ***Whether Beeman is a named insured and therefore entitled to reject UM coverage, even though he was simply listed as a "driver" on the renewal certificate and not a named insured.***

Holding: No. A named insured must reject UM/UIM coverage. *See Nationwide Ins. Co. v. Nicholas*, 868 So. 2d 457 (Ala. Ct. App. 2003). Beeman was only listed as a driver. Although Alabama courts have not addressed this exact issue, other courts have and found that a driver is not a named insured. *See Waller v. Rocky Mountain Fire & Cas. Co.*, 535 P.2d 530 (Or. 1975); *Stanley v. Government Emps. Ins. Co.*, 810 S.E.2d

179 (Ga. Ct. App. 2012); *Nationwide Mut. Ins. Co. v. Williams*, 472 S.E.2d 220 (N.C. Ct. App. 1996). Also, the Eleventh Circuit held that a driver was not a named insured and not entitled to UIM coverage when the named insured rejected UIM coverage. *Rimas v. Progressive Spec. Ins. Co.*, 292 F. Appôx 833 (11th Cir. 2008).

Moreover, rejection by the named insured is a rejection for all insureds. The Alabama Supreme Court has held that Alabama Code Statute 32-7-23(a) states that a named insured has the ñright to knowingly reject [UIM] coverage with respect to additional insureds.ò *Federated Mut. Ins. Co. v. Vaughn*, 961 So. 2d 816 (Ala. 2007). Therefore, Beeman is not a named insured and was not entitled to UM coverage because he did not specifically reject it. The court affirmed the dismissal of the insurer.

Alabama Federal Law Update

CGL Policy- "Occurrence"
Northfield Ins. Co. v. Browning Timber Saw & Mill, LLC, 2019 WL 127358 (N.D. Ala. Jan. 8, 2019).

Facts: Colin Browning (ñBrowningò) owned Browning Timber & Sawmill, LLC. Browning hired Pier One to build a pier on his property, and Brad Wilson (ñWilsonò), an employee of Pier One, was assigned to build the pier. Wilson offered to sell Browning timber from his own property, and Browning agreed to accompany Wilson to the property to harvest timber. After creating a notch in a tree in preparation for cutting it down, Browning left the property. While Browning was gone, the tree fell and injured Wilson.

Wilson sued Browning Timber and other defendants for his injuries, and Browning Timber sought coverage from his CGL insurer, Northfield. Northfield defended under a reservation of rights and filed a declaratory judgment action in the United States District Court for the Northern District of Alabama. Northfield sought a declaration that it did not owe a defense or indemnity.

Issue: ***Whether the CGL insurer was entitled to summary judgment because the injury was not caused by an occurrence.***

Holding: Yes. The CGL policy only provided coverage for bodily injury caused by ñTree Pruning, Dusting, Spraying, Repairing, Trimming or Fumigating.ò The policy did not cover cutting down trees. Wilson argued that his injuries were caused by Browning pruning a tree. However, Browning placed a notch in a tree to cut it down. Because notches are not made in trees unless they are going to be cut down, and the policy did not provide coverage for bodily injury while cutting down a tree, no coverage was available for the injury. The district court granted summary judgment in favor of

Northfield and held that it did not have a duty to defend or indemnify.
[Note: This firm represented Northfield in this case. It is presently on appeal]

Actual Controversy - Appraisal
Haman, Inc. v. Chubb Custom Ins. Co., 2019 WL 121275 (N.D. Ala. Jan. 7, 2019).

Facts: Following a fire that damaged the insuredôs motel, the insured filed a claim with its CGL insurer. Although the insured and insurer initially agreed on the amount the insurer should pay for the loss and the insurer paid this amount, the insured hired an appraiser who calculated a much higher figure. After the insurer declined coverage for a portion of the loss, the insured filed suit against the insurer. The insurer then filed a counterclaim for declaratory judgment, asking the court to find that the insuredôs appraiser was biased, and the insured was not entitled to have an appraisal of the wind loss claim. The insured filed a motion to dismiss the counterclaim.

Issue: ***Whether the insurer's counterclaims regarding the appraisal process were a present justiciable controversy.***

Holding: No. The insurer argued that the appraiser was biased, however, the court found that, as pleaded, the insurerôs counterclaim did not state how this bias would cause the insurer any injury. At the most, the court found that the insurer was seeking an advisory opinion as to the credibility of the damages the appraiser calculated. This was not enough to create an actual controversy. Also, the insurer failed to state an actual controversy regarding the request for a declaration that the insured was not entitled to an appraisal for the wind claim. This is because the insurer is given the authority in the policy to deny the insuredôs claim after the insured submits this appraisal. Because the insurer still had the opportunity after appraisal not to pay for any loss that is not covered under the policy, no actual controversy existed and the counterclaims were dismissed without prejudice.

Homeowner's Policy - Arson
Nationwide Mut. Fire Ins. Co. v. King, 2019 WL 182497 (N.D. Ala. Jan. 14, 2019).

Facts: After a fire damaged his home, the insured made a claim with his homeownerôs insurer. In the preliminary investigation report, the Bessemer Fire Department concluded that the fire was caused by an electrical wiring malfunction, and the cause of this malfunction was under investigation. The insurerôs cause and origin investigator noted that the burn patterns were consistent with the burning of ignitable liquid. One part of the living room tested positive for burned gasoline. Although the insurer made payments to the insured, and stated that it has not denied the claim, the insurer stopped payments when it determined the insured did not live in the house. The insurer resumed payments after the insured filed a complaint with the Alabama Department of Insurance, but the insurer stopped again after filing a declaratory

judgment action.

The insurer filed a declaratory judgment action asking the court to hold that no coverage exists for the insured, as the fire was caused by arson. The insured filed a counterclaim against the insurer alleging breach of contract and bad faith. The insurer filed a summary judgment motion for its declaratory judgment claim as well as the insuredôs breach-of-contract and bad-faith claims, and the insured opposed the motion.

Issue: ***1) Whether the insurer's summary judgment motion for the breach-of-contract counterclaim should be granted, as the fire was caused by arson and the policy excludes intentional acts.***
2) Whether the insurer's summary judgment motion for the bad-faith claim should be granted, as the insurer had a legitimately debatable reason to deny the claim.
3) Whether the insured is entitled to mental anguish damages for the breach-of-contract claim, if a jury returns a verdict in favor of the insured.

Holding: 1) No. In order to prove the affirmative defense of arson, an insurer must prove that (a) the fire was of an incendiary origin, (b) the insured had a motive to start the fire, and (c) there were unexplained circumstances that implicate the insured. *Great Southwest Fire. Ins. Co. v. Stone*, 402 So. 2d 899 (Ala. 1981). Although the insurerôs expert concluded the fire was intentionally set, and the insured was the only one with access to the home, the insured denied starting the fire, denied being at home when the fire started, and the preliminary investigation report from the Bessemer Fire Department concluded that the fire was caused by an electrical wiring malfunction. Even after the Bessemer Fire Department investigator learned about the report stating there were traces of gasoline, he would not agree the fire was caused by arson. Therefore, the first element was not met, as there is conflicting evidence.

Second, there was also conflicting evidence as to whether the insured had a financial motive to start the fire. Although he was behind on paying his mortgage, he had a history of getting behind on his payments at this time of year and then catching up after receiving a tax refund. He had been paying the mortgage for 20 years, had stable, long-term employment, he was not behind on his homeownerôs insurance payments, and he was the primary caretaker for his mother. Therefore, a jury could conclude there was no financial motive.

Third, there was also conflicting evidence as to the unexplained circumstances surrounding the fire. The insured used electric heaters to heat his house because it was cheaper, he was the last one in his home before the fire, but he was asleep at his motherôs house when the fire began. Although there is evidence of gasoline on one piece of wood from the living room, there is other evidence that contradicts the

likelihood of arson. Therefore, the court denied summary judgment as to the breach-of-contract claim.

2) Yes. Because the insurer relied on the conclusions of its experts that the fire was caused by arson, the insurer had a legitimate debatable reason to deny the claim and was entitled to summary judgment on the bad-faith claim.

3) Yes. Although Alabama law typically does not allow a party to receive mental anguish damages for breach of an insurance contract claims, this type of damage is available ñwhere the 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). This situation is most often found involving residences. *Ruiz de Molina v. Merritt & Furman Ins. Agency, Inc.*, 207 F.3d 1351 (11th Cir. 2000). In this case, the insured owned his home for more than 20 years, he was not at home the night of the fire because he was taking care of his mother, the insurer has not paid the claim, and the insured has been accused of arson. Considering these factors, the court held that the insured could request mental anguish damages for the breach-of-contract claim.

Auto Policy- Employee Exclusion and Notice
Canal Ins. Co. v. Butler, 2019 WL 277361 (N.D. Ala. Jan. 22, 2019).

Facts: Nine months after Michael Butler (ñButlerò) was injured while unloading a vehicle from a trailer, he filed an action in state court against Alan Farmer Trucking, Inc. (ñFarmerò) and Sheridan Logistics, Inc. (ñSheridanò). Farmer notified its automobile liability insurer of this incident shortly after the state court suit was filed, almost ten months after Butler was injured. The insurer agreed to provide a defense to Farmer and Sheridan under a reservation of rights, and the insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama. The insurer filed a motion for summary judgment, and Farmer and Sheridan opposed the motion.

Issue: ***1) Whether the insurer was entitled to summary judgment based on the employee exclusion.***
2) Whether the insurer was entitled to summary judgment because of Farmer's late notice.

Holding: 1) No. The policy excludes coverage for ñbodily injury to an employee arising out of: (1) his employment or (2) performance of duties órelated to the conduct of the óinsuredôs business.ô ò The exclusion is effective ñ[w]hether the óinsuredô may be liable as an employer or in any other capacity.ò

Although the insurer argued that because the policy was subject to the Federal Motor Carrier Safety Act regulations, the statuteôs definition of a ñstatutory employeeò defined ñemployee in the policy, the court disagreed. Instead, the court relied on the policyôs definition of ñemployee,ò because there was no indication in the policy that the federal definition applied. The definition of ñemployeeò in the policy included a ñleased workerò but not a ñtemporary worker.ò In the underlying complaint, Butler described himself as an independent contractor. The court held that the policy and the ñcommon, every day meaningò of employee did not include the term ñindependent contractor.ò *See State Farm Mut. Auto. Ins. Co. v. Brown*, 26 So. 3d 1167 (Ala. 2009). Therefore, this exclusion did not apply.

2) No. Following an ñóaccidentô, claim, ósuitô or ólossô . . . [p]rompt notice of the óaccidentôor ólossôò is required for coverage under the policy. Alabama law interprets ñprompt noticeò as notice that is ñgiven within a reasonable time in view of all the facts and circumstances.ò *See Travelers Indem. Co. of Conn. v. Miller*, 86 So. 3d 338 (Ala. 2011). When determining whether notice was prompt, a court must examine ñthe length of the delayò whether there is a reasonable excuse for the delay. *S. Guar. Ins. Co. v. Thomas*, 334 So. 2d 879 (Ala. 1976). Although the parties do not dispute that Farmer and Sheridan gave prompt notice after the lawsuit was filed, the insurer argues that Farmer and Sheridan neglected to provide prompt notice after the incident.

Alabama courts hold that a shorter delay than ten months was unreasonable as a matter of law. However, a delay to provide notice can be excusable if the accident ñwould not put a reasonable person on notice that a claim for damages may arise.ò *See CIE Serv. Corp. v. Smith*, 460 So. 2d 1244 (Ala. 1984). Farmer and Sheridan argue that their delay is excusable because, before the lawsuit was filed, they received no information that indicated a claim would be made, and Farmer and Sheridan did not think the policy applied to this accident. Farmer and Sheridan suffered little to no property damage as a result of this accident. No evidence was provided as to when Farmer and Sheridan were informed of Butlerôs injuries. Therefore, the court concluded it could not hold, as a matter of law, that a ten month delay was unreasonable in this case. The court denied the insurerôs motion for summary judgment.

Homeowner's Insurance- Arson and Failure to Cooperate
Axis Ins. Co. v. Terry, 2019 WL 384004 (N.D. Ala. Jan. 30, 2019).

Facts: Less than a month after the insured bought and purchased homeownerôs insurance for a house, a fire damaged the house. The insured was the last person to leave the house. She told the fire department and the homeownerôs insurer different times when she left the house before the fire started. The fire departmentôs investigator found a gun on the kitchen floor, a block by an open window, and a gas can that contained

gasoline on the kitchen floor. He concluded that the house was intentionally set on fire. When asked if she was having problems with anyone, the insured stated that Jamie Moore (ñMooreò) possibly set the fire. Moore was murdered the day after the fire. The insuredôs tax returns for the past three years showed income between $15,000 and $19,000. Her savings, which were a little over $200,000, were destroyed in the fire.

A detective investigated the fire, and although the case is still open, and the insured is a person of interest, no charges have been filed against her. After the insurer conducted an investigation, the insurer filed a declaratory judgment action and asked the court to hold that no coverage exists under the policy. The insurer filed a motion for summary judgment, and the insured opposed the motion.

Issue: ***1) Whether summary judgment should be granted, as the fire was intentionally set, and arson violates the terms of the policy.***
2) Whether summary judgment should be granted, as the insured failed to cooperate with the investigation, and cooperation is a condition precedent to coverage.

Holding: 1) No. Alabama law allows an insurer to deny coverage if arson is the cause of the occurrence. To prove arson, an insurer must prove that there was 1) ñarson by someoneò; 2) ñmotive by the [insured]ò; and 3) ñunexplained surrounding circumstantial evidence implicating the [insured].ò *Great Southwest Fire Ins. Co. v. Stone*, 402 So. 2d 899 (Ala. 1981). Even if an insurer provided the court with a *prima facie* case of arson, it does not mean the insurer is entitled to summary judgment. *See Hillery v. Allstate Indem. Co.*, 705 F. Supp. 2d 1343 (S.D. Ala. 2010). The court is not permitted to ignore the insuredôs explanations of the facts, even if they are unlikely. Because the insured disagreed with the insurerôs interpretation of the facts, and the insured provided an alternative interpretation of the facts, the court did not grant summary judgment in favor of the insurer.

2) No. To prevail on the insurerôs argument that the insured failed to cooperate with the investigation, the insurer must prove that the insuredôs failure to cooperate was ñmaterial and substantialò and the insurer was prejudiced by this failure. *QBE Ins. Corp. v. Blount Med. Ctr. Partners*, 2010 WL 11565124 (N.D. Ala. Apr. 19, 2010) (citing *Ex parte Clarke*, 728 So. 2d 135 (Ala. 1998)). The insurer argued that the insured failed to cooperate because she did not identify witnesses, she did not give a complete disclosure of facts, she changed the timeline of the facts, she did not provide facts about her income and expenses, she did not provide a truthful and accurate account of her lost personal property, and she ñdeveloped a strange and bizarre story or alibiò with regard to Moore. The court held that, for purposes of summary judgment, the only failure on the insuredôs part significant enough to cause prejudice to the insurer was the failure to identify witnesses. However, the insurer failed to

explain to the court how this failure caused prejudice. Therefore, the court denied summary judgment.

Business Income Loss- Fraud Claim
Cincinnati Ins. Co. v. Atlas Healthcare, LLC., 2019 WL 450854 (N.D. Ala. Feb. 5, 2019).

Facts: After water damaged the building in which the insured was a tenant, the insured submitted a claim with its business insurance insurer for lost income of over $1 million. The insurer investigated the claim, denied the claim, and filed an action alleging that the insured committed fraud by intentionally concealing or misrepresenting material facts and also included a declaratory judgment claim. The insured filed a motion for partial judgment on the pleadings on the fraud claim, and the insurer opposed it.

Issue: ***Whether the insurer's fraud claim should be dismissed, as the insurer failed to properly plead the fraud claim, the insurer cannot prove the requisite intent to deceive that is required in a fraud claim, and the insurer failed to allege a material misrepresentation of fact.***

Holding: No. The insured argued that the fraud claim should be dismissed because the insurer failed to properly plead the fraud claim, the insurer cannot show the requisite intent to deceive that is required in a fraud claim, and the insurer failed to allege a material misrepresentation of fact.

Federal Rule of Civil Procedure 9(b) requires a plaintiff to plead fraud claims with particularity by providing the circumstances that amount to fraud. The court held that the insurer provided enough detail in its allegations to make a fraud claim because the complaint included information about when the representations were made, the names of the providers from whom the insured lost business, and that certain contracts were lost. Because the insurer alleged that the insured expressly violated the terms of the policy by intentionally concealing or misrepresenting material facts, this allegation was sufficient to allege the insured had the requisite intent to deceive required in fraud claims.

Although the insured argued that the insurerôs allegations simply amounted to different opinions about the value of the claim and this could not constitute a material misrepresentation, the court disagreed. It was irrelevant whether the insurer can prove its fraud claim at the motion to dismiss stage. Instead, the insurer was only required to provide sufficient allegations. Therefore, the court denied the insuredôs motion to dismiss.

Homeowner's Policy - Insect and Vermin Exclusion
Robinson v. Liberty Mut. Ins. Co., 2019 WL 527374 (N.D. Ala. Feb. 11, 2019).

Facts: After the insureds moved into their house, they discovered brown recluse spiders in every room. A pest control company tried to eradicate the spiders three times over the course of two years, but was unsuccessful. The insureds submitted a claim with their homeownerôs insurer for loss of use of the house because of the spider infestation. At the end of the investigation, the insurer denied coverage based on its determination that spiders were excluded under the policyôs insect exclusion. The insureds filed a breach-of-contract and bad-faith action against their insurer, and the insurer moved to dismiss the action.

Issue: ***Whether the motion to dismiss should be granted, as the ordinary meaning of spiders includes insects or vermin and a loss caused by insects or vermin is excluded under the policy.***

Holding: Yes. The policy does not include a definition of ñinsectsò or ñvermin,ò and so the court must rely on dictionary terms to provide the ordinary meaning of the terms. *See Safeway Ins. Co. of Alabama, Inc. v. Herrera*, 912 So. 2d 1140 (Ala. 2005). Definitions of ñinsectò from multiple dictionaries included ñspiderò in the definition, even though technically spiders are arachnids and not insects. Also, ñverminò is defined as ñanimals obnoxious to man. . . [that includes] small animals (as lice, bedbugs, mice) that tend to occur in great numbers, are difficult to control, and are offensive as well as injurious.ò *Merriam-Webster's Third New International Dictionary* (1993 ed).

The court concluded that an ordinary person would consider an infestation of spiders to be ñobnoxious,ò that exist in ñgreat numbers,ò are ñdifficult to control,ò and are ñoffensive as well as injurious.ò The court also noted that the Eastern District of California held that a similar exclusion applied to mites, even though mites were not specifically listed in the exclusion. *See Gregory v. Nationwide Mut. Ins. Co.*, 2012 WL 6651342 (E.D. Cal. Dec. 19, 2012). Therefore, the insurer did not breach the contract or act in bad faith since the exclusion applied. The court granted the insurerôs motion to dismiss.

UIM Bad Faith Claim- Dispute Over Damages
Broadway v. State Farm Mut. Auto. Ins. Co., 364 F. Supp. 3d 1329 (M.D. Ala. 2019).

Facts: In 2012, the insured was injured in an automobile accident caused by an underinsured driver. After settling with the driverôs insurer for the full policy amount of $25,000, the insured filed a $25,000 claim for UIM benefits with his UIM insurer. The insurer offered $5,000 to settle the claim, and the insured cashed the check. The insured filed a breach-of-contract and bad-faith action in 2016 against his UIM insurer, and the

United States District Court for the Middle District of Alabama dismissed the action without prejudice. The court dismissed the action, as Alabama law requires damages to be determined before filing an action against an UIM insurer, and the Eleventh Circuit affirmed the decision in 2017.

The insured filed this second action in the United States District Court for the Middle District of Alabama alleging that the breach-of-contract and bad-faith claims rely upon additional medical treatment he received after he filed the original lawsuit. Relying on an argument that the insured had a preexisting injury and then experienced a new injury after the car accident, the insurer moved for summary judgment. The insured opposed the motion.

Issue: ***Whether the UIM insurer is entitled to summary judgment on the bad-faith claim, because Alabama law does not permit an action to be filed before damages have been determined.***

Holding: Yes. The court reviewed the history of Alabamaôs UM/UIM law. Alabama courts require an insured to prove that the insured is ñlegally entitled to recover damagesò by establishing that the UM/UIM motorist is at fault, and that the insured can prove the extent of his damages. *Quick v. State Farm Mut. Auto. Ins. Co.*, 429 So. 2d 1033 (Ala. 1983); *State Farm Mut. Auto. Ins. Co., v. Griffin*, 286 So. 302 (Ala. Ct. App. 1973). The court was critical of these decisions, as it is unclear to whom the insured must prove the damages.

In addition, the court criticized Alabama courts for failing to distinguish breach-of-contract claims and bad-faith claims. A ñfact finderò must be given ñsubstantial evidenceò of the liability and damages from the insured. *See Ex parte Safeway Ins. Co. of Ala., Inc.*, 148 So. 2d 39 (Ala. 2013). Since *Safeway*, two courts have indicated that the ñfact finderò is the claims adjuster. *See Joffrion v. Allstate Ins. Co.*, 2014 WL 3518079 (S.D. Ala. July 16, 2014); *Lawson v. State Farm Fire & Cas. Co.*, 2015 WL 2345575 (S.D. Ala. May 15, 2015). The court did not think that making the claims adjuster stand in the shoes of what should be a neutral arbiter was appropriate. If the claims adjuster, who is not neutral, decides that the damages are not valid, then the insured has no recourse, since the insured lacks a valid claim in court. *See State Farm Mut. Auto. Ins. Co. v. Smith*, 956 So. 2d 956 (Ala. Ct. App. 2006); *Ex parte Safeway Ins. Co. of Ala., Inc.*, 990 So. 2d 344 (Ala. 2008).

Although the court disagreed with the legal precedent, the court applied the law as it is written. Because the insured did not adequately refute evidence the insurer provided that the damages were caused by a preexisting condition and an additional injury that occurred after the accident, the insured lacks proximate cause to prove his bad-faith claim. Therefore, the court granted the insurerôs motion for summary judgment on the bad-faith claim.

Determining UIM Damages when Insured is Killed in Accident
Stephenson v. New Hampshire Ins. Co., 2019 WL 1245790 (M.D. Ala. Mar. 18, 2019).

Facts: Gerald Stephenson was killed in a car accident caused by another driver, Donald Rhein. Mr. Stephenson was driving his employerôs car and was within the scope of his employment when the accident occurred. Mr. Stephensonôs wife settled with Mr. Rheinôs insurer for $100,000 with the approval of the employerôs insurer. Then Mrs. Stephenson (ñthe plaintiffò) filed an action against the employerôs UIM insurer for failure to pay the policy limits, $1 million in damages, for her husbandôs wrongful death. The insurer moved to dismiss the action, and the plaintiff opposed the motion.

Issue: ***Whether the UIM insurer's motion to dismiss should be granted, as liability and damages had not been established.***

Holding: Yes. To establish a breach of UIM contract claim, a plaintiff must prove that the underinsured motorist was at fault, the fault caused damages, and the extent of the damages caused. *Pontius v. State Farm Mut. Auto. Ins. Co.*, 915 So. 2d 557 (Ala. 2005). If damages are in dispute, then the claim is unripe. *See Ex parte Safeway Co. of Alabama, Inc.*, 990 So. 2d 344 (Ala. 2008). Under Alabama law, a plaintiff is only entitled to punitive damages for a wrongful death action. *See Aetna Cas. & Sur. Co. v. Beggs*, 525 So. 2d 1350 (Ala. 1988). Punitive damages are ñinherently unpredictable.ò ñWith only punitive damages recoverable in wrongful death cases . . . if it is doubtful that an insured could ever prove the amount of an insurerôs liability under uninsured motorist coverage in a wrongful death case with the specificity necessary to recover against an insurer for . . . [failing to] pay a wrongful death claim under uninsured motorist coverage.ò *Watts v. Farmers Ins. Exchange*, 2018 WL 1993018 (N.D. Ala. Apr. 27, 2018).

The plaintiff and insurer can only guess the amount of damages a jury would award the plaintiff. Because the plaintiffôs wrongful death damages have not been established, the insured could not maintain a breach of contract claim against the insurer.

Property Policy- Fire and Hail Damage- Appraisal Process
Cobblestone Condominium Assoc., Inc. v. Travelers Cas. Ins. Co. of America, 2019 WL 1376715 (N.D. Ala. Mar. 27, 2019).

Facts: The insured, a condominium association, filed two claims with its property insurer after a fire severely damaged one building and a hail storm caused roof damage to all of the buildings. With regard to the fire claim, the parties entered into appraisal, however a dispute arose with regard to the insuredôs refusal to provide contractorôs bids during the appraisal process and it was not completed. The insured requested appraisal on the roof claim, but the insurer could not identify the dispute and

requested a re-inspection. The insured filed a breach-of-contract claim and bad-faith claim against the insurer in the United States District Court for the Northern District of Alabama. The insured filed a partial motion for summary judgment with regard to the breach of contract claims as to both the fire and roof claims. The insurer sought summary judgment on the breach of contract and bad faith claims.

Issue: ***1) Whether the insurer breached the contract with the insured by suspending the appraisal process for the fire claim.***
2) Whether summary judgment should be awarded to either party for the breach-of-contract claim for the roof loss.
3) Whether the insurer is entitled to summary judgment for the bad-faith claim for the fire loss.
4) Whether the insurer is entitled to summary judgment for the bad-faith claim for the roof loss.

Holding: 1) Yes. After the insurer was able to investigate the fire claim and arrive at a damage estimate, the insured disputed the damage amount and demanded appraisal. During appraisal, it was discovered that the insured had requested and obtained bids from local contractors for the repairs of the building. The insured declined to produce the bids to the insurer and returned the bids unopened to the bidders. As a result, the insurer suspended the appraisal process.

The insurer argued that it the insured breached the contract by failing to provide the bids. The insured argued that it had not breached the contract and, conversely, that the insurer had breached the contract by failing to complete the appraisal process. The court agreed with the insured, stating that no case law exists requiring an insured to provide contractorôs bids to the insurer after the insurer had sufficiently investigated the loss, determined coverage, completed of a valuation of damage, and agreed to enter the appraisal process. The court held that the insured did not wrongfully withhold the bids from the insurer. The court held that while it was understandable that the insurer would want to obtain the bids, the insured did not have an obligation to provide the bids to the insurer once the appraisal process had begun.

Next, the insurer argued that the insuredôs appraiser was not impartial and that appraisal was premature because there were coverage and causation questions. The fee agreement between the appraiser and the insured included an hourly rate with a cap and a contingency that the appraiser would not receive a fee unless the award was greater than the insurerôs first estimate. The court ruled that the contingency in the appraiserôs contract was not sufficient to prevent the appraisal process from moving forward. The court also held that appraisal was appropriate since the parties agreed that fire caused the loss and the only remaining issue was he extent of the loss. Therefore, the insurerôs motion summary judgment for the breach-of-contract claim is denied and the insuredôs motion for summary judgment for the breach-of-contract

claim is granted.

2) No. Both parties argue that the other breached the terms of the policy for the roof claim and each is entitled to summary judgment for the breach-of-contract claim. The insured argued that the insurer breached the contract by failing to inspect all of the roofs that were damaged in the hail storm. The insured also argued that filing the lawsuit before appraisal began was reasonable since the insurer refused to enter appraisal and was stalling the claim.

However, the insurer argued that the insured breached the policy by not providing additional information and allowing a re-inspection of the roofs by an engineer. The insured did not allow this inspection and instead filed a lawsuit. The court held that because there was dispute over the roof and that it was conceivable that, if the engineer had been permitted to inspect, the insurer would have made an additional payment to the insured then genuine issues of material fact on both sides. Summary judgment is denied on this issue for both parties.

3) No. The court held that genuine issues of material fact are present for the insuredôs bad-faith claim for the fire loss. Even though the insurer provided payment for a portion of the insuredôs claim, the court found that there were issues of facts as to whether the insurerôs withdrawal from the appraisal process and the resulting delay in paying the remainder of the claim was based on a legitimate or arguably debatable reason. *See Livingston v. Auto Owners Ins. Co.*, 582 So. 2d 1038 (Ala. 1991). Also, there are genuine issues of material fact as to whether the insurer had a legitimate or arguable reason to deny any additional payments for the fire claim. Therefore, the insurerôs summary judgment motion is denied for the bad-faith claim as it relates to the fire loss.

4) Yes. The court held that, because the insured filed suit rather than allowing a re-inspection by the engineer, it could not establish, as a matter of law, that the insurer breached the contract. As a result, the insurer was entitled to summary judgment for the bad-faith claim for the roof loss.

Property Policy - Removal/Fraudulent Joinder
Haddix v. Teachers Ins. Co., 2018 WL 7568369 (M.D. Ala. Dec. 14, 2018) (opinion adopted in *Haddix v. Teachers Ins. Co.*, 2019 WL 1460876 (M.D. Ala. Apr. 2, 2019).

Facts: After her home was damaged in a fire, the insured made a claim with her property insurer. Although the fire marshall concluded that the cause of the fire could not be determined, the insurerôs adjuster concluded that the fire was caused by arson that either the insured or her husband started. The insurer denied the claim, and the insured filed a lawsuit in state court against the insurer, the fire investigation company, and the fire investigator (collectively ñfire investigation defendantsò) for breach of

contract, bad faith, fraud, negligence, wantonness, and breach of implied covenant of good faith and fair dealing. The defendants removed the action to the United States District Court for the Middle District of Alabama, and the fire investigation defendants filed motions to dismiss. The insured opposed the motions to dismiss and moved to remand the action to state court.

Issue: ***1) Whether the fire investigation defendants were fraudulently joined and due to be dismissed.***
2) Whether the case should be remanded to state court.

Holding: 1) Yes. In her opposition to the motion to dismiss, the insured dropped the breach-of-contract and bad-faith claims against the fire investigation defendants. The Alabama Supreme Court will not recognize a cause of action for negligent or wanton handling of insurance claims. *Kervin v. S. Guar. Ins. Co.*, 667 So. 2d 704 (Ala. 1995). Also, the insurer hired the fire investigation defendants, and so these defendants only have a duty to the insurer and not the insured. *Akpan v. Farmers Ins. Exch., Inc.*, 961 So. 2d 865 (Ala. Ct. App. 2007). Because a duty to the plaintiff is ñfundamental to a negligence claim,ò the insured cannot maintain a negligent hiring, negligent inspection, or wantonness claim against these defendants.

Similarly, in order to maintain a fraudulent suppression claim, a defendant must suppress a material fact that the defendant has an obligation to communicate. The obligation to communicate can arise from ñparticular circumstancesò or ñconfidential relationsò between the parties. *See* Ala. Code § 6-5-102 (1975). A duty can arise based on ñthe relation of the parties, the value [materiality] of the particular fact, the relative knowledge of the parties, and other circumstances.ò *Trio Broadcasters, Inc. v. Ward*, 495 So. 2d 621 (Ala. 1986). The fire investigation defendants only had a duty to communicate to the insurer and not the insured. Because the fire investigation defendants lacked a duty to communicate to the insured, the insured could not maintain her fraudulent suppression claim against them. Therefore, the court granted the fire investigation defendantsô motion to dismiss.

2) No. Because the insured failed to state a claim upon which relief may be granted against the fire investigation defendants, they were ñfraudulently joinedò and their citizenship should not be considered for purposes of federal court jurisdiction. Therefore, the case was properly removed to federal court, and the court denied the insuredôs motion to remand.

General Liability Policy- Claims against Insurer, Broker, and Agent Based on Alleged Void Exclusion.

Jones Stephens Corp. v. Coastal Ningbo Hardware Manufacturing Co., Ltd., 2019 WL 1436418 (N.D. Ala. Apr. 1, 2019).

Facts: Jones Stephens Corp. (ñJones Stephensò) bought plumbing products from the insured and then sold the products in the United States. Jones Stephens and the insured had a contract that required the insured to maintain general liability insurance on the products it sold Jones Stephens and to include Jones Stephens as an additional insured. The contract also required the insured to defend and indemnify Jones Stephens against claims involving the products. The insured did not defend and indemnify Jones Stephens in actions involving the insuredôs products.

Jones Stephens filed an action against the insured, the insuredôs insurer, the insuredôs broker, and the insuredôs agent alleging bad faith, breach of contract, common law indemnity, civil conspiracy, negligence and wantonness, negligent failure to procure insurance, unjust enrichment, tortious interference with contract, and a declaratory judgment action. Jones Stephens claims that the insured, the insurer, the broker and the agent worked together to create a retroactively effective exclusion that allowed the insurer to deny Jones Stephensô requests for defense and indemnification. The defendants moved to dismiss the civil conspiracy, negligence and wantonness, negligent failure to procure insurance, unjust enrichment, and tortious interference of a contract. Jones Stephens opposed this motion, but stipulated that the unjust enrichment claim should be dismissed.

Issue: ***1) Whether Jones Stephens' civil conspiracy claim against all the defendants states a claim upon which relief may be granted.***
2) Whether Jones Stephens can maintain a negligence and wantonness action against all three defendants with regard to the issuance and modification of policies.
3) Whether Jones Stephens can maintain negligent and wanton procurement of an insurance policy claims against the broker and the agent.
4) Whether the tortious interference with a contract claim against all the defendants states a claim upon which relief may be granted.

Holding: 1) Yes. Jones Stephens alleged that the insurer, the broker, and the agent conspired to create an exclusion that is not lawful and/or violates public policy. Civil conspiracy claims must include an ñunderlying wrong.ò *Jones v. BP Oil Co.*, 632 So. 2d 435 (Ala. 1993). Jones Stephens claims include a bad-faith claim against the insurer for creating an exclusion that allowed the insurer to deny the claim. The bad-faith claim is an ñunderlying wrongò and the defendants did not move to dismiss the bad-faith claim. Therefore, the civil conspiracy claim could not be dismissed.

2) No. Jones Stephens alleges that the insurer, the agent, and the broker negligently and wantonly failed to issue and modify the policies in a way that benefitted Jones Stephens and that they also failed to inform Jones Stephens of changes to the policy. The court noted that the insurer has a duty to act in good faith and honesty with the insured and the additional insured. *See Carrier Exp., Inc. v. Home Indem. Co.*, 860 F. Supp. 1465 (N.D. Ala. 1994). An insurer is negligent if it neglects to do what a ñreasonably prudent insurance company would have doneò in a similar situation. *See Carrier Exp.* An insurer is liable for wanton conduct if the duty it breaches is done with ñconscious knowledgeò that the insured will probably incur damages. *See Mazda Motor Corp. v. Hurst*, 261 So. 3d 167 (Ala. 2017). Because a reasonably prudent insurance company would not apply a retroactive exclusion to avoid providing coverage to an additional insured, the court denied the insurerôs motion to dismiss on the negligence and wantonness claims.

However, Jones Stephens failed to explain how the agent and broker were involved in issuing, modifying, or failing to notify Jones Stephens of the changes to the policy. Although they were generally involved in negotiating the coverage provided to the insured, no information indicated what duty they owed the insured and how the duty was violated. Therefore, the court granted the agentôs and brokerôs motions to dismiss on the negligence and wantonness claims.

3) No. Jones Stephens alleged that the broker and the agent were negligent and wanton because they failed to use reasonable diligence when procuring insurance for the insured. An insurance agent or broker may be liable for negligence or wantonness after an agreement is reached on the insurance needed if the agent or broker does not ñexercise reasonable skill, care, and diligence in effecting coverage.ò *Montz v. Mead & Charles, Inc.*, 557 So. 2d 1 (Ala. 1987). Jones Stephens failed to allege any relationship between it and the broker and the agent. Therefore, it was not possible to impose a duty of care if no relationship existed between the parties. The court granted the broker and agentôs motion to dismiss on the negligent and wantonness claim.

4) No. Jones Stephens alleged that the insurer, the broker, and the agent intended to deprive Jones Stephens of its contractual rights in the insurance policy and in the indemnity agreement between Jones Stephens and the insured. One of the elements required to establish a tortious interference with contract is that the ñdefendant is independent of or a stranger to the relation or contract.ò *MAC East, LLC v. Shoney's*, 535 F.3d 1293 (11th Cir. 2008). If the defendant would have benefitted economically from the injured relationship or if the defendant and plaintiff are parties to a ñcomprehensive interwoven set of contract[s] or relations, the defendant is not a stranger to the contract.ò *MAC East*. Also, if a non-party was involved in creating the relationship between the parties involved in the contract, that individual is not a stranger to the relationship. *Tom's Foods, Inc. v. Carn*, 896 So. 2d 443 (Ala. 2004).

None of the defendants was a stranger to either contract. The broker and the agent negotiated the contract with the insurer and the insured. Also, the broker and the agent were involved in the negotiations for the insurance policy, and the indemnity agreement between the insured and Jones Stephens involved this insurance policy. Therefore, the court dismissed the tortious interference of a contract claim.

Remand - Amount in Controversy
Egbert v. Auto Club Family Ins., Co., 2019 WL 1573693 (M.D. Ala. Apr. 11, 2019).

Facts: When a fire damaged the insuredôs house, the insured submitted a claim to her homeownerôs insurer. After the insurer did not pay the loss, the insured filed an action against the insurer in state court. The insured requested compensatory and punitive damages for bad faith in addition to compensatory and punitive damages for the loss of the house, its contents, emotion distress and mental anguish. The insurer removed the action to the United States District Court for the Middle District of Alabama, and the insured moved to remand the action to state court.

Issue: ***Whether the insurer proved the amount in controversy exceed $75,000 because inventory of personal items destroyed by the fire greatly exceeded $75,000.***

Holding: Yes. The insurer timely removed the action, so the insurer was permitted to submit evidence outside the pleadings in support of the removal. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 1184 (11th Cir. 2010). Information from the claim process showed that the estimated replacement cost of the insuredôs personal property items was $291,068.53. The insured argued that not all items listed in the inventory might be covered under the policy, so the figure was speculation. However, the court noted that other district courts denied remand in similar situations. *See JZ Auto Serv., Inc. v. Western Heritage Ins. Co.*, 2014 WL 12461366 (S.D. Fla. July 24, 20140) (holding that an adjusterôs affidavit listed allegedly $82,480 in damaged property proved with a preponderance of evidence that the amount in controversy was met); *Hicks v. Am. Modern Ins. Co.*, 2011 WL 1753504 (S.D. Ala. May 6, 2011) (holding that the insured submitted $80,000 in personal property lost, and would likely seek the policy limits of $60,000 for the dwelling, and so the amount in controversy was met).

The court found that $291,068.53 was far greater than $75,000, and the insured did not dispute that sought this amount from the insurer. Even if the entire amount was not covered by the policy, the insured also requested damages for the loss of her house, emotional distress damages, mental anguish damages, and punitive damages. Therefore, the court held that the insurer had proven by a preponderance of evidence that the amount in controversy exceeded $75,000.

Motion to Dismiss - Fraud/Particularity Pleading Requirement
Thomas v. Nat'l Union Fire Ins. Co., 2019 WL 1573702 (M.D. Ala. Apr. 11, 2019).

Facts: After the insured, a truck driver, was injured while working underneath his tractor, he made a medical expenses and lost wages claim with his insurer. When the insurer denied the claim, the insured filed a breach-of-contract, bad-faith, and fraud action against his insurer. The insurer moved to dismiss the fraud claim, and the insured opposed the motion.

Issue: ***Whether an insured's fraud claim was due to be dismissed because it was not pleaded with particularity.***

Holding: Yes. The insured argued that he properly alleged his fraud claim because the insurer promised to pay benefits if the insured suffered an accident during the policy period. However, outside of a bad-faith action, the only way to convert a breach-of-contract action into a tort action is if an insurer promises to perform in the future, but the insurer has no intention of performing in the future when the promise is made. *Exxon Mobil Corp. v. Ala. Dep't of Conservation & Nat. Res.*, 986 So. 2d 1093 (Ala. 2007). The insured failed to allege that the insurer had no intention of paying the insurance claim when the policy was created. The fraud claim was based only on failure to perform on a promise. This alone was not enough to be considered fraud. Therefore, the insured failed to state a claim upon which relief may be granted and the court dismissed the fraud claim with prejudice.

UIM Insurance - Motion to Intervene
Parker v. Morton, 2019 WL 1645207 (S.D. Ala. Apr. 16, 2019).

Facts: After the plaintiffs were involved in an automobile accident, the plaintiffs filed an action against the defendant driver, Randy Morton, in the United States District Court for the Southern District of Alabama. In that action, the plaintiffs also asserted UM claims against Georgia Farm Bureau Mutual Insurance Company (ñGeorgia Farmò), and State Farm Mutual Automobile Insurance Company (ñState Farmò). After the court noted lack of diversity, the plaintiffs moved to dismiss Georgia Farm and State Farm without prejudice. To cure the diversity defect, Plaintiffs moved to dismiss Georgia Farm because Georgia Farm and the plaintiffs were all Georgia citizens. The plaintiffs moved to dismiss State Farm because, as the excess carrier, State Farm did not have any responsibility to pay for a loss until the Georgia Farm policy paid its policy limits. The court granted the plaintiffsômotion to dismiss. After their dismissal, Georgia Farm and State Farm moved to intervene.

Issue: ***1) Whether Georgia Farm should be permitted to intervene, because if Georgia Farm intervenes, diversity will be eliminated.***
2) Whether State Farm should be permitted to intervene.

Holding: 1) No. Georgia Farm intervened to participate in initial discovery to determine whether it should remain in the action or opt out. Because Georgia Farm is a Georgia corporation and the plaintiffs are citizens of Georgia, the parties are not diverse. When deciding whether a motion to intervene should be granted, ñindependent jurisdictional groundsò must be demonstrated. *See Sunpoint Sec., Inc. v. Porta*, 192 F.R.D. 716 (M.D. Fla. 2000). Federal courts do not have subject matter jurisdiction over nondiverse parties, and, so if an intervenor will destroy diversity, many courts deny motions to intervene. *See Cotlin Elec., Inc. v. Cont'l Cas. Co.*, 2013 WL 1150920 (S.D. Ala. Mar. 19, 2013).

Contending it was only a nominal party, Georgia Farm argued that the fact that the parties are nondiverse does not matter. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980) (holding that with regard to diversity jurisdiction, ña federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of the real parties to the controversyò). The court disagreed, finding that Georgia Farm was more than a nominal party because it had not opted out of litigation and planned to submit discovery. Because its presence would destroy diversity, the court declined to grant the motion to intervene.

2) Yes. State Farm did not specify whether the motion to intervene was based on Federal Rule of Civil Procedure 24(a) or 24(b). The court assumed State Farm moved to intervene under Rule 24(b), a permissive intervention. For permissive intervention, the court must consider whether the motion to intervene was timely, and whether the intervenorôs claim or defense has a question of law or fact that is the same as the original action. *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508 (11th Cir. 1996). The court allowed State Farm to intervene because State Farm was diverse, its motion to intervene was timely, and its defense has issues of law or fact that were the same as the main action.

Commercial General Liability Policy - Motion to Dismiss and Motion to Amend Counterclaim
Scottsdale Ins. Co. v. I-20 HD Ultra Lounge, LLC, 2019 WL 1754356 (N.D. Ala. Apr. 19, 2019).

Facts: Margie Ree Bonner-Mitchell (ñMitchellò) filed a lawsuit in state court against the insured and Nikolaus Danvar Mitchell (ñNikolausò) after she was struck by Nikolausôs car and injured. Nikolaus allegedly struck her after drinking at the insuredôs bar. The CGL insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama, asking the court to hold that it had no duty to defend or indemnify the insured in the underlying state court action. After the insured answered the complaint and included six state law counterclaims against the insurer, the insurer moved to dismiss the counterclaims. The insured opposed the insurerôs motion, moved to partially dismiss the insurerôs claims, and moved to amend its counterclaim.

Issue: ***1) Whether the insurer's declaratory judgment action that asks the court to hold it has no obligation to indemnify the insured is due to be dismissed.***
2) Whether the insured's fraudulent misrepresentation, fraudulent suppression, and negligent or wanton suppression and misrepresentation claims fail to meet the specific pleading requirements of Federal Rule of Civil Procedure 9(b).
3) Whether the insured's negligent and/or wanton failure to procure insurance should be dismissed, as the insured has not suffered an injury.
4) Whether the insured's motion to amend its counterclaims and add cross-defendants should be granted.

Holding: 1) Yes. Determining whether the insurer has a duty to indemnify cannot be decided before the underlying state court action is resolved when coverage depends on the outcome of the underlying action. *See Alabama Gas Corp. v. Travelers Cas. & Sur. Co.*, 990 F. Supp. 2d 1163 (N.D. Ala. 2013), *aff'd Alabama Gas. Corp. v. Travelers Cas. and Sur. Co.*, 568 Fed. Appx. (11th Cir. 2014). Because the underlying action was still pending, the court granted the insuredôs motion to partially dismiss the insurerôs claims.

2) Yes. A misrepresentation claim must include ñ1) a misrepresentation of material fact, 2) made willfully to deceive, recklessly, without knowledge, or mistakenly, 3) which was reasonably relied on by the [claimant] under the circumstances, and 4) which caused damage as a proximate consequence.ò *Bryant Bank v. Talmage Kirkland & Co.*, 155 So. 3d 238 (Ala. 2014). A suppression claim must include ña duty to disclose the facts, 2) concealment or nondisclosure of material facts by the [tortfeasor], 3) inducement of the [claimant] to act, and 4) action by the [claimant] to his injury.ò *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997). In her counterclaim, the insured failed to explain what representative of the insurer was responsible for making the misrepresentation or the omission. This is required in a pleading. *See Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 775 F. Supp. 1460 (M.D. Fla. 1991); *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230 (11th Cir. 2008). The insured moved to re-plead to avoid dismissal, and the court granted the motion.

3) Yes. In order to recover for a negligent failure to procure insurance claim, it requires ñan injury or harm to [the claimant] as a consequence of [the tortfeasorôs] negligence to serve as a basis for recovery of damages.ò *Weninegar v. S.S. Steele & Co.*, 477 So. 2d 949 (Ala. 1985). This type of claim accrues ñwhen a loss that would trigger liability under the policy occurs,ò and not when the first premium is paid. *Bush v. Ford Life Ins. Co.*, 682 So. 2d 46 (Ala. 1996). Because the insurer had not denied the insuredôs claim, the insured had not suffered a loss. Therefore, this claim was due to be dismissed.

4) No. The insured wished to add an agent and insurance agency as cross-defendants, as the agent and agency of the insurer. Federal Rule of Civil Procedure 19(a)(1)

provides that, if a person is subject to service of process, the person must be joined if complete relief cannot be created between the existing parties without the person. The insured cannot show that complete relief cannot be created without these two parties, as a policyôs terms are the only way to determine whether a loss is covered. *Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co.*, 817 So. 2d 687 (Ala. 2001). According to the policy terms, the policy constitutes the entire agreement between the parties. The courtôs only focus is whether the policy provides coverage for the claims in the underlying action. If the insured wishes to file a separate action against the agent and agency, she is welcome to do so. The court denied the insuredôs motion to add parties.

Site Specific Pollution Legal Liability Policy- Non-Disclosed Conditions Exclusion
Rockhill Ins. Co. v. Southeastern Cheese Corp., 2019 WL 1767892 (S.D. Ala. Apr. 22, 2019).

Facts: Three state court lawsuits were filed against the insured alleging wrongful discharge and disposal of wastewater. The Site Specific Pollution Legal Liability Insurer filed a declaratory judgment action in the United States District Court for the Southern District of Alabama and asked the court to determine the obligations and rights of the parties. After amending the complaint, the insurer moved for partial judgment on the pleadings, and the insured opposed the motion.

Issue: ***Whether the insurer is entitled to partial judgment on the pleadings, as the policy exclusion for non-disclosed conditions applies.***

Holding: No. The policy excluded coverage for clean up costs, claims, or legal expense caused by a pollution condition that existed before the coverage period or before the location was endorsed in the policy if the responsible insured knew or reasonably should have known a pollution condition or circumstances would create clean-up costs, claim, or loss. The insured did not disclose that it was a party to an ADEM Enforcement Action, received a demand letter from the Black Warrior Riverkeeper, Inc., was a defendant in an action for violating the Clean Water Act, and the insured had filed a lawsuit against the engineering firm that designed the sprayfields for failure to properly design the fields. Instead, the insured only mentioned that it had a ñself-reported one time wastewater spill,ò had never had a pollution claim, and was not aware of any circumstances that could reasonably be expected to turn into a claim. In the insuredôs lawsuit against the engineering firm, the insurer noted that the insured listed the ADEM lawsuit and the environmental group lawsuit and alleged that the insured may have to redesign or relocate its plant and waste water disposal system. Based on these omissions in the application, the insurer argued that the exclusion applied.

However, the insured denied the insurerôs allegations and stated that it was without sufficient information to admit or deny the questions in the insurance application when

it was filled out. The court held that, if the insured could prove that this is true, the insured will prevail on this count. The insured also noted that the ADEM Enforcement Action and the Riverkeeper lawsuit resolved before it completed the application.

The allegations the insurer made are not ñspecific factual detailsò that contradict the insuredôs defense, admissions, and denials in the declaratory judgment action. *See Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241 (11th Cir. 2016) (holding that exhibits govern if they contradict the allegations in the pleading if the exhibits ñplainly showò with ñspecific factual detailsò the answers to the allegations are untrue). Because the insured raised questions of material fact, the court denied the insurerôs motion for partial judgment on the pleadings.