Summer 2019 Issue

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

In this edition of our newsletter, we feature a number of cases from Alabama and its federal courts. Of particular interest are *Nationwide Mut. Fire Ins. Co. v. The David Group, Inc.*, --- So. 3d ---, 2019 WL 2240382 (Ala. May 24, 2019); *Evanston Ins. Co. v. The Break I, Inc.*, 2019 WL 2995507 (N.D. Ala. July 9, 2019); and *Haddix v. Teachers Ins. Co.*, 2019 WL 3323319 (M.D. Ala. July 24, 2019). In *Nationwide*, the Alabama Supreme Court held that the insured contractorôs faulty workmanship was not an occurrence under a CGL policy because the damage to the insuredôs faulty work caused damage to the house and there was no resultant damage. Next, in *Evanston*, the Northern District of Alabama held that a three-year delay in notifying the insurer of an occurrence was significant enough to violate the terms of the policy, and the assault and battery exclusion applied. Finally, in *Haddix*, the Middle District of Alabama held that, even though the insurer did not include ñadvice of counselò as a reason to deny coverage, the insurer could add the defense of ñadvice of counselò in response to a bad-faith claim, because the alleged bad faith did not arise out of an express condition in 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

CGL Policy- Faulty Workmanship

Nationwide Mut. Fire Ins. Co. v. The David Group, Inc., --- So. 3d ----, 2019 WL 2240382 (Ala. May 24, 2019).

Facts: Saurin and Valerie Shah (ñthe Shahsò) bought a newly constructed house from the insured, a construction company. Shortly after moving in, the Shahs experienced numerous problems with their house caused by construction defects. They filed a lawsuit against the insured contractor, alleging recession, breach of contract, breach of warranties, negligence, wantonness, suppression, gross negligence and incompetence. The CGL insurer provided a defense to the insured until the insurer completed an investigation and determined that the Shahs did not allege an ñoccurrenceò under the policy.

As a result, the insured filed a declaratory judgment action against the insurer and asked the court to hold that the insurer had a duty to defend and indemnify the insured. The underlying action was sent to arbitration and resulted in an award of $12,725.00 against the insured. The insured and the insurer filed cross-motions for summary judgment on the coverage issue. The trial court denied the insurerôs motion for summary judgment, and partially granted the insuredôs motion, and the insurer appealed to the Alabama Supreme Court.

Issue: ***Whether the faulty workmanship is an "occurrence" under a CGL policy when all of the damages are to the insured contractor's own work.***

Holding: No. An ñoccurrenceò is ñan accident, including continuous or repeated exposure to substantially the same general harmful conditions.ò The policy does not include a definition of ñaccident,ò but the Court has previously defined it as ñ[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could [not] be reasonably anticipated.ò *Hartford Cas. Ins. Co. v. Merchants & Farmers Bank*, 928 So. 2d 1006 (Ala. 2005) (quoting *Black's Law Dictionary*, 15 (7th ed. 1999).

The Shahs alleged that the insured failed to correctly build their house in a ñgood workmanlikeò manner. Alabama law requires contractors to provide an implied warranty of workmanship and ñuse reasonable skill in fulfilling [his] contractual obligations.ò *Blackmon v. Powell*, 132 So. 3d 1 (Ala. 2013).

In policies such as this one, ñfaulty workmanship itself is not an occurrence.ò *Town & Country Prop., LLC v. Amerisure Ins. Co.*, 111 So. 3d 699 (Ala. 2011). However, faulty workmanship can become an occurrence if the faulty work ñsubjects personal property or other parts of the [damaged] structure to ócontinuous or repeated exposureô to some other ógeneral harmful conditionô . . . and as a result of that exposure, personal property or other parts of the structure are damaged.ò *Town & Country*. A CGL policy is intended to protect the contractor from tort liability but not from its own faulty work.

The arbitrator in the underlying action concluded that the Shahsôhome did not suffer defects outside of some minor damage. No mental anguish damages were awarded. There is no evidence indicating that the Shahs suffered property damage or personal injury caused byòcontinuous or repeated exposureò to a ñgeneral harmful conditionò other than to the contractorôs own work. Accordingly, there was no ñoccurrenceò under the policy, and the insurer was due summary judgment. The Alabama Supreme Court reversed and remanded the decision of the trial court.

Alabama Federal Law Update

Property Policy- Inventory
Tracy v. USAA Cas. Ins. Co., 2019 WL 2030135 (S.D. Ala. May 7, 2019).

Facts: After their house was damaged in a fire, the insureds submitted a claim to their homeownerôs insurer and demanded policy limits. The insurer inspected the property and paid the policy limits for the dwelling coverage, advanced six months of additional living expenses, paid for debris removal, and made a partial payment for personal property benefits. However, the insureds did not provide an inventory and supporting

documentation for their personal property.

When the insurer did not provide additional personal property benefits or additional living expenses payments beyond the first six month payment, the insureds filed a breach-of-contract, bad-faith, negligent and intentional infliction of emotional distress, and misrepresentation action against the insurer in the United States District Court for the Southern District of Alabama.

The insurer moved for summary judgment on all these claims, and the insureds opposed the motion. At a hearing, the insureds decided not to pursue their negligent and intentional infliction of emotional distress and misrepresentation claims.

Issue: ***Whether the insurer was entitled to summary judgment because the insureds breached the insurance policy by failing to provide an inventory and supporting documentation.***

Holding: Yes. Although the insureds argued that the insurer breached the contract and acted in bad faith by failing to make payments to the insureds and keep them living in a manner in which they were accustomed to living before the fire, the court disagreed. An insured is required to abide by all of the policy terms before an insured may file a breach-of-contract action against the insured. *See Nationwide Ins. Co. v. Nilsen*, 745 So. 2d 264 (Ala. 1998). The insurer does not have an obligation to pay the claim if the insured does not abide by the policy terms. *Hillery v. Allstate Indem. Co.*, 705 F. Supp. 2d 1362 (S.D. Ala. 2010). Because there is no dispute that the insureds failed to produce an inventory and documentation for the personal property portion of the claim, and the policy requires the insureds to cooperate with the insurer by providing an inventory and documentation, the insureds violated the terms of the policy. The insurer had a legitimate and arguable reason for not making further payments to the insureds, and so the court granted summary judgment on the bad-faith claim. Similarly, the insurer was entitled to summary judgment for the breach-of-contract claim because the insurer did not have an obligation to pay the claim when the insureds failed to comply with the policy terms.

Remand- Amount in Controversy
Glass-Wyble v. GEICO Cas. Co., 2019 WL 2078994 (S.D. Ala. May 23, 2019).

Facts: The insured was injured in a three-car accident. The driver of the vehicle that caused the accident fled the scene. When her UM insurer denied her claim, the insured filed suit in Alabama state court for UM benefits. The insurer removed the action to a federal court in the Southern District of Alabama, and the insured moved to remand the action to state court.

Issue: ***Whether the insurer successfully proved the amount in controversy exceeds***

$75,000 and therefore allows the case to remain in federal court.

Holding: No. For the court to have subject matter jurisdiction over the action, the amount in controversy must exceed $75,000. Although the complaint did not allege a specific amount of damages, the insured alleged in her complaint that she had medical bills, expenses, and will continue to have these bills and expenses due to her injuries in the accident. She also alleged that she also unable to work full time as a registered nurse due to her injuries. The insurer argued that her claims were greater than $75,000 because a letter from the insuredôs pain management physician noted that she required physical therapy and epidural injections to treat her injuries, she suffered from anxiety and insomnia, and was only able to work part time due to her injuries. However, the insured did not include lost wages or a decrease in her ability to earn a living in her list of damages in the complaint.

The court acknowledged that the insuredôs medical treatments cost money, but the insurer did not provide any evidence as to the extent of the cost of these treatments. Because the insurer did not provide any information to the court such that it was ñmore likely than notò the damages the insured sought were greater than $75,000, the court would have had to ñengage in impermissible speculation.ò *Kirkland v. Midland Mortg. Co.*, 243 F.3d 1277 (11th Cir. 2001); *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007). Therefore, the court remanded the case to state court.

Remand- Fraudulent Joinder

Southern Wholesale Fibers & Recycling, Inc. v. Evanston Ins. Co., 2019 WL 2185240 (N.D. Ala. May 21, 2019).

Facts: The insured owned two plants and decided to expand one of the plants and move most of its operations to the newly-expanded plant. While the expansion was underway, the insured informed its insurance agent of this change and told the agent that the expanded plant would need the coverage that the smaller plant had and the smaller plant would need less coverage. The agent said that transferring the coverages ñwould be fast and easyò and could be transferred with a telephone call. Two days after the insured called and told the agent to switch coverages between the plants, a fire significantly damaged the newly expanded plant. The business property insurer adjusted the loss with the original coverages, as the coverages had not been transferred by the time of the fire. After the insured filed an action in state court against the insurer, the insurance agent, and the insurance agency, the insurer removed the case to the United States District Court for the Northern District of Alabama. The insured moved to remand the case to state court.

Issue: ***Whether the action should be remanded to state court, as the agent and agency were not fraudulently joined.***

Holding: Yes. Although the insured and the insurer were diverse, the insured, the agent, and the agency were all citizens of Alabama. The insurer removed the action on the basis that the citizenship of the agent and agency should be ignored, as they were fraudulently joined. To prove fraudulent joinder, the insurer must establish with clear and convincing evidence that ñ(1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.ò *Berber v. Wells Fargo Bank, N.A., No. 18-11102*, 760 Fed. Appx. 684 (11th Cir. 2019); *Henderson v. Washington Nat. Ins. Co.*, 454 F.3d 1278 (11th Cir. 2006). The court focused on the insuredôs negligent procurement of insurance claim.

In the negligent procurement claim, the insured alleged that the defendants failed to procure the requested insurance. In the conspiracy claim, the insured alleged that the agent obtained the increased coverage for the expanded plant, but that the insurer did not adjust the claim with the new coverage. Although the insurer argued that the insuredôs complaint was inconsistent in that it alleged negligent procurement of insurance and conspiracy and so both claims could not be maintained, the court disagreed. The court noted that the insured is permitted to allege alternate pleadings. *See* Ala. R. Civ. P. 8(a). Even if the conspiracy claim could not survive a motion to dismiss, the insured properly pleaded a negligent procurement of insurance claim. Because the insured argued that the insured properly requested coverage, the insured did not receive coverage and suffered damages, there is a possibility the insured could recover from the agent and agency on this claim. Therefore, the court held that the agent and the agency were not fraudulently joined, and the court granted the motion to remand.

Remand- Fraudulent Joinder
Franklin Co. Commission v. Madden, 2019 WL 2161145 (N.D. Ala. May 17, 2019).

Facts: After the insuredôs former employee stole $753,889.21 from the insured, the insured submitted a claim to its insurers, but both insurers refused to pay the claim. The insured filed an action against the former employee, the insurers, the agency and the agent, and the insurer removed the action to the United States District Court for the Northern District of Alabama. The insured moved to remand the action to state court.

Issue: ***Whether the insurer was able to prove fraudulent joinder such that the insured's motion to remand is due to be denied.***

Holding: Yes. Because the insured, former employee, the agency, and the agent were all Alabama residents, there was a lack of diversity between the parties. The insurer alleged that the insured fraudulently joined the former employee, agency, and agent; therefore, their citizenship should be disregarded. To prove fraudulent joinder, the insurer most establish that ñ(1) there is no possibility the plaintiff can establish a cause

of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.ò *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329 (11th Cir. 2011).

The only claim against the former employee was conversion. Because she is the only party who could be held liable for conversion, and the insurance claims were entirely separate issues, the court held that the insured had fraudulently joined the former employee.

The only claim the insured asserted against the agent and agency was fraudulent suppression. ñAbsent a special relationship, a separate agreement, additional compensation, or an affirmative misrepresentation about the contents of the policy, an insurer or agent does not have a duty to advise a client or potential client about the adequacy of coverage.ò *Somnus Mattress Corp. v. Hilson*, --- So. 3d ---, 2018 WL 6715777 (Ala. Dec. 21, 2018). Because the court found no special relationship, separate agreement, additional compensation, or affirmative misrepresentation alleged against the agent or agency, the court held that the insured could maintain the fraudulent suppression claim. Therefore, the court held that the agent and the agency had been fraudulently joined.

The court denied the insuredôs motion to remand.

Remand- Amount in Controversy
White v. Nat'l Fire & Marine Ins. Co., 2019 WL 2206443 (N.D. Ala. May 22, 2019).

Facts: After his trailer was severely damaged when it was used to haul wheat on a farm, the insured filed a breach-of-contract action in state court against his insurer. The insured requested damages for the loss of its use and his loss of income related to the loss of the trailer. When the insured did not timely respond to the insurerôs request for admissions that asked the insured to admit that the damages he sought were greater than $75,000, the insurer removed the action to a federal court in the Northern District of Alabama. The insured moved to remand the action to state court.

Issue: ***Whether the action should be remanded to state court, as the amount in controversy does not exceed $75,000.***

Holding: Yes. The insurerôs summary judgment motion notes that the trailer cost $19,000. The policy lists the value of the trailer as $19,000. Although the insured requests damages for his loss of income for the loss of use of the trailer, this type of recovery is excluded by the policy. Failing to respond to the request for admissions does not validate removing the action to federal court. ñ[M]ere silence does not establish the amount in controversy.ò *See Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945 (11th Cir. 2000).

The insurer asked the court to hold that the insured is judicially estopped from requesting damages greater than $75,000, but the court noted it was not permitted to render any judgments on the case because it did not have jurisdiction and the insurer was free to request this from the state court. *See Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95 (1st Cir. 2001). The action was remanded to state court.

Appraisal - Umpire Selection
Allstate Vehicle and Prop. Ins. Co. v. Encarnacion, 2019 WL 2221603 (M.D. Ala. May 22, 2019).

Facts: The insured and insurer could not agree on the value of the loss under a first-party property policy. The insurer calculated the loss was valued at $278,598.60 and the insured calculated the value of the loss to be $454,329.18. Because of a disagreement regarding value, the insured demanded appraisal under the appraisal provisions of the policy. Both parties selected their respective appraisers, but were unable to agree on an umpire. Therefore, the insurer filed suit in the Middle District of Alabama federal court asking the court to appoint an umpire. The insured filed a motion to dismiss.

Issue: ***Whether the federal court has subject matter jurisdiction over an insurer's request for appointment of an umpire, even though the insurer is not asking for monetary damages.***

Holding: Yes. The insured argued that the federal court did not have jurisdiction because the insurer had not established that the amount in controversy exceeded the courtôs jurisdictional threshold of $75,000 because the insurer did not seek money damages.

The court noted that both the insured and the insurerôs valuation of the loss exceeded the amount-in-controversy requirement. Also, the difference between both calculations exceeds the amount-in-controversy requirement. The Eleventh Circuit and district courts in the Eleventh Circuit have consistently held that, when parties cannot agree to the value of the loss and cannot agree on an umpire, the amount in controversy exceeds $75,000 where only the ñvalue of the relief that the plaintiff can obtainò should be considered. *See Ericsson GE Mobile Comm., Inc. v. Motorola Comm. & Electronics, Inc.*, 120 F.3d 216 (11th Cir. 1996); *Fidelity Warranty Services, Inc. v. Kidd*, 45 F. Supp. 2d 1284 (N.D. Ala. 1999); *Terminix Int'l Co., L.P. v. Palmer Ranch Ltd. Partnership*, 446 F. Supp. 2d 1308 (M.D. Fla. 2006). Because the amount the insured and insurer claim is owed to the insured and the difference between these figures all exceed $75,000, the court held that the insurer met the amount-in-controversy requirement and denied the insuredôs motion to dismiss.

Remand- Diversity and Amount in Controversy
Richey v. Auto-Owners Ins. Co., 2019 WL 2420401 (M.D. Ala. June 7, 2019).

Facts: Several weeks after the insureds bought a homeowners insurance policy, a fire

destroyed their house. The fire department concluded that the fire was accidental. After the insureds made a claim with their homeownersô insurer, the insurerôs investigator thought the fire was suspicious and asked the fire department to help with the investigation. When the fire department and insurance investigator concluded that the insureds should be prosecuted for insurance fraud, the insureds were arrested and indicted for first-degree fraud. However, the criminal case was later dismissed.

The insurer denied coverage. After the dismissal of the criminal case, the insureds filed a lawsuit against the out-of-state insurer and an in-state employee of the fire department. After the in-state employee was dismissed from the lawsuit, the insurer removed the action to a federal court in the Middle District of Alabama. The insureds moved to remand the action to state court.

Issue: ***1) Whether diversity existed such that removal was appropriate.***
2) Whether the amount in controversy exceeded $75,000 such that removal was appropriate.

Holding: 1) Yes. The insureds argued that the insurer was actually a citizen of Alabama, creating a lack of diversity. However, citizenship for a corporation is determined by the location of the corporationôs principal place of business and the state in which it is incorporated. 28 U.S.C. § 1441(b)(2). The insurer was incorporated in Michigan. Moreover, its secretary and general business address were in Michigan. Therefore, the court held that it was reasonable to conclude that the insurerôs principal place of business was also in Michigan. The insureds argued that the insurer waived the issue of citizenship by doing business in Alabama. The court held that there was no legal foundation for this argument. Therefore, the court held that diversity of citizenship existed.

2) Yes. The insureds submitted a proof of loss calculating the value of the house as ñpriceless,ò the personal property loss totaling $113,529.05, and other losses totaling $27,000. The policy listed $135,300 as the value of the home. Also, the plaintiffs denied the state court request for admissions that stated the amount in controversy or damages were less than $75,000. *See Williams v. Wal-Mart Stores, Inc.*, 534 F. Supp. 2d 1239 (M.D. Ala. 2008). They also denied a request for admission stating that they did not intend to recover more than $75,000. The court held that all of the evidence suggested that the amount in controversy exceeded $75,000. Therefore, the court denied the motion to remand.

Remand- Amount in Controversy
Menendez v. American Strategic Ins. Corp., 2019 WL 2491705 (N.D. Ala. June 14, 2019).

Facts: After the insureds discovered water damage in their kitchen, they submitted a claim to their homeownerôs insurers. The insurers denied the claim, and the insureds filed

a declaratory judgment, breach-of-contract, and bad-faith action in state court. When the insurers removed the action to a federal court in the Northern District of Alabama, the insureds moved to remand the action to state court.

Issue: ***Whether the amount in controversy exceeded $75,000 such that removal was appropriate.***

Holding: Yes. In support of the insurersô argument that the amount in controversy exceeded $75,000, the insurers relied on an estimate for kitchen repairs totaling $47,650 and a sworn affidavit from one of the insurerôs adjusters. In the affidavit, the adjuster noted that the estimate was limited to kitchen repairs and did not include the additional structural and mold damage for which the insureds requested coverage. The adjuster also stated in the affidavit that, because the structural and mold damage was more extensive than the kitchen repairs, those repairs would likely cost more to repair than the kitchen damages. In addition, the insureds requested damages for bad faith. Therefore, the court denied the insuredôs motion to remand the case to state court.

CGL Policy- Failure to Settle

Desired Temp Services Contrs., Inc. v. Nationwide Prop. and Cas. Ins. Co., 2019 WL 2716306 (N.D. Ala. June 28, 2019).

Facts: Edgarôs Bakery (ñEdgarôsò) hired the insured to expand its production facility. During the expansion, the insured negligently applied a sealant and ruined the inventory and raw ingredients stored in a freezer. The insured properly notified its CGL insurer and the insurer conducted an investigation of the claim. Edgarôs and the insurer disagreed over the amount of the loss and were not able to reach a resolution of the claim.

As a result of the disagreement, Edgarôs moved forward with the filing of a lawsuit against the insured, and the insurer provided a defense to the insured. Ultimately, Edgarôs and the insurer reached a settlement, and Edgarôs dismissed the lawsuit against the insured. Nevertheless, the insured was dissatisfied how the insurer handled the claim and did not settle the case before Edgarôs filed suit. Therefore, on the same day that Edgarôs filed the lawsuit against the insured, the insured filed this separate breach-of-contract, bad-faith, fraudulent misrepresentation, fraudulent suppression, and negligence case against the insurer. The insurer filed a motion for summary judgment on all counts in the insuredôs complaint.

Issue: ***1) Whether the insurer was entitled to summary judgment for the breach-of-contract and bad-faith claims.***
2) Whether the insurer was entitled to summary judgment for the fraudulent misrepresentation and fraudulent suppression claims.
3) Whether the insurer was entitled to summary judgment for the negligence claim.

Holding: 1) Yes. The policy allows the insurer to exercise ñdiscretionò and investigate the occurrence as well as settle claims and lawsuits on behalf of the insured. All the evidence indicated that the insurer investigated the claim, did not deny the claim, and defended the insured in the action Edgarôs filed against the insured. When a dispute arose over the amount owed to Edgarôs, the insurer chose to further investigate the claim. No evidence indicates that the insurer violated any of the terms of the policy. The court granted summary judgment in favor of the insurer on the breach-of-contract and bad-faith claims.

2) Yes. The court noted that the insured failed to present any evidence showing that the insurer made a false representation. Because a false representation is one of the elements of fraudulent misrepresentation, the insurer is entitled to summary judgment on this issue.

As to the fraudulent suppression claim, the insured argues that the insurerôs agent failed to tell the insured that the insurer was the only one who could decide when to pay a claim and that the insured might have costs associated with waiting for the insurer to pay a claim that the insurer did not have to cover. The policy requires the insurer to pay when the insured becomes ñlegally obligatedò to pay a claim. No one should have advised the insured that the insurer was the only one who could decide a claim, because it is not correct. Also, the insured neglected to read the policy before purchasing it. If the insured read the policy, the insured would be aware that the insurer will not pay any sums unless it is ñexplicitly provided for under Supplementary Payments.ò Therefore, the court granted summary judgment to the insurer on the fraudulent misrepresentation and fraudulent suppression claims.

3) Yes. The insured argued that the insurer negligently failed to disclose material facts and negligently failed to adjust, investigate, and process Edgarôs claim. Because the court held that the insured could not maintain a fraudulent misrepresentation or suppression claim, the same argument held for this type of negligence claim. Also, Alabama courts do not recognize a cause of action for negligent handling of an insurance claim. *See Kervin v. S. Guar. Ins. Co.*, 667 So. 2d 704 (Ala. 1995). Therefore, the court granted summary judgment in favor of the insurer.

Late Notice and Assault/Battery Exclusion
Evanston Ins. Co. v. The Break I, Inc., 2019 WL 2995507 (N.D. Ala. July 9, 2019).

Facts: While Amanda Beasley (ñBeasleyò) was outside the insuredôs restaurant, a patron fired his gun at the insuredôs security guard. In response, the security guard fired shots back and accidentally shot Beasley in the leg and ankle. Four months later, the insurer first learned of the incident when Beasleyôs lawyer sent the insurance agent two letters. As a result, the insurer sent the insured two reservation of rights letters that

requested the insured contact the insurer if a lawsuit was filed. One letter noted that it was unlikely there would be coverage because Beasley was injured by a ñbattery.ò

Almost two years after the incident, Beasley filed an action in state court against the insured. Nearly a year later, the insuredôs lawyer forwarded a request to mediate the action to the insurer, and the insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama against the insured and Beasley. After the insurer moved for a judgment on the pleadings and moved for a default judgment against Beasley, neither the insured nor Beasley responded.

Issue: ***Whether the motion for judgment on the pleadings should be granted, as the insured failed to give the insurer timely notice and the incident is excluded by the assault and battery exclusion.***

Holding: Yes. The policy requires the insured to notify the insured ñas soon as practicable of an óoccurrenceô or an offense which may result in a claim.ò Should a lawsuit be filed, the insured is required to ñ(1) [i]mmediately record the specifics of the claim or ósuitô and the date received and (2) [n]otify us as soon as practicable.ò Alabama courts interpret the term ñas soon as practicableò to mean ñówithin a reasonable timeôin view of all the facts and circumstances of the case.ò *State Farm Mut. Auto. Ins. v. Burgess* 474 So 2d 634 (Ala. 1985). No reason was given to explain why the insured waited nine months to tell the insurer of the lawsuit or almost three year delay in notifying the insurer of the incident. The policy requires the insured, not the injured party, to notify the insurer of the incident. The court held this delay was significant enough to violate the terms of the policy, and so the insurer was not obligated to defend or indemnify the insured.

The policy includes an exclusion that does not allow coverage for any ñóinjuryôarising out of óassault or battery.ôò This exclusion applies even if the injury is caused by an employee or patron or arises out of negligent hiring, training, placement or supervision. ñBatteryò is defined as ñintentional or reckless physical contact with or any use of force against a person without his consent.ò Battery is described as any ñinjuryò that is caused by ñthe use of reasonable force to protect persons or property.ò Because Beasleyôs injuries were caused by a battery, the exclusion applied and the court held that the insurer did not have a duty to defend or indemnify the insured.

Affirmative Defense- Advice of Counsel
Haddix v. Teachers Ins. Co., 2019 WL 3323319 (M.D. Ala. July 24, 2019).

Facts: The insured filed an action in state court that included claims of breach of contract, bad faith, fraud, negligence, wantonness, and breach of implied covenant of good faith and fair dealing against three defendants. After the court denied the insuredôs motion to remand, two of the defendants were dismissed from the action. The previously

agreed upon Uniform Scheduling Order listed the deadline to amend pleadings as August 15, 2019. About three months after the court motion to remand was denied, the remaining defendant, the insurer, filed a motion to amend its answer. The insured opposed this motion.

Issue: ***Whether the insurer should be permitted to add the affirmative defense of "advice of counsel."***

Holding: Yes. The insurer wished to add the affirmative defense that the insurer acted on the advice of its counsel when it denied the insuredôs claim. However, the insured argued that the insurer waived the affirmative defense under state law because it did not raise ñadvice of counselò before declining the claim.

In the denial letter, the insurerôs grounds for denial were based on the fire and origin expertôs opinion. The insured argued that state law limited the insurerôs ability to provide additional reasons for denying the claim if the insurer did not list them in the denial letter. Although the court acknowledged that an insurer waives all other grounds for denial if it relies upon one reason to deny a claim, this requirement is limited to defenses ñwhich arise out of an express condition contained in the insurance contract.ò *Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312 (11th Cir. 2004). The insurer seeks to use the affirmative defense of ñadvice of counselò only for the bad-faith claim and not for the breach-of-contract claim. Alabama law allows an insurer to use ñadvice of counselò as a defense for a bad-faith claim. *Davis v. Cotton States Mut. Ins. Co.*, 604 So. 2d 354 (Ala. 1992). Therefore, the court held that the insurer had not waived the affirmative defense of ñadvice of counselò just because it had not been included in the denial letter to the insured.