Fall 2019 Issue

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

In this edition, we have included a number of cases we hope you find interesting. Included is a case from the Alabama Supreme Court that considers whether an õinsured autoö can qualify as an õuninsured autoö for purposes of UM coverage under the same policy. *Cowart v. GEICO Cas. Co.*, --- So. 3d ----, 2019 WL 5485268 (Ala. Oct. 25, 2019). In addition, the Middle District of Alabama examines whether two individuals reasonably believed they had implied permission to borrow the insuredøs motorcycle. *Encompass Indem. Co. v. Sarkari*, 2019 WL 3805992 (M.D. Ala. Aug. 13, 2019). In an action in Northern District of Alabama in which our firm represented the insurer, the court addressed whether the bankøs motion for summary judgment should be granted and interpleaded funds issued to the bank, whether a motion for a settlement involving an incapacitated individual should be granted, and whether a motion for default judgment should be granted against two defendants. *The Standard Fire Ins. Co. v. Carr*, 2019 WL 4466664 (N.D. Ala. Sept. 18, 2019). Finally, the Northern District of Alabama considers whether the businessownerøs insurer owed coverage to the insured when the accident was not õwith respect to the conduct of a businessö covered by the policy. *Nationwide Mut. Ins. Co. v. Frost*, 2019 WL 4201999 (N.D. Ala. Sept. 5, 2019).

We hope you find this information useful. If you have any questions or would like to discuss these cases, please do not hesitate to let us know.

Alabama State Law Update

UM Policy - Covered Vehicle, Permission, and Ownership
Cowart v. GEICO Cas. Co., --- So. 3d ----, 2019 WL 5485268 (Ala. Oct. 25, 2019).

Facts: After arguing with each other, Zachariah Cowart drove his wife Mistyøs Jeep without her permission. While he was backing out of the driveway, he ran over Mistyøs leg and injured her. Zachariah and Misty had an automobile insurance policy that provided coverage for the Jeep, and Misty made a claim under the policy. She also filed an action against Zachariah for negligence and wantonness. Misty settled her claim with the insurer in the bodily injury section of the policy, although this amount did not fully compensate her for her damages. Before the claims against Zachariah were dismissed with prejudice, Misty added an uninsured motorist claim against her insurer. The state court granted the insurerøs motion for summary judgment, and Misty appealed.

Issue: ***1) Whether an "insured auto" can qualify as an "uninsured auto" for purposes of UM coverage under the same policy.***
2) Whether a genuine issue of material fact existed whether Misty owned the Jeep and did not give Zachariah permission to drive the Jeep.

Holding: 1) Yes. The UM portion of the policy stated that an õuninsured autoö did not include an õinsured auto.ö However, in this particular policy, the definition of õinsured autoö did not include õan auto being used without the ownerøs permission.ö Misty provided an affidavit that she owned the vehicle and that Zackariah did not have her permission to drive the vehicle at the time of the accident. The court held õ[b]ecause the plain language of the policy does not exclude from uninsured-motorist coverage a vehicle being driven without the ownerøs permission, the policy must be read to provide uninsured-motorist coverage in such an event.ö

2) Yes. The policy would provide UM coverage if Misty owned the Jeep and did not give permission to Zachariah. Alabama law describes an *inter vivos* gift as õ1) An intention to give and surrender title to, and dominion over, the property; 2) Delivery of the property to the donee; and 3) Acceptance by the donee.ö *Dial v. Dial*, 603 So. 2d 1020 (Ala. 1992). Misty presented evidence that Zachariah gave her the Jeep as a gift, he delivered the Jeep to her, she normally drove the Jeep, and she kept the only set of keys to the Jeep. The court found that this evidence established at least a genuine issue of material fact existed whether Misty owned the Jeep, and reversed the grant of summary judgment in favor of the insurer.

UIM Insurer - Motion to Compel
Ex parte D.P.T., --- So. 3d ----, 2019 WL 5485273 (Ala. Oct. 25, 2019).

Facts: After a car accident in which D.P.T. and his minor stepson were injured, they sued the other driver and later added a UIM claim against their UIM insurer. The UIM insurer requested D.P.T.øs employment records from the United States Army, and D.P.T. refused. The court granted the UIM insurerøs motion to compel, and D.P.T. filed a writ of mandamus and asked the Alabama Supreme Court to require the state court to rescind its order for the motion to compel.

Issue: ***Whether the motion to compel should be granted, as the information requested violates the psychotherapist-patient privilege.***

Holding: No. A court may not order the production of records that are privileged. Although there are exceptions to the psychotherapist-patient privilege, which is similar to the attorney-client privilege, there are no relevant exceptions in this case. The UIM insurer limited its document request to employment records from the Army, and did not check the box that includes medical records. D.P.T. did not provide any information that indicates the Armyøs employment records include privileged communications with his psychotherapist. Therefore, the court denied the motion to compel.

Alabama Federal Law Update

UIM Insurer - Opting Out

Popwell v. Sessoms, 2019 WL 3400692 (S.D. Ala. July 26, 2019).

Facts: William Popwell was injured when Desiree Sessomsøs vehicle collided with his vehicle. Mr. Popwell and his wife filed a negligence and wantonness action against Sessoms. The Popwells also included their UIM insurer and requested UIM benefits. The UIM insurer moved to opt out of the proceedings.

Issue: ***Whether a UIM insurer may opt out of the case and not participate in trial.***

Holding: Yes. An insurer can opt out of the proceedings within a reasonable time, and no mention will be made of the insurer at trial. *Lowe v. Nationwide Ins. Co.*, 521 So. 2d 1309 (Ala. 1988). The insurer will be bound by any settlement or judgment, and has the option to opt back into the case for good cause shown.

Commercial Property Insurance - Appraisal

Haman, Inc. v. Chubb Custom Ins. Co., 2019 WL 3573550 (N.D. Ala. Aug. 6, 2019).

Facts: The insurer issued a commercial property policy for the insuredøs hotel. In the event of a disagreement over the value of the property or amount of the loss, the policy required the insurer and insured to enter into an appraisal process. Both parties were required to select a competent and impartial appraiser. If the appraisers could not agree on the loss, then the appraisers would select an umpire.

The insuredøs hotel was damaged in a fire and further damaged in a storm a little over a month later. The insured submitted claims for both losses. The insurer and insured disagreed over the cost to repair the fire loss, and they disagreed whether the policy covered the storm damage. For the fire claim, the parties agreed to enter into the appraisal process. But, the insurer would not proceed with appraisal because the insurer believed the insuredøs appraiser was not impartial.

The insured wished to enter the appraisal process for the storm claim. However, the insurer refused to begin the appraisal process for the storm claim because the parties disagreed about the cause of damages and what damages were covered under the policy. When the appraisal did not proceed for either claim, the insured filed an action against the insurer requesting specific performance on the appraisal provision, breach of contract, and bad faith. The insured then moved for specific performance to enforce the policy provisions.

Issue: ***1) Whether genuine issues of material fact existed regarding the impartiality of the insured's appraiser.***

2) Whether appraisal was premature on the storm claim where coverage questions existed.

Holding: 1) Yes. The insuredøs appraiserøs website claimed that he only worked for the insured, he only appraised claims with a õmajor deficit in the estimate and where [he had] a chance to significantly increase the claim amount for [his] clients and to be profitable in doing so for [the appraiser].ö The insured agreed to pay the appraiser an hourly fee that did not exceed 30% of the settlement awarded to the insured. The court held that the website and financial agreement reflect a potential bias and a financial incentive for the appraiser. If the appraiser has a bias or incentive, the appraiser is not impartial, and so a genuine issue of material fact existed regarding the insuredøs appraiser.

2) Yes. Although the insured maintained that the storm destroyed the hoteløs roof and caused water damage inside the hotel, the insurer maintained that the majority of the damage was caused by poor maintenance and the age of the roof. The Alabama Supreme Court holds that the appraisal process is not intended to decide coverage issues; it is simply a method of determining the amount of a loss. *See Rogers v. State Farm Fire and Cas. Co.*, 984 So. 2d 382 (Ala. 2007). Because the parties had not agreed on the cause of the loss, an appraisal of the value of the loss was premature.

UM Insurance - Implied Permission/"Reasonable Belief" Exclusion and Contributory Negligence

Encompass Indem. Co. v. Sarkari, 2019 WL 3805992 (M.D. Ala. Aug. 13, 2019).

Facts: Zubin Sarkari (õSarkariö) and Abhiprai Gulati (õGulatiö) were both injured when the motorcycle they borrowed from the insured, without the insuredøs express permission, left the road to avoid hitting an oncoming vehicle. The oncoming vehicle did not stop after the motorcycle left the road. Sarkari and Gulati made a claim with the insuredøs motorcycle insurer for UM benefits. The insurer filed a declaratory judgment action against Sarkari and Gulati and asked the court to declare that the policy does not provide coverage for them. The insurer then filed a motion for summary judgment and Sarkari and Gulati opposed the motion.

Issue: ***1) Whether the insurer is entitled to summary judgment because Sarkari and Gulati were using the motorcycle without a reasonable belief that they were entitled to use the motorcycle.***
2) Whether the insurer is entitled to summary judgment because Sarkari was contributorily negligent in causing his injury.

Holding: 1) No. The policy excludes coverage for bodily injury to a covered person who uses the motorcycle õwithout a reasonable belief that the covered person is entitled to do so.ö A õcovered personö is a õperson occupying [the insuredøs] covered motor vehicle.ö Although Sarkari had express permission from the insured to take his son

for a ride on the motorcycle, he did not ask the insured if he could take Gulati for a ride.

Implied permission to use a vehicle requires õa course of conduct engaged in by the parties over a period of time prior to the use in question or else there must be particular circumstances to justify an interference of implied permission.ö *Sleight v. State Farm Mut. Auto. Ins. Co.*, 516 So. 2d 616 (Ala. 1987). Because Sarkari only rode the motorcycle a few times including twice on the day of the accident, the court held that there was not a course of conduct between Sarkari and the insured that could give Sarkari a reasonable belief he was allowed to use the motorcycle whenever he wished. However, because the insured allowed Sarkari to use the motorcycle each time he asked, the insured did not say Sarkari was not allowed to take anyone in particular on a ride, and no evidence indicated that the insured did not prohibit anyone who asked to use the motorcycle to take it for a ride, the court held that a reasonable juror could find that Sarkari had implied permission.

Gulati did not ask for permission to ride on the motorcycle. However, Gulati testified that the insured was offering to let people at the party use his new motorcycle. Gulati also testified that people were constantly taking turns on the motorcycle. Therefore, a reasonable juror could conclude that Gulati had implied permission to ride the motorcycle. Therefore, the court denied the insurerøs motion for summary judgment on the application of the õreasonable beliefö exclusion.

2) No. The insurer argued that Sarkari was contributorily negligent because he was speeding and he was not wearing a helmet. Contributory negligence is proven by showing that the claimant õ1) had knowledge of the dangerous condition; 2) had an appreciation of the danger under the surrounding circumstances; and 3) failed to exercise reasonable care, by placing himself in the way of danger.ö *Ridgeway v. CSX Transp., Inc.*, 723 So. 2d 600 (Ala. 1998). Although Sarkari was driving more than twice the speed limit, the insurer did not offer evidence to indicate that his speed somehow contributed to the cause the accident. Even if it could be proven that his speed caused the accident, the insurer did not prove that Sarkari appreciated the danger of the oncoming vehicle. Although Sarkariøs failure to wear a helmet likely made his head injury worse, the insurer failed to explain how simply failing to wear a helmet caused the accident. Therefore, the court denied the insurerøs motion for summary judgment on the issue of contributory negligence.

Diversity Jurisdiction

Alabama Space Science Exhibit Com'm d/b/a U.S. Space & Rocket Center v. Merkel American Ins. Co., 2019 WL 3842781 (N.D. Ala. Aug. 15, 2019).

Facts: The Alabama Space Science Exhibit Commission d/b/a U.S. Space & Rocket Center (õthe Centerö) filed an action in state court to resolve an insurance coverage dispute,

and the insurer removed the action to the United States District Court for the Northern District of Alabama. The Center moved to remand the action to state court.

Issue: ***Whether the federal court had diversity jurisdiction over the Center's case against the insurer.***

Holding: Yes. The Center argued that the parties were not diverse because the Center is an arm of the State of Alabama and not a citizen of the State of Alabama. A state is not a citizen of a state when determining diversity jurisdiction. 28 U.S.C. § 1332. õA public entity or political subdivision of a state, unless simply an ÷arm or alter ego of the State,ø however, is a citizen of the state for diversity purposes. *Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405 (11th Cir. 1999). The Eleventh Circuit requires courts to consider four factors when determining whether an entity is an arm of the state: õ(1) how the state law defines the entity; (2) the degree of state control over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.ö *Nichols v. Alabama State Bar*, 815 F.3d 726 (11th Cir. 2016).

There is no Alabama law that describes the Center as an arm of the state. However, other courts in this district have previously held that the Center is not an arm of the state ó Alabama law gives the Center õbroad power and autonomyö to run it and the personnel who work at the Center. Also, the Center independently hires employees, raises and spends funds with very little state interference, enters into contracts in its own name and not the stateøs name, and can purchase and sell property. Most of the Centerøs funds are acquired by admissions and sales. Finally, although the Center receives funds from the Education Trust, and an adverse judgment would reflect and affect the Education Trustøs costs, the state would not actually be liable for any judgment against the Center. Therefore, relying on the four-factor test, the court concluded that the weight of evidence did not indicate that the Center was an arm of the state. The court therefore held that the parties were diverse and denied the motion to remand.

Aircraft Insurer- Duty to Defend and Indemnify

American Nat'l Prop. and Cas. Co. v. Gulf Coast Aerial, LLC, 2019 WL 4131107 (S.D. Ala. Aug. 29, 2019).

Facts: After a pilot and John LaFleur were killed in a plane crash, LaFleurøs estate filed an action in state court against the insured (owner of the aircraft) and its managing member. The aircraft insurer filed a declaratory judgment action in the United States District Court for the Southern District of Alabama and asked the court to declare that the insurer did not have the duty to defend or indemnify the insured in the underlying action. The insured, the managing member, and the estate of LaFleur (õthe defendantsö) moved to dismiss, stay, and/or abstain from the action, and the insurer opposed the motions.

Issue: ***1) Whether the court should abstain from hearing the duty to indemnify because the claim was not ripe for adjudication.***
2) Whether the duty to defend claim should be dismissed, because the insurer has not proven that the amount in controversy exceeds $75,000.
3) Whether the court should abstain from hearing the duty to defend claim, because the Brillhart-Wilton Abstention rule applies.

Holding: 1) Yes. The defendants argued that the duty to indemnify was not ripe for adjudication because the underlying action has not yet been resolved. Where an underlying civil action was still pending, the court noted that the former Fifth Circuit affirmed the district courtøs dismissal of a duty to indemnify declaratory judgment action, because the action was a õrequest [that] sought a declaration on a matter which might never arise.ö*American Fidelity & Cas. Co. v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co.*, 280 F.2d 453 (5th Cir. 1960). Relying on this and similar precedent, the court held that the duty to indemnify claim was not ripe. Therefore, the court stayed the duty to indemnify, but agreed to revisit the issue after deciding the duty to defend.

2) No. The defendants argued that the duty to defend claim should be dismissed, because the insurer failed to prove that the amount in controversy exceeds $75,000. When determining the amount in controversy, the court looks at the õmonetary value of the benefit that would flow to the plaintiff if the relief he is seeking were granted.ö *S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312 (11th Cir. 2014). In an insurance coverage case, the court may combine the insurerøs potential liability with costs associated with defending the underlying action to calculate the amount in controversy. *First Mercury Ins. Co. v. Excellent Computing Distributors, Inc.*, 648 F. Appøx 861 (11th Cir. 2016). The policy limits were $100,000; the underlying action included negligence, wantonness and wrongful death; and the legal costs likely required to defend the action all made it õmore likely than notö the potential liability would be greater than $75,000. Therefore, the court found that the insurer had established the amount in controversy.

3) No. The Declaratory Judgment Act gives courts discretion to hear a case, and the Brillhart-Wilton Rule provides a set of principles the court should consider when deciding if federalism, efficiency, and comity direct a court to hear an action. *See Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328 (11th Cir. 2005). The court found that the declaratory judgment action was not being used merely for õprocedural fencing,ö the action would not increase friction between federal and state courts, factual development in the underlying action was not likely an important factor in creating a resolution in this action, there was not a more effective remedy to resolving the duty to defend issue, and this action would not settle the controversy in the underlying action. Accordingly, the court held that the *Ameritas* factors indicated that the court should retain jurisdiction over the duty to defend issue.

Motion to Dismiss - Occurrence within Policy Terms

Franklin Co. Com'm v. Madden, 2019 WL 4143042 (N.D. Ala. Aug. 30, 2019).

Facts: In 2018, the insured discovered that a former employee stole $753,889.21 from the insured. The insured submitted a claim to its insurer, Lafayette Insurance Company, under a policy covering employee theft, but that expired on April 1, 2015. The policy contained a one-year coverage extension, that provided coverage for any loss discovered by April 1, 2016. Lafayette declined the claim because the insured did not discover the theft until 2018, well after the expiration of the coverage extension. The insured sued the insurer for breach of contract and fraudulent suppression.

Issue: ***1) Whether the insured's breach-of-contract claim should be dismissed, because the insured did not discover the loss within the time period the policy requires.***
2) Whether the insured's fraudulent suppression claim should be dismissed, because the insured failed to state the claim with particularity and insured did not fraudulently suppress information.

Holding: 1) Yes. The parties did not dispute that the employeeøs theft constituted an occurrence under the policy. But, the policy only provided coverage for losses that occurred during the extended policy period. Because the insured discovered the theft almost three years after the extended policy period, the court held that the policy did not provide coverage, and dismissed the breach-of-contract claim.

2) Yes. The insured alleged that the insurer fraudulently suppressed information because the insurer did not inform the insured that it would need additional coverage for theft after the policy was cancelled. However, the insured failed to plead this claim with particularity as required by Alabama law. *Somnus Mattress Corp. v. Hilson*, --- So. 3d ---, 2018 WL 6715777 (Ala. De. 21, 2018). The insured neglected to allege what additional coverage was available, exactly what the insured should have told the insured about additional coverage, exactly what the insured did as a result of this failure to communicate, or how the insurerøs failure to communicate caused the insured to act or not act. Also, although the insured argued that the insurer was vicariously liable for the agentøs failure to tell the insured this information, all claims against the agent were dismissed. Therefore, the insurer could not be held liable, and the court dismissed the insuredøs fraudulent suppression claim.

Motion to Dismiss - Non-Cumulation

Franklin County Comm'n v. Madden, 2019 WL 4139657 (N.D. Ala. Aug. 30, 2019).

Facts: This is a companion case to the case discussed above. In addition to suing Lafayette, the insured also sued State Farm Fire and Casualty Company (õState Farmö) under its employee-theft policy. State Farm had paid its limits of $100,000, but the insured claims that State Farm owed $100,000 for each year the theft occurred. State Farm

refused, based on non-cumulation language in the policy, and the insured filed suit against State Farm.

Issue: ***Whether the policy requires the insurer pay $100,000 policy limits for each year a theft occurred.***

Holding: No. The policy states, õ[r]egardless of the number of years this Insurance applies as respects a specific ÷employee,ø the most we will pay in the aggregate for any one ÷occurrenceø is the largest Limit of Insurance applicable to that ÷employeeø shown in the SCHEDULE at the time loss occurred.ö The Schedule states that the limit for the employee is $100,000. Alabama courts are required to õgive meaning and effect, if possible, to every word and phrase in the contractø and cannot adopt ÷a construction which neutralizes any provision.øö *Royal Ins. Co. of America v. Thomas*, 879 So. 2d 1144 (Ala. 2003). The court held that the non-cumulation provision was not ambiguous and clearly limited recovery to $100,000. Therefore, State Farm did not breach the contract with the insured and the court granted the motion to dismiss.

Motion to Dismiss - Bad Faith
Steele v. Liberty Ins. Corp., 2019 WL 4202001 (N.D. Ala. Sept. 5, 2019).

Facts: After the insuredøs jewelry was stolen, the insured made a claim with his insurer under a tenantøs policy. When the insurer denied the claim, the insured filed an action against the insurer and alleged negligence, breach of contract, bad faith, fraud, violations of the Alabama Deceptive Trade Practices Act, and alleged he was entitled to declaratory judgment. The insurer moved to dismiss all claims except the breach of contract and declaratory judgment, and the insured agreed to dismiss the negligence, fraud, and violations of the Alabama Deceptive Trade Practices Act claims. However, the insured opposed dismissal of the bad-faith claim.

Issue: ***Whether the bad-faith claim should be dismissed because the insured did not sufficiently plead the elements of bad faith under Alabama law.***

Holding: Yes. In Alabama, in order to establish bad faith under a theory of õnormal bad faith,ö the insured must plead that the insurer knowingly lacked an arguable reason for denying coverage. In this case, the insured failed to include this allegation; therefore, the court granted the insurerøs motion to dismiss the õnormal bad faithö claim. Similarly, in order to establish bad faith under a theory of õabnormal bad faith,ö the insured must allege that the insurer intentionally or recklessly failed to investigate the claim. In this case, the insured also failed to include this allegation or any details about the investigation other than in a general statement in the factual section. Accordingly, the court also granted the insurerøs motion to dismiss the õabnormal bad faithö claim.

Nevertheless, while the court granted the motions to dismiss, it also granted the insuredøs motion to amend the complaint, which will allow the insured to correct the errors in its pleading.

Business Owner's Policy- Policy Owner
Nationwide Mut. Ins. Co. v. Frost, 2019 WL 4201999 (N.D. Ala. Sept. 5, 2019).

Facts: David and Judy Frost owned a commercial property where several businesses leased space from them. Mrs. Frost owned a salon that occupied one of these spaces without a lease. The Frosts did not incorporate a business for the property. Norma Jean Sartin fell and was injured while attending a yard sale in front of Mrs. Frostøs salon. Fifteen months after she fell, Mrs. Sartin filed a premises liability lawsuit against the salon. Mr. Frost filed a claim with his businessownerøs insurer, seeking defense and indemnity. The policy provided coverage for Mr. and Mrs. Frost, but õonly with respect to the conduct of a business of which [Mr. Frost, the named insured, was] the sole owner.ö The insurer filed a declaratory judgment action in federal court in the Northern District of Alabama, asking the court to declare it has no duty to defend or indemnify the Frosts because Mrs. Frostøs salon was not solely owned by Mr. Frost. The insurer moved for summary judgment.

Issue: ***Whether the insurer owed coverage when the accident was not "with respect to the conduct of a business" covered by the policy.***

Holding: No. The policy provided coverage for Mr. and Mrs. Frost, but õonly with respect to the conduct of a business of which [Mr. Frost, the named insured, was] the sole owner.ö Mr. Frost was the only named insured in the policy. The Frosts argued that coverage existed because both Frosts ran the yard sale together and the sale was not related to the salon. However, the policy only covered an occurrence that involved a business that Mr. Frost solely owned. The court held that the policy terms were unambiguous and no coverage existed; therefore, the court granted summary judgment in favor of the insurer.

Homeowner's Insurance- Mortgagee and Insured Claims
The Standard Fire Ins. Co. v. Carr, 2019 WL 4466664 (N.D. Ala. Sept. 18, 2019).

Facts: A fire damaged the insuredøs home and contents. As power-of-attorney for the insured, Donna McCullars made claims with the insuredøs homeownerøs insurer to recover damages. She and Steve Millwood claimed their personal property was destroyed in the fire. However, the insurer learned that most of the property was sold or removed before the fire. McCullars and Millwood were indicted for insurance fraud and arson, and both parties pled guilty to the insurance fraud charges. The mortgagee also filed a claim for the property loss.

The insurer filed a declaratory judgment action in the United States District Court for the Northern District of Alabama asking the court to declare that there is no coverage for the claims McCullars and Millwood made because of the misrepresentations they made. Since there were multiple claims on the policy, the insurer interpleaded $27,657.73. This is the amount remaining to pay off the mortgage. The court appointed a guardian *ad litem* for the insured to protect his interests. Although McCullars and Millwood appeared *pro se* initially, they have failed to appear or participate in proceedings. Neither defendant responded to the bankøs motion for summary judgment nor the insurer and insuredøs motion for approval of a settlement.

Issue: ***1) Whether the interpleaded funds should be issued to the bank, and the bank's motion for summary judgment should be granted.***
2) Whether the motion for approval of settlement should be granted.
3) Whether the motion for default judgment against McCullars and Millwood should be granted.

Holding: 1) Yes. Since the insurer interpleaded the funds, the insurer admits that this amount is owed to another party. *Gilbert v. Cong Life Ins. Co.*, 646 So. 2d 592 (Ala. 1994). The policy states that õ[i]f a mortgagee is named in the policy, any loss payable under Coverage A or B shall be paid to the mortgagee and [the mortgagor/insured] as interests appear.ö The policy lists the bank as the only mortgagee. The insured defaulted on the mortgage after the fire, and the mortgage allows the mortgagee to apply the insurance proceeds to the amount owed in the event of a default. Alabama law provides that the mortgagee has the first right to the insurance proceeds and the mortgagor has the remaining interest in the policy proceeds. *Standard Fire Ins. Co. v. Knowles*, 129 F. Supp 3d 1271 (N.D. Ala. Sept. 15, 2015). Since the policy and the mortgage require the proceeds to be paid to the mortgagee, the interpleaded funds, which constitute the outstanding mortgage amount, are due to be paid to the mortgagee. Summary judgment is granted in favor of the mortgagee.

2) Yes. If an incapacitated individual is a party to an action, the court must approve of the settlement, and the court must determine the best interests of the incapacitated individual. *See Rivera v. Fast Eddie's, Inc.*, 2013 WL 12164682 (D.N.M. Mar. 18, 2013); *Large v. Hayes by and through Nesbitt*, 534 So. 2d 1101 (Ala. 1988). The proposed settlement provides that the insurer will pay $56,729 to the insured and the insured waives any claim to the interpleaded funds. This payment will resolve the insurerøs claims against the insured and the insuredøs claims against the insurer. This figure represents 85% of the remaining benefits available to the insured. The court held this amount was reasonable given the wrongful acts in which McCullars engaged as the agent of the insured. The proposed settlement was approved.

3) Yes. McCullars and Millwood failed to participate in the action and the individuals violated court orders. Both defendants were aware of the courtøs orders. Therefore,

the violations were deliberate and done in bad faith. *See Malautea v. Suzuki Co., Ltd.*, 987 F.2d 1536 (11th Cir. 1993). The interests of justice support a default judgment and so the default judgment is granted.

Motion to Dismiss - Duty to Indemnify

Nationwide Mut. Ins. Co. v. Barrow, 2019 WL 4572913 (N.D. Ala. Sept. 20, 2019).

Facts: A.B., a minor, by and through her next friend and parent, J.B., filed an action in state court to recover damages from the insured. This underlying action is still pending. After the insured made a claim with his automobile, homeowners, dwelling, and umbrella insurer and requested a defense and indemnification, the insurer filed a declaratory judgment action in a federal court in the Northern District of Alabama. The insurer asked the court to hold that the insurer does not have a duty to defend or indemnify the insured in the underlying action. A.B. filed a partial motion to dismiss and asked the court to dismiss the indemnity claim without prejudice because it was not ripe. A.B. did not request that the court dismiss the duty to defend issue.

Issue: ***While maintaining jurisdiction over the duty to defend, whether the insurer's indemnity claim should be dismissed without prejudice, because the claim was not ripe.***

Holding: Yes. The insurer conceded that the claim was not ripe, but asked the court to stay the duty to indemnify issue instead of dismissing it. The court acknowledged that federal district courts have come to different conclusions about whether courts should dismiss or stay the duty to indemnity issue while considering the duty to defend issue. The court in this case determined that, based on the insurerøs concession that the duty to indemnify was dependent on the underlying action, the court did not have subject matter jurisdiction over it. Therefore, it dismissed the duty to indemnify issue without prejudice. *See Digital Props, Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997); *Univ. of So. Ala. v. Am. Tobacco Co.*, 168 F.3d 405 (11th Cir. 1999).