Winter & Spring 2020 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, its federal courts, and the Eleventh Circuit. Of particular interest are *Ex parte Allstate Prop. and Cas. Ins. Co.*, --- So. 3d ----, 2020 WL 502667 (Ala. Jan. 31, 2020) (the Alabama Supreme Court holding that the UIM insurer, who opted out of participating in trial, nevertheless had a right to demand a jury trial), *Ex parte State Farm Fire and Cas. Co.*, --- So. 3d ----, 2020 WL 502537 (Ala. Jan. 31, 2020) (Alabama Supreme Courtôs denial of an insurerôs petition for a writ of mandamus that asked the Court to hold that the claims alleged against it are barred by the direct action statute); *Smith v. State Farm Mut. Auto. Ins. Co.*, --- Fed. Appx. ---, 2020 WL 548149 (11th Cir. Feb. 4, 2020)(the Eleventh Circuit held that the UIM insurer did not abuse the judicial process by following the *Lambert* procedure, and the tortfeasorôs insurer did not negligently and wantonly fail to settle the claim), *Dawson v. Liberty Ins. Corp., Inc.*, 2020 WL 570134 (N.D. Ala. Feb. 5, 2020)(the Northern District of Alabama concluded that the insured cannot maintain a breach-of-contract claim against the homeownerôs insurer, because the property was burglarized by a named insured); *Cheatham v. JPMorgan Chase Bank, N.A.*, 2020 WL 1015760 (M.D. Ala. Mar. 2, 2020)(the Middle District of Alabama did not to allow the defendants to rely upon a proof of loss to support their motion to dismiss, because the document is not central to the plaintiffôs claims), and *AIX Specialty Ins. Co. v. Members Only Management, LLC*, --- Fed. Appx. ---, 2019 WL 6736374 (11th Cir. Dec. 11, 2019)(the Eleventh Circuit concluded that the CGL policyôs Absolute Liquor Liability Exclusion applies and excludes coverage for the insured in the underlying action). We hope that you find the cases helpful and hope that you all are staying safe.

Alabama State Law Update

Venue - Coverage Action

Ex parte Allstate Ins. Co., --- So. 3d ----, 2019 WL 5853307 (Ala. Nov. 8, 2019).

Facts: Dylan Gardener and Alexander Hobson were passengers in a vehicle owned by Thomas Hobson and driven by Devin Harrison, which was involved in a single-vehicle accident. Alexander Hobson filed an action against the driver, Harrison, seeking damages for his injuries. Harrison also sued Thomas Hobsonôs insurer, Allstate, for breach-of-contract and bad-faith for failing to defend and indemnify him regarding the claims arising from the accident. Allstate moved to transfer the action from Perry County to Shelby County or Bibb County. The court denied the Allstateôs motion, and Allstate then filed a petition for writ of mandamus to the Alabama Supreme Court.

Issue: ***Whether the coverage action against Allstate should be transferred from the county where the automobile accident occurred to the county of Allstate's principal place of business or the county in which the driver of the vehicle resides.***

Holding: Yes. Allstateôs principal place of business is Shelby County, Alabama. The driver of

the vehicle, Devin Harrison, resides in Bibb County. Therefore, venue would have been proper in either of those counties. Alabama Code Section 6-3-7(a)(1) permits an action to be filed ñin the county in which a substantial part of the events or omissions giving rise to the claim occurred . . ..ò Even though the accident happened in Perry County and the underlying lawsuit was filed in Perry County, Allstate argued that all claims handling occurred in Shelby County.

The Alabama Supreme Court previously held that, when determining whether the venue is appropriate, ñthe inquiry is not the location of the injury, but the location of the events or omissions giving rise to the claim.ò *Ex parte Smith Wrecker Serv., Inc.*, 987 So. 2d 534 (Ala. 2007). Here, the events or omissions giving rise to the claims against Allstate occurred in Shelby County, the county of Allstateôs principal place of business. Allstate submitted an affidavit explaining that most of the insurerôs investigation, claims handling, and most of the decisions for the claim were made in Shelby County. Also, Hobson and Harrison reside in Bibb County. Accordingly, the Supreme Court held that venue was not proper in Perry County and should be transferred to Shelby or Bibb County. The Court granted Allstateôs petition and issued the writ of mandamus.

Workers' Compensation- Employer Immunity
Ex parte Ultratec Special Effects, Inc., --- So. 3d ----, 2019 WL 5853264 (Ala. Nov. 8, 2019).

Facts: After two employees were killed in the scope of their employment, the administrators of their estates (ñthe Estatesò) filed negligence, negligent supervision, wantonness, conspiracy, and strict liability actions against their employerôs parent company and other employees. The employer, an Alabama corporation, is a wholly owned subsidiary of the parent company, a Canadian corporation. The parent company filed a motion for summary judgment and argued that the claims against it were barred by the exclusivity provisions of the WorkersôCompensation Act (ñthe Actò). When the trial court denied the parent companyôs motion, the parent company filed two petitions for a writ of mandamus. The Alabama Supreme Court denied these petitions without an opinion, the parent company filed applications for rehearing, and the Court granted the parent companyôs motion for rehearing.

Issue: ***1) Whether the parent company and the employer operated as a single employer group for purposes of the Act.***
2) Whether the parent company and the employer were joint employers for purposes of the Act.
3) Whether the employer operated as a division of the parent company for purposes of the Act.

Holding: 1) No. In the event of injury or death in the scope of employment, the Act prohibits the employee from filing a civil lawsuit against an employer. The Act defines an

employer as ñ[e]very person who employs another to perform a service for hire and pays wages directly to the person. The term shall include a service company for a self-insurer or any person, corporation, copartnership, or association, or group thereof . . .ò Ala. Code Ann. § 25-5-1(4) (1975). Although the parent company argued that it and the employer operated as a single employer group, the Estates argued that ñgroup thereofò refers to persons or entities that act as a ñservice company for a self insurerò and not a group of entities with the same parent company as ñthe employer.ò

The Court concluded that the ordinary meaning of ñgroup thereofò ñmodifies the phrase óa service company for a self-insurerôò. Therefore, only entities that assist with workersô compensation benefits will be considered an ñemployerò for purposes of the Act. Because the parent company did not provide evidence that it assists in administering the employerôs workersô compensation plan, the parent company was not an ñemployerò under this Act.

2) No. A special employer gains legal protection under the Act if the general employer lends an employee to the special employer and ñ(a) the employee has made a contract of hire, express or implied with the special employer; . . . ñ(b) the work being done is essentially that of the special employer; and . . . © the special employer has the right to control the details of the work . . ..ò *Terry v. Read Steel Products*, 430 So. 2d 862 (Ala. 1983)(*Quoting* 1C A. Larson, THE LAW OF WORKMENôS COMPENSATION, § 48 (1980)). Although the president of the parent company had the right to control the employeesô work, the parent company failed to provide evidence that the employees contracted (whether expressly or impliedly) to work for the parent company or that the work they performed at their employer was ñessentiallyò the work of the parent company.

3) No. The parent company relied on the holding in *Meeks v. Budco Group, Inc.*, 631 So. 2d 915 (Ala. 1993) that the Act provides immunity to a parent corporation from tort liability when an employee from one of the wholly owned and controlled divisions is injured. However, the Court held that the *Meeks* case was distinguishable with the present action. In *Meeks*, the parent company merged with the subsidiary before the employee of the subsidiary was injured. In this case, the parent company and employer had not merged. Both companies in this case file a separate tax return, and the parent company successfully petitioned OSHA to remove the parent company from the proceedings that happened as a result of the accident. The Court also noted that it is the legislature and not the judiciaryôs place to change public policy. Therefore, the Court denied the petition.

Liability Insurer- Attorney-Client Privilege and Work-Product Doctrine in Underlying Action
Ex parte Dow Corning Alabama, Inc., --- So. 3d ----, 2019 WL 6337291 (Ala. Nov. 27, 2019).

Facts: Scotty Blue, II was injured in the scope of his employment with Alabama Electric

Company, Inc. of Dothan (ñAlabama Electricò) while he was working at Dow Corning Alabama (ñDow Corningò). Alabama Electric was installing a vacuum system at a Dow Corning facility. The contract between them required Alabama Electric to indemnify Dow Corning against injuries caused by acts or omissions of Alabama Electricôs employees. Alabama Electric was also required to have liability insurance and include Dow Corning as an additional insured.

Blue filed an action against Dow Corning, the parent company of Dow Corning and two employees of Dow Corning (ñthe Dow defendantsò). Although the defendants in this action demanded a defense and indemnification from Alabama Electricôs insurer, the insurer denied the request. Dow Corningôs liability insurers (ñthe Dow insurersò) provided a defense. The parties eventually settled this action, and the action was dismissed.

Alabama Electric and its liability insurer filed a declaratory judgment action against the Dow defendants and Blue and asked the court to hold that they were not responsible for the defense costs in the underlying action or indemnification. The Dow insurers were later added to this action, and they filed a counterclaim asking for contribution for the incurred defense costs and settlement funds. Alabama Electric and its insurer filed deposition notices to Dow Corning, the parent company, and the Dow defendants. Some of the information sought in these depositions was related to the decision to settle, the analysis of the settlement value and liability, budget, litigation plan, and other related information. Dow Corning, the parent company, and the Dow insurers objected to the information sought and argued that the information was protected by the attorney-client privilege and work-product doctrine. They filed a motion for protective order, and it was denied. Then, Dow Corning, the parent company, and the Dow insurers filed a petition for writ of mandamus.

Issue: ***Whether Dow Corning, the parent company, and the Dow insurers waived the attorney-client privilege and work-product doctrine in the underlying action, allowing the information related to the decision to settle the underlying action to be discoverable in the declaratory judgment action.***

Holding: No. All parties agree that typically the information sought in the deposition would be protected by the attorney-client privilege or work-product doctrine. Alabama Electric and its insurer argue that the defendants have waived these protections because they seek indemnification from the underlying action. The parties also agree that the defendants will be required to prove that they have a valid indemnification claim and that the settlement in the underlying action was reasonable and achieved in good faith. *See Star Elec. Contractors, Inc. v. Stone Bldg. Co.*, 863 So. 2d 1071 (Ala. 2003).

The Alabama Supreme Court noted that ñproving or disproving the objective reasonableness and good faith of the settlement in Blueôs personal-injury case does

not require the production of attorney-client-privileged materials or materials protected by the work-product doctrine.ò Instead, non-privileged materials are sufficient to evaluate potential liability and whether the settlement was reasonable and reached in good faith. The Court held that a party does not waive the attorney-client privilege or work-product doctrine simply by seeking indemnification and thereby placing the reasonableness and good faith of settlement at issue. *See Kansas City Power & Light Co. v. United States*, 139 Fed. Cl. 546 (2018); *Steel v. Philadelphia Indem. Ins. Co.*, 381 P.3d 111 (Wash. Ct. App. 2016); *In re Exxon Mobil Corp.*, 389 S.W.3d 577 (Tex. Ct. App. 2012); *Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Trust*, 43 A.D.3d 56 (N.Y. Ct. App. 2013); *Chomat v. Northern Ins. Co. of New York*, 919 So. 2d 535 (Fla. Dist. Ct. App. 2006). The defendants did not waive the attorney-client privilege or work-product doctrine; therefore, the Court granted the petition and issued the writ.

Due Process - Party to the Action
GEICO Ins. Co. v. Evans, --- So. 3d ----, 2020 WL 255752 (Ala. Jan. 17, 2020).

Facts: Johnson Evans, Jimmy Smith, and Bernard Smith (ñthe plaintiffsò) filed a negligence action against the insured to recover damages caused in an automobile accident. When the insured failed to respond, a default judgment was entered against him. A new attorney for the plaintiffs filed a notice of appearance 7 months later and then a motion to reconsider a year after that. The motion references the insurer, and so it seems the attorney filed the motion in the wrong action. It appears that the plaintiffs filed a second action and wished to collect the judgment in the original action from the insurer. The insurerôs motion for summary judgment in the second action was granted, and the insurer was dismissed with prejudice from the action. The plaintiffs also filed a motion in opposition for the insurerôs summary judgment in the original action.

The insured filed a suggestion of bankruptcy, and the original action was moved to the administrative docket. About two years later, the plaintiffs moved to consider reinstatement to the trial docket. The plaintiffs listed GEICO as a defendant, although GEICO had never been named a party or served with a complaint. In a hearing five years later, where only the plaintiffs were present, the court entered a judgment against GEICO and in favor of the plaintiffs. GEICO was added as a party 49 days after the judgment was entered against it. GEICO appealed the judgment.

Issue: ***Whether the judgment against GEICO is void, because GEICO was not served and was not named as a party before the judgment was entered.***

Holding: Yes. There is no dispute that GEICO did not receive notice of a claim against it in the original action. It is not sufficient that GEICO had constructive notice of the action, since their insured was a party to the action. ñ[T]he constitutional requirement of due

process of law means notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing.ò *Kingvision Pay-Per-View, Ltd. v. Ayers*, 886 So. 2d 45 (Ala. 2003) (*quoting Cooper v. Watts*, 191 So. 2d 519 (Ala. 1966)). A judgment cannot be entered if it violates due process. Therefore, the Court voided the judgment and dismissed the appeal.

UIM Insurer- Right to Jury Trial
Ex parte Allstate Prop. and Cas. Ins. Co., --- So. 3d ----, 2020 WL 502667 (Ala. Jan. 31, 2020).

Facts: The insured, who was involved in an automobile accident, filed a negligence and wantonness action against the driver of the other vehicle. In the same action, she demanded UIM benefits from her UIM insurer. Both the insured, in the complaint, and the insurer, in the answer, demanded a jury trial. The insurer opted out of the litigation, and agreed to be bound by the judgment. Although the insured and the driver decided to have a bench trial, the insurer still demanded a jury trial. When the court denied the insurerôs demand and set the case for a bench trial, the insurer filed a petition for a writ of mandamus.

Issue: ***Whether the insurer, who opted out of the action, still has the right to demand a jury trial.***

Holding: Yes. If a party demands a jury trial in writing, Alabama Rule of Civil Procedure 28(d) does not allow a court to change the trial to a bench trial unless all the parties agree. Although opting-out of litigation removes the insurerôs responsibility to participate in litigation, the insurer maintains ways to protects its interests. This Court previously held that a UIM insurer may hire its own attorney to represent the defendant. *Ex parte State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 75 (Ala. 1995); *Driver v. Nat'l Sec. Fire & Cas. Co.*, 658 So. 2d 390 (Ala. 1995). Allowing the insurer to do this maintains the insurerôs interest in protecting itself and the insured from liability and damages. Since the insurer opted out, a jury (unlike the judge) will not know about insurance coverage and cannot be influenced by this information. *See Ex parte Allstate Prop. & Cas. Co.*, 237 So. 3d 199 (Ala. 2017). Therefore, the petition is granted and the writ is issued.

Direct Action Statute
Ex parte State Farm Fire and Cas. Co., --- So. 3d ----, 2020 WL 502537 (Ala. Jan. 31, 2020).

Facts: Before adding parking areas, building storm water basins, and building an earthen dam, Walker Springs Road Baptist Church (ñthe Churchò) received approval for site plans from the government. Unfortunately, after construction was finished, a large amount of rain caused the earthen dam to fail and flooded Samuel and Lucretia Boykin and Reginald and Ida Berryôs homes (ñthe homeownersò). Both the Church and homeowners had insurance policies with the same insurer. When the insurer

denied the homeownersô claims under their homeownersô coverage, the homeowners made a claim with the Churchôs liability insurer. The insurer denied this claim as well. Then, the homeowners filed a lawsuit against the Church and the insurer with regard to the homeownersô policies and the Churchôs liability policy. The trial court granted the insurerôs motion for judgment on the pleadings for three of the five claims, but the court denied the claims alleging breach of fiduciary duty and breach of assumed duty. The insurer filed a petition for a writ of mandamus for the remaining claims.

Issue: ***Whether a writ of mandamus is a proper remedy for the insurer who asks the Court to hold that the claims alleged against it are barred by the direct action statute.***

Holding: No. A writ of mandamus is an ñextraordinary remedyò and can only be exercised in ñexceptional cases.ò *See Ex parte Ocwen Fed. Bank, FSB*, 872 So 2d 810 (Ala. 2003). In 2014, the Alabama Supreme Court named the exceptional situations in which mandamus review is proper. *Ex parte U.S. Bank Nat'l Ass'n*, 148 So 3d 1060 (Ala. 2014). The insurer failed to provide authority that suggests a denial of a motion to dismiss or judgment on the pleadings involving the direct action statute warrants a writ of mandamus.

Instead, the insurer argues the abatement statute, which the Supreme Court has reviewed as a proper use of mandamus, is similar enough to a direct action statute. However, the Court felt this was misguided. The abatement statute prohibits a plaintiff from prosecuting two actions in Alabama at the same time with the same parties and causes of action. *See* Ala. Code Ann. § 6-5-440 (1975). The direct action statue allows a party with a vested interest in the amount due to the insured to file an action against the insurer, but this may only happen after judgment is entered against the insured. *Macey v. Crum*, 30 So. 2d 666 (Ala. 1947). Mandamus relief is allowed for the abatement statute, because the court strives to avoid redundant litigation. However, the direct action statute creates a cause of action for the injured party. The direct action statute does not require ñimmediate appellate intervention.ò

Also, the insurer argued that the Supreme Court held mandamus review was appropriate when the statute-of-limitations for a claim was at issue, and the insurer will suffer an immediate injury if the claims move forward. *Ex parte Hodge*, 153 So. 3d 734 (Ala. 2014). The Court allowed mandamus review in *Hodge* because ñan eventual appeal is incapable of ópprotecting parties from the injury immediately resulting from the error of the court.ôò However, the Court did not agree, because unlike a certain type of statute-of-limitations situation in which the Court allowed review, there is no history of the Court allowing review of the direct action statute. Further, mandamus review is not reasonable if the complaint itself does not make it obvious that the case should be dismissed. The Court noted that it is not clear from the complaint that the claims against the insurer should be dismissed. ñThis Court has

never recognized an exception to the general rule that would permit interlocutory review of a trial courtôs denial of a motion to dismiss or for a judgment on the pleadings for cases that turn on whether the plaintiff has stated a cognizable claim . . .ò The petition is denied.

Alabama Federal Law Update

Business Owners Policy - Statute of Limitations/Duty to Defend and Indemnify
Great American Alliance Co. v. Bravo Food Service, LLC, 2019 WL 6219143 (N.D. Ala. Nov. 21, 2019).

Facts: After the jury returned a verdict against the insured, the business ownerôs insurer, which had provided a defense to the insured, filed a declaratory judgment action in the United States District Court for the Northern District of Alabama. The insurer asked the court to hold that the insurer did not have a duty to defend or indemnify the insured. A few weeks later, the plaintiff in the underlying action, Cahaba Valley Health Services (ñCahabaò) filed a declaratory judgment action in state court against the insurer and asked the court to hold that the insurer has a duty to indemnify the insured in the underlying action. The insurer removed this action, and both cases were consolidated. Cahaba moved to dismiss the action, and the insurer opposed the motion.

Issue: ***1) Whether the insurer's declaratory judgment action is barred by the statute of limitations.***
2) Whether the declaratory judgment action must be dismissed, because it is not ripe.

Holding: 1) No. The statute of limitations for breach-of-contract claims is six years. Although Cahaba argued that the period of limitations expired because the underlying lawsuit was filed more than six years ago, the court disagreed. ñ[I]n an action seeking indemnification the limitations period does not begin to run until liability has become fixed.ò *Am. Commercial Barge Line Co. v. Roush*, 793 So. 2d 726 (Ala. 2000). Therefore, at the earliest, the period of limitations began to run when the jury in the underlying case returned a verdict. This was a few months before the declaratory actions were filed. Therefore, the action is not barred by the statute of limitations.

2) No. With regard to the duty to defend, although the insurer provided a defense to the insured in the underlying suit, the insurer filed the declaratory judgment action when it learned of additional facts that proved no coverage exists for the insured. An insurerôs duty to defend is ripe, even if the underlying suit that will determine the insuredôs liability has not been resolved. *St. Paul Fire & Marine Ins. Co. v. Town of Gurley, Ala.*, 2012 WL 3637690 (N.D. Ala. Aug. 22, 2012). Because the insured wished to have a defense provided by the insurer, and the insurer did not think it had

a duty to continue to defend the insured, the issue is ripe.

With regard to the duty to indemnify, ñan insurerôs duty to indemnify is not ripe for adjudication unless and until the insured or putative insured has been held liable in the underlying action.ò *Accident Ins. Co. v. Greg Kennedy Builder, Inc.*, 159 F. Supp. 3d 1285 (S.D. Ala. 2016). The judgment in the underlying action is not final, because the insured appealed the jury verdict. This appeal is pending, and it is unknown whether the insured will have any liability. The court stayed this issue until the underlying action reaches its final disposition or the issue of the duty to defend is determined.

The court also noted that it is not appropriate to abstain from hearing this case, because this action is not parallel to the state court action. Instead, the state court action involves tort claims, and the declaratory judgment action involves coverage issues.

Auto Policy- Rated Driver/Insured Vehicle
Progressive Specialty Ins. Co. v. Bennett, 2019 WL 6310188 (M.D. Ala. Nov. 22, 2019).

Facts: Steven Bennett filed an action against Robert Atkin in state court to recover damages for the accident that Atkin caused when his truck crossed the center line of a state highway. At the time of the accident, Atkin was acting in the scope of his employment with LG Trucking, LLC, (ñLG Truckingò) and driving a truck LG Trucking owned. Holmes Transport had an automobile insurance policy that listed LG Trucking as an additional insured. The policy included coverage for comprehensive and collision coverage, but it did not include liability coverage.

Grady Holmes, Jr. is the only member of LG Trucking. His father, Grady Holmes, Sr., owns Holmes Transport as a sole proprietorship. Grady Holmes, Sr. and Holmes Transport also had an automobile insurance policy that listed LG Trucking as an additional insured. This policy included bodily injury and property damage liability coverage. But, the truck Atkin was driving at the time of the accident was not listed as an insured vehicle under either policy, and Atkin was not listed as a rated driver under either policy.

The insurer filed a declaratory judgment action in the United States District Court for the Middle District of Alabama and asked the court to hold that Akin is not entitled to coverage. The insurer then filed a motion for summary judgment. Bennett, the only party to appear, does not object to the insurerôs motion.

Issue: ***Whether neither policy provides coverage, because a non-rated driver driving a vehicle that was not listed in the policy was involved in the accident.***

Holding: Yes. Atkin failed to appear in this action and failed to respond to the motion for

summary judgment. The insurer provided evidence in the form of requests for admission, deposition transcripts, and insurance documents that support the motion. Because there are no issues of material fact, the court awarded summary judgment in favor of the insurer.

Auto Policy- Default Judgment
Progressive Specialty Ins. Co. v. LG Trucking, LLC, 2019 WL 6307212 (M.D. Ala. Nov. 22, 2019).

Facts: This is a companion case to the case discussed above. The insurer filed a motion for default judgment against LG Trucking, LLC, Grady Holmes, Jr., Grady Holmes, Sr., Holmes Transport, and Robert L. Atkin, because none of these parties responded to the complaint.

Issue: ***Whether the motion for default judgment is due to be granted.***

Holding: Yes. The defendants failed to plead or defend this action. Because the plaintiff does not wish to recover monetary or equitable relief from the defendants, a default judgment may be awarded without a hearing.

UIM Insurer-Negligence of Driver and Contributory Negligence
Lee v. State Farm Mut. Auto. Ins. Co., 2019 WL 6588537 (M.D. Ala. Dec. 4, 2019).

Facts: While jogging on the side of a rural road, a bug landed on Matthew Leeôs forehead and caused him to move from the grassy area next to the road onto the edge of the paved road. William Mannôs vehicle struck Lee and injured him. Lee filed an action to recover benefits from his UIM insurer after the insurer denied his claim. The insurer filed a motion for summary judgment and Lee opposed the motion.

Issue: ***1) Whether undisputed evidence proves Mann was negligent in causing or contributing to the accident and thus creates UIM coverage for Lee. 2) Whether the undisputed evidence proves that Lee was contributorily negligent for his injuries and therefore Lee is not entitled to UIM coverage.***

Holding: 1) No. UIM coverage only becomes available to an insured if the insured proves that the UIM motorist was at fault. *LeFevre v. Westberry*, 590 So. 2d 154 (Ala. 1991). Negligence is ñthe failure to do what a reasonably prudent person would have done under the same or similar circumstances, or the doing of something that a reasonably prudent person would not have done under the same or similar circumstances. *Ford Motor Co. v. Burdeshaw*, 661 So. 2d 236 (Ala. 1995). A motorist must act with reasonable care while operating a vehicle. *Jones v. Baltazar*, 658 So. 2d 420 (Ala. 1995); *Allman v. Beam*, 130 So. 2d 194 (Ala. 1961). Although the insurer argues that Lee failed to prove Mann was negligent, Lee disagrees and argues that Mann was speeding, and he did not try to avoid Lee. Therefore, there is an issue of material fact

and summary judgment is denied for this issue.

2) No. Contributory negligence is an affirmative defense for negligence. *Ridgeway v. CSX Transp., Inc.*, 723 So. 2d 600 (Ala. 1998). ñNormally, contributory negligence is a jury question; however, if the facts are such that all reasonable people would logically have to reach the conclusion that the plaintiff was contributorily negligent, then contributory negligence may be found as a matter of law.ò *Serio v. Merrell, Inc.*, 942 So. 2d 960 (Ala. 2006). The insurer argues that Lee was contributorily negligent by 1) jogging on the right side of the road violating Ala. Code § 32-5A-215© 2) Lee violated Ala. Code § 32-5A-215(b) by entering the road, and 3) Lee did not yield to Mannôs vehicle that had the right-of-way violating Ala. Code § 32-5A-215(d).

However, Lee disputes each of these facts and argues that 1) he was on the left side of the road, 2) Lee was on the fog line of the road and very close to the grass when he was struck, and 3) if Lee were on the fog line close to the grass, and a vehicle swerved toward him, a reasonable juror could find that Lee did not fail to yield the right-of-way. The facts suggest that a reasonable juror could agree with Leeôs version of the facts. Therefore, there are genuine issue of material facts and the court denied summary judgment.

Performance Bond- Bad-Faith Claim
Goudy Const., Inc. v. Raks Fire Sprinkler, LLC, 2019 WL 6841067 (N.D. Ala. Dec. 16, 2019).

Facts: RAKS Fire Sprinkler, LLC (ñRAKSò) contracted with Goudy Construction, Inc. (ñGoudyò) to install a fire sprinkler system. The contract required RAKS to maintain $2 million in CGL insurance during the installation. RAKS was also required to provide a performance bond and a labor and material bond and list Goudy as the owner of both. RAKS followed the contract terms and bought the two bonds from Aegis Security Insurance Company (ñAegisò). During the installation, RAKS fell behind, and failed to timely pay its employees. Eventually, RAKS left the job site without completing the installation and did not return.

Goudy notified the CGL insurer, and learned that RAKS dropped the policy shortly after the installation began. Then, Goudy filed a claim with Aegis, and Goudy denied the claim. Goudy filed an action against RAKS and Aegis in state court and Aegis removed the action to the United States District Court for the Northern District of Alabama. The complaint alleges that RAKS was negligent, breached its contract with Goudy, and acted fraudulently or misrepresented information. The complaint alleges that Aegis breached its contract and acted in bad faith. Aegis filed a motion to strike, or in the alternative, motion to dismiss the bad faith claim.

Issue: ***Whether the motion to dismiss the bad-faith claim should be granted, because bad-fath claims are limited to first-party insurance claims, and a performance bond is***

not an insurance contract.

Holding: Yes. The United States Supreme Court noted that ñthe usual view, grounded in commercial practice, [is] that suretyship is not insurance.ò *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962). The Alabama Supreme Court has repeatedly limited bad-faith claims to first-party insurance contract lawsuits. *See Chavers v. Nat'l Security Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981); *National Security Fire & Cas. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982). Relying on Alabama law in an unpublished opinion, the Middle District of Alabama held that ñ[t]his court will not expand the [bad-faith] tort beyond the scope recognized by Alabama state law and, specifically will not extend it to this case involving a surety bond.ò *Amwest Surety Ins. Co. v. Pittsburgh Tank & Tower Co., Inc.* (M.D. Ala.). Similarly, in an unpublished opinion in *Sprinkler Contractors, Inc. v. United States Fidelity and Guaranty Co.*, the Northern District of Alabama concluded that ñthe bad faith claim asserted by the plaintiff [with regard to the performance bond] is not based upon an insurance contractò and so a bad-faith claim cannot be maintained.

Goudy argued that Aegis had superior bargaining power when the bonds were issued and argued that public policy requires an extension of bad-faith to performance bonds. Aegis does not have ñsuperior bargaining powerò because Goudy is a sophisticated business. And, public policy issues should be addressed in state court and not a federal district court. The court declined to extend bad-faith claims to performance bonds, and granted Aegisôs motion to dismiss.

Motion to Dismiss- Claims Administrator and Marketing Name
Staten v. Federal Ins. Co., 2019 WL 6878994 (N.D. Ala. Dec. 17, 2019).

Facts: Sandra Staten, *pro se*, filed a breach-of-contract and bad-faith action against Federal Insurance Company (ñFederalò), Chubb Group Insurance (ñChubbò), and Broadspire Services, Inc. (ñBroadspireò) and attached an insurance policy issued by Federal. Chubb and Broadspire moved to dismiss the claims against them, because they are not parties to the insurance contract. Staten opposed the motion.

Issue: ***Whether Chubb and Broadspire should be dismissed from the action, because they are not parties to the insurance contract.***

Holding: Yes. Staten argued that the motions to dismiss were filed by Federalôs attorneys, and that Chubb and Broadspire are intertwined with Federal. Staten believed these were legitimate reasons to deny the motions to dismiss, but the court disagreed. Chubb is a marketing name for a group of insurance companies, and Federal is one of these companies. Another court has held that Chubb cannot be liable for a breach-of-insurance-contract because Chubb is not a corporate entity and cannot enter into an insurance contract. *Pincus v. Chubb Grp. of Ins. Companies*, 2009 WL 839096 (E.D.

Pa. Mar. 27, 2009). Also, the Northern District of Alabama has held that Broadspire, as a claims administrator, is not a party to the insurance contract, and thus a breach-of-contract or bad-faith action can be maintained against Broadspire. *Lawson v. Fed. Ins. Co.*, 2018 WL 6171430 (N.D. Ala. Nov. 26, 2018). The court agreed with the case law, and dismissed Chubb and Broadspire from the action.

Remand- Amount in Controversy
Stewart v. State Auto. Mut. Ins. Co., 2020 WL 58449 (N.D. Ala. Jan. 6, 2020).

Facts: The insureds filed a claim with their homeownersô insurer when their house was damaged by water. When the homeownersô insurer limited the insuredsô recovery to $10,000 due to an endorsement, the insureds filed a breach-of-contract and bad-faith action in state court. After receiving the insureds responses to the insurerõs request for admission on the amount in controversy, the insurer removed the action to a federal court in the Northern District of Alabama. The insureds moved to remand to state court.

Issue: ***Whether the court has subject matter jurisdiction over the action, as the amount in controversy exceeds $75,000.***

Holding: No. The complaint alleges that the insureds do not seek compensatory and punitive damages that exceed $74,500.00. However, the insureds then denied the requests for admission stating that they did not seek damages that exceed $74,500. ñA denial of a request for admission does not establish ñthe opposite of the proposition offered for admission, but rather [] simply establish[es] that the matter is in dispute.ò *Harmon v. Wal-Mart Stores, Inc.*, 2009 WL 707403 (M.D. Ala. Mar. 16, 2009); *see also Ford v. Leroy*, 2009 WL 10703678 (N.D. Ala. Aug. 13, 2009). Although the insurer cited similar cases such as this one where damages awarded exceeded $75,000, the court did not find this helpful. ñõMere citation to what has happened in the pastõò does not establish that a plaintiffõs claim meets the amount in controversy requirement.ò *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805 (11th Cir. 2003). Therefore, the district court remanded the case to state court.

Default Judgment- Failure to Cooperate
Progressive County Mut. Ins. Co. v. Fetty, 2020 WL 265681 (M.D. Ala. Jan. 17, 2020).

Facts: Carl Morgan filed a negligence and wantonness action in a federal court in the Middle District of Alabama against the insured to recover damages caused in an automobile accident. The automobile insurer filed a declaratory judgment action against the insured and Morgan in a federal court in the Middle District of Alabama and asked the court to declare that the insurer has no obligation to defend or indemnify the insured. Neither Morgan nor the insured appeared or filed an answer to the complaint. The insurer moved for default judgment against both defendants.

Issue: ***Whether default judgment should be granted against both defendants, because neither defendant appeared in the case and the complaint states a claim for relief.***

Holding: Yes. The insurer alleges that since the insured failed to cooperate in the underlying lawsuit against him, the insured violated the policy terms. The insurer alleges that the policy requires the insured to cooperate with the insurer and participate in signed and recorded statements, attend hearings and other court matters, and the insured failed to do these things. Because the defendants failed to respond to the complaint and the facts in the complaint are accepted as true, the insurer is entitled to relief. The insurer has no duty to defend or indemnify the insured in the underlying action.

Motion to Dismiss- Lack of Subject Matter Jurisdiction
Bridges v. Poe, 2020 WL 374668 (N.D. Ala. Jan. 23, 2020).

Facts: Six actions were filed against employees from the City of Jasper and the insurer for the City. Each action relates to alleged sexual harassment, abuse, and rape of female pretrial detainees in Jasper City Jail and alleges state law claims and 42 U.S.C. § 1983 claims. Because each action involves the same defendants, similar allegations and legal theories, six actions were consolidated into one action.

The insurer issued policies to the City of Jasper and individual municipal employees who are defendants in the action. In each action, the plaintiffs filed a declaratory judgment claim and a contingent claim for monetary damages against the insurer. After these actions were filed, the insurer filed a declaratory judgment action in state court and asked the court to declare that it had no duty to defend and indemnify the municipal employees. The insurer filed a motion to dismiss the consolidated federal court action for lack of subject matter jurisdiction, and the plaintiffs opposed the motion.

Issue: ***Whether the actions should be dismissed, because the court lacks subject matter jurisdiction over the matters.***

Holding: Yes. The court notes that the claims alleged against the defendants are state law claims involving Alabama citizens. Therefore, the court does not have federal question jurisdiction or diversity jurisdiction over those claims. The district court held that the only way it could have jurisdiction over these claims is if it chooses to apply supplemental jurisdiction over the claims. A federal court with subject matter jurisdiction over one claim may also have supplemental jurisdiction over state law claims if they all ñderive from a common nucleus of fact.ò *United Mine Workers of Am. v. Gibbs*, 282 U.S. 715 (1966). Although the facts of the case center around a ñcommon nucleus of operative fact,ò the claims involving the insurer are limited to questions of coverage, and the § 1983 claims do not involve insurance coverage issues.

It is unclear whether the claims against the insurer would be tried together with the other claims in these actions. The court noted that supplemental jurisdiction should be exercised if the claims present a ñnovel or complex issue of State lawò or ñthere are other compelling reasons for declining jurisdiction.ò 28 USC § 1367©. Although the court acknowledged that the issues raised against the insurer were complex, the court felt that these were state law matters that are better decided by state courts. Also, because there was a pending state court action involving the same coverage issues, the court felt that this separate action created a ñcompelling reasonò to avoid parallel proceedings. The court also noted that although the Eleventh Circuit has not made a determination of whether the plaintiffs have standing against the insurer, in general, those who are not a party to a policy do not have standing to file an action against the insurer. *See Canal Ins. Co. v. Cook*, 564 F. Supp. 2d 1322 (M.D. Ala. 2008). Judicial economy, comity, convenience, and fairness suggest that state court should hear these insurance claims and not federal court. *See United Mine Workers of AM. v. Gibbs*, 383 U.S. 715 (1966). Therefore, the district court granted the insurerôs motions to dismiss.

CGL Policy- Employment Practices Liability Provision

Elite Refreshment Serv. LLC v. Liberty Mut. Group, Inc., 2020 WL 470289 (N.D. Ala. Jan. 29, 2020).

Facts: Although the insured requested defense and indemnity from its CGL insurer when the insured was named as a defendant in an employment discrimination lawsuit, the insurer denied the claim. The insured filed an action in a federal court in the Northern District of Alabama against its CGL insurer and asked the court to require the insurer to pay for defense costs and indemnity. The insurer filed a motion to dismiss, and the insured opposed the motion.

Issue: ***Whether the insurer should be dismissed from the action, because the employment practices liability provision in the CGL policy applies.***

Holding: Yes. The last discriminating acts happened in October 2016 when the employee was fired from her position. However, the retroactive coverage for the employment practices provision did not begin until the end of January 2017. In the factual allegations section, the underlying complaint states that the insurerôs continued discriminating practices continue to violate the employeeôs ADEA and Title VII rights. Based on this allegation, the insured argues that these acts occurred after the January 2017 beginning of coverage date.

The court was unpersuaded by this argument, because she was terminated in October and the continuing injury was not described in the specific counts of the underlying complaint. Also, when she filed her EEOC charge, she alleged that the last discriminatory act happened in October 2016. Even though an insurer is required to

consider facts outside the complaint when determining whether it has a duty to defend, it is not required in this case. The court held that the insured did not allege admissible facts that can prove the employee suffered an injury after January 2017. Therefore, the court granted the motion to dismiss with prejudice.

Insurer's Failure to Settle- Abuse of Process and Wanton/Negligent Failure to Settle
Smith v. State Farm Mut. Auto. Ins. Co., --- Fed. Appx. ---, 2020 WL 548149 (11th Cir. Feb. 4, 2020).

Facts: While speeding and talking on the phone, Donna Smithôs vehicle collided with a bicyclist, Daniel Voss, and caused significant injuries to him. Smith reported the accident to her insurer, Nationwide Mutual Insurance Company (ñNationwideò), and Voss made a claim for UIM coverage under four policies with State Farm Mutual Automobile Insurance Company (ñState Farmò). The Nationwide policy provided $25,000 in potential liability coverage, and the State Farm policies provided $100,000 in potential UIM coverage. Following the guidelines offered in *Lambert v. State Farm Mutual Automobile Insurance Company*, 576 So. 2d 160 (Ala. 1991), State Farm fronted Nationwideôs policy limits. Although Nationwide offered to settle with Voss, State Farm did not agree to the settlement. A jury returned a $1,900,000 verdict against Smith.

Voss then filed an action in state court against both insurers, and alleged that State Farm abused judicial process and Nationwide negligently and wantonly failed to settle the claim. State Farm removed the action to the United States District Court for the Northern District of Alabama. The district court granted State Farmôs and Nationwideôs motions to dismiss, and Smith appealed.

Issue: ***1) Whether State Farm abused judicial process by following the Lambert procedure, even though State Farm did not wish to exercise its subrogation rights. 2) Whether Nationwide negligently and wantonly failed to settle the claim.***

Holding: 1) No. In order to recover for an abuse of process claim, the plaintiff must prove that the defendant ñwrongfully use[d] a judicial process, but the wrongful use must also occur after the process was initiated.ò *See C.C. & J., Inc. v. Hagood*, 711 So. 2d 947 (Ala. 1998). However, ñthe mere continued pursuit of a wrongfully initiated claim does not count as an ôact in furtheranceô of the improper motive.ò *Hagood*. Smithôs complaint alleges that the *Lambert* procedure constituted the judicial act, and that State Farm ñhad an ulterior purpose when it initiated the fronting process.ò After initiating the *Lambert* process, State Farm did nothing. Because Smith failed to allege that wrongful use of the judicial process continued after the claim was initiated, Smith improperly pled this claim. This claim was properly dismissed.

2) No. Alabama law allows insurers to be held liable for negligence or bad faith for

failure failing to settle a claim. *Waters v. American Cas. Co. of Reading, PA*, 73 So. 2d 524 (Ala. 1953). However, Nationwide attempted to settle the claim by offering its policy limits to Voss in exchange for a release of liability. Voss could have continued to pursue its UIM claim against State Farm. Nationwide was unsuccessful in settling the claim simply because State Farm would not agree to the settlement. State Farm did not agree to the settlement because it would have kept State Farm from being able to file any subrogation claims against Smith. Although Smith argues that Nationwide was required to negotiate the settlement in such a way that would not have made her liable for more than $125,000, she fails to include any case law that supports this argument. The claim was properly dismissed.

Homeowner's Insurance- Theft by Spouse
Dawson v. Liberty Ins. Corp., Inc., 2020 WL 570134 (N.D. Ala. Feb. 5, 2020).

Facts: While Tracy Dawson (ñthe plaintiffò) and Andrew Dawson (ñthe defendantò) were separated and going through a divorce, the defendant returned to the marital home, threw a brick through a window and burglarized the property. Although both the plaintiff and defendant were listed as named insureds under the policy, the plaintiff filed a theft claim with her homeownerôs insurer, and the insurer denied the claim. The plaintiff filed a breach-of-contract and bad-faith action against the insurer, the insurer filed a motion to dismiss, and the insured opposed this motion.

Issue: ***1) Whether the insured can maintain a breach-of-contract claim against the insurer for not paying the claim, because the property was burglarized by a named insured. 2) Whether the plaintiff properly pled an alternative pleading allowing her to maintain a breach-of-contract claim against the insurer. 3) Whether the insured can maintain a bad-faith claim against the insurer, if the insurer did not breach-the-contract with the insured.***

Holding: 1) No. The policy covers ñattempted theft and loss of property from a known place . .ò but the policy excludes coverage for theft if it is ñ[c]ommitted by an insured.ò A named insured in the declarations is included in the definition of ñinsured.ò Although the plaintiff does not dispute that her husband was a named insured, she argues that he had no ñinsurable interestò in the property and so cannot be an insured on the policy. The plaintiff cites three Alabama cases involving automobile policies that held the separated spouse did not have insurable interest in the automobile at issue. *See Allstate Ins. Co. v. Moore,* 429 So. 3d 1087 (Ala. 1983); *McKinney v. State Farm Mut. Auto. Ins. Co.*, 349 So. 2d 1091 (Ala. 1977); *Rogers v. Lubermans Mut. Cas. Co.*, 124 So. 2d 70 (Ala. 1960). However in each of these cases, the Alabama Supreme Court decided the spouse did not have an insurable interest, in part, because each spouse was not listed as a named insured under the policy. The contract is valid and the policy does not cover theft claims if the named insured committed the theft.

2) No. In her amended complaint, the plaintiff included a two sentence statement stating that if her husband did not steal the items from her home and someone else did, then the insurer had no justification for denying her claim. Although a plaintiff may plead in the alternative, a plaintiff is required to properly allege the claim. The plaintiff did not properly plead the claim in the alternative.

3) No. One of the elements of a bad-faith claim is that the insurer breached the contract with the insured. The plaintiff failed to state a breach-of-contract claim upon which relief may be granted. Therefore, the plaintiff cannot maintain a bad-faith claim against the insurer. The motion to dismiss is granted, but the court will allow the plaintiff to amend her complaint one more time.

Automobile Insurer- Subject Matter Jurisdiction and Alabama's Direct Action Statute
Jones v. Chance, 2020 WL 570135 (N.D. Ala. Feb. 5, 2020).

Facts: Willie Turner borrowed Deborah Chanceôs vehicle and crashed the vehicle into Tracie Thomasôs property. Thomas filed a negligence action against Turner and Chance as well as Chanceôs insurer for failing to pay Thomasôs damages. The insurer filed a motion to dismiss.

Issue: ***1) Whether the court has subject matter jurisdiction over this matter. 2) Whether Thomas can maintain an action against the insurer due to Alabama's Direct Action Statute.***

Holding: 1) No. Thomas alleges she is a resident of California and provided a copy of her California driverôs license. However, she did not provide a sworn statement that states she is a California resident. Thomas also listed a Birmingham, Alabama address in her complaint as her address. Therefore, the complaint is due to be dismissed without prejudice for lack of subject matter jurisdiction.

2) No. Alabamaôs Direct Action Statute forces a plaintiff to win a final judgment against the insured before the plaintiff can file a lawsuit against the insurer. *State Farm Mut. Auto. Ins. Co. v. Brown*, 894 So. 2d 643 (Ala. 2004). Because Thomas did not state that she has already obtained a final judgment against Chanceôs insurer, she cannot maintain an action against the insurer at this time. The insurer is dismissed without prejudice.

Remand- Amount in Controversy
Spurlin v. Cincinnati Ins. Co., 2019 WL 759167 (N.D. Ala. Feb. 14, 2020).

Facts: The insured holds a lease for a parking lot near the Alston Building. In 1985, the insured entered into a 99 year lease with the ownerôs association for the Alston Building that allowed the ownerôs association to use the parking lot for $1.00 a year

during this lease. Although the lease required the ownerôs association to maintain an insurance policy for the parking lot, the insured learned there was a gap in coverage. The insured terminated the lease with the owners association, and the ownerôs association filed a declaratory judgment, breach-of-contract, wrongful termination of the lease, and wrongful eviction action in state court against the insured. No specific amount of damages was listed.

The insured filed a claim with its insurer an requested a defense and indemnification, and the insurer denied the claim. Then, the insured then filed a breach-of-contract and bad-faith action against the insurer, and the 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 court has subject matter jurisdiction over this action, because the amount in controversy exceeds $75,000.***

Holding: No. The insured did not include a specific damages amount in the prayer for relief. Therefore, the insurer may rely on affidavits, declarations or other documents, but must prove with a preponderance of evidence that the amount in controversy is greater than $75,000. *See Leonard v. Enterprise Rent a Car*, 279 F. 3d 967 (11th Cir. 2002); *Pretka v. Kolter City Plaza II, Inc.*, 608 F. 3d 744 (11th Cir. 2010). The insurer argues that simply requesting punitive damages proves that the amount in controversy exceeds $75,000. However, the court may not assume that the insured will be awarded punitive damages. *SUA Ins. Co. v. Classic Home Builders, LLC*, 751 F. Supp. 2d 1245 (S.D. Ala. 2010).

The insured requests compensatory damages for defense costs in the underlying action, and the potential judgment against the insured in the underlying action. In the underlying action, the ownerôs association simply requests damages for the loss of use of the property for the remaining term of the lease and litigation costs. The insurer did not provide any information of the estimated attorneys fees in the underlying litigation.

Finally, the insurer used information from the Alston Buildingôs website to calculate the value of the lost parking spaces and concluded that it was over $300,000. However, the website states that the listing is outdated, it does not prove that the ownerôs association actually rented the parking spaces for the price listed on the website, there is a discrepancy between inside and outside parking spaces, the insuredôs affidavit states that the parking spaces were never rented or used, and there is no evidence that the ownerôs association seeks damages in the form of lost rent in the underlying action. Therefore, the court does not have subject matter jurisdiction over this action, and the case is remanded to state court.

CGL Insurer- Motions for Realignment of the Parties and Judgment on the Pleadings
Jones v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 2020 WL 805919 (N.D. Ala. Feb. 18, 2020).

Facts: After the plaintiffs were injured when working in a mine operated by Cliffs Mining Services Company (ñCliffs Miningò), Oak Grove Resources, LLC (ñOak Groveò) and Seneca North American Coal, LLC (ñSenecaò) (collectively ñthe mine operatorsò), the plaintiffs filed an action against the mine operators. This lawsuit was settled, and the court dismissed the action with prejudice. After the mine operators failed to satisfy the judgment, the plaintiffs filed requests for consent judgments against the mine operators. Although the mine operators signed the consent judgments, Oak Grove and Seneca filed for bankruptcy. The court did not sign the consent judgments.

When the mine operatorsô CGL insurer failed to satisfy the consent judgments, the plaintiffs filed an action in state court against the insurer and the mine operators and asked the court to make the defendants satisfy the judgments. The insurer removed the action to a federal court in the Northern District of Alabama, and although Cliffs Mining agreed to the removal, Seneca and Oak Grove did not. The insurer filed a motion to realign the parties. Both the insurer and Cliffs Mining filed a motion for judgment on the pleadings. The plaintiffs opposed these motions. The plaintiffs filed a motion to amend the complaint, and the insurer opposed this motion.

Issue: ***1) Whether the insurer's motion to realign the parties should be granted, so the court can proceed without Seneca and Oak Grove's consent. 2) Whether the motion for judgment on the pleadings should be granted, and the other motions should be denied, because the underlying action has not reached a final judgment.***

Holding: 1) No. The court noted that federal law requires an automatic stay against ñthe commencement or continuationò of an action against the debtor. 11 U.S.C. § 362(a)(1). When Oak Grove and Seneca filed Chapter 11 Bankruptcy petitions, the underlying action was stayed. Since all proceedings against Oak Grove and Seneca are stayed, no action may be filed against them. The Bankruptcy Court has not granted the plaintiffsômotion for relief from the automatic stay. Therefore, the claims against Seneca and Oak Grove are void *ab initio* and realigning the parties is not possible. *See U.S. v. White*, 466 F.3d 1241 (11th Cir. 2006).

2) Yes. Because the court has not signed the consent judgment in the underlying action as Alabama Rule of Civil Procedure 58 requires, the judgment is not final. The dismissal order does not reference the settlement agreements, it does not discuss the financial obligations of the defendants, and it does not discus the consent judgments. Without the underlying courtôs signature on the consent judgment, this court cannot rely on the order of dismissal as a final judgment. Therefore, the motion for judgment on the pleadings is granted. The action is dismissed without prejudice.

CGL Policy - Water Damage
Barton v. Nationwide Mut. Fire Ins. Co., 2020 WL 759057 (N.D. Ala. Feb. 14, 2020).

Facts: The homeowners contracted with a builder to construct their home. After construction was complete in October 2006, the homeowners noticed some problems with the house that were addressed on a punch list. In 2006 and 2007, the homeowners noticed problems with a window in the foyer and the dormer windows in the attic. Water was entering these places and causing damage to the home. The builder repaired the dormer windows. Although water no longer entered the house, water was still in the attic.

In 2010, Crown Construction Consulting inspected the house and found water damage on dormers with fungal growth, water damage from the roof line to the upstairs bedroom, and water staining on the front foyer wall with a Palladiun window leak. When the toe board holes made the roof begin to rot, the homeowners had to replace their roof. The homeowners continued to have problems with their home, and asked E-Services to inspect the home in 2012. E-Services found damage at front dormers, stains at windows and framing and at windows below dormers, a severe crack in rear arch above window, and improper flashing and siding.

In 2011, the homeowners filed an action against the builder to recover damages for faulty construction. Although the builderôs insurer initially provided a defense, the insurer stopped providing a defense in 2012, and the builderôs counsel withdrew from the action. The builder did not defend or participate in the case afterward, and the homeowners were awarded summary judgment against the builder. A $900,000 judgment was entered against the builder.

The builder had policies with its insurer from 2005-2009. The homeowners filed this action against the insurer to satisfy the judgment in the underlying action based on Alabama Code Section 27-23-2. The insurer filed a motion for summary judgment, and the homeowners opposed the motion.

Issue: ***1) Whether defective work is an "occurrence" under the policy. 2) Whether there is no subcontractor exception because it was removed by an endorsement. 3) Whether the "occurrence" happened during the policy period. 4) Whether the "products-completed operations" coverage applies and prevents the "your work" exclusion from applying. 5) Whether damages caused by mold are excluded from coverage. 6) Whether coverage exists for intentional conduct.***

Holding: 1) Yes. The policies over each policy period define ñoccurrenceò as ñan accident, including continuous or repeated exposure to substantially the same general harmful conditions.ò In this case, repeated exposure to water and moisture caused by poorly constructed dormers and windows is the ñaccidentò as described in the ñoccurrenceò

definition. The Alabama Supreme Court generally does not consider faulty workmanship to be an occurrence, but faulty workmanship can cause an occurrence. *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So. 3d (Ala. 2014). The court noted that, even though some of the damages for which the homeowners received a judgment against the builder are not covered because they do not meet the definition of an ñoccurrence,ò there are some resultant damages caused by the faulty workmanship that constitute an occurrence under the policy.

2) No. The subcontractor exception was part of the policy in the 2006 and 2007 policies, but it was removed from the 2008 and 2009 policies. The subcontractor exception that was in place in 2006 and 2007 allows the builder to have coverage for an ñoccurrenceò that would otherwise be excluded under the ñyour workò exclusion if the work done that caused the damage was performed by a subcontractor. Because the homeowners presented evidence that the home was damaged in the first year they lived there, during 2006 and 2007, the subcontractor exception could create coverage. These are factual issues that exist that must be decided by a jury.

3) Yes. Although the insurer argues that the homeowners cannot prove damages occurred during the policy period. However, the homeowners argue there is evidence that proves the damages occurred or manifested during the 2006 and 2007 policy periods. The polices each state that ñóproperty damageôthat occurs during the policy period . . . includes any continuance, change or resumption of that . . . óproperty damageô after the end of the policy period.ò An ñoccurrenceò under Alabama law happens when the damage occurred and not when the underlying work was done. *U.S. Fidelity & Guar. Co. v. Warwick Development Co.*, 446 So. 2d 1021 (Ala. 1984). If the parties do not agree about the facts and timing of damages, then these issues must be decided by a jury.

4) Yes. The policy includes $2 million in ñproducts-completed operationsò coverage. Since the Alabama Supreme Court has held a ñyour workò exclusion identical to the one in this case as null when ñproducts-completed operationsò coverage applies, summary judgment may not be granted for the ñyour workò exclusion. *See Jim Carr*.

5). Yes. Both parties agree that mold damages are excluded from coverage. However, a jury has to decide what amount of the damages incurred are from mold.

6) No. Although the policy does not provide coverage for intentional conduct, the underlying complaint does not allege intentional conduct. The homeowners simply allege negligence claims. Therefore, summary judgment is not awarded to the insurer.

Removal- Amount in Controversy
Robinson v. USAA General Indem. Co., 2020 WL 880728 (M.D. Ala. Feb. 21, 2020).

Facts: After she was injured in an automobile accident, the plaintiff made a claim for UM/UIM coverage with her fatherôs UM/UIM insurer for her injuries and damages. When the insurer denied coverage, she filed an action against the insurer in state court. The insurer removed the action to a federal court in the Middle District of Alabama, and the plaintiff moved to remand the action.

Issue: ***Whether the court has subject matter jurisdiction, because the amount in controversy exceeds $75,000.***

Holding: No. The Eleventh Circuit allows courts to consider sworn statements to help decide whether the amount in controversy exceeds $75,000. *See Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945 (11th Cir. 2000); *see also Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805 (11th Cir. 2003). The plaintiffôs affidavit states that she did not intend to seek damages greater than $75,000 when she filed the underlying complaint and does not now and will not in the future. In her complaint, motion to remand and reply, the plaintiff claims that she does not wish to recover more than $50,000 in damages. The insurer argues that since her medical expenses were over $60,000, and she seeks future compensation, the amount in controversy has to be greater than $75,000. If her UM/UIM claims are combined with any of the numerous torts she alleges against the insurer, the insurer argues that amount also exceeds $75,000. But, the court relied on the affidavit and disagreed with the insurerôs arguments. The action is remanded.

Motion to Dismiss- Lack of Jurisdiction

Cahaba Valley Health Services, Inc. v. Truck Ins. Exchange, 2020 WL 978828 (N.D. Ala. Feb. 28, 2020).

Facts: Cahaba Valley Health Services, Inc. (ñCahabaò), an Alabama citizen, filed a declaratory judgment action against Jackson Business, a citizen of Alabama, Shezad Keshwani, also a citizen of Alabama, and Truck Insurance Exchange (ñTIEò) , a reciprocal insurance exchange. TIE is unincorporated. TIE filed a motion to dismiss, and Cahaba did not respond.

Issue: ***Whether the court has federal question or subject matter jurisdiction over the declaratory judgment action.***

Holding: No. In its complaint, Cahaba stated that this court has subject matter jurisdiction over the action pursuant to the Declaratory Judgment Act, 28 U.S.C. Section 2201. The court assumes that Cahaba intended to say that this court has federal question jurisdiction over the matter. However, the complaint must state an ñindependent basisò to create subject matter jurisdiction and not simply allege a declaratory judgment action. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950)(ñ[T]he requirements of jurisdictionð the limited subject matters which alone

Congress had authorized the District Courts to adjudicateð were not impliedly repealed or modified [by the Declaratory Judgment Act]ò). This court does not have federal question jurisdiction over the matter.

The court also does not have diversity jurisdiction over this matter. TIE is an unincorporated association. An unincorporated associationôs citizenship matches the citizenship of its members. *Girgis v. Fire Ins. Exch.*, 2012 WL 13019064 (N.D. Ala. Mar. 19, 2012). The members of TIE are all citizens of Alabama. Since the other two defendants are also citizens of Alabama, and Cahaba is an Alabama citizen, there is no diversity between the parties. The action is dismissed.

Motion to Remand - Amount in Controversy/Motion to Dismiss - Fraud Claim
Battle v. Nationwide Mut. Fire Ins. Co., 2020 WL 978807 (N.D. Ala. Feb. 28, 2020).

Facts: Valeria Battle was injured in a car accident that was caused by an UM/UIM motorist. Although she made a claim with her UM/UIM insurer, she was not able to reach an agreement with the insurer, and she and her husband, the Reverend Ocie Battle, Jr., filed an action in state court. After the insurer removed the action to a federal court in the Northern District of Alabama, the plaintiffs filed a motion to remand, and the insurer filed a motion to dismiss the fraud claim.

Issue: ***1) Whether the action should be remanded to state court, because the amount in controversy does not exceed $75,000. 2) Whether the fraud claim should be dismissed, because the fraud claim was not pled with particularity.***

Holding: 1) No. The complaint does not include a specific damages amount. Although none of Mrs. Battleôs pre-suit settlement demands exceed $75,000, the plaintiffs seek punitive damages with their fraud claim. Courts in the Eleventh Circuit should consider punitive damages when determining the amount in controversy. *Rae v. Perry*, 392 F. Appôx 753 (11th Cir. 2010). Punitive damages may be awarded up to three times the amount of compensatory damages awarded. Ala. Code Ann. §§ 6-11-20(a); 6-11-21(a). The court held that ñcommon sense and judicial experienceò allow the court to infer that the amount in controversy exceeds $75,000. The motion to remand is denied.

2) Yes. Although the insurer argued that the fraud claim is not ripe, the court disagreed. The insurer failed to provide authority supporting its argument that a fraud claim must be dismissed because liability has not been determined. Moreover, the insurer neglected to provide case law supporting its argument that the fraud claim is not ripe because it has not denied Mrs. Battleôs claim.

However, the court supported the insurerôs argument that the fraud claim was not pled in such a way that it met the heightened standard that the Federal Rules of Civil

Procedure require for fraud claims. The complaint generally recites the elements of fraud and does not include enough details to support the claim. Therefore, the claim is dismissed. This claim is dismissed with prejudice because the plaintiffs failed to respond to the motion to dismiss or request permission to amend the complaint. The court noted that dismissal of the fraud claim does not eliminate subject matter jurisdiction, because the court is required to consider the amount at issue, and not the amount the plaintiffs probably will be awarded.

Motion to Dismiss - Proof of Loss
Cheatham v. JPMorgan Chase Bank, N.A., 2020 WL 1015760 (M.D. Ala. Mar. 2, 2020).

Facts: While the insured was incarcerated, his home was damaged in a fire. JP Morgan Chase Bank, N.A. (ñJPMorganò) held the mortgage. The homeownerôs insurer investigated the claim and sent the insured a check for $114,268.61. As required by the policy, the check was made payable to both the insured and JPMorgan. When the insured asked his insured to issue the check again with only his name listed because JPMorgan foreclosed on the property a few months before and had already received enough money to satisfy the mortgage, the insurer told him to send the check to JPMorgan and ask them to endorse the check to him. JPMorgan declined to endorse the check to the insured. The insured filed an action against the insurer, Tim Parkman, Inc., and JPMorgan. All of the defendants moved to dismiss the breach-of-contract, bad-faith, negligence, and wantonness counts, and the insured opposed the motion.

Issue: ***Whether the proof of loss may be used as evidence in a motion to dismiss.***

Holding: No. Although the insured argues that the insurer violated the insurance contract by giving the check to JPMorgan instead of him, the defendants argue that they followed the terms of the proof of loss form that the insured signed. No party questions the authenticity of the proof of loss. When deciding a motion to dismiss, the Eleventh Circuit held that courts may rely upon extrinsic documents if the authenticity is not questioned, and the document is ñcentral to a plaintiffôs claims.ò *Maxcess, Inc. v. Lucent Techs, Inc.*, 433 F.3d 1337 (11th Cir. 2005). A document that is ñcentralò to a plaintiffôs claims must be a ñnecessary part of [the] effort to make out a claim. *Day v. Taylor*, 400 F.3d 1272 (11th Cir. 2005). There is no reference to the proof of loss in the complaint. Therefore, this document might be central to the defense, but it is not central to the plaintiffôs claims. *Humphrey v. City of Headland*, 2012 WL 2568206 (M.D. Ala. July 2, 2012). The court may not consider a document that is not central to the complaint. Therefore, the motion to dismiss is denied.

CGL Policy - Pollution Exclusion/ Motion to Abstain
National Trust Ins. Co. v. Southern Heating & Cooling, Inc., 2020 WL 1083209 (N.D. Ala. Mar. 6, 2020).

Facts: As personal representative of his parentsô estates, Steven Hoge filed a negligence and wantonness action against the insured and other defendants to recover damages for his parentsô wrongful deaths caused by carbon monoxide poisoning. Hoge alleged that the insured failed to properly service his HVAC system. The CGL insurer filed a declaratory judgment action in a federal court in the Northern District of Alabama and asks this court to hold that carbon monoxide is pollution and the policyôs pollution exclusion applies to exclude coverage. Hoge filed a motion to abstain based on the *Brillhart-Wilton* Doctrine and *Ameritas* factors, and the insurer opposed the motion.

Issue: ***Whether the district court should abstain from hearing this declaratory judgment action, because the Ameritas factors require abstention.***

Holding: Yes. A declaratory judgment action is discretionary in federal court if there is a related action pending in state court. *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328 (11th Cir. 2005). The Eleventh Circuit held that a court must focus on ñbalancing the state and federal interestsò by considering these factors when deciding whether to abstain: 1) the stateôs interest in having the action decided in state court; 2) if the declaratory judgment action will end the controversy; 3) if a federal action will be useful in resolving the legal issue; 4) if the declaratory action is simply a tool to create *res judicata* or prevent a federal hearing in a case that is not removable; 5) if moving forward with the action will improperly impose on state jurisdiction; 6) if there is another remedy that is more effective; 7) if the underlying facts are important to the declaratory judgment action; 8) if the state is can decide the factual issues in a better way than the federal court; and 9) if the underlying issues are closely related to state law or public policy.

The parties agree that Alabama law has not yet interpreted whether carbon monoxide should be included in the pollution exclusion in a CGL policy. Hoge and the insured argue that many issues in the state court action will also be addressed in this action, including placement and alignment of the furnace. While the insurer does not argue that these evidence issues exist, the insurer argues that the two actions are not parallel and so it is not necessary to examine the *Ameritas* factors.

The Eleventh Circuit clarified that even though parallelism must be considered, it is not required for the actions to be parallel for courts to examine the *Ameritas* factors. *First Mercury Ins. Co. v. Excellent Computing Distributors, Inc.*, 648 Appôx 861 (11th Cir. 2016). Although the insurer argued that the two actions cannot be parallel because the insurer is not a party in the underlying action, the insurer did not provide case law to support this argument. Instead of relying on the parties to determine whether the actions are parallel, the issues were ñsufficiently parallelò and so the court decided to examine the other *Ameritas* factors. The court found that the state has a compelling interest in deciding the issues in this action; this action cannot resolve the issues in the underlying action; the action will not be helpful in clarifying legal issues;

to avoid increasing friction between federal and state courts, the pollution question would need to be certified to the Alabama Supreme Court; much of the same evidence will be addressed in both cases; and the factual and legal issues are closely related to state law and public policy. Since the majority of the *Ameritas* factors supported abstention, the court granted the motion to abstain and dismissed the action without prejudice.

Auto Insurer - Motion to Remand
McCaskey v. GEICO Ins. Co., 2020 WL 1171945 (S.D. Ala. Mar. 11, 2020).

Facts: After her vehicle was damaged in an accident and her automobile insurer denied her claim, the insured filed an action against her insurer, a citizen of Maryland, in state court. She also named Brian Dozier, a citizen of Florida and Tanya Johnson, a citizen of Alabama, as defendants. The insured is a citizen of Alabama. Although the insured attempted to serve Johnson twice, both attempts were not successful. Her insurer removed the action to a federal court in the Southern District of Alabama. The insured moved to remand the action.

Issue: ***Whether the action should be remanded to state court because removal was not timely, Johnson was not fraudulently joined, and the amount in controversy has not been shown to exceed $75,000.***

Holding: Yes. Removal is only appropriate if it is done within 30 days of the defendantôs receipt of the initial pleading or if it is done within 30 days of the defendantôs receipt of an amended pleading or other document that makes the case removable. *See* 28 U.S.C. § 1446. The insurer did not remove the action within 30 days of receiving the insuredôs complaint. Also, the insurer did not provide any information about what it relied upon that made the case removable within the 30 day period before the insurer filed the notice of removal. Because no information was provided that explains how this court has diversity jurisdiction and that the removal was timely filed, the motion to remand is granted.

The defendants argue that the parties are diverse because the non-diverse defendant was unsuccessfully served twice. However, they did not include case law that supports this argument. Many courts have held that diversity is determined by all of the parties, regardless of whether a defendant has actually been served. *See Stan Winston Creatures, Inc. v. Toys 'R' Us, Inc.*, 314 F. Supp. 2d 177 (S.D.N.Y. Apr. 17, 2003); *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939). If a plaintiff voluntarily abandons a non-diverse defendant, and this defendant has not been served, a state action may be removable. *Faulk v. Husqvama Consumer Outdoor Products, N.A., Inc.*, 849 F. Supp. 2d 1327 (M.D. Ala. 2012). The defendants failed to provide any evidence that the plaintiff has abandoned Johnson. Therefore, there is a lack of diversity, and the action is due to be remanded.

Finally, the complaint does not provide any indication of the amount in controversy outside of the jurisdictional requirement of $10,000 in state court. A blanket statement that the amount in controversy exceeds $75,000 due to the numerous claims and damages alleged against the defendants is not enough information on which the court may rely to accurately calculate the amount in controversy. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744 (11th Cir. 2010). Therefore, the action is due to be remanded.

Auto Insurer - Appraisal Process

Walker v. Allstate Prop. & Cas. Ins. Co., 2020 WL 1235626 (N.D. Ala. Mar. 10, 2020).

Facts: After his vehicle was damaged in an automobile accident, the insuredôs automobile insurer enlisted CCC Information Services, Inc. (ñCCCò) to provide a report calculating the actual cash value of the insuredôs vehicle. The insured disagreed with the accuracy of the valuation. So, the insured filed a class action lawsuit against the insurer and CCC arguing that the insurer suppressed and concealed a conspiracy to undervalue total loss claims. When both CCC and the insurer filed motions to dismiss, the insured opposed the motions.

Issue: ***1) Whether the breach-of-contract claim and bad-faith claims against the insurer should be dismissed, because the insured failed to the waive required appraisal process. 2) Whether the tortious-interference-with-performance-of-a-contract claim against CCC should be dismissed, because the appraisal process is not complete. 3) Whether the breach-of-contract claim against CCC should be dismissed, because the insured cannot prove he is an intended third party beneficiary. 4) Whether the civil conspiracy claim against the insurer and CCC should be dismissed, because the underlying causes of action are due to be dismissed.***

Holding: 1) Yes. The plain terms of the policy require the insured to enter into the appraisal process with the insurer if there is a disagreement over the value of the loss. The Eleventh Circuit has upheld this provision in the past and did not allow a lawsuit to be filed until the appraisal process was complete. *Moore v. Travelers*, 321 F. Appôx 911 (11th Cir. 2009). The district court held that it cannot know whether the claim was undervalued until the appraisal process is complete.

Also, the insurer did not waive the right to require appraisal due to an unreasonable delay, because the insurer did not ñsubstantially invoke the litigation processò and the insured did not provide compelling evidence that the insured will be prejudiced by a court order requiring him to enter into the appraisal process. *See Rogers v. State Farm Fire & Cas. Co.*, 984 So. 2d 382 (Ala. 2007)(holding that a party waives the right to require appraisal if ñit substantially invokes the litigation process and thereby substantially prejudices the party opposing arbitration.ò). The insured argued that he

was prejudiced because during the two years between the accident and the lawsuit the vehicle was salvaged and therefore not able to be inspected. Also, the insured is prejudiced because he is required to pay for his own appraiser and help pay for the umpire. The court was not persuaded because the insured failed to provide case law to support his argument.

The court was also unconvinced by the insuredôs equitable estoppel argument because the insured failed to meet the first element of equitable estoppel, ñknowledge of the facts by the party to be estopped.ò *Pierce v. Hand, Arendall, Bedsole, Greaves, & Johnston*, 678 So. 2d 765 (Ala. 1996). This is because there is no evidence indicating that the insurer misrepresented the appraisal section of the policy. The amended complaint states that the insurer informed the insured of the appraisal process at a minimum of three times.

Finally, the insuredôs bad-faith claim cannot survive dismissal, because there is no evidence of one of the elements, which is a breach of a contract between the parties. Therefore the breach-of-contract and bad-faith claims are dismissed.

2) Yes. Tortious interference with performance of a contract requires the insured to be able to prove that he was damaged by the CCC market valuation reports. However, since the appraisal process has not be completed, it is not possible to know whether the reports undervalued his vehicle. Also, the insured stated that providing the report to the insurer ñenabledò the insurer to under pay the claim, but enabling is not the same as intentionally interfering with the policy. Therefore, the district court granted the motion to dismiss on this issue.

3) Yes. The insured argued that he was a third-party beneficiary of the contract between the insurer and CCC. A third party beneficiary must prove that ñthe contracting parties intended, at the time the contract was created, to bestow a direct benefit upon the third party.ò *Airlines Reporting Corp. v. Higginbotham*, 643 So. 2d 952 (Ala. 1994). The breach-of-contract claim fails against CCC because the complaint fails to allege that CCC and the insurer intended the insured to be a third party beneficiary at the time they entered into their contract. Therefore the district court dismissed this claim.

4) Yes. Finally, a civil conspiracy action may only be maintained if the underlying cause of action can be maintained. *Allied Supply Co. v. Brown*, 585 So. 2d 33 (Ala. 1991). The insured cannot maintain his civil conspiracy claim against either defendant, because each of his claims discussed above cannot be maintained at this time. Therefore this claim is dismissed as well.

Eleventh Circuit Update

Removal - Amount in Controversy
Anderson v. Wilco Life Ins. Co., --- F.3d ---, 2019 WL 6242199 (11th Cir. Nov. 22, 2019).

Facts: Vanessa Anderson, on behalf of herself and those similarly situated, filed a putative class action in state court against the life insurance carrier and argued that the insurer unlawfully increased the cost of life insurance premiums and caused her policy to lapse. The insurer removed the action to the United States District Court for the Southern District of Georgia, and Anderson moved to remand. The district court remanded the action, and the insurer appealed.

Issue: ***Whether the district court has jurisdiction over the class action, because the amount in controversy exceeds $5 million.***

Holding: Yes. The Class Action Fairness Act gives federal courts jurisdiction over class actions when the amount in controversy exceeds $5 million. 28 U.S.C. §1332(d)(2). The court is required to determine the amount is in controversy at issue in the case, and the amount in controversy is not the amount the plaintiffs are likely to be awarded. *Dudley v. Eli Lilly & Co.*, 778 F.3d 909 (11th Cir. 2014). ñWhen the validity of a life insurance policy is at issue in a case, the face value of the insurance policy is the amount in controversy.ò *See Guardian Life Ins. Co. of Am. v. Muniz*, 101 F.3d 93 (11th Cir. 1996). When an insured wishes to reinstate a lapsed life insurance policy, ñthe face value of the policy is the amount in controversy.ò *Waller v. Prof'l Ins. Corp.*, 296 F.2d 545 (5th Cir. 1961). Because Anderson, as the class representative, wished to reinstate the life insurance policies that lapsed or were surrendered, the face value of the policies should be included to calculate the amount in controversy. The face value of the polices is over $75 million, which is greater than the $5 million minimum to create jurisdiction. Therefore, the Eleventh Circuit reversed the district courtôs remand order.

CGL Policy- Liquor Liability Exclusion
AIX Specialty Ins. Co. v. Members Only Management, LLC, --- Fed. Appx. ---, 2019 WL 6736374 (11th Cir. Dec. 11, 2019).

Facts: A patron of the insured became intoxicated at the insuredôs night club and then died after she lost control of her vehicle later that night. Her estate filed a Dram Shop action against the insured and asked for damages. The CGL insurer provided a defense to the insured under a reservation of rights. The insurer then filed a declaratory judgment action in the United States District Court for the Southern District of Florida and asked the court to hold that the insurer was not required to provide a defense or indemnification to the insured. The district court granted the insurerôs motion for summary judgment, and the insured appealed.

Issue: ***Whether the CGL policy's Absolute Liquor Liability Exclusion applies and excludes coverage for the insured in the underlying action.***

Holding: Yes. [I]nterpretation of an insurance policy is a question of law.ò *Gas Kwick, Inc. v. United Pac. Ins. Co.*, 58 F.3d 1536 (11th Cir. 1995). If there is no possibility for coverage, the insurer does not have a duty to defend or indemnify. *See Trailer Bridge, Inc. v. Illinois Nat'l Ins. Co.*, 657 F.3d 1135 (11th Cir. 2011). The CGL policy does not provide coverage a claim ñseeking recovery for bodily injury under ó[a]ny statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.ò The Florida Dram Shop Act relates to the ñdistribution or use of alcoholic beverages.ò The exclusion also applies to an insured who contributed to ñthe intoxication of any person.ò Since the insured served alcohol to a patron who was already intoxicated, this part of the exclusion also applies.

The insured argues that the exclusion is overly broad and makes coverage ñillusory.ò However, for a claim to ñrender coverage illusory, the exclusion must ócompletely contradict the insuring provisions.ôò *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962 (11th Cir. 2014). Since the exclusion does not prevent every claim for bodily injury, mainly injuries that do not involve alcohol, the exclusion is not illusory. Therefore, the exclusion applies, and the insurer is not obligated to provide a defense and indemnification to the insured.

Automobile Insurance- Illusory Coverage
Hallums v. Infinity Ins. Co., --- F.3d ---, 2019 WL 6872507 (11th Cir. Dec. 17, 2019).

Facts: Shelithea Hallums and Samuel Castillo (ñinsuredsò) leased vehicles from dealerships. The dealerships assigned the leases to Financial Services Vehicle Trust and JP Morgan Chase Bank, N.A. The terms of the lease required Hallums and Castillo to purchase liability insurance with $100,000 limits for bodily injury per person, $300,000 limits per accident, and $50,000 limits for property damage per accident. Both insureds applied for automobile insurance from the insurers and requested a lower policy limit for themselves than for the lessors. The Lessor Liability Endorsement (ñEndorsementò) was approved by the Florida Office of Insurance. The insureds later filed a putative class action in the United States District Court for the Southern District of Florida against the insurers arguing they were entitled to damages, because the Endorsement was illusory. After discovery, both parties filed for summary judgment. The district court awarded summary judgment in favor of the insurers, and the insureds appealed.

Issue: ***1) Whether the insureds have standing to bring their claim.*** **2)** ***Whether the Endorsement is illusory, because the Endorsement does not provide coverage for more than simply vicarious liability.***

Holding: 1)Yes. The insurers argued that the insureds lacked standing to bring their claim, because the insureds did not plead any facts that show they did not receive the coverage for which they contracted. However, the insureds argue that they are paying for an Endorsement that does not provide coverage. Florida law recognizes an injury to an insured if the insured is paying premiums on an illegal contract. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003). Because the insureds bargained for insurance coverage from the insurers, and they allege that they are paying for coverage that does not exist, they have standing to bring their claim.

2) No. The Endorsement provides: ñThis additional coverage will apply to damages your lessor becomes legally obligated to pay that arise from and are legally related to a loss covered under your policy. The coverage provided by this endorsement . . . is available only to indemnify your lessor . . .ò In the event a vicarious liability action is filed against the lessor, the policy requires the insurers to defend the lessor. However, the Graves Amendment does not allow vicarious liability claims to be filed against the lessors of vehicles. 49 U.S.C. § 30106(a). Although a lessor may not be vicariously liable due to the Graves Amendment, an action still may be filed against the lessor, and the lessor will still incur attorneysôand court fees. Florida law recognizes that a duty to defend is broader than a duty to indemnify. *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289 (11th Cir. 2006). Even if a claim has no merit, an insurer is still obligated to provide a defense. Therefore, coverage is not illusory due to the Graves Amendment, because the insurer still has a duty to defend the lessor in vicarious liability actions. Summary judgment in favor of the insurer is affirmed.