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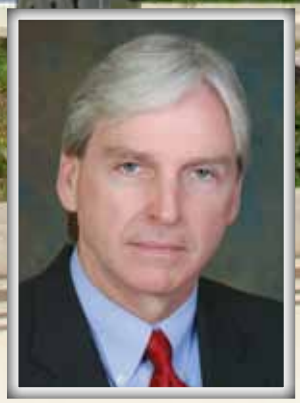

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# BAD FAITH AFTER BRECHBILL: FINDING THE NEW NORMAL

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**Bad Faith After Brechbill**

In *State Farm Fire & Cas. Co. v. Brechbill*, the Alabama Supreme Court recently held that there exists only one tort of bad faith, albeit with two methods of proof.[1] Decades of case law seemed to suggest the presence of two bad faith torts, "normal" and "abnormal," each with different elements and standards of proof. The *Brechbill* Court observed, "[w]e have repeatedly held that the tort of bad-faith refusal to pay a claim has four elements – (a) a breach of insurance contract, (b) the refusal to pay claim, (c) the absence of arguable reason, (d) the insurer's knowledge of such absence – with a conditional fifth element: "(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim."[2] In prior cases, elements (a) through (d) were required to prove a "normal" case, while (e) applied to "abnormal" cases only. Eschewing the abnormal/normal dichotomy as "confusing," the *Brechbill* Court opted for the "more descriptive" terms "bad faith refusal to investigate" and "bad faith refusal to pay." The Court emphasized that regardless of the method of proof, the third element, absence of a lawful basis for denial of the claim, must always be satisfied before a bad faith case may proceed to a jury.

**Origins of Bad Faith in Alabama**

In two cases decided on the same day, Alabama introduced the tort of bad faith, tracing its origins to the common law duty of fair dealing. "Every contract contains an implied in law covenant of good faith and fair dealing; this covenant provides that neither party will interfere with the rights of the other to receive the benefits of the agreement. Breach of the covenant provides the injured party with a tort action for 'bad faith' notwithstanding that the acts complained of may also constitute a breach of contract."[3]

In *Chavers*, the Court announced that "an actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal."[4] In *Gulf Atl. Life Ins. Co. v. Barnes*, the Court expanded on the *Chavers* elements, breaking the tort down into two tiers.[5] Tier I, predicated on an insurer's refusal to pay a claim, required proof of (1) refusal to pay the claim and (2) actual knowledge that an arguable basis existed for the refusal. Tier II provided that an insurer's intentional failure to determine the existence of any lawful basis for refusal may supply proof that no such basis ever existed. Tier II required proof of (1) a refusal to pay, (2) no lawful basis for the refusal, and (3) an intentional failure to determine whether a lawful basis existed. In essence, Tier II allowed willful ignorance to substitute for actual knowledge in a case based on failure to investigate. "[T]he knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proof submitted by the insured." [6]

The next year, the Supreme Court interpreted the lack of a lawful basis element to require a plaintiff in an "ordinary" case to prove entitlement to directed verdict on the contract claim as a prerequisite to submission of the bad faith claim to the jury. In the normal case, in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must demonstrate the plaintiff's entitlement to a directed verdict on the contract claim and, thus, his entitlement to recover on the contract claim as a matter of law.[7] This requirement came to be known as the "directed verdict" or "pre-verdict judgment as a matter of law" on the contract standard applicable only to "ordinary" or "normal" bad faith cases. In a concurring opinion, Justice Jones observed that "extreme cases will arise in which a fact issue will present a jury question on [the contract] claim. This is

not the case before us; and, absent such circumstances, the 'directed verdict on the contract claim' is the applicable standard for testing the tort of bad faith claim."[8]

*Aetna Life Ins. Co. v. Lavoie*, recognized the first exception to the directed verdict standard where an insurer avoids summary judgment on the contract by creating its own fact issue.[9] The *Lavoie* Court held that under those circumstances, applying the directed verdict standard would reward an insurer for "the very conduct which the tort of bad faith was originally recognized to admonish." Later the same year, the Court applied the *Lavoie* exception to a case in which the sole reason for the denial was the insurer's account of the insured's statement regarding the damage giving rise to the claim. [10]

The Alabama Supreme Court next recognized an exception to the directed verdict standard where a factual question existed as to whether an insurer "either intentionally or recklessly failed to subject the results of the investigation to a cognitive evaluation and review and, thereby intentionally failed to determine prior to denying the claim whether there was, in fact, a lawful basis for denial."[11] In an egregious set of facts, a life insurer denied Thomas' claim for a one thousand dollar benefit following the death of her twenty-four year old daughter. The insurer deemed the daughter not to be a covered dependent under the policy because she did not attend school full time at the time of her death. The insurer knew that the daughter had been a full time student prior to the year and ten months preceding her death during which she was disabled and/or hospitalized due to the cancer which ultimately claimed her life. The Supreme Court held this to be an extraordinary case in which a fact question as to coverage and bad faith should be submitted to the jury.

In *Blackburn v. Fid. & Deposit Co. of Maryland*, the Supreme Court recognized another exception to the directed verdict standard where an insurer's debatable reason for denial of a defense arose from an ambiguous provision of its own contract.[12] Three years later, *Employees' Benefit Ass'n v. Grissett* extended the exception to first party claims, holding the absence of a debatable reason not to pay a claim cannot be grounded on the vagaries of construction of an ambiguity. [13] In holding that Plaintiff's abnormal bad faith claim was properly submitted to the jury along with the contract claim, *State Farm Fire & Cas. Co. v. Slade* observed that "[t]o this date, the abnormal cases have been limited to those instances in which the plaintiff produced substantial evidence showing that the insurer (1) intentionally or recklessly failed to investigate the plaintiff's claim; (2) intentionally or recklessly failed to properly subject the plaintiff's claim to a cognitive evaluation or review; (3) created its own debatable reason for denying the plaintiff's claim; or (4) relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff's claim." [14]

The doctrine of abnormal bad faith thus evolved to address situations in which factual contract disputes coincided with arguably legitimate bad faith claims. In these circumstances the Court deemed it unjust to decide the fate of the bad faith claim on summary judgment and therefore allowed a contract and bad faith claim to be presented to the jury simultaneously. Consequently, pleading of a bad faith claim often sealed its fate on summary judgment. Claims pled as normal faced an extremely high bar, i.e., entitlement to directed verdict on the contract; whereas abnormal bad faith claims could be presented to the jury along with fact questions on the contract claim.

*Brechbill*'s procedural history illustrates the significance of the normal/abnormal dichotomy. The *Brechbill* trial court, relying on existing case law, granted State Farm's motion for partial summary judgment as to Brechbill's normal bad faith claim, but denied it as to the abnormal bad faith claim predicated on failure to investigate. The trial court explicitly held that Brechbill "created no genuine issue of material fact about whether or not State Farm had a reasonably legitimate or arguable reason for refusing to pay the claim." In other words, Brechbill had not satisfied the third element, the absence of an arguable reason. At trial, State Farm would have therefore been entitled to a directed verdict on the contract claim.

Citing *Jones v. Alfa Mut. Ins. Co.*,[15] the *Brechbill* trial court denied summary judgment on the remaining bad faith claim based on State Farm's failure to make a prima facie showing that it adequately investigated all areas of damage related to the claimed loss. In *Jones*,

the trial court granted summary judgment in favor of the insurer as to both the normal and abnormal bad faith claims. On appeal, the *Jones* Court affirmed the summary judgment as to the normal claim, but reversed as to the abnormal claim. As to the normal claim, it held that summary judgment was proper because a question of material fact precluded the Joneses from receiving a directed verdict on their contract claim. With regard to the abnormal claim, the *Jones* Court observed that "an insurance company has a 'responsibility to marshal all ... facts' necessary to make a determination as to coverage '*before* its refusal to pay.' ...This duty must include a duty to investigate a covered event that an insured claims has caused his loss."[16] The *Jones* Court held that a fact question existed "as to whether Alfa met its duty to marshal all facts necessary to make a determination as to coverage before it denied the Joneses' claim. Thus, the trial court erred in granting Alfa's motion for a summary judgment as to the Joneses' claims of 'abnormal' bad-faith failure to properly investigate the Joneses' insurance claim and failure to investigate the condition of the house before Hurricane Opal."[17]

The *Brechbill* trial court relied on *Jones* in granting summary judgment as to the normal bad faith claim due to a fact issue as to the existence of a debatable reason for denial of the claim. With regard to the abnormal claim, the trial court held that State Farm had not made a prima facie showing that it met its duty to marshal all facts necessary for it to make a good faith determination as to coverage prior to denying the claim. The fact question regarding whether State Farm met its duty to investigate precluded summary judgment on the abnormal claim pursuant to *Jones*.

In reversing the *Brechbill* trial court's ruling, the Supreme Court held that the trial court had misapprehended the elements of the tort of bad faith and misapplied the standard on summary judgment. The Court distinguished *Jones* from *Brechbill*. "In *Jones*, evidence for the insurer's denial was gathered *after* the denial was made, whereas here a debatable reason for State Farm's denials existed *at the time of the denials*." (emphasis in original) The Court emphasized that here, the debatable reason existed *prior to the denials*, requiring summary judgment in favor of the insurer. The Court cited *Weaver v. Allstate Ins. Co.* for the proper standard on summary judgment of an abnormal bad faith claim: "Alabama law is clear: …regardless of the imperfections of [the insurer's] investigation, the existence of a debatable reason for denying the claim at the time the claim was denied defeats a bad faith failure to pay the claim."[18]

*Weaver* cited *Balmer*, an Eleventh Circuit case, which in turn cited *Nat'l Sec. Fire & Cas. Co. v. Bowen* for the proposition that the existence of a debatable reason for denial compels summary judgment for the insurer in a failure to investigate claim.[19] Because Bowen did not allege failure to investigate, that issue was never before any court. Further, when the Supreme Court decided *Bowen*, it had yet to recognize any exceptions to the directed verdict standard. Likewise, the portion of *Balmer* cited by *Weaver,* and in turn by *Brechbill,* addresses the treatment of a normal case. After setting out the elements a plaintiff must prove in a normal case as articulated in *Bowen*, the *Balmer* Court recognized that the Alabama Supreme Court had carved out an exception to the directed verdict rule where an insurer intentionally failed to investigate a claim, but held that the case before it did not qualify for the exception.

*Weaver* pre-dated the full expression of the abnormal failure to investigate doctrine which began with *Slade*. It relied on *Bowen* in deciding a generic failure to pay a claim, not an abnormal failure to investigate a claim under *Slade* and its progeny.

The *Brechbill* Court's return to *Weaver* and its application of the elements of bad faith articulated in *Bowen* to the abnormal case before it is problematic. The Supreme Court would not recognize an abnormal case of bad faith until *Lavoie*, four years after *Bowen*. *Bowen* also pre-dated the advent of the failure to investigate exception instituted by *Thomas* by eight years. The Supreme Court's decision to cite *Bowen* for the summary judgment standard under an abnormal bad faith doctrine which did not yet exist is perplexing in light of the volume of cases decided by the same court since *Thomas* explicitly holding the directed verdict standard inapplicable to abnormal failure to investigate cases.

The Court cited *Jones* in support of the proposition that the absence of a debatable reason element applies with equal force to both varieties of bad faith, but the basis for the *Jones* Court's reversal of summary judgment as to the abnormal claim was the fact question of whether Alfa met its duty to investigate, not whether there was a debatable reason for denial. Despite the *Brechbill* Court's suggestion, the *Jones* Court did not rely on *when* the debatable reason arose for purposes of deciding the failure to investigate claim. By definition, the third element requires the existence of a debatable reason at the time of the denial. Therefore, if the insurer develops the reason after the denial, there is no debatable reason for purposes of bad faith analysis. In that circumstance, the plaintiff would be entitled to have the normal claim go to the jury. In *Jones*, the normal claim was dismissed on summary judgment due to the existence of a debatable reason before, not after, the denial.

Under *Jones*, the timing of the fact question regarding the debatable reason is relevant only to the normal claim. The *Jones* Court did not apply the debatable reason standard to the abnormal claim. The trial court held and the *Jones* Court affirmed that there was a fact question as to the existence of a debatable reason for denial of the claim which precluded a pre-verdict judgment as a matter of law on the contract claim. The Jones' failure to meet the directed verdict standard compelled summary judgment on the normal bad faith claim. If the *Jones* Court had applied the existence of a debatable reason standard articulated by *Brechbill*, the abnormal claim would have been dismissed on summary judgment as well.

**Finding the New Normal**

*Brechbill* tells us in no uncertain terms that bad faith comprises one tort with one set of elements, and suggests that the third element applies in all bad faith cases to compel summary judgment where a plaintiff is not entitled to a directed verdict on the contract claim. Yet the *Brechbill* Court opted to embrace and distinguish rather than overrule *Jones v. Alfa*. Thus, even after *Brechbill*, a failure to investigate claim will not be subjected to the directed verdict standard on summary judgment under at least some circumstances. Because *Jones* is still good law, where the insurer's evidence in support of denial is gathered after denial, the failure to investigate claim may be submitted to the jury along with the contract claim. Do any other exceptions to the directed verdict standard survive *Brechbill*?

In a future *Jones*-like case, a bad faith failure to pay claim would be dismissed on summary judgment based on the trial court's holding that no debatable reason for the denial existed at the time of the denial. The failure to investigate and the contract claims would proceed to the jury. What elements must be proved to establish bad faith failure to investigate? Under *Brechbill*, the *Bowen* elements apply: (a) a breach of insurance contract, (b) the refusal to pay claim, (c) the absence of arguable reason, (d) the insurer's knowledge of such absence – with a conditional fifth element: (e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim. Will the jury be asked to decide the third element, whether a debatable reason existed prior to the denial, where there has already been a finding as a matter of law that it did not?

Under what circumstances does the "conditional fifth element" apply? When the conditional fifth

element applies, how does it apply? Why would a plaintiff opt to plead a fifth element unless it replaced one of the first four elements? Under *Jones*, the fifth element arguably replaced the third and maybe the fourth elements. If that is true going forward, don't we have two bad faith torts, each with different elements? If in fact, all bad faith claims require proof of the first through fourth elements, how does *Jones* survive?

Did *Brechbill* implicitly overrule *Jones* with regard to the disposition of the normal bad faith claim? *Brechbill* affirmed well-settled law that if the debatable reason is developed after the denial, it is not a debatable reason at all. *Brechbill* remarked that in *Jones* the debatable reason was developed *after* the denial. The normal claim in *Jones* should have gone to the jury along with the abnormal under *Brechbill*'s analysis. Are there two different standards for existence of a debatable reason with regard to failure to pay and failure to investigate claims?

By affirming but distinguishing *Jones*, *Brechbill* adopted several mutually exclusive positions: (1) The tort of bad faith is one tort requiring the proof of at least four elements; (2) A debatable reason for purposes of the third element must arise prior to the denial of the claim; (3) If the denial precedes the debatable reason, there is no debatable reason. In these circumstances, a failure to investigate claim may go to the jury along with a fact question on the contract; (4) If the denial precedes the debatable reason, a normal failure to pay claim may not go to the jury because there is a fact question on the contract.

**Federal District Court Applications of the *Brechbill* Doctrine**

No Alabama appellate court has passed on a bad faith issue since *Brechbill* was decided on September 27, 2013. To date, Federal District Courts in Alabama have applied *Brechbill* on four occasions. In the first of these, *Phillips v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, plaintiff brought a breach of contract as well as normal and abnormal bad faith claims based on his insurer's refusal to pay occupational accident benefits.[20] Finding the policy language relied upon by the insurer in denying coverage ambiguous, the trial court denied summary judgment on the contract, granted summary judgment as to the normal bad faith claim, and denied summary judgment as to the abnormal claim. Acknowledging *Brechbill's* holding that the absence of a debatable reason for denial of coverage is an element of every bad faith case, the court relied on the line of cases not explicitly overruled by *Brechbill* holding that an insurer may not rely on an ambiguous policy

term to negate the absence of a debatable reason and the well-settled principle that ambiguous policy terms should be construed against the insurer.[21]

On May 29, 2014, the Northern District of Alabama applied *Brechbill* to another abnormal bad faith claim on summary judgment. In *Christian v. Country Mut. Ins. Co.,*[22] the court cited *Brechbill* for the proposition that in order to survive summary judgment on a normal bad faith claim, "a Plaintiff must show substantial evidence of five elements: (a) an insurance contract between the parties and a breach thereof by the defendant; (b) an intentional refusal to pay the insured's claim; (c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason); (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason; (e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." Here, plaintiffs did not contend that they were entitled to judgment as a matter of law as to the contract claim, but instead advanced their bad faith claim under the abnormal method. Before granting summary judgment in favor of the insured based on a finding of a debatable reason at the time of the claim, the court observed that the abnormal method selected by plaintiffs is not subjected to the same pre-verdict judgment standard as a normal claim. It set forth the elements of an abnormal bad faith claim as follows: "[i] n order to prove the abnormal case, the plaintiff must show that the insurer (1) intentionally or recklessly failed to investigate the plaintiff's claim; (2) intentionally or recklessly failed to properly subject the plaintiff's claim to a cognitive evaluation or review; (3) created its own debatable reason for denying the plaintiff's claim; or (4) relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff's claim. In addition to proving one of these four elements, however, the plaintiff must also demonstrate that the insurer lacked a debatable reason to deny the claim."[23] The *Phillips* Court's application of the ambiguous policy terms exception to the directed verdict standard highlights one consequence of *Brechbill*'s affirmance of *Jones*: the persistence of two torts with different elements and standards of proof.

In a UIM case, the Southern District of Alabama dismissed a bad faith claim based upon plaintiffs' failure to demonstrate legal entitlement to recover, as required in the UIM context.[24] The court noted that even if plaintiffs had satisfied the UIM requirements, their bad faith claim would fail because the insurer had a debatable reason for refusing to settle the claim. Setting out the elements required to prove both abnormal and normal bad faith, the court held that plaintiffs' claim based solely on a failure to investigate was solely on the abnormal side of the tree. Citing *Brechbill* and *Weaver*, the court held that the presence of a debatable reason for denial of a claim defeats even an abnormal bad faith claim. The court observed that the directed verdict on the contract standard does not apply in abnormal cases, adding "[t]his led some to believe that the third element of a bad faith claim did not apply in abnormal cases."

Five weeks after *Joffrion*, the Northern District of Alabama likewise interpreted *Brechbill* to have preserved the exemption from the directed verdict standard for all claims previously known as "abnormal."[25] In *EMCASCO Ins. Co. v. Knight*, plaintiffs alleged only that EMCASCO created its own debatable reason for denying their claim. Noting that this exception is only available where the very existence of the sole factual basis for denial is in dispute, the court held the narrow exception inapplicable to the case before it.

Did *Brechbill* impose the third element on all bad faith claims, but preserve the directed verdict standard exception for abnormal cases? In *Phillips*, the court did not apply the debatable reason element or the directed verdict standard to the abnormal bad faith claim. How could a court apply the third element without applying the directed verdict standard? Aren't the directed verdict standard and *Brechbill*'s third element just two different ways of expressing the same idea: a bad faith claim only goes to the jury where there is no legal or factual question that an insurer did not pay a covered claim? Could the avoidance of the directed verdict standard ever aid the abnormal bad faith plaintiff in the face of the lack of a debatable reason requirement? If the insurer has no arguable reason for denial, won't a plaintiff always be entitled to summary judgment

on the contract? Isn't abnormal bad faith defined by its exemption from the directed verdict standard? If the directed verdict exception is eviscerated by the imposition of a third element, does any abnormal bad faith cause of action survive?

Delving into the evolution of bad faith jurisprudence in Alabama yields more questions than answers. The Alabama Pattern Jury Instruction Committee has been working diligently to provide answers to some of these questions in the wake of *Brechbill*. The Committee met on September 5, 2014 and will reconvene on October 10, 2014 to ratify new pattern jury instructions for the unified tort of bad faith. These will provide some much needed guidance on the elements and application of the unified tort of bad faith.

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[1] 1111117, 2013 WL 5394444 (Ala. Sept. 27, 2013).

[2] Brechbill, 2013 WL 5394444 at *9, citing *Nat'l Sec. Fire & Cas. Co. v. Bowen*, 417 So.2d 179, 183 (Ala. 1982).

[3] *Chavers v. Nat'l Sec. Fire & Cas. Co.,* 405 So.2d 1, 4 (Ala. 1981).

[4] 405 So.2d at 7.

[5] 405 So.2d 916 (Ala. 1981).

[6] *Barnes*, 405 So.2d at 924.

[7] *Nat'l Sav. Life Ins. Co. v. Dutton*, 419 So.2d 1357, 1362 (Ala. 1982).

[8] *Dutton*, 419 So.2d at 1363.

[9] 470 So.2d 1060, 1072 (Ala. 1984) *vacated on other grounds,* 475 U.S. 813 (1986).

[10] *Jones v. Alabama Farm Bureau Mut. Cas. Co.,* 507 So.2d 396, 401 (Ala. 1986). ("Precluding a plaintiff's bad faith action by application of the directed verdict on the contract claim test when the disputed factual issue arises solely from a contradicted oral conversation between the insurer and the insured or a third person puts too onerous a burden on the plaintiff. Moreover, it would frustrate the purpose of the bad faith action by allowing an insurer simply to misrepresent the content of an oral conversation to avoid liability.")

[11] *Thomas v. Principal Fin. Grp.*. 566 So.2d 735, 750 (Ala. 1990).

[12] 667 So.2d 661 (Ala. 1995).

[13] 732 So.2d 968, 977 (Ala. 1998).

[14] 747 So.2d 293, 306-07 (Ala. 1999).

[15] 1 So. 3d 23, 25 (Ala. 2008).

[16] *Jones*, 574 So.2d at 37, citing *Slade*, 747 So.2d at 316.

[17] *Jones*, 1 So. 3d at 37.

[18] 574 So.2d 771, 775 (Ala. 1990), quoting *State Farm Fire & Cas. Co. v. Balmer*, 891 F.2d 874, 876 (11th Cir. 1990).

[19] 417 So.2d at 183.

[20] 6:12-CV-02757-LSC, 2013 WL 5974906 (N.D. Ala. Oct. 30, 2013).

[21] *Phillips*, 2013 WL 5974906 at *7; citing *Slade*, 747 So.2d at 306; *Blackburn,* 667 So.2d at 669; *Loyal Am. Life. Ins. Co. v. Mattiace,* 679 So.2d 229, 237–38 (Ala.1996), *cert. denied,* 519 U.S. 949, 117 S.Ct. 361, 136 L.Ed.2d 252 (1996); *Grissett,* 732 So.2d at 976-77; and *Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co.,* 817 So.2d 687, 695 (Ala. 2001), respectively.

[22] 7:13-CV-0027-LSC, 2014 WL 2434294 (N.D. Ala. May 29, 2014)(internal citations and quotations omitted).

[23] *Christian*, 2014 WL 2434294 at *3, citing *Slade,* 747 So.2d at 306–07; and *Brechbill,* 2013 WL 5394444 at *9.

[24] *Joffrion v. Allstate Ins. Co.,* CIV.A. 12-0434-WS-M, 2014 WL 3518079 (S.D. Ala. July 16, 2014).

[25] EMCASCO Ins. Co. v. Knight, CV-12-S-1890-NW, 2014 WL 4269116 (N.D. Ala. Aug. 22, 2014).

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