IN THE WAKE OF *STATE FARM v. BRECHBILL* – THE FUTURE OF THE TORT OF BAD FAITH IN ALABAMA

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More than thirty years have passed since the Alabama Supreme Court first acknowledged a tort-based claim for bad faith refusal to pay an insurance claim in *Chavers v. National Security Fire & Casualty Company*.[1] During the first fifteen years of this period, the frequency of such claims steadily increased beyond the limited scope originally intended by the court in *Chavers*. Originally, the tort of bad faith was limited to alleged bad faith failure to pay an insurance claim. In order to create a jury question on such a claim, a plaintiff must be entitled to a judgment as a matter of law on his contract claim, a test commonly referred to as the "directed verdict on the contract" standard.[2] Subsequent decisions, however, began to recognize claims of bad faith not only for so-called "normal" cases of failure to pay, but also for "abnormal" cases involving failure to properly investigate or review a claim.[3] Eventually, the categories of "abnormal" bad faith grew to include situations where 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.[4]

Recognizing the confusion created by the delineation of "normal" and "abnormal" claims and the continual expansion of the list of "abnormal" claims, in 1999 the Alabama Supreme Court issued its most comprehensive decision to that point regarding the tort of bad faith. In *State Farm Fire & Casualty Company v. Slade*, the Court summarized the evolution of the tort of bad faith in detail and compared the "normal" claim versus the "abnormal" claim, the different types of "abnormal" claims, and the plaintiff's burden with respect to each.[5] The court also clarified that bad faith liability in Alabama is limited to those instances in which the insured's losses are covered under the policy.[6]

Following *Slade*, the climate of Alabama bad faith litigation stabilized significantly with regard to the applicable legal standards. However, one question which continued to plague judges and lawyers alike was whether a claim for bad faith refusal to investigate ("abnormal" bad faith) might proceed even when the plaintiff's evidence of bad faith refusal to pay ("normal"

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[1] 405 So. 2d 1 (Ala. 1981).
[2] *See, e.g., Nat'l Sec. Fire & Cas. Co. v. Bowen*, 417 So. 2d 179, 185 (Ala. 1981); *Nat'l Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357, 1362 (Ala. 1982). Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury. *Dutton*, 419 So. 2d at 1362.
[3] *See Dutton*, 419 So. 2d at 1362-63 (Jones, J., concurring specially) (first distinguishing "ordinary" bad faith cases from "extreme" cases).
[4] *State Farm Fire & Cas.Co. v. Slade*, 747 So. 2d 293, 306-07 (Ala. 1999).
[5] 747 So. 2d at 303-307.
[6] *Id.* at 317.

bad faith) is insufficient to survive summary judgment. Plaintiffs often argued that it could, citing several cases holding that plaintiffs alleging "abnormal" bad faith need not prove entitlement to judgment as a matter of law on the contract claim.[7] Defendants, on the other hand, cited another line of cases holding that if the insurer has a legitimate or arguable reason for refusing to pay the claim, no triable issue is presented on a corresponding claim for failure to investigate.[8]

On September 27, 2013, the Alabama Supreme Court issued a decision clarifying this issue and thus substantially impacting the law of abnormal bad faith. In *State Farm Fire & Casualty Company v. Brechbill*, the plaintiff submitted an insurance claim to State Farm for wind damage to his home.[9] State Farm retained a consultant who initially determined that the loss resulted not from windstorm but from wear and tear and/or faulty workmanship in construction. Plaintiff hired an engineer who disagreed with the insurer's findings. After reinspection, State Farm added as a third ground for denial the policy's earth movement exclusion.[10] Plaintiff hired another engineering consultant who disagreed with State Farm's conclusions. Upon review of that engineer's opinions, State Farm's consultant revised his observations to agree that wind speeds on the date of the claim were in excess of 60 miles per hour.[11]

Brechbill sued State Farm for breach of contract, "normal" bad faith, and "abnormal" bad faith failure to investigate. The trial court granted State Farm's motion for summary judgment on the "normal" bad faith claim, holding that the plaintiff had not created a genuine issue of material fact about whether State Farm had a legitimate reason for refusing to pay the claim. In so ruling, the trial court acknowledged that in order to survive summary judgment, the plaintiff must prove that he was entitled to a directed verdict on the contract claim.[12] However, the trial court denied summary judgment on the claim for "abnormal" bad faith, stating that it could not hold with certainty that State Farm had met its burden of showing that it had marshaled all of the facts necessary to make a good faith coverage determination or that it had adequately investigated the claimed damage, the cause of loss, or the pre-loss condition of the property, or that it had properly subjected the plaintiffs' claim to a reasonable cognitive review. In reaching this holding, the trial court specifically rejected State Farm's contention that the "directed verdict on the contract" standard was equally applicable to abnormal bad faith claims as to those for normal bad faith.[13] The case was tried and the jury returned a verdict for Brechbill.

On appeal, in an opinion authored by Chief Justice Roy Moore, the Alabama Supreme Court stated the issue as follows: "whether the trial court, after finding that State Farm had a

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[7] *See, e.g., Employees' Benefit Ass'n v. Grissett*, 732 So. 2d 968, 976 (Ala. 1998) ("The rule in 'abnormal' cases dispensed with the predicate of a preverdict [judgment as a matter of law] for the plaintiff on the contract claim if the insurer had recklessly or intentionally failed to properly investigate a claim or to subject the results of its investigation to a cognitive evaluation.")

[8] *See, e.g., Weaver v. Allstate Insurance Co.*, 574 So. 2d 771, 774 (Ala. 1990) ("With regard to Weaver's allegation that Allstate intentionally failed to adequately investigate the accident, we agree with the trial court that no triable issue was presented on this issue, because we hold that Allstate's investigation established a legitimate or arguable reason for refusing to pay Weaver's claim, which is all that is required.")

[9] 144 So. 3d 248.

[10] *Id.* at *253-254.

[11] *Id.* at *254.

[12] *See id.* at *254-255.

[13] *Id*. at *255.

reasonably legitimate or arguable reason for refusing to pay Brechbill's claim at the time of the August 7, 2008 denial, erroneously denied State Farm's motion for a judgment as a matter of law on Brechbill's claim of 'abnormal' bad faith failure to investigate."[14] State Farm argued that Brechbill's claim for bad faith refusal to investigate could not proceed as a matter of law because the trial court found that State Farm had a legitimate reason for refusal to pay the claim at the time of denial.[15] Brechbill countered that he could maintain a claim for bad faith refusal to investigate even when evidence of bad faith refusal to pay was insufficient to survive judgment as a matter of law.[16]

The Supreme Court held, first, that there is only one tort of bad faith refusal to pay an insurance claim in Alabama, not two separate torts, although there are two different options for proof.[17] The court confirmed that the plaintiff must establish four elements of a claim for bad faith refusal to pay, representing the "normal" case, with a conditional fifth element (intentional failure to determine) representing the "abnormal" case, in order to recover for bad faith:

(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.[18]

The *Brechbill* court then held that, regardless whether the claim is for failure to pay or failure to investigate, proof of the third element – absence of a legitimate reason for denial – is always required.[19] The court reiterated that if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith.[20] The court also reinvigorated its decision in *Weaver v. Allstate Insurance Company*, which had been weakened somewhat by decisions in recent years, citing with approval the *Weaver* holding that where the "insurer's investigation establishes a legitimate or arguable reason for refusing to pay the insured's claim, that is all that is required."[21] The court then explained that:

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[14] *Id.* at *256.
[15] *Id*. at *257.
[16] *Id*. at * 257.
[17] *Id.* at *257-258.
[18] *Id.* at *257, quoting *National Sec. Fire & Cas. Co. v. Bowen*, 417 So. 2d 179, 183 (Ala. 1982).
[19] "Regardless of whether the claim is a bad-faith refusal to pay or a bad-faith refusal to investigate, the tort of bad faith requires proof of the third element, absence of legitimate reason for denial: 'Of course, if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith.'" *Brechbill*, 144 So. 3d 248 at *258, quoting *Chavers*, 405 So. 2d at 924.
[20] *Brechbill*, 144 So. 3d 248, *258.
[21] 574 So. 2d 771, 774 (Ala. 1990).

> "[b]ecause the trial court's ruling eliminated the third element of bad faith refusal to pay, Brechbill's claim relying on the fifth element, *i.e.*, that State Farm 'intentionally failed to adequately investigate' the claim, must fail. The existence of an insurer's lawful basis for denying a claim is a sufficient condition for defeating a claim that relies upon the fifth element of the insurer's intentional or reckless failure to investigate. The trial court's summary judgment on the third element of bad faith established the law of the case and should have foreclosed further litigation of that claim."[22]

The court also distinguished the 2008 plurality opinion in *Jones v. ALFA Mutual Insurance Company*,[23] a case often relied upon by plaintiffs to avoid summary judgment on abnormal bad faith claims. *Jones* involved a hurricane claim in which the insurer denied coverage on grounds that the damage was caused by soil settlement rather than by wind. Although the *Jones* court affirmed summary judgment on the failure to pay claim, it found a jury question as to the claim for refusal to investigate, noting that ALFA did no investigation into the pre-hurricane condition of the property.[24] The *Brechbill* court explained that a jury question existed in *Jones* because the evidence for the insurer's denial was gathered after the denial was made, unlike State Farm's decision in *Brechbill* which was supported by a debatable reason at the time the claim was denied. The court noted that the standard for claims handling is not "perfection," but rather the existence of a debatable reason at the time of denial.[25]

Thus, the Supreme Court reversed the trial court's judgment on the claim for refusal to investigate, holding that "a bad-faith-refusal-to-investigate claim cannot survive where the trial court has expressly found as a matter of law that the insurer had a reasonably legitimate or arguable reason for refusing to pay the claim at the time the claim was denied. Because State Farm repeatedly reviewed and reevaluated its own investigative facts as well as those provided by Brechbill, it is not liable for a tortuous failure to investigate."[26]

Interestingly, in a special concurrence, Chief Justice Moore wrote further, describing in detail the history of confusion generated by Alabama's judicially created tort of bad faith.[27] He then stated his belief that the judicial creation of the tort was unconstitutional. He urged the Court to abolish the tort in an appropriate case, leaving to the legislature the right to determine whether a bad faith cause of action should exist.[28] Based upon Chief Justice Moore's

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[22] *Id.* at *26-27.

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

[24] *Jones*, 1 So. 3d at 36-37.

[25] *Brechbill*, 144 So. 3d 248, *259-260 (quoting *Weaver*, *supra*). "Bad faith is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of a known duty, *i.e.*, good faith and fair dealing, through some motive of self-interest or ill will". *Thomas v. Principal Financial Group*, 566 So. 2d 735, 741 (Ala. 1990). Stated another way, bad faith requires nonpayment without any reasonable ground for dispute. *Bowen*, 417 So. 2d at 183.

[26] *Brechbill*, 144 So. 3d 248, *259-260.

[27] *Id*. at *260-264.

[28] *Id.* at *264 ("Although the legitimacy of the judicially created tort of bad-faith refusal to pay was not challenged in this case, I believe that this Court's recognition of the tort as the law in Alabama was unconstitutional. I urge the court to reexamine *Chavers*, to overrule it in an appropriate case, and to abolish this judicially legislated tort, leaving

concurrence, Alabama defense practitioners will be wise to incorporate into their answers to bad faith complaints a defense to preserve an argument that the judicially created tort of bad faith is unconstitutional and should be abolished, inasmuch as the Alabama Supreme Court exceeded its constitutional authority by judicially creating the tort.

As a postscript, Shawn Brechbill was a *pro se* litigant. He filed an application for rehearing in which he was supported by *amicus curiae* United Policyholders. The a*micus* brief urged the Supreme Court to limit its opinion to its reversal of the trial court's decision or to clarify the opinion to state that for a bad faith claim to reach trial there must at least be a genuine issue of material fact as to whether or not the insurer had a legitimate reason for refusing to pay. *Amicus curiae* also questioned whether the *Brechbill* decision is inconsistent with the court's opinion in *Slade*, noting that *Brechbill* did not even mention *Slade*, and positing that insurers will now argue that *Slade* has been implicitly overruled. The *amicus* brief also requested the court to recast the elements of bad faith so that the fifth element is merely an alternative method for proving the third element. On January 17, 2014, the Supreme Court denied Brechbill's application for rehearing, without opinion. Thus, the *Brechbill* decision represents the current bad faith law in Alabama. The decision was published in October 2014.

Neither the Alabama Supreme Court nor the Court of Civil Appeals has yet cited or construed *Brechbill*. However, several federal district courts in Alabama have done so. The facts of three of these cases were similar to those in Brechbill – the parties disputed whether the property damage was caused by wind or settling.[29] In two of these wind cases, the courts held that *Brechbill* required summary judgment because plaintiff could not establish the existence of the third element – the absence of a legitimate or debatable reason for the insurer's decision.[30] The other cases involve fire insurance claims,[31] a personal property claim under a homeowner's policy,[32] an ambiguity in a disability policy,[33] and a uninsured motorist policy.[34]

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to the legislative branch the right to determine policy questions such as the intentional breach of an insurance contract by an insurance company.")

[29] *See Lord v. Allstate Ins. Co.*, 2014 U.S. Dist. LEXIS 129813 (N.D. Ala. Sept. 17, 2014) (Magistrate Judge Michael T. Putnam); *Holman v. State Farm Fire and Cas. Co.*, 2014 U.S. Dist. LEXIS 125516 (N.D. Ala. Sept. 9, 2014) (Magistrate Judge John E. Ott), and *Christian v. Country Mutual Ins. Co.*, 2014 U.S. Dist LEXIS 73104 (N.D. Ala. May 29, 2014) (Judge Scott Coogler).

[30] *Holman*, 2014 U.S. Dist. LEXIS 125516 at *11 (court addressed only "normal" bad faith); *Christian*, 2014 U.S. Dist. LEXIS 73104 at *9 (court granted summary judgment as to "normal" bad faith and "abnormal" bad faith failure investigate).

[31] *EMCASCO Ins. Co. v. Knight*, 2014 U.S. Dist. LEXIS 142397 (N.D. Ala Oct. 7, 2014) (Judge Lynwood Smith) (granting summary judgment on abnormal bad faith claim that insurer created its own debatable reason for denial); *Pearson v Travelers Home & Marine Ins. Co.*, 2014 U.S. Dist. LEXIS 135419 (N.D. Ala. July 2, 2014) (Magistrate Judge John England, III)(granting summary judgment as to both normal bad faith and abnormal bad faith failure to investigate claim).

[32] *Stewart v. Allstate Indemnity Company*, 2014 U.S. Dist. LEXIS 46012 (N.D. Ala. April 3, 2014) (Magistrate Judge Harwell Davis, III)(granting summary judgment on all breach of contract and bad faith claims due to plaintiff's failure to comply with policy provisions regarding submission of claims for payment and appearing for Examination Under Oath).

[33] *Phillips v. National Union Fire Ins. Co.*, 2013 U.S. Dist. LEXIS 155327, *18-19 (N.D. Ala. Oct. 30, 2013) (Judge Scott Coogler)(granting summary judgment as to normal bad faith but denying it as to abnormal bad faith, holding that "[t]he absence of a reasonable or debatable reason for denial of coverage remains an element of the tort of bad faith even in the abnormal case. *Brechbill, 2013 WL at *9.* However, an insurer cannot rely on an ambiguous policy

Each of these decisions construes *Brechbill* slightly differently. They reflect some subtle differences, and perhaps a bit of confusion, with regard to applicability of the "directed verdict on the contract" standard, the plaintiffs' burden of proof in an abnormal bad faith case in light of *Brechbill*, and the status of certain pre-*Brechbill* cases such as *Jones v. ALFA Mutual Insurance Co.*[35] and *Employees' Benefit Ass'n v. Grissett*.[36] These decisions raise questions that will likely be presented to the Alabama Supreme Court in the future, such as whether and to what extent *Slade* is still good law, whether *Brechbill* applies to abnormal bad faith *other than* failure to investigate, whether an insurer can survive an abnormal bad faith claim when the court finds the insurance policy to be ambiguous, and whether the directed verdict on the contract claim standard is applicable to abnormal bad faith claims.

As with any area of the law, bad faith litigation in Alabama has experienced ebbs and flows in the thirty-plus years since its inception. Bad faith remains a frequently pled cause of action. However, the Alabama Supreme Court's refinement of the tort in *Brechbill* provides guidance to insurers on how to review claims in order to maximize their ability to defeat allegations of bad faith. Increased awareness of insurers, coupled with their heightened attention to detail and the Alabama Supreme Court's continued clarification of the parameters of the tort has resulted in increasing difficulty for plaintiffs attempting to establish a *prima facie* claim of bad faith.

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term to negate this element. *Grissett, 732 So. 2d at 977* ("The absence of a debatable reason not to pay a claim cannot be grounded on the vagaries of construction of an ambiguity").

[34] *Joffrion v Allstate Ins. Co.*, 2014 U.S. Dist. LEXIS 96483 (S.D. Ala. July 15, 2014) (Judge William Steele) (granting summary judgment on plaintiffs's allegation of bad faith failure to investigate their damages under a UIM claim).

[35] 1 So. 3d 23 (Ala. 2008).

[36] 732 So. 2d 968 (Ala. 1998).