Long Live The Debatable Reason

Back To The Basics Of Alabama Bad Faith Law

By Henry T. Morrissette

The Alabama tort of bad faith was first recognized as "an extreme remedy that finds its application in extreme circumstances within the restricted parameter of an unexcused failure to pay benefits."[1] Beginning shortly after the tort was first recognized, however, almost every action alleging a breach of an insurance contract has been accompanied by a bad faith claim. From the beginning, Alabama bad faith law has had a relatively high standard for liability, requiring a showing that the insurer lacked a legitimate debatable reason for failing to pay the claim, coupled with actual knowledge of that fact.

With the development of the case law relating to the "abnormal case" exceptions to the directed verdict standard, lawyers, some trial judges, and even the Eleventh Circuit Court of Appeals have asserted that Alabama law has moved away from the debatable reason standard in bad faith claims toward a standard that comes close to the application of a reckless, or even negligent, claim handling standard. This article will demonstrate that the lawyers and court opinions advancing a shift away from the debatable reason standard misinterpret the decisions on which they purport to rely, mainly *State Farm Fire & Casualty Company v. Slade*.[2] Examining the evolution of the Alabama law of bad faith to its present state demonstrates that the existence of an objective debatable reason for denying an insurance claim at the time that claim was denied still precludes bad faith liability as a matter of law.

I. RECOGNITION OF A CLAIM OF BAD FAITH UNDER ALABAMA LAW

The Alabama tort of bad faith failure to pay an insurance claim was first recognized in *Chavers v. National Security Fire & Casualty Company*.[3] In that case, the Alabama Supreme Court held 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 refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether there was any lawful basis for such refusal.'[4]

Later in *Bowen*, the court summarized the basic elements of a bad faith claim, which remain applicable today, holding:

[T]he plaintiff in a "bad faith refusal" case has the burden of proving:

(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.

In *Barnes*, the court emphasized that the insurer is entitled to debate a claim when that claim is "fairly debatable," whether the debate concerns a matter of fact or law.[6] The court further held that the requirement that the insurer have actual knowledge of the absence of a debatable reason implies a conscious wrongdoing, such that bad faith is not simply bad judgment or negligence, but rather "imports a dishonest purpose and means a breach of known duty, i.e. good faith and fair dealing, through some motive of self-interest or ill will."[7]

Courts applying the absence of a debatable reason standard developed the "directed verdict on the contract test" which held that, in order to make out a *prima facia* bad faith case, plaintiff must show that he is entitled to a directed verdict on a contract claim since any fact issue that would give rise to a jury question on a contract claim would provide an arguable reason for denying the claim.[8]

II. THE ABNORMAL CASE EXCEPTION

In adopting the directed verdict test, the Alabama Supreme Court recognized that this test was applicable "in the normal case," allowing for exceptions to that test. Examples of the exceptions that have developed include the situation where there is a dispute as to the very existence of the fact that the insurer relied on for the debatable reason, such as whether a witness actually made an oral statement upon which the insurer relied in denying the claim.[9] This exception is characterized as an insurer allegedly creating its own debatable reason.

The Alabama Supreme Court has also held that the

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[1] *Waldon v. Cotton States Mut. Ins. Co.*, 481 So. 2d 340 (Ala. 1985).

[2] 747 So. 2d 293 (Ala. 1999).

[3] 405 So. 2d 1 (Ala. 1981).

[4] *Chavers*, 405 So. 2d at 7 (citation omitted); see also *Nat'l Sec. Fire & Cas. Co. v. Bowen*, 417 So. 2d 179, 183 (Ala. 1982); *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981).

[5] *Bowen*, 417 So. 2d at 183.

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

[7] *Id; see also Blue Cross & Blue Shield of Ala. v. Granger*, 461 So. 2d 1320, 1327-1328 (Ala. 1984).

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

"abnormal case exception" exists when the insurer bases its denial on an ambiguous provision in the policy.[10] The court explained that an insurer's subjective belief that a portion of its own insurance contract precludes coverage is not an absolute defense to a bad faith claim on the basis that it would encourage insurers to write ambiguous insurance contracts if they could create a debatable reason based on their own interpretation of their contract as excluding coverage.[11]

The Alabama courts have also applied the abnormal bad faith case exception to those situations in which the insured "intentionally or recklessly failed to properly investigate plaintiff's claim or to subject the results of the investigation to cognitive evaluation and review."[12] This exception to the application of the directed verdict test has been the source of much confusion and uncertainty for litigants and courts.

As explained in *Aetna Life Insurance Co. v. Lavoie*,[13] the failure to investigate or subject the results of an investigation to cognitive evaluation or review arises out of the second tier of the Chavers test. Elaborating on the first tier of the *Chavers* test, the *Lavoie* court explained that bad faith arises where there is no lawful basis for refusal, coupled with actual knowledge of the lack of lawful basis for refusal.[14] Drawing from *Barnes*, the court explained that the second tier of the *Chavers* test, "the intentional failure to determine whether there was an arguable reason for denying the claim," may be used to support a finding of "actual knowledge" if the plaintiff cannot prove "actual knowledge" under the first tier.[15]

In *Lavoie*, the court quoted *Barnes:*

> The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review. Implicit in that test is the conclusion that the 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 . . . [T]he insurer's knowledge of the non-existence of any debatable reasons for refusal would be a question for the finder of fact, i.e., the jury.[16]

Interestingly, the block quote from *Barnes* in *Lavoie* includes an ellipsis after the second sentence, signifying a significant omission by the *Lavoie* court from that quote. The omitted language reads:

> 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.[17]

As explained in *Barnes*, a lawful basis means a legitimate or arguable reason for failing to pay the claim.[18]

After *Lavoie*, the Alabama Supreme Court in *Thomas* cited *Lavoie* for the proposition that a plaintiff could prove the intentional failure on the part of the insurer to determine whether there was a lawful basis for denying a claim by proving that the insurer either intentionally or recklessly failed to properly investigate the claim or subject the results of the investigation to cognitive evaluation or review.[19] The *Thomas* court, however, did not address the situation where there was a legitimate debatable or arguable reason present because it held that none of the evidence in the insurer's file supported the denial and that the insurer's alleged lawful basis for denying the claim was the insured's own subjective belief as to the intent of the policy.[20] For that reason, the court held that the directed verdict test did not apply and that the bad faith claim was a question for the jury.[21]

Shortly after the *Thomas* decision, the Alabama Supreme Court considered the impact of the existence of a debatable reason on a bad faith failure to investigate a claim in *Weaver v. Allstate Ins. Co.*[22] In *Weaver*, the court held that evidence from witnesses interviewed by Allstate, as well as the accident report, provided a legitimate, arguable basis for denying plaintiff's claim. The court then held that "if any one basis for denial of coverage is at least 'arguable,' this court need not look any further," and that a claim for bad faith refusal to pay will not lie.[23] The court rejected plaintiff's assertion that Allstate intentionally failed to adequately investigate plaintiff's claim, quoting the Eleventh Circuit Court's holding in *State Farm Fire & Casualty Co. v. Balmer:*[24]

> "Alabama law is clear . . . that regardless of the imperfections of State Farm'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 claim."[25]

In *Weaver*, the Alabama Supreme Court clearly stated

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[9] *Jones v. Ala. Farm Bureau Mut. Cas. Co.*, 507 So. 2d 396 (Ala. 1987).

[10] Blackburn v. Fid. & Deposit Co. of Md., 667 So. 2d 661, 669 (Ala. 1995).

[11] *Id.*

[12] Thomas v. Principal Fin. Group, 566 So. 2d 735, 744 (Ala. 1990)

[13] 505 So. 2d 1050 (Ala. 1987).

[14] Lavoie, 505 So. 2d at 1052.

[15] *Id.*

[16] Lavoie, 505 So. 2d at 1052 (quoting Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916, 924 (Ala. 1981).

[17] Barnes, 405 So. 2d at 924.

[18] *Id.*

[19] Thomas, 566 So. 2d at 742.

[20] *Id.* at 750.

[21] *Id.*

[22] 574 So. 2d 771 (Ala. 1990).

[23] *Id.* at 774.

[24] 891 F.2d 874 (11th Cir.), *cert. denied* 498 U.S. 902 (1990).

[25] *Weaver*, 574 So. 2d at 774 (quoting *State Farm Fire & Casualty Co. v. Balmer*, 891 F.2d 874, 877 (11th Cir.) (emphasis added in *Weaver*); see also *Oblander v. USAA Cas. Ins. Co.*, 792 So. 2d 1103, 1112 (Ala. Civ. App. 2000) *cert. denied* (February 9, 2001) (citing *Weaver* as the basis for holding that the existence of a legitimate or arguable reason for refusing to pay the claim precluded a finding of bad faith failure to investigate).

that the existence of a debatable reason for denying the claim at the time the claim was denied precludes a finding of bad faith based on an alleged intentional reckless failure to investigate or to properly subject plaintiff's claim to cognitive evaluation or review. This holding is consistent with the *Barnes* opinion's description of the failure to investigate exception's roots in the second tier of the *Chavers* test for bad faith – "The intentional failure to determine whether there was an arguable reason for denying the claim."[26]

III. *STATE FARM FIRE & CASUALTY COMPANY V. SLADE*

Later, the Alabama Supreme Court issued its opinion in *State Farm Fire & Casualty Co. v. Slade*,[27] extensively discussing Alabama bad faith law. The *Slade* court acknowledged that standards for recovery for bad faith lacked precision and that the lack of precision has caused confusion among the bench and bar. It then proceeded to outline the above-discussed law, quoting heavily from *Thomas* and *Barnes*. The *Slade* court explained the directed verdict test and the exceptions to the directed verdict test that have been recognized as the "abnormal case," describing the exceptions as those instances in which the plaintiffs 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 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 plaintiff's claim.[29]

In *Slade*, the jury found for the defendant insurer on the breach of contract claim, but returned a verdict in favor of the plaintiffs on the bad faith claim. The *Slade* court held that State Farm's defense to plaintiffs' first theory for obtaining coverage was based on an ambiguity in the policy. The court then held that a debatable reason could not be based on "vagaries of construction of an ambiguity."[30] The *Slade* court found that there was a legitimate basis to deny the plaintiffs' claim on their second theory of liability relating to an unambiguous policy exclusion. The court next held that State Farm failed to even investigate plaintiffs' third theory of coverage. Thus, the *Slade* court found that State Farm had a debatable reason for denying coverage on only one of plaintiffs' three asserted grounds for coverage, and held that there could be no bad faith liability as to that ground.[33] The court found, however, that the issue of bad faith on the other two theories was properly submitted to the jury.[34]

The court then rejected plaintiffs' claim that they could recover based on the alleged bad faith failure to investigate when the jury had found that there was no breach of contract, holding that a breach of contract is a required element of the tort of bad faith.[35] The court explained:

> We make it clear that in order to recover under a theory of an abnormal case of bad-faith failure to investigate an insurance claim, the insured must show (1) that the insurer failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review and (2) that the insurer breached the contract for insurance coverage with the insured when it refused to pay the insured's claim.[36]

Ignoring the discussion of the applicable law earlier in the *Slade* opinion, lawyers have argued, and some courts have held, that the above-quoted language essentially sets forth the only required elements for bad faith failure to investigate. Read in its entirety, however, the *Slade* opinion clearly does not support expansion of the tort of bad faith beyond the precedent on which *Slade* expressly relies. *Slade* correctly states the law from prior decisions, even quoting the above-discussed language from *Barnes* explaining that the existence of a debatable reason precludes a bad faith claim as a matter of law.[37] One could also argue that the *Slade* court's holding is faithful to the original elements of bad faith in that the court found that the insurer improperly relied on an ambiguity in denying liability on plaintiff's first theory of coverage and that the insurer never investigated plaintiff's third theory of coverage to determine whether there was an arguable reason to reject that theory. Accordingly, the *Slade* opinion does not represent a change or expansion in the law on bad faith.

IV. *MUTUAL SERVICES CASUALTY INSURANCE COMPANY V. HENDERSON*

One of the most striking examples of the misinterpretation in *Slade* as expanding the tort of bad faith is the Eleventh Circuit Court of Appeals' opinion in *Mutual Services Casualty Insurance Co. v. Henderson*.[38] In *Henderson*, the Eleventh Circuit reversed the trial judge's ruling granting summary judgment in favor of the insurance company based on its interpretation of *Slade*. *Henderson* involved a

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[37] *Id.* at 304.
[38] *368 F.3d 1309 (11th Cir. 2004).*
[26] *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916, 924 (Ala. 1981).
[27] 747 So. 2d 293 (Ala. 1999),
[28] *State Farm Fire & Casualty Co. v. Slade*, 747 So. 2d 293, 303 (Ala. 1999).
[29] *Id.* at 294.
[30] *Slade*, 747 So. 2d at 315.
[31] *Id.* at 316.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 318.
[36] *Id.*
[37] *Id.* at 304.
[38] *368 F.3d 1309 (11th Cir. 2004).*

claim by the plaintiffs relating to a lawsuit by neighbors alleging damages arising from the Hendersons' poultry farming operation.

The specific holding in the case addressed three separate letters that the court held could each be construed as claim denials. The court held that the grounds for denial asserted in the first and second letters were not arguable reasons for denial, but that the third letter asserted a legitimate reason for denial.[39] The Eleventh Circuit held that the insurance company failed to conduct an adequate investigation, or any investigation in fact, before writing the first two letters denying coverage, but concluded that the defendant did conduct an adequate investigation before asserting the legitimate grounds for denial in the third letter.[40] The court's holding that bad faith was an issue for the jury is arguably the correct holding under prior Alabama precedent for bad faith claims, since Alabama law has long held that the adequacy of the basis for a denial is evaluated based on the information available at the time of the denial rather than the information developed later.[41]

Henderson, however, goes beyond the specific holding discussed above in its explanation of the law of bad faith. First, the court held that the normal bad faith claim would not have been properly submitted to the jury because the basis for denial asserted in the third letter provided a legitimate and arguable reason for denying the claim.[42] This holding is incorrect because, as noted above, the court actually held that there was an issue of fact as to whether the first two letters constituted bad faith denials without a debatable reason. Under the law that the basis for denial is evaluated at the time of the denial, those first two denials should have created an issue of fact for the jury under the normal bad faith case.

The *Henderson* court went on to evaluate the "abnormal bad faith claim." The court cited the above-quoted elements from *Slade* for proving an abnormal bad faith failure to investigate claim and held that, based on those elements, "[u]nlike in "normal" bad faith claims, providing an arguable reason for denying an "abnormal" bad faith claim does not defeat that claim."[43] The *Henderson* court held that the Alabama Supreme Court had moved away from its holding in *Weaver* that "regardless of the imperfections of [insurer's] investigation, the existence of a debatable reason for denying the claim at the time that the claim was denied defeats a bad faith failure to pay claim."[44]

In addition to the above holding, the *Henderson* court also held that there was no separate requirement under Alabama law concerning the "abnormal" bad faith case of an intent to injure and that a bad faith failure to investigate requires only a "reckless" failure to investigate.[45]

The *Henderson* court's statement that the *Slade* court found an arguable reason for denying the contract claim, but still found a jury issue as to the bad faith failure to investigate claim, is incorrect. As explained above, the *Slade* court only found that there was an arguable reason for denying plaintiffs' claim on the second of plaintiffs' three theories for obtaining coverage under the policy.[46] The court held that there could be no bad faith liability on that ground and found an issue of fact for the jury on bad faith only as to the other two coverage theories asserted by plaintiffs.[47]

Likewise, the court in *Employees Benefit Ass'n. v. Grissett*,[48] the other case cited by *Henderson*, held that the debatable reason asserted by the insurer as to part of the claim was based on an ambiguity in the policy, which the court held could not be used as the basis for a claim that the insurer had a legitimate basis for denying the claim.[49] As to the other portion of the claim in *Grissett*, the defendant's representative admitted that the claim should have been paid, so there was no arguable basis for denying the claim. Furthermore, the court concluded that there had been no

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[39] *Henderson, 368 F. 3d at 1317-1319.*

[40] *Id.*

[41] *Nat'l Ins. Assoc. v. Sockwell,* 829 So. 2d 111, 130 (Ala. 2002).

[42] *Henderson,* 368 F. 3d at 1314-1315.

[43] *Henderson,* 368 F. 3d at 1315 *(citing Slade,* 747 So. 2d at 315-16 and *Employees Benefit Ass'n v. Grissett,* 732 So. 2d 968, 975 (Ala. 1998)).

[44] *Id. at 1315, n. 2.*

[45] *Henderson,* 368 F. 3d at 1316.

[46] *State Farm Fire & Casualty Co. v. Slade,* 747 So. 2d 293, 316 (Ala. 1999).

[47] *Id.* at 315-316.

[48] 732 So. 2d 968 (Ala. 1998).

[49] *Grissett,* 732 So. 2d at 975.

investigation of that claim. Thus, *Grissett* does not hold that there can be a bad faith claim when there is a debatable reason for denying the claim that is not based on an ambiguity in the policy. In fact, the Alabama Supreme Court in *Grissett* recognized that the theory that the insurer recklessly or intentionally failed to properly investigate the claim is a method of proving the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim. This point presupposes that the insurer did not have a legitimate or arguable reason to refuse to pay the claim known to the insured.[50] In other words, proving a reckless or intentional failure to investigate does not establish the lack of a debatable reason, but rather is used to establish the defendant's knowledge or reckless disregard of the fact that there is no legitimate or reasonable basis for denying the claim.[51]

Accordingly, contrary to the statement by the *Henderson* court, neither *Slade* nor *Grissett* found that there can still be a valid claim for bad faith failure to investigate when the insurer has a legitimate or arguable reason for denying the claim, and the above-discussed holding in *Weaver* remains good law.

V. IN *SINGLETON V. STATE FARM FIRE & CASUALTY COMPANY*, THE ALABAMA SUPREME COURT CONFIRMS THAT *SLADE* DID NOT CHANGE THE ALABAMA BAD FAITH LAW

In *Singleton v. State Farm Fire & Casualty Co.*,[52] the Alabama Supreme Court again evaluated the abnormal bad faith issue. The court held that the defendant insurer was entitled to summary judgment on the abnormal bad faith issue because the adjuster for the insurer relied on a statement from one of the roofers who provided an estimate for plaintiffs' roof that the damaged portion of the roof could be repaired for less than the amount of the policy deductible. The court noted that the adjuster's handling of the claim may not have complied with certain requirements in the claims manual, but that the non-compliance could only indicate bad judgment or negligence.[53] The court reiterated that more than bad judgment or negligence was required for bad faith,[54] and concluded that the plaintiffs "ha[d] failed

[50] *Id.* at 976.
[51] *Id.* (citing *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916, 924 (Ala. 1981).
[52] 928 So. 2d 280 (Ala. 2005).
[53] *Id.* at 286-287.

to adduce sufficient evidence of 'dishonest purpose' or breach of known duty, i.e. good faith and fair dealing, through some motive of self interest or ill will."[55]

While couched in terms of an evaluation of the sufficiency of the investigation, the *Singleton* opinion indicates that the report from the roofer provided a legitimate debatable reason for denying the claim and that the existence of that debatable reason precluded a finding of bad faith failure to investigate. In addition, it is significant, given the holding in *Henderson*, that the Alabama Supreme Court also relied on the requirement that plaintiff provide evidence of a "dishonest purpose" or a "motive of self interest or ill will," rather than just recklessness.[56]

VI. *JONES V. ALFA MUTUAL INSURANCE COMPANY* CAUSES SOME FURTHER CONFUSION CONCERNING ALABAMA BAD FAITH LAW

In *Jones v. Alfa Mutual Insurance Co.*,[57] the Alabama Supreme Court continued to focus on the theory of bad faith failure to investigate. In *Jones*, plaintiffs submitted a claim for damage to their home after Hurricane Opal, including roof damage and damage relating to cracking in the walls and fireplace. In evaluating the claim, Alfa hired an engineer who opined that the cracks in the walls and fireplace in the plaintiffs' home were not caused by Hurricane Opal.

After finding that there was an issue of fact as to the statute of limitations, the court addressed the substance of the bad faith claim. The court noted that plaintiffs had made a claim for both "normal" bad faith and also for "abnormal" bad faith in the form of a claim for bad faith failure to investigate.

In analyzing the "normal" bad faith claim, the court held that there was an issue of fact concerning coverage based on the report of the outside engineer hired by the insurer to inspect the property.[58] The court affirmed the trial court's summary judgment on the "normal" bad faith claim because it held that the engineer's report provided an issue of fact.[59] For that holding, the court relied on the authority of *Adams v. Auto Owners Insurance Co.*,[60] in which the court concluded that the reliance on an adjuster and the report of an outside engineer provided an arguable reason for denying the claim.

While the *Jones* court held that there was an issue of fact on the contract claim based on the outside engineer's report, the *Jones* court went on to consider whether Alfa was liable for bad faith failure to investigate. Pointing to alleged imperfections in the engineer's inspection and failures by the Alfa adjusters to follow up with certain individuals concerning the condition of the house before the storm, the court held that there was a genuine issue of material fact as to whether Alfa was liable for bad faith failure to investigate.[61]

Significantly, only four of the justices joined in the portion of the opinion discussing the "abnormal bad faith" issue, with the other justices concurring only in result.[62] As a plurality opinion, the precedential value of the opinion is "questionable at best."[63] While that portion of the opinion is only a plurality opinion, it is troubling in that it appears to endorse an evaluation of alleged imperfections in the claim handling as the basis for denial of summary judgment after finding, based on the *Adams* opinion, that the report from the outside engineer created an issue of fact on the contract.

Jones does not endorse a change in the law addressing the bad faith failure to investigate issue. The abnormal bad faith portion of the *Jones* opinion cites to the opinion in *Slade*, which found that the insurer failed to even investigate plaintiffs' theory that lightening directly struck their home in that State Farm never sent an expert to their home who was qualified to conduct a lightening investigation and never interviewed any witnesses. Thus, the court held that the *Slade* defendant failed to determine whether there was an arguable basis for rejecting the lightening claim. The plurality opinion in *Jones* analogizes to this portion of the *Slade* opinion by pointing out that the evidence indicated that the engineer never inspected the roof or the attic of the plaintiffs' home, even though the roof had suffered damage.[64] *Jones* also contained unusual facts concerning alleged statements to the plaintiffs by the agent, the engineer, and other employees concerning the coverage and the cause of the damage. The court also cited Alfa's failure to analyze records in its possession of the condition of the house before the hurricane or to interview individuals who saw the house before the hurricane. Thus, there are unique facts in the *Jones* case on which the court based its holding that *Jones* was analogous to *Slade*.

The concern with *Jones* is that the court appears to go further than *Slade* in that the court did not find the absence of investigation of the coverage theory advanced by the plaintiffs, but rather appears to have endorsed an evaluation of alleged imperfections in the investigation as the basis for denial of the motion for summary judgment. Unlike in *Slade*, there was no evidence that the engineer was not qualified, and the court does not explain how the insurer's reliance on the engineer's report constitutes an intentional failure to determine whether there was a debatable reason to deny the claim.[65] Because it is a plurality opinion with unique facts, perhaps *Jones* should properly be considered to be limited to its facts and not a

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[54] *Id.*

[55] *Id.*

[56] *Singleton v. State Farm Fire & Casualty Co.*, 928 So. 2d 280, 287 (Ala. 2005).

[57] 1 So. 3d 23 (Ala. 2008).

[58] *Jones*, 1 So. 3d at 34.

[59] *Id.*

[60] 655 So. 2d 969 (Ala. 1995),

[61] *Id.* at 35-37.

[62] *Id.* at 37.

[63] *Ex Parte Discount Foods, Inc.*, 789 So.2d 842 (Ala. 2001).

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

[65] *See Adams v. Auto Owners Ins. Co.*, 655 So. 2d 969, 972 (Ala. 1995) (holding that an inspection by an independent engineer provided a reasonably arguable and legitimate reason for denying the insured's claim).

deviation from prior precedent. The *Jones* court certainly does not expressly state that it is deviating from the fundamental rule from *Barnes* that an insurer cannot be liable for bad faith if a lawful basis for denial actually exists.[66]

VII. Conclusion

The above analysis establishes that defense counsel should continue to assert that the existence of a legitimate, arguable basis for denying the claim at the time of denial precludes a finding of bad faith – either normal or abnormal – as a matter of law. While the case law concerning allegations of bad faith failure to investigate has caused confusion for lawyers and for some courts, there has never been an Alabama Supreme Court case holding to the contrary. Moreover, the "debatable reason" rule is consistent with the fundamental elements of the tort of bad faith on which the bad faith failure to investigate theory is based. The question of whether a claim was properly investigated and whether the results of the investigation were subject to cognitive evaluation or review has always been the test for deciding whether there was an intentional failure to determine whether there was any lawful basis for denying the claim.[67] It is self-evident that, if there was a known lawful basis for the denial of the claim, then there could not possibly be an intentional failure to determine whether there was any lawful basis for the claim denial. Allowing a bad faith claim to go to the jury based on a failure to investigate when there exists an objective, arguable reason for the claim denial is not only contrary to the fundamental elements of a claim for bad faith, it also defies logic. Furthermore, focusing the decision on whether a bad faith claim goes to a jury on an analysis of imperfections in the claim investigation and the activities that the insurer failed to perform approaches a claim for negligent claim handling, which has never been an actionable claim under Alabama law.[68]

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[66] *State Farm Fire & Casualty Co. v. Slade*, 747 So. 2d 293, 304 (Ala. 1999) (quoting *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916, 924 (Ala. 1981).

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

[68] *Singleton v. State Farm Fire & Casualty Co.*, 928 So. 2d 280, 286-287 (Ala. 2005) (the claim handling imperfections cited by the plaintiffs amount to, at most, negligence, which is insufficient to support a bad faith claim).

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