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INSURANCE LAW UPDATE

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I. INSURANCE CASE LAW UPDATE

A. BURDEN OF PROOF IN THE INSURANCE FRAUD CASE

Prior to May 13, 1994, those who practiced in the area of insurance fraud law found the law to be in a state of flux. There was a line of cases in Alabama that stated in the insurance fraud case when fraudulent conduct had been discovered by a Plaintiff, but between the time of purchase and the time of discovery no claims were made on the insurance policy in question, no cause of action for fraud would arise because the period of time had past without the Plaintiff having made a claim. These cases stood for the principle that you must have made a claim and have incurred damages in order for a fraud case to exist. See, Moore v. Liberty National Life Insurance Company, 581 So.2d 833 (Ala. 1991); Allen v. Gulf Life Insurance Company, 617 So.2d 664 (Ala. 1993); and Applin v. Consumers Life Insurance Company, 623 So.2d 1094 (Ala. 1993).

However, there was a second line of cases that stood for the principle that a fraud claim was actionable at the time the alleged fraudulent transaction occurred, viewing the injury or damage as the payment of unnecessary premiums. See generally Willingham v. United Insurance Company of America, 628 So.2d 328 (Ala. 1993); Liberty National Life Insurance Company v. Waite, 551 So.2d 1003 (Ala. 1989); Guinn v. American Integrity Insurance Company, 568 So.2d 760 (Ala. 1990); Brewton v. Alabama Farm Bureau Mut. Casualty Ins. Co., 474 So.2d 1120 (Ala. 1985); and Old Southern Life Insurance Company v. Woodall, 348 So.2d 1377 (Ala. 1977).

The Alabama Supreme Court having discussed both line of cases decided that the second line of cases was "the better law" and **overruled** the first line of cases, in its holding of Boswell v. Liberty National Life Insurance Company, [Ms. 1930222, May 13, 1994] ___ So.2d ____ (Ala. 1994).

The Boswell decision is a key decision in fraud cases and is now the standard in making a prima facie case for fraud.

B. VENUE IN THE INSURANCE FRAUD CASE

While it is important to have a good understanding of the venue statutes as they pertain to all tort cases in Alabama, there is a special insurance venue statute that most lawyers overlook. Section 6-3-5, Ala. Code (1975), provides venue in the county where the Plaintiff lives so long as the Defendant insurance company does business in that county. To qualify for doing business in that county, all that is required is that the insurance company mail the policy to the Plaintiff.

In addition, there are other factors that can be considered under § 6-3-5, but it is a very useful tool in defeating a Defendant insurance company's motion to transfer

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the case to a less desirable county. See also Ex Parte City of Fayette, 611 So.2d 1032 (Ala. 1992), and Rule 82, A.R.Civ.P..

Recently, the Supreme Court of Alabama in the case of Ex Parte Bloodsaw, [Ms. 1930536, Sept. 2, 1994] ___ So.2d ___ (Ala. 1994), a breach of contract and bad faith insurance case, the Court allowed the Plaintiff to file her case in Macon County, when she resided in Elmore County and all documents sent to her were sent to her in Elmore County. The Court found that the Defendant insurance company failed to prove that Elmore County was a significantly more convenient forum for the parties than Macon County. The Court seemed to heavily rely on § 6-3-5, Ala. Code, (1975), as well as the fact that Macon County and Elmore County were contiguous. However, the Court appeared to be most impressed with the fact the Defendant insurance company failed to prove that Elmore County was a significantly more convenient forum for all the parties than was Macon County.

The Bloodsaw opinion is an excellent opinion supporting the Plaintiff's right to file his or her lawsuit in the county he or she desires.

C. AGENCY LAW IN THE INSURANCE FRAUD CASE

In the insurance fraud case, the issue of agency inevitably surfaces as a potential trouble area in connecting the company with the misconduct of the agent. However, recently the Supreme Court of Alabama issued an opinion that more clearly defines the responsibilities of the insurance company with regard to the misconduct of its agents. In the case of Ragsdale v. Life Insurance Company of North America, 632 So.2d 465 (Ala. 1994), the Court held that an insurance company cannot give authority to a person to solicit and obtain applications for insurance, and give them the power to explain benefits available under particular policies, and then attempt in the case of liability, to claim to be exempt from responsibility when that person misrepresents the coverage available to the insured. Id. at 469.

The Ragsdale Court specifically stated that the law of agency in Alabama is a jury question. The Court stated:

> "'In Alabama, agency is determined by the facts, and not by how the parties might characterize the relationship', Semo Aviation, Inc. v. Southeastern Airways, 366 So.2d 936, 940 (Ala. 1978); Battles v. Ford Motor Company, 597 So.2d 688, 689 (Ala. 1992). 'If the facts establish the relationship of principal and agent, the intentions of the parties is immaterial, and the character of the relationship is

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> not affected by an agreement between the parties that an agency does not exist, or that some other relation does exist', Semo Aviation, 366 So.2d 940."

Ragsdale, 632 So.2d at 468.

Most importantly, the Court went further to state:

> "'An agent's authority is measured by the powers which his principal has caused him or permitted him to 'seem to possess'. As to third persons without knowledge or notice, it is not limited to the powers actually conferred and those to be implied as flowing therefrom, but includes as well the apparent powers which the principal by reason of his conduct is estopped to deny'".

Ragsdale, 632 So.2d at 468 (citing Patterson v. Williams, 206 Ala. 527, 528, 91 So.315 (1921); Blue Cross-Blue Shield of Alabama v. Thorton, 56 Ala.App. 678, 683, 325 So.2d 187 (1975)).

It is abundantly clear from the Ragsdale opinion that the question of agency must go before the jury. Therefore, any argument by a Defendant insurance company stating that they are not responsible for the acts of the agent, Ragsdale defeats that argument.

D. A WARRANTY CAN BE AN INSURANCE CONTRACT

Recently the Supreme Court of Alabama issued the opinion of Schoepflin v. Tender Loving Care Corporation, 631 So.2d 909, (Ala. 1993) which declared that a warranty can, for purposes of bad faith, be considered an insurance contract.

The Schoepflin Court found that an insurance contract is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee, a certain ascertainable sum of money on a specified contingency. Using this definition the Court found that there was an agreement reduced to a formal document that described three available "coverage plans", and it provided that in the event of a mechanical breakdown that the Defendant warranty company would pay the Plaintiff for the cost of repairing or replacing certain covered parts on his new automobile. This warranty contract also contained a specific procedure for filing "claims" as well as certain exclusions in pertinent definitions. The Court further rationalized that the Plaintiff paid a fee to the Defendant in exchange for its assumption of the risk of mechanical failure of his automobile.

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Despite the warranty company's position that the contract was not an insurance contract because the word "insurance" appeared no where in the contract, the Court found that the contract between the Plaintiff and the Defendant in this particular case was an insurance contract. Thus, the "insurance contract" was subject to the tort of bad faith.

This is a significant opinion in that it allows claims not paid under an extended warranty sold with an automobile, to be subject to the tort of bad faith. In essence, this case creates a new cause of action.

E. NEGLIGENT AND/OR WANTON SUPERVISION

In the case of Northwestern Life Insurance Company v. Sheridan, 630 So.2d 384 (Ala. 1993), an insurance fraud case resulting in a $26,000,000 award to the Plaintiffs, which was ultimately reduced to half that figure on appeal, seemed to resurrect the tort of negligent and/or wanton supervision, a tort that has been around since 1910. See Sloss-Sheffield, Steel & Iron Co. v. Bibb, 164 Ala. 62, 51 So. 345 (1910). The tort has variations such as wrongful hiring and retention, wrongful supervision, negligent supervision, and wanton supervision. However, it is the wanton supervision claim that results in the award of punitive damages.

In the Sheridan case, a rogue agent for Northwestern Mutual Life Insurance Company had represented certain qualified retirement pension plans and deferred compensation plans to the Plaintiffs, plans which were not available from Northwestern, but the evidence presented in that case allowed the jury to conclude that Northwestern knew of the agent's unethical conduct and not only tolerated such conduct, but actually exploited the agent's misconduct all for the benefit of profit. This evidence was significant in supporting the statutory requirements for vicarious liability found under § 6-11-27, Ala. Code, (1975). Again, it was the evidence establishing wantonness that allowed the punitive damage award to withstand the scrutiny of an appeal.

In the insurance fraud case where there is misconduct by an agent, a negligent and/or wanton supervision claim should be alleged as a separate count in the complaint.

II. DEFEATING EMPLOYER'S RETIREMENT INCOME SECURITY ACT ("ERISA")

With the continuing discovery of fraudulent conduct on behalf of insurance companies resulting in punitive damages has caused insurance companies to take drastic measures in fighting back. One of their most often used defenses is that of the ERISA statutes. However, a good investigation of the facts **before** filing a lawsuit can prevent the devastating effect of ERISA pre-emption.

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A discussion of the following ways of "defeating ERISA" should be analyzed **before filing** the insurance fraud case.

A. IS THERE A PLAN?

First and foremost, attempt to determine if an employee welfare benefit plan is in place. The most common test used for this analysis is that found in Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). Under Donovan it is not only the five criteria listed in that case that should be analyzed, but once all of the facts have been applied to the general test, you should then further your analysis by subjecting the case facts to the standard established in Donovan which is "from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing and procedures for receiving benefits". Donovan, 688 F.2d at 1373.

If it appears that an employee welfare benefit plan may be in place, then you must look to other exceptions.

B. STATUTORY EXCEPTIONS

The ERISA statutes exclude some five different types of plans from its coverage. Look to 29 U.S.C. § 1003 entitled "Coverage" to determine if any statutory exceptions are applicable.

There are two such exceptions that often surface and are often overlooked by attorneys filing cases on behalf of Plaintiffs. One such exception is a governmental plan. If a Plaintiff works for any type of government, or works for an instrumentality of a government, whether federal, state or municipal, look to the language of 29 U.S.C. § 1002(32). See also Harbor Ins. Co. v. Blackwelder, 554 So.2d 329 (Ala. 1990); Silvera v. Mutual Life Ins. Co., 884 F.2d 452 (9th Cir. 1989).

A second exception to review would be that of a church plan. The church plan exception can be found at 29 U.S.C. § 1002(33). However, the church plan exception is only applicable where no election has been made under § 410(d), of the Internal Revenue Code of 1986 (29 U.S.C. § 410(d). For a discussion of Church Plans see American Association of Christian Schools Voluntary Employees Beneficiary Ass'n Welfare Trust Plan by Janny v. U.S., 850 F.2d 1510 (11th Cir. 1988).

There are other exceptions, such as insurance for the sole purpose of complying with workmen compensation statutes, unemployment compensation or disability insurance laws.

There is another exception for plans maintained outside the United States which primarily benefit non-residential aliens.

Finally, there is an exception for plans that are

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considered an "excess benefit plan" that is statutorily defined in 29 U.S.C. § 1002(36).

If the statutory exceptions provide no escape from ERISA, look to another possible path of escape.

C. SAFE HARBOR PROVISIONS

There are numerous, yet apparently unknown exceptions to ERISA that are borne out of the regulations promulgated by the Department of Labor. The most popular of these exceptions can be found in 29 C.F.R. § 2510.3-1(j) which provides that certain group type insurance programs are deemed not to be subject to ERISA.

Under 29 C.F.R § 2510.3-1(j) an employee welfare benefit plan or welfare plan shall not be subject to ERISA if the following four criteria are met:

> (1) No contributions are made by an employer or employee organization;
>
> (2) Participation in the program is completely voluntary for employees or members;
>
> (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deduction or dues checkoffs and to remit them to the insurer; and
>
> (4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with the payroll deductions or dues checkoffs.

This regulation is a sure escape from the cloak of ERISA, if all criteria can be met. This can usually be established through an affidavit filed with your motion to remand. There is an abundance of case law under this particular provision. A Westlaw search will quickly plug you into dozens of cases discussing this particular provision.

This regulation has on numerous times converted the average case into an extremely valuable case.

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D. OWNER AND HIS/HER SPOUSE EXCLUDED FROM ERISA PRE-EMPTION

The Department of Labor has also established definitions which have unequivocally been held as binding as they relate to the pre-emption issues of ERISA. As mandated in 29 C.F.R. § 2510.3-3(c)(1):

> (1) An individual and his/her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual or his/her spouse . . ..

This regulation clearly prevents an owner of a business from being simultaneously an employer and an employee. His or her act of purchasing insurance for himself/herself or his/her family even if done under the current color of his/her commercial stature, he/she does not create an employee welfare benefit plan.

There is a wealth of cases under this provision which provides another fertile area for escaping the cloak of ERISA. However, these regulations have been virtually unnoticed since their inception. Nonetheless, they are an excellent tool in maintaining the value of your case.

Warning! There is a case styled Madonia v. Blue Cross Blue Shield of Virginia 11 F.3d 444 (4th Cir. 1993), which attempts to distinguish a sole proprietor, partner, and a sole shareholder of a corporation, thereby, defeating the protection provided to a sole shareholder from ERISA. However, the Madonia opinion is poorly written and is riddled with illogical conclusions.

In a recent case in the Middle District of Alabama, Northern Division, the Honorable Harold Albritton authored the opinion of Sexton v. John Alden Life Insurance Company, et al, CV No. 94-A-72-N (M.D. Ala., May 2, 1994), where the Court rejected the Madonia holding recognizing its flawed analysis. In Sexton Judge Albritton presents an excellent discussion as to why Madonia should not be followed. In fact, Madonia has not been followed by any other circuit, nor federal district court.

III. DISCOVERY IN THE INSURANCE FRAUD CASE

The Alabama Rules of Civil Procedure provide an abundance of discovery methods that can be used in obtaining information from the Defendant insurance company in the insurance fraud, or bad faith case.

The most effective way of beginning the discovery process is to file discovery with your complaint, typically a good set of interrogatories, request for production, request for

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admissions and notices of deposition should all be filed with the complaint. This allows you to maintain control over the discovery process from the outset.

For purposes of this seminar, it would be unnecessary to review each and every rule of civil procedure governing discovery in the insurance fraud case, but you should have a good understanding of Rule 30, Rule 33, Rule 34 and Rule 36, A.R.Civ.P..

The key to the insurance fraud or bad faith case is evidence of similar acts by the Defendant, also known as "pattern and practice evidence". This topic will be discussed later, but there are three important cases that you should be familiar with during the discovery process in the insurance fraud case. The first case, Pugh v. Southern Life & Health Insurance Company, 544 So.2d 143, (Ala. 1988), serves as a general guideline in establishing what is discoverable in the initial stages of the insurance fraud or bad faith cases.

Another important case is that of Ex Parte Clarke, 582 So.2d 1064 (Ala. 1991), which gives the counsel for the Plaintiff the right to contact other policyholders. The Court reasoned in Clarke that the Plaintiff's burden is so high that a broader range of discovery must be allowed.

Finally, the case of Ex Parte Asher, Inc., 569 So.2d 733 (Ala. 1990), establishes the general rule that information regarding other policyholders, other complaints, other lawsuits of similar type, must be produced when properly requested by the Plaintiff.

In light of Pugh, Clarke and Asher, pattern and practice evidence is easily obtainable, but must be pursued counsel for the Plaintiff.

IV. PATTERN AND PRACTICE FROM THE PLAINTIFF'S PERSPECTIVE IN FRAUD AND BAD FAITH LITIGATION

The use of pattern and practice evidence in fraud and bad faith litigation is very likely the most effective evidence that the plaintiff can represent to the jury. Although, pattern and practice evidence by today's standard is an essential element in preparing the fraud or bad faith case for trial, prior to 1987, pattern and practice evidence in these areas of the law were the exception. Oddly enough, a statute designed to limit punitive damages in fraud and bad faith litigation, § 6-11-21, Ala. Code (1975), (recently declared unconstitutional in Henderson v. Alabama Power Company, [1993 W.L. 222341 (Ala.)]), actually established a new standard for plaintiff's counsel in preparation for trial in these type cases.

The following is a discussion the use of pattern and practice evidence prior to the enactment of § 6-11-21, Ala. Code (1975), the use of this evidence after the enactment of §

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6-11-21, and the use of pattern and practice evidence in light of Henderson v. Alabama Power Company, supra.

PRIOR TO THE ENACTMENT OF § 6-11-21, Ala. Code (1975)

Prior to the enactment of Section 6-11-21, Alabama had the doctrine of *res inter alios acta* which generally operated to exclude as irrelevant, any evidence of acts and declarations of non-parties or dealings of parties with non-parties. However, the operation of that doctrine was limited in certain circumstances. See Dorcal, Inc. v. Xerox Corp., 398 So.2d 365 (Ala. 1981), and cases cited therein. For example, in cases involving issues of intent of the party, based on dealings of a party with a non-party is admissible evidence. See Roberson v. Ammons, 477 So.2d 957 (Ala. 1985).

Despite these rules of evidence, the Alabama Supreme Court has historically made exceptions in cases involving fraud. The Court clearly acknowledged their broad view of pattern and practice evidence in the case of Kabel v. Brady, 519 So.2d 912 (Ala. 1987):

> "In a fraud action, the `intent, knowledge, and scienter constitute essential elements of the offense, [and] evidence of similar frauds and similar misrepresentations [is] commonly admissible'. Dorcal, Inc., 398 So.2d at 671, citing Roan v. Smith, 272 Ala. 538, 133 So.2d 224 (1961); Johnson v. Day, 230 Ala. 165, 160 So. 340 (1935); and 37 Am.Jur.2d Fraud & Deceit § 456 (1968)."

Kabel, 519 So.2d at 918.

The Kabel court cited with approval Jackson v. Lowe, 48 Ala. App. 633, 266 So.2d 891 (1972), a case which involved automobile fraud and the trial court allowed the use of pattern and practice witnesses that had been similarly defrauded by the same salesman. The Jackson court held that the evidence was proper under Section 70.03(1) of McElroy's Alabama Evidence. C. Gamble, McElroy's Alabama Evidence, § 70.03(1) (3rd Ed. 1977).

Section 70.03(1) of McElroy's Alabama Evidence, (often referred to as "the Bible on Alabama Evidence") has been cited in numerous Alabama Supreme Court cases in upholding the use of pattern and practice witnesses in fraud cases. Section 70.03(1) provides in pertinent part the following:

> "On an issue of whether a party did a fraudulent act, such as false representation, proof may be made that such party committed similar fraudulent acts against other persons about the same time which appear to be in keeping with common plan or scheme to defraud. The Alabama Courts generally agree that

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evidence of other fraudulent transaction or deceit by the civil defendant is admissible to show fraud, motive, scheme, or intent.

It appears quite clear that the plaintiff may not prove that similar false representations were made to others in the absence of evidence that the representation to the plaintiff was indeed false. Another way of stating this rule is that prior acts of the defendant, standing alone, can not form the basis of a judgment that he acted fraudulently in the present transaction. Once there is evidence that the representation to the plaintiff was false, the plaintiff may then offer evidence of similar representations to others about the same time for the purpose of bolstering the conclusion that the representation to him was false. Such is admissible even though there is no evidence warranting a finding that the misrepresentations were a part of a common plan or scheme.

Even where there is issue of the defendant's intent to defraud, such intent may be ground for an award of punitive damages. When such damages are claimed by the plaintiff, he may make proof of similar misrepresentations tending to show such intent.

Proof of collateral acts in a fraud suit is often dependent upon access to other clients or customers of the defendants. Courts are very generous, particularly in fraud cases, in permitting the plaintiff unrestricted discovery of those persons, names and addresses."

C. Gamble, McElroy's Alabama Evidence, § 70.03(1) (3rd Ed. 1977), (footnotes omitted) (See annotations contained therein).

Even § 70.03(1) of McElroy's Alabama Evidence has been broadly construed by the Alabama Supreme Court. In the case of Davis v. Davis, 474 So.2d 684 (Ala. 1985), the Supreme Court allowed testimony of prior similar representations made by a defendant to a third person some ten years after the alleged misrepresentation was made to the plaintiff. Both the Supreme Court and the trial court characterized the conduct in that case as a "continuing type of fraud". Id. at 655.

In a case involving an unusual evidentiary question, Harris v. M & S Toyota, Inc., 575 So.2d 74 (Ala. 1991), the court cautioned trial judges against limiting pattern and

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practice evidence and stated that there is a "strong policy in our law permitting proof of prior `bad acts' or schemes to defraud". Although the Harris court limited pattern and practice evidence as it related to prior settlements against particular defendants, it strongly stated its view in favor of trial court's allowing pattern and practice testimony in fraud cases.

In the case of Associates Financial Services Company of Alabama, Inc. v. Barbour, 592 So.2d 191 (Ala. 1991), an opinion authored by Justice Shores, surveyed the court's recent decisions concerning its position on the use of pattern and practice evidence in fraud cases. HealthAmerica v. Menton, 551 So.2d 235, 245 (Ala. 1989), ("in fraud actions, great latitude is allowed in the scope of evidence introduced. . . questions of materiality, relevance, and remoteness of evidence are matters resting within the discretion of the trial court, whose exercise of that discretion will not be reversed unless it has been grossly abused."); Georgia Cas. & Surety Co. v. White, 531 So.2d 838 (Ala. 1988), (the court held that evidence of similar fraudulent acts was admissible to prove an alleged fraudulent scheme. The court cited Great American Ins. Co. v. Dover, 221 Ala. 612, 130 So. 335 (1930), for the proposition that "evidence of fraudulent transactions by the same party and substantially the same character, contemporaneous in point of time, or nearly so, is admissible to show fraud in respect to a matter wholly distinct from the previous transaction.") Nonetheless, the court in Barbour allowed an audit report conducted by a third party on the defendant to be admitted into evidence because it revealed a scheme, pattern, and practice by defendants. The Alabama Supreme Court has taken a very liberal view on discovery in the fraud and bad faith type cases. In the case of Pugh v. Southern Life and Health Insurance, 544 So.2d 143 (Ala. 1988), the court considered a number of discovery issues related to the discoverability of information necessary to prove other similar acts by Defendants. Pugh concerned a bad faith refusal to pay death benefits, and the plaintiff sought discovery of prior claims in the last five years in the State of Alabama, complaints, prior lawsuits, explanations of loss ratios, and general information about the financial stability of the company. The trial court denied the discovery and granted summary judgment to the defendant. The Supreme Court reversed the trial court's decision stating that all materials requested by the plaintiff were, in fact, discoverable. Pugh, supra at 144-145.

The Supreme Court has taken a liberal view on discovery in two other cases, Ex parte Clarke, 582 So.2d 1064 (Ala. 1991), and Ex parte Asher, Inc., 569 So.2d 733 (Ala. 1990). In both these cases, the court stressed the importance of a

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broad range of discovery. These cases provide excellent arguments for obtaining discovery.

Another case offering an excellent explanation of pattern and practice evidentiary rules is that of Valentine v. World Omni Leasing, Inc., 601 So.2d 1006 (Ala. Civ. App. 1992). This was another automobile fraud case, an area where the court seems to be most liberal in its application of pattern and practice evidence.

It is abundantly clear that the law in Alabama provides for very liberal and broad discovery in the fraud and bad faith type cases. It is also clear that the law favors the use of pattern and practice witnesses in fraud cases, but it has done so under the guise of § 70.03(1) of McElroy's Alabama Evidence.

For additional cases concerning the use of pattern and practice witnesses, see the following: Shoals Ford, Inc. v. McKinney, 605 So.2d 1197 (Ala. 1992); Massachusetts Mutual Life Insurance Company v. Collins, 575 So.2d 1005 (Ala. 1990); Southern States Ford, Inc. v. Proctor, 541 So.2d 1081 (Ala. 1989); Potomac Leasing Company v. Bulger, 531 So.2d 307 (Ala. 1988); Sessions Company, Inc. v. Turner, 493 So.2d 1387 (Ala. 1986); Ex parte State Farm Mutual Automobile Insurance Company, 452 So.2d 861 (Ala. 1984); Winn Dixie Montgomery, Inc. v. Henderson, 395 So.2d 475 (Ala. 1981); Roan v. Smith, 272 Ala. 538, 133 So.2d 224 (Ala. 1961); Johnson v. Day, 160 So. 340 (Ala. 1935); Cartwright v. Braly, 117 So. 477 (Ala. 1928); Blackwood v. Standridge, 102 So. 108 (Ala. 1924); and Maxwell v. Brown Shoe Company, 21 So. 1009 (Ala. 1897).

THE ENACTMENT OF § 6-11-21 Ala. Code (1975)

In 1987, the Alabama Legislature enacted section 6-11-21 as part of a "package of bills" collectively called the "Alabama Tort Reform Act". Act number 87-185, 2, 1987 Ala. Acts 251. This section provided:

> "An award of punitive damages shall not exceed $250,000.00, unless it is based upon one or more of the following:
>
> (1) A pattern and practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or,
>
> (2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,
>
> (3) Liable, slander, or defamation."

Simply, punitive damage awards for fraud or bad faith

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cases which accrued after June 11, 1987, could not exceed $250,000.00, unless exception 1 was satisfied. Sections 2 and 3 did not apply to fraud and bad faith cases.

Although the standard for allowing pattern and practice evidence in fraud cases seemed to have been relaxed somewhat under § 6-11-21(1), the stated law on the issue did not change the standard for admissibility of this evidence from that which existed prior to the enactment of the statute. Cf. D. Marsh and S. Silvernail, The Tort of Bad Faith and Avoiding the $250,000.00 Cap on Punitive Damages, 51 Ala. Law 114 (March 1990). Simply, nothing changed in the law with regard to admissibility.

However, many lawyers viewed the clear language of the statute as demanding the introduction of any evidence indicating pattern or practice of intentional wrongful conduct. Contrary to those beliefs, the law actually never changed. Despite the enactment of the statute, all pattern and practice evidence must survive the scrutiny of § 70.03(1), McElroy's Alabama Evidence.

From the plaintiff's perspective, § 6-11-21 forced the plaintiff to broaden discovery, which led to better quality cases being presented to juries. Ironically, the practical result of § 6-11-21 was better presentation of cases, resulting in larger verdicts. See Union Mortgage Company, Inc. v. Barlow, 595 So.2d 1335 (Ala. 1992). The statute ultimately backfired on its proponents.

The following are a few things that our firm routinely includes as part of developing pattern and practice evidence:

A WESTLAW search to find every instance that a particular company has been sued for similar cases in the past ten years. This information can be very useful. Once we have obtained a reported opinion, we read the facts of the case closely. If the case applies, then we may contact the other attorneys who represented the plaintiffs, if the facts are similar to those in our case. Most of the time, attorneys are more than willing to cooperate.

We also do an ATLA search. The American Trial Lawyers Association maintains a computer list of every incidence that an attorney requests information on a particular insurance company. Often times, we will contact these attorneys and discuss with them the particular cases. Again, these attorneys are more than happy to cooperate.

In most all fraud and bad faith cases, we will run an ATLA Advocate advertisement. The American Trial Lawyers Association has an insurance exchange list which enables us to place an advertisement stating the type of information we are seeking on a particular insurance company. Often times, this will result in valuable information from cases all over the country.

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In addition, we develop pattern and practice through interrogatories and requests for production dealing with other complaints and lawsuits. The Insurance Department of Alabama is a vital source of this information through its consumer complaints and agent files. The consumer complaints are a wealth of information as far as obtaining witnesses who have previously had a complaint against an insurance company. It has been our experience that these people are usually more than willing to cooperate. Often times, these people have been mistreated, but they, for one reason or another, did not seek legal advice. These witnesses view an opportunity to testify against this company as their way of obtaining peace of mind.

Once we have determined our pattern and practice witnesses from various sources, we send a request for production to the insurance company and ask for the entire file on that individual. This will help you prepare the witness for their deposition testimony.

Recently, we have been able to plug into the Administrative Offices of the Courts on its new Insurance Exchange Group for Alabama attorneys. This information allows us to determine what other cases are being litigated in the State of Alabama involving insurance companies. Again, you can contact the attorney, obtain the pleadings, and discuss in detail the facts of each case with the attorneys. This often times leads to very valuable information. Within the last year, we have developed an Insurance Exchange Group. This involves about fifteen Alabama firms that handle a great deal of insurance fraud and bad faith cases. About every six months, we gather a list of insurance companies that these law firms have had litigation against. The list is compiled and is mailed to each member of the group. It has proved very helpful in that other firms have discovery that has either been resisted or has not previously been requested. The real beauty with this function of the group is that often times, we will request information from the defendant and get different information from that of another attorney.

If you are interested in joining this group, please contact our office and ask to speak with Lisa Harris. If you will provide us with a list of companies in which you have had litigation against, we will provide you with a list of all defendants that are currently on the group list.

We began nearly all of these practices as a result of the enactment of § 6-11-21. It is important to note that the enactment of the statute provided an immediate benefit only to defendants, and the damages limitations adversely effected the most severely injured plaintiffs without providing them with any benefits in return. <u>See</u> L. Nelson, <u>Tort Reform Act in Alabama: Are Damages Restrictions Unconstitutional?</u>, 40 Ala.

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L. Rev. 533, 573, (1989). However, through hard work from the plaintiff's bar and cooperation from the trial courts, the evils of tort reform resulted in a golden opportunity for plaintiffs.

HENDERSON V. ALABAMA POWER COMPANY AND THE ABOLISHMENT OF § 6-11-21

On June 25, 1993, the Supreme Court of Alabama released Henderson v. Alabama Power Company which held, among other things, that § 6-11-21, which places a limitation on punitive damages, clearly impaired the traditional function of the jury and was declared unconstitutional as a violation of § 11 of the Alabama Constitution, which provides: "That the right of trial by jury shall remain inviolate". **Ala. Const. Art. I § 11 (1901)**. Henderson, authored by Justice Oscar Adams, provides an excellent discussion on the sacredness of the right to trial by jury under the Alabama Constitution. The well-reasoned opinion should prove to be a road block to any further attempt to pass similar legislation of that of § 6-11-21.

While the plaintiff's bar anxiously awaited the court's decision concerning the constitutionality of § 6-11-21, the court seemed to almost wink and smile when it stated that the answer to the constitutionality question had already been revealed in the case of Moore v. Mobile Infirmary Ass'n, 592 So.2d 156 (Ala. 1991), which held that a similar statute, 6-5-544(b), (which limited non-economic damages in medical malpractice cases to $400,000.00) was unconstitutional. The court stating that the issue in Henderson v. Alabama Power Company, supra, "was, in fact, there *decided sub silentio*". In any event, the court definitively held in Henderson that 6-11-21 was unconstitutional.

In an effort to lessen the blow, the defense bar has now attempted to read Henderson as stating that because § 6-11-21 relaxed the standard for pattern and practice, the abolishment of that statute will return us to a more rigid standard of admitting pattern and practice evidence in these types of cases. **This is simply making a distinction where there is no difference.** As discussed earlier, the case law in the State of Alabama clearly provides support for the proposition that the law never changed with regard to the standard of admitting evidence of pattern and practice. There is absolutely no law to support the proposition being presented by the defense bar.

The practical result of Henderson v. Alabama Power Company, supra, is that it simply removed the training wheels on the plaintiff's bar on how to effectively prepare the fraud and bad faith case against defendants. In retrospect, § 6-11-21 has brought fraud and bad faith cases to a new level in

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Alabama, one that provides a better system of fairness.

Henderson v. Alabama Power Company, supra, did confirm what most experts predicted, the demise of the Alabama Tort Reform Act and the Alabama Medical Liability Act of 1987. See L. Nelson, Tort Reform Act in Alabama: Are Damages Restrictions Unconstitutional?, 40 Ala. L. Rev. 533, 1989. More importantly, because Henderson is well-reasoned and exhaustive on the issue of right to trial by jury under the Alabama Constitution, it preserved the plaintiff's right to have his day in court, present his case the way he so chooses, and the right to punitive damages in the appropriate case. No legislator in good conscious could attempt to pass such restrictive legislation as that presented in the Tort Reform Act of 1987, in the face of the logic established in Henderson.

In surveying the case law in the State of Alabama, one thing is abundantly clear, pattern and practice evidence in fraud and bad faith litigation cases is alive and well!

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