

# Exhibit A



**IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA**

**MIKE AND CATHY WESLER, et al.,** )  
 )  
**Plaintiffs,** )  
 )  
 v. ) **Case No. CV-2009-358**  
 )  
**JONATHAN L. KIMERLING, et al.** )  
 )  
**Defendants.** )

**CONSOLIDATED WITH**

**HCG, INC., et al.,** )  
 )  
**Plaintiffs,** )  
 )  
 v. ) **Case No. CV-2008-1251**  
 )  
**WILLIAM A. OCHSENHIRT, III, et al.** )  
 )  
**Defendants.** )  
 )  
 )  
**JONATHAN L. KIMERLING, WILLIAM** )  
**A. OCHSENHIRT, III, INVERNESS** )  
**HOLDINGS, LLC d/b/a INVERNESS** )  
**COUNTRY CLUB, and S & & FAMILY,** )  
**LLC,** )  
 )  
**Third-Party Plaintiffs,** )  
 )  
**WESTCHESTER FIRE INSURANCE** )  
**COMPANY a/k/a ACE WESTCHESTER** )  
**FIRE INSURANCE COMPANY,** )  
 )  
**Third-Party Defendant.** )

**THIRD-PARTY COMPLAINT**

Defendants/third party plaintiffs Jonathan L. Kimerling, William A. Ochsenhirt, III, and Inverness Holdings, LLC d/b/a Inverness Country Club, (“Defendants/Third Party Plaintiffs”),

pursuant to Rule 14(a) of the Alabama Rules of Civil Procedure, state the following third party complaint against third party defendant Westchester Fire Insurance Company a/k/a ACE Westchester Fire Insurance Company (“Westchester”):

#### **PARTIES**

1. Defendant/Third Party Plaintiff Jonathan L. Kimerling is an adult resident citizen of Jefferson County, Alabama. Kimerling is a member, officer and/or director of Heatherwood Holdings, LLC, and Inverness Holdings, LLC.

2. Defendant/Third Party Plaintiff William A. Ochsenhirt, III is an adult resident citizen of Shelby County, Alabama. Ochsenhirt is a member, officer and/or director of Heatherwood Holdings, LLC, and Inverness Holdings, LLC.

3. Defendant/Third Party Plaintiff Inverness Holdings, LLC, is an Alabama limited liability company with its principal place of business in Birmingham, Alabama.

4. Third party defendant WESTCHESTER is a foreign corporation registered to do business and conducting business in the State of Alabama, including Shelby County.

#### **JURISDICTION AND VENUE**

5. This court has subject matter jurisdiction over this action because Defendants’/Third Party Plaintiffs’ claims are founded on state law and the amount in controversy exceeds the jurisdictional minimum of this Court.

6. Venue is proper in this Court pursuant to *Ala. Code* § 6-3-7(a)(1) because a substantial part of the events or omissions giving rise to this cause of action occurred in Shelby County, Alabama.

## FACTUAL ALLEGATIONS

7. Defendants/Third Party Plaintiffs are fully insured for the types of risks and litigation costs arising from the claims asserted by the plaintiffs in these consolidated lawsuits through separate policies of insurance issued by Westchester to certain named defendants and covering those defendants as well as related persons and entities, including, without limitation, the following policies:

A. Westchester policy number BMI20059101 issued to Inverness Holdings, LLC (“Inverness Policy”); and

B. Westchester policy number BMI20059100 issued to Heatherwood Holdings, LLC (“Heatherwood Policy”).

8. Plaintiffs in these consolidated actions have asserted claims against the Defendants/Third Party Plaintiffs for tortious interference with a business relationship, conspiracy, fraud, negligence, wantonness, and fraudulent suppression. Plaintiffs allege that defendants Kimerling and Ochsenhirt have acted improperly in their capacity as members, officers and directors of both Heatherwood Holdings, LLC, and Inverness Holdings, LLC.

9. Defendants/Third Party Plaintiffs timely provided proper notice of these consolidated lawsuits to Westchester, and have demanded coverage.

10. Citing various reasons, Westchester has refused to acknowledge or accept its full coverage and defense obligations, or has otherwise wrongfully failed and refused to provide full indemnity protection to Defendants/Third Party Plaintiffs for the claims asserted by the plaintiffs.

11. While Westchester has tendered a defense to some of the defendants under the Inverness Policy, Westchester has failed or refused to settle these consolidated actions, despite Defendants’/Third Party Plaintiffs’ demand that Westchester do so.

12. Westchester has failed or refused to fully defend and indemnify the Defendants/Third Party Plaintiffs under the Heatherwood Policy, and also failed or refused to settle these consolidated actions, despite Defendants'/Third Party Plaintiffs' demand that Westchester do so. While Westchester previously tendered a defense to Heatherwood Holdings, LLC in separate and now-concluded bankruptcy proceedings, Westchester has failed or refused to defend and indemnify Heatherwood's members, officers and directors (Kimerling and Ochsenhirt) in these consolidated actions.

13. Westchester's actions demonstrate a greater concern for its own monetary interest than for its insureds' financial risk.

14. Both the Inverness Policy and Heatherwood Policy are "defense within limits" or "eroding coverage" policies, pursuant to which the costs of defense are deducted from policy limits. Under such policies, every dollar spent on the defense of a claim reduces the policy limit by the same amount. Therefore, the longer this litigation continues, the fewer funds are available for resolution or settlement of these consolidated actions. To date, a substantial portion of the subject insurance proceeds have been spent defending these consolidated lawsuits, which have been pending since 2008 and 2009, respectively.

15. Westchester has further failed or refused to fully inform its insureds about such matters as: the grounds for Westchester's defense under a reservation of rights, saying nothing about potential coverage defenses between its initial reservation of rights, and then sending a belated reservation of rights letter just prior to the first trial; and developments relating to policy coverage, specifically the erosion and available limits remaining for the consolidated lawsuits.

**COUNT ONE  
DECLARATORY JUDGMENT**

16. Defendants/Third Party Plaintiffs adopt and incorporate each of the foregoing paragraphs as if fully set forth herein.

17. There exists a legitimate dispute between the parties of the amounts owed by Westchester to Defendants/Third Party Plaintiffs for coverage, defense and indemnity under the Heatherwood Policy and Inverness Policy.

WHEREFORE, Defendants/Third Party Plaintiffs demand a judgment declaring Westchester's obligations under the subject insurance contracts, amounts owed to Defendants/Third Party Plaintiffs, and such other and further relief to which Defendants/Third Party Plaintiffs may be entitled.

**COUNT TWO  
BREACH OF CONTRACT**

18. Defendants/Third Party Plaintiffs adopt and incorporate each of the foregoing paragraphs as if fully set forth herein.

19. The policies of insurance issued by Westchester were intended by the parties to provide coverage to the Defendants/Third Party Plaintiffs for all of the risks and costs arising from the allegations asserted by the plaintiffs in these consolidated actions.

20. Westchester has breached its contractual obligations under the respective insurance policies by, without limitation: failing or refusing to provide full coverage and indemnity protection to the Defendants/Third Party Plaintiffs for the claims in these consolidated actions; failing or refusing to settle these consolidated lawsuits and instead continuing to allow the erosion of policy limits by the amount of defense costs; and failing or refusing to keep its insureds fully

informed about such matters as the bases for Westchester's defense under a reservation of rights, developments relating to policy coverage, and progress of the lawsuit.

21. As a result of Westchester's breach of the respective insurance contracts, Defendants/Third Party Plaintiffs have suffered damages.

WHEREFORE, the Defendants/Third Party Plaintiffs demand a judgment against Westchester in an amount to be determined by the trier of fact, plus interest, costs, attorneys' fees, and such other and further relief as the Court deems just and proper.

**COUNT THREE**  
**BAD FAITH FAILURE OR REFUSAL TO DEFEND AND INDEMNIFY**

22. Defendants/Third Party Plaintiffs adopt and incorporate each of the foregoing paragraphs as if fully set forth herein.

23. An insurance contract exists between Westchester and Heatherwood Holdings, LLC which provides coverage to Heatherwood's directors and officers, including Kimerling and Ochsenhirt.

24. An insurance contract exists between Westchester and Inverness Holdings, LLC, which provides coverage to Inverness' directors and officers, including Kimerling and Ochsenhirt.

25. Kimerling and Ochsenhirt have been sued in these consolidated cases for certain alleged actions they took in their capacity as Heatherwood members, officers and directors. Kimerling and Ochsenhirt have also been sued for certain alleged actions they took in their capacity as Inverness members, officers and directors.

26. Under the terms of the Heatherwood Policy, Westchester is obligated to defend and indemnify Heatherwood's and Inverness' members, officers and directors, Kimerling and Ochsenhirt.

27. Westchester has intentionally failed or refused to fully pay Defendants' claim, without any reasonably legitimate or arguable reason for said refusal. Westchester has acted in bad faith by, without limitation: failing or refusing to provide full coverage and indemnity protection to the Defendants/Third Party Plaintiffs for the claims in these consolidated actions; failing or refusing to settle these consolidated lawsuits and instead continuing to allow the erosion of policy limits by the amount of defense costs; and failing or refusing to keep its insureds fully informed about such matters as the bases for Westchester's defense under a reservation of rights, developments relating to policy coverage, and progress of the lawsuit.

28. Westchester's actions demonstrate that it has a greater concern for its monetary interest than it does for its insureds' financial risk.

29. Westchester had actual knowledge that there was no reasonably legitimate, arguable or debatable reason for its failure or refusal to fully defend and indemnify its insureds under the subject policies.

30. As a result of Westchester's bad faith, Defendants/Third Party Plaintiffs have suffered damages, including attorneys' fees and other defense costs.

WHEREFORE, the Defendants/Third Party Plaintiffs demand a judgment against Westchester in an amount to be determined by the trier of fact, plus punitive damages, interest, costs, attorneys' fees, and such other and further relief as the Court deems just and proper.

**COUNT FOUR  
NEGLIGENT OR BAD FAITH FAILURE OR REFUSAL TO SETTLE**

31. Defendants/Third Party Plaintiffs adopt and incorporate each of the foregoing paragraphs as if fully set forth herein.



32. Westchester has tendered a defense under the Inverness Policy to certain defendants, under a reservation of rights. As such, Westchester has an enhanced obligation of good faith toward its insureds in conducting said defense.

33. Westchester previously tendered a defense under the Heatherwood Policy pursuant to a reservation of rights. As such, Westchester has an enhanced obligation of good faith toward its insureds in conducting said defense.

34. Westchester has failed or refused to settle these consolidated actions, despite its insureds' demand that it do so. Westchester has demonstrated a greater concern for its monetary interest than for its insureds' financial risk.

35. The Inverness Policy and Heatherwood Policy are eroding policies wherein the policy limits are continually being reduced by defense costs. As such, the amounts available to settle these consolidated actions continues to erode and reduce the longer Westchester fails or refuses to settle this matter.

36. As a result of Westchester's negligent or bad faith failure to settle, Defendants/Third Party Plaintiffs have been damaged by, without limitation, continuing to incur defense costs and reducing the available policy limits, and risking an adverse verdict at trial.

WHEREFORE, the Defendants/Third Party Plaintiffs demand a judgment against Westchester in an amount to be determined by the trier of fact, plus punitive damages, interest, costs, attorneys' fees, and such other and further relief as the Court deems just and proper.

/s/ Sela S. Blanton  
Bruce F. Rogers  
Sela S. Blanton  
Attorneys for Defendants/Third Party Plaintiffs

BAINBRIDGE, MIMS, ROGERS & SMITH, LLP  
Post Office Box 530886  
Birmingham, Alabama 35253  
205-879-1100  
205-879-4300 (fax)  
brogers@bainbridgemims.com  
sblanton@bainbridgemims.com

**JURY DEMAND**

**DEFENDANTS/THIRD PARTY PLAINTIFFS DEMAND A TRIAL BY STRUCK  
JURY ON ALL ISSUES SO TRIABLE.**

**PLEASE SERVE THIRD PARTY DEFENDANT BY CERTIFIED MAIL:**

**Westchester Fire Insurance Company  
Registered Agent: C T Corporation System  
2 North Jackson Street, Suite 605  
Montgomery, Alabama 36104**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2013, the foregoing was electronically filed with the Clerk of Court using the Alafile system which will send notification of such filing to the following:

James C. Gray III  
E. Britton Monroe  
Taffi S. Stewart  
Bryan A. Grayson  
LLOYD GRAY WHITEHEAD & MONROE, P.C.  
2501 20<sup>th</sup> Place South, Suite 300  
Birmingham, Alabama 35223-1702

Stephen D. Heninger  
Gayle L. Douglas  
HENINGER GARRISON DAVIS, LLC  
P.O. Box 11310  
Birmingham, AL 35202

Lee R. Benton  
Brenton Morris  
BENTON & CENTENO, LLP  
2019 Third Avenue North  
Birmingham, Alabama 35203

Rachel J. Moore  
NAJJAR DENABURG, P.C.  
2125 Morris Avenue  
Birmingham, Alabama 35203

s/ Sela S. Blanton  
Of Counsel





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 Plaintiffs, )  
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 v. )  
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Case No. CV-2009-358

CONSOLIDATED WITH

HCG, INC., et al., )  
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 Plaintiffs, )  
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 v. )  
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 WILLIAM A. OCHSENHIRT, III, et al. )  
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 Defendants. )

Case No. CV-2008-1251

JONATHAN L. KIMERLING, WILLIAM )  
 A. OCHSENHIRT, III, INVERNESS )  
 HOLDINGS, LLC d/b/a INVERNESS )  
 COUNTRY CLUB, and S & J FAMILY, )  
 LLC, )  
 Third-Party Plaintiffs, )  
 )  
 v. )

ORAL ARGUMENT REQUESTED

WESTCHESTER FIRE INSURANCE )  
 COMPANY a/k/a/ ACE )  
 WESTCHESTER FIRE INSURANCE )  
 COMPANY, )  
 )  
 Third-Party Defendant. )

**THIRD-PARTY DEFENDANT WESTCHESTER FIRE INSURANCE COMPANY'S  
 MOTION TO SEVER**

COMES NOW Third-Party Defendant Westchester Fire Insurance Company (“Westchester”), pursuant to Rule 14 of the Alabama Rules of Civil Procedure and respectfully moves the Honorable Court to sever the claims against it from the underlying matter. The Third-Party Plaintiffs’ assertions of independent causes of action against Westchester are improper under Rule 14 of the Alabama Rules of Civil Procedure and Alabama case law, and are contrary to their insurance contracts with Westchester and should be severed for the following specific reasons:

- **Because Alabama Law Mandates The Separation Of Insurance Coverage Matters From The Litigation Of Liability, Westchester’s Motion To Sever Should Be ALLOWED;**
- **Because Bifurcation Under Universal Underwriters Ins. Co. V. East Cent. Alabama Is Inapplicable Here, Westchester’s Motion To Sever Should Be ALLOWED; and**
- **Because The Third-Party Plaintiffs’ Complaint Is A Breach Of Their Insurance Contracts With Westchester, Westchester’s Motion To Sever Should Be ALLOWED.**

Therefore, Westchester respectfully requests that this Honorable Court enter an Order severing the Third-Party Plaintiffs’ claims against Westchester from the underlying litigation and creating a new and independent action.

Respectfully submitted,

s/Candace L. Hudson  
Joel S. Isenberg (ASB-8855-n76j)  
Candace L. Hudson (ASB-8314-n66h)  
Attorneys for Third Party Defendant  
Westchester Fire Insurance Company a/k/a  
ACE Westchester Fire Insurance Company

**OF COUNSEL:**

ELY & ISENBERG, LLC  
2100-B SouthBridge Parkway  
Suite 380  
Birmingham, Alabama 35209  
Telephone: (205) 313-1200  
Facsimile: (205) 313-1201  
[jisenberg@elylawllc.com](mailto:jisenberg@elylawllc.com)  
[chudson@elylawllc.com](mailto:chudson@elylawllc.com)

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing has been served on all parties of record via AlaFile electronic filing system and/or U.S. Mail on this the 9<sup>th</sup> day of December, 2013.

Stephen Heninger  
Gayle Douglas  
HENINGER GARRISON DAVIS  
P.O. Box 11310  
Birmingham, Alabama 35202

Bruce Rogers  
Sela Blanton  
BAIMBRIDGE, MIMS, ROGERS, & SMITH  
Post Office Box 530886  
Birmingham, Alabama 35253

James Gray  
Britt Monroe  
Taffi Stewart  
Bryan Grayson  
LLOYD, GRAY, WHITEHEAD & MONROE  
2501 20<sup>th</sup> Place South, Suite 300  
Birmingham, Alabama 35223-1702

Rachel J. Moore  
NAJJAR DENABURG, P.C.  
2125 Morris Avenue  
Birmingham, Alabama 35203

s/Candace L. Hudson  
OF COUNSEL



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 COUNTRY CLUB, and S & J FAMILY, )  
 LLC, )  
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 Third-Party Plaintiffs, )  
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 v. )

ORAL ARGUMENT REQUESTED

WESTCHESTER FIRE INSURANCE )  
 COMPANY a/k/a/ ACE )  
 WESTCHESTER FIRE INSURANCE )  
 COMPANY, )  
 )  
 Third-Party Defendant. )

**MEMORANDUM OF LAW IN SUPPORT OF THIRD-PARTY DEFENDANT  
 WESTCHESTER FIRE INSURANCE COMPANY'S MOTION TO SEVER**



Pending before this Honorable Court is Westchester Fire Insurance Company's ("Westchester") Motion to Sever. Because good cause exists, Westchester's Motion is warranted and this Honorable Court should enter an Order severing the claims made against Westchester from this lawsuit.

### **I. STATEMENT OF THE CASE.**

The instant lawsuit is a business tort and breach of contract action. The Third-Party Plaintiffs have impleaded Westchester into the instant action by bringing the entirely independent claims of breach of contract and bad faith, resulting in a bifurcated trial as set out in Universal Underwriters Ins. Co. v. East Cent. Alabama. Universal Underwriters Ins. Co. v. East Cent. Alabama Ford-Mercury, Inc., 574 So.2d 716, 725 (Ala. 1990). Westchester vigorously denies these third-party claims and is eager to address the Third-Party Complaint's numerous deficiencies should this litigation progress. The Third-Party Plaintiffs' use of impleader in this manner, however, is contrary to both Rule 14 of the Alabama Rules of Civil Procedure and Universal Underwriters Ins. Co. and will result in undue prejudice against Westchester if these claims are not severed from the instant lawsuit.

Westchester respectfully asks that this Honorable Court sever all of the Third-Party Plaintiffs' claims against Westchester for the following specific reasons:

- **Because Alabama Law Mandates The Separation Of Insurance Coverage Matters From The Litigation Of Liability, Westchester's Motion To Sever Should Be ALLOWED;**
- **Because Bifurcation Under Universal Underwriters Ins. Co. V. East Cent. Alabama Is Inapplicable Here, Westchester's Motion To Sever Should Be ALLOWED; and**
- **Because The Third-Party Plaintiffs' Complaint Is A Breach Of Their Insurance Contracts With Westchester, Westchester's Motion To Sever Should Be ALLOWED.**

On December 30, 2008, HGC, Inc. filed a Complaint against the Third-Party Plaintiffs and Heatherwood Holdings, LLC, asserting claims for breach of contract, breach of fiduciary duties,

tortious interference with business relations, and conspiracy. On April 9, 2009, over two hundred plaintiffs, including lead Plaintiffs Mike and Cathy Wesler, filed their own complaint against the Third-Party Plaintiffs, alleging similar claims for tortious interference with business relationships, conspiracy to tortiously interfere with business relationships, fraud, and suppression. On October 8, 2009, these two matters were consolidated into the instant litigation. The parties subsequently engaged in extensive discovery efforts, including depositions of more than twelve key fact witnesses, and discovery has since closed in the underlying matter. Following the close of discovery, this Honorable Court ordered separate trials be held for each Plaintiff, the first of which was to begin on October 7, 2013. On September 30, 2013, the Third-Party Plaintiffs filed their Motion for Leave to Assert Third-Party Complaint and Motion for Continuance of Trial so as to implead Westchester as a third-party defendant in the instant litigation. This Honorable Court granted the Third-Party Plaintiffs' Motion on October 3, 2013. Westchester now moves for the instant relief pursuant to Rule 14 of the Alabama Rules of Civil Procedure.

## **II. FACTUAL BACKGROUND.**

The factual background necessary to rule on the instant Motion may be briefly stated. Third-Party Plaintiff Inverness Holdings, LLC is the named insured on a Business and Management Indemnity Policy issued by Westchester for the Policy Year October 20, 2008 through October 20, 2009. Westchester also issued a different Business and Management Indemnity Policy for the identical Policy Year to an entity Heatherwood Holdings, LLC, a limited liability company that is not a party in the instant lawsuit. While the two policies are similar in many ways, they contain numerous differences that serve to effect coverage.

The instant lawsuit arises out of the alleged breach of contract and fraudulent conduct of the Third-Party Plaintiffs during their ownership and operation of the Heatherwood Country Club in Birmingham, Alabama. Westchester assigned the firm of Lloyd, Gray, Whitehead & Monroe, P.C.

to defend the Third-Party Plaintiffs throughout the litigation pursuant to a reservation of its rights under the Inverness Policy. The original parties have already spent several years engaged in the discovery process for the underlying matter, which involves an alleged breach of a contract that is entirely distinct from the Third-Party Plaintiffs' contract with Westchester. While the Third-Party Plaintiffs, Westchester, and defense counsel have all participated in numerous settlement negotiations in the hopes of resolving this litigation, no settlement demand within the Policy limits has been tendered by the Plaintiffs and the parties have been unable to reach a resolution to date. Additionally, a separate lawsuit against Heatherwood Holdings, LLC, which is not a party to the instant lawsuit, was the subject of an adversary proceeding in the United States Bankruptcy Court for the Northern District of Alabama. Westchester provided defense counsel to Heatherwood Holdings, LLC in that matter pursuant to a reservation of its rights under the Heatherwood Policy. The parties resolved that litigation with a settlement of the claims against Heatherwood Holdings, LLC in January 2012.

### **III. ARGUMENT.**

The Third-Party Complaint against Westchester is prohibited by Rule 14 of the Alabama Rules of Civil Procedure, misapplies key Alabama precedent, and will result in undue prejudice against Westchester should its claims not be severed from the instant lawsuit.

#### **A. STANDARD OF REVIEW.**

Rule 14(a) of the Alabama Rules of Civil Procedure permits a defendant to assert claims against third-party defendants "who may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." ALA. R. CIV. P. 14. The Rule, however, does not give the third-party plaintiff free reign to pursue any and all claims against a third-party defendant in this fashion. In fact, "a third-party complaint may not introduce a totally independent cause of action," and "the foundation of such a complaint must be that the third party is or may be liable to

the defendant for all or part of the plaintiff's claim against the defendant.” SouthTrust Bank v. Jones, Morrison, Womack & Dearing, P.C., 939 So. 2d 885, 898 (Ala. Civ. App. 2005), quoting Torok v. Torok, 1987 WL 5654 (Ohio Ct. App. 1987).

To protect third-party defendants, Rule 14 also provides a mechanism to “strike the third-party claim, or for its severance or separate trial.” ALA. R. CIV. P. 14. In evaluating whether the third-party defendant is entitled to such relief, Alabama courts, in their discretion, must “weigh the need for one trial involving all issues and parties in furtherance of the stated purpose of the rule against the risk of substantial prejudice to the original parties resulting from an undue complication of issues and evidence because of the addition of the third-party defendants.” Ex parte Athens-Limestone Hosp., 858 So. 2d 960, 963 (Ala. 2003), quoting Ex parte Duncan Constr. Co., 460 So. 2d 852, 854 (Ala. 1984).

While Alabama courts have historically used the terms “severance” and “separate” interchangeably in evaluating these motions, Rule 14 recognizes the significant distinction between the two. “[S]eparate trials of different claims in a single action under Rule 42(b) usually result in a single judgment... When, however, a claim is severed from the original action . . . a new action is created, just as if it had never been a part of the original action, and a completely independent judgment results.” Key v. Robert M. Duke Ins. Agency, 340 So. 2d 781, 783 (Ala. 1976).

**B. BECAUSE ALABAMA LAW MANDATES THE SEPARATION OF INSURANCE COVERAGE MATTERS FROM LITIGATION OF THE UNDERLYING LIABILITY ACTION, WESTCHESTER’S MOTION TO SEVER SHOULD BE ALLOWED.**

Because Alabama law mandates the separation of insurance coverage matters from liability matters when impleading claims under Rule 14(a) of the Alabama Rules of Civil Procedure, Westchester’s Motion to Sever should be allowed.

**1. The Third-Party Plaintiffs' Claims Are Independent Causes Of Action Against Westchester.**

Under Rule 14 of the Alabama Rules of Civil Procedure, a “summons and complaint [may] be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.” ALA. R. CIV. P. 14. Alabama courts have narrowly interpreted the breadth of this rule and do not allow third-party plaintiffs to use it to pursue independent causes of action against third-party defendants. SouthTrust Bank, 939 So. 2d at 898.

The Third-Party Plaintiffs in this matter have raised entirely independent causes of action that rely on entirely separate facts and that implicate different alleged damages. Thus, the Third-Party Plaintiffs’ Claims against Westchester should be severed from the underlying Complaint. The Plaintiffs’ claims in the underlying Complaint center around the sale of the Heatherwood Country Club to Heatherwood Holdings, LLC, the interpretation of a restrictive covenant agreed to during that sale, and the alleged diversion of club memberships and assets from Heatherwood Holdings, LLC to Inverness Holdings, LLC. Third-Party Plaintiffs’ claims against Westchester, however, involve contracts and facts that are completely separate and irrelevant to the underlying litigation, including the sufficiency of Westchester’s investigation, its adjustment of any claims or requests for coverage, and its evaluation of the Third-Party Plaintiffs’ litigation strategy and potential for settlement.

The majority of the discovery process for the Third-Party Complaint is therefore likely to involve issues well beyond the scope of the underlying litigation and will require the production of several documents from Westchester’s claims file, which contain highly sensitive and confidential claims-handling information. None of this information would be appropriate subjects for discovery in this litigation absent the Third-Party Complaint. Should this Third-Party Complaint proceed,

however, Westchester would likely be forced to produce this information to all parties, essentially showing its hand to the opposition and causing significant prejudice to Westchester.

Perhaps even more telling, however, is that these independent causes of action against Westchester offer no possibility of indemnification for any of the Plaintiffs' claims and are therefore inappropriate under Rule 14. This is because Westchester's insurance contracts both provide that there shall be no assignment of any interest arising under the Policy and Alabama law prohibits the assignment of bad faith claims to third-parties. Cash v. State Farm, 125 F. Supp. 2d 474 (M.D. Ala. 2000). Therefore, not only are the damages sought by the Third-Party Plaintiffs separate from the relief sought in a declaratory judgment action, such relief cannot adhere in any way to the benefit of the original Plaintiffs as required by Rule 14.

**2. Alabama Courts Have Recognized The Importance Of Separating Insurance Coverage Litigation From Liability Litigation.**

It is doctrine in Alabama law that courts must exercise great caution when faced with the interplay of insurance coverage matters with liability litigation. This principle is directly addressed, for example, in Rule 411 of the Alabama Rules of Evidence which, out of concern for unfair prejudice against the insured, declares evidence of a party's insurance coverage inadmissible "upon the issue whether the person acted negligently or otherwise wrongfully." ALA. R. EVID. 411. Similarly, Rule 18(c) of the Alabama Rules of Civil Procedure sets out that "[i]n no event shall this or any other rule be construed to permit a jury trial of a liability insurance coverage question jointly with the trial of a related damage claim against an insured." ALA. R. CIV. P. 18. This concern for the intermingling of coverage questions with liability questions is also demonstrated in this state's court decisions. Alabama courts have traditionally recognized the importance of separating the litigation of insurance coverage matters from the litigation of liability so as to avoid undue complications and the confusion of the jury. See e.g. Ex Parte R.B. Ethridge and Associates, Inc., 494 So. 2d 54 (Ala. 1986) (upholding trial court's decision to sever insurance coverage causes of action from underlying

action because the “legal and factual questions to be resolved are sufficiently different... and would unduly complicate the trial and confuse the jury.”)

As this Honorable Court has already recognized, the impleader of claims against Westchester requires a separate trial of the insurance coverage claims apart from the trial of the liability claims at issue here. While it is inapplicable for the reasons stated below, the Supreme Court of Alabama’s Universal Underwriters Ins. Co. decision nevertheless cited by this Honorable Court established a bifurcated trial procedure relying on Rule 42(b)’s rationale that the procedure would be used “in furtherance of convenience or to avoid prejudice, or [when] conducive to expedition and economy.” Universal Underwriters Ins. Co. v. East Cent. Alabama Ford-Mercury, Inc., 574 So. 2d 716, 725 (Ala. 1990). These concerns are strikingly similar to the concerns raised by the Ex parte Athens-Limestone Hospital court when evaluating a third-party defendant’s motion to sever, particularly the courts’ concern for judicial economy and prejudice. As this Honorable Court’s decision to conduct bifurcated trials demonstrates, the relief requested by Westchester is necessary to avoid undue prejudice and unnecessary complications in the original action.

**C. BECAUSE BIFURCATION UNDER UNIVERSAL UNDERWRITERS INS. CO. V. EAST CENTRAL ALABAMA IS INAPPLICABLE HERE, WESTCHESTER’S MOTION TO SEVER SHOULD BE ALLOWED.**

The bifurcation procedure set out in Universal Underwriters Ins. Co. v. East Cent. Alabama is inapplicable in the instant matter as it was established for when a party intervenes in a lawsuit, not when a party has been impleaded into a lawsuit. The Universal Underwriters Ins. Co. Court was faced with one particular issue: how could a third-party insurer intervene under Rule 24 in a lawsuit for the limited purpose of presenting special interrogatories or jury instructions so as to clearly determine liability insurance coverage should the plaintiff prevail on liability. Universal Underwriters Ins. Co., 574 So. 2d at 718-719. Holding that the insurer had not met the requirements for intervention under Rule 24 of the Alabama Rules of Civil Procedure, but also recognizing the

predicament faced by all insurers and the courts tasked with determining coverage afterwards, the Supreme Court of Alabama established a procedure for permissive intervention whereby there would be bifurcated trials on the issues of liability and insurance coverage. Id. at 723-724.

Applying the Universal Underwriters Ins. Co. bifurcation procedures to the claims against Westchester in this lawsuit would unduly prejudice Westchester's ability to receive a fair trial. The procedures established by Universal Underwriters Ins. Co. are only appropriate when an insurer has intervened in a trial under Rule 24, which is completely different than Rule 14, the vehicle by which the Third-Party Plaintiffs impleaded Westchester into this lawsuit. The Third-Party Plaintiffs do not, and cannot, cite to any applicable case law that would expand the Universal Underwriters procedures to permit a defendant to pull in a third-party insurer without its consent. Instead, as the third-party defendant in an impleader action, Westchester is being deprived of its opportunity to be heard by a neutral jury. In fact, any jury faced by Westchester under the procedures of Universal Underwriters Ins. Co. will already have found the Third-Party Plaintiffs liable and will then be tasked with the question of whether to nullify their previous decision by finding in Westchester's favor.

Furthermore, the Third-Party Plaintiffs' inclusion of its independent claims is further evidence of the misapplication of to Universal Underwriters Ins. Co. to this case. As explained above, the bifurcated trial procedures in Universal Underwriters Ins. Co. are only implicated should a jury return a verdict for the Plaintiffs, since the issue being determined in the second phase is contingent on a finding of liability. The Third-Party Plaintiffs' inclusion of independent causes of action against Westchester that are entirely unrelated to a finding of the Plaintiffs' liability, however, demonstrates that the use of this procedural mechanism is more akin to putting a square peg in a round hole. The use of the Universal Underwriters Ins. Co. decision is therefore unwarranted in this circumstance and this Honorable Court should instead sever the claims against Westchester from this lawsuit.



**D. BECAUSE THE THIRD-PARTY PLAINTIFFS' COMPLAINT IS A BREACH OF THEIR INSURANCE CONTRACTS WITH WESTCHESTER, WESTCHESTER'S MOTION TO SEVER SHOULD BE GRANTED.**

By impleading Westchester into this action, the Third-Party Plaintiffs have breached the terms of their insurance contract with Westchester and, thus, Westchester's Motion to Sever should be granted. Both insurance contracts, the Heatherwood Policy and the Inverness Policy, have identical no-impleader/joinder clauses that state that "[n]o person or organization shall have any right under this Policy to join Insurer as a party to any action against the Insureds to determine their liability, nor shall Insurer be impleaded by the Insureds or their legal representative."

No-impleader/joinder clauses are enforceable when the insurer has provided its insured with a defense and has not repudiated its contract. "If the insurer actually is conducting the defense, it is hardly likely to seek to implead itself and any attempt by the insured to implead an insurer who has not disclaimed liability clearly would be a breach of the 'cooperation' clause of the insurance policy." 6 Fed. Prac & Proc. Civ § 1449 (3d ed.). This tenet has been adopted by courts both in Alabama and elsewhere in the United States. For example, the United States District Court for the Middle District of Alabama held that this type of impleader/joinder clause is enforceable absent a waiver. Roberson v. Alabama Trucking Ass'n Workers Compensation Fund, 2012 WL 4477648 (M.D. Ala. 2012); see also Hall v. Allstate Ins. Co., 880 F.2d 394, 397, (citing Munday v. State Farm Fire & Cas. Co., 323 S.E.2d 193 (Ga. App. 1984) in its identification of an insurer's failure to defend its insured as the key factor in the inapplicability of a "no action clause" similar to the no-impleader/joinder clause at issue here).

The no-impleader/joinder clauses in both the Heatherwood and Inverness Policies are enforceable and unambiguous. The Third-Party Complaint does not bring any claims against Westchester for an alleged failure of its duty to defend. In fact, the Third-Party Plaintiffs admit that Westchester has provided them with a defense throughout this litigation. Third-Party Compl. ¶¶ 33-

34. Therefore, this Honorable Court should honor the terms of the insurance contracts between Westchester and the Third-Party Plaintiffs. The Third-Party Plaintiffs claims should be severed and brought as an action independent from the instant lawsuit.

#### **IV. CONCLUSION.**

The Third-Party Plaintiffs' assertions of independent causes of action against Westchester are improper under Rule 14 of the Alabama Rules of Civil Procedure and are contrary to their insurance contracts with Westchester. Furthermore, the Third-Party Plaintiffs' use of the procedures set out in Universal Underwriters Ins. Co. is unwarranted when an insurer has been implicated, as Westchester has here. For the foregoing reasons, Westchester respectfully contends that its Motion to Sever should be ALLOWED.

Respectfully submitted,

s/Candace L. Hudson  
Joel S. Isenberg (ASB-8855-n76j)  
Candace L. Hudson (ASB-8314-n66h)  
Attorneys for Third Party Defendant  
Westchester Fire Insurance Company a/k/a  
ACE Westchester Fire Insurance Company

#### **OF COUNSEL:**

ELY & ISENBERG, LLC  
2100-B SouthBridge Parkway  
Suite 380  
Birmingham, Alabama 35209  
Telephone: (205) 313-1200  
Facsimile: (205) 313-1201  
[jisenberg@elylawllc.com](mailto:jisenberg@elylawllc.com)  
[chudson@elylawllc.com](mailto:chudson@elylawllc.com)

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing has been served on all parties of record via AlaFile electronic filing system and/or U.S. Mail on this the 9<sup>th</sup> day of December, 2013.

Stephen Heninger  
Gayle Douglas  
HENINGER GARRISON DAVIS  
P.O. Box 11310  
Birmingham, Alabama 35202

Bruce Rogers  
Sela Blanton  
BAIMBRIDGE, MIMS, ROGERS, & SMITH  
Post Office Box 530886  
Birmingham, Alabama 35253

James Gray  
Britt Monroe  
Taffi Stewart  
Bryan Grayson  
LLOYD, GRAY, WHITEHEAD & MONROE  
2501 20<sup>th</sup> Place South, Suite 300  
Birmingham, Alabama 35223-1702

Rachel J. Moore  
NAJJAR DENABURG, P.C.  
2125 Morris Avenue  
Birmingham, Alabama 35203

s/Candace L. Hudson  
\_\_\_\_\_  
OF COUNSEL



## AlaFile E-Notice

58-CV-2008-001251.00

Judge: HEWITT L CONWILL

To: HUDSON CANDACE LEANN  
chudson@elylawllc.com

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

HGC INC VS HEATHERWOOD HOLDINGS LLC ET AL  
58-CV-2008-001251.00

The following matter was FILED on 12/12/2013 1:54:38 PM

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 58-CV-2008-001251.00  
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**IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA**

HGC INC, )  
 BILLINGSLEY H. FRANK, )  
 BILLINGSLEY PAT, )  
 BREWER LINDA ET AL, )  
 Plaintiffs, )

V. )

Case No.: CV-2008-001251.00

HEATHERWOOD HOLDINGS LLC% )  
 WILLIAM A OCHSENHIRT, )  
 OCHSENHIRT WILLIAM A III, )  
 KIMERLING JONATHAN L, )  
 INVERNESS HOLDINGS LLC % WILLIAM A )  
 OCHSENHIRT III ET AL, )  
 Defendants. )

**ORDER**

Motion to Sever filed by Third Party Defendant Westchester Fire Insurance Company is set for argument on January 30, 2014 at 9:00 A.M.

DONE this 12<sup>th</sup> day of December, 2013.

/s/ HEWITT L CONWILL  
 CIRCUIT JUDGE



**IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA**

<b>MIKE AND CATHY WESLER, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. CV-2009-358</b>
	)	
<b>JONATHAN L. KIMERLING, et al.</b>	)	
	)	
<b>Defendants.</b>	)	

**CONSOLIDATED WITH**

<b>HCG, INC., et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. CV-2008-1251</b>
	)	
<b>WILLIAM A. OCHSENHIRT, III, et al.</b>	)	
	)	
<b>Defendants.</b>	)	
	)	
<b>JONATHAN L. KIMERLING, WILLIAM</b>	)	
<b>A. OCHSENHIRT, III, INVERNESS</b>	)	<b>HEARING DATE:</b>
<b>HOLDINGS, LLC d/b/a INVERNESS</b>	)	<b>MARCH 6, 2014 at 9:00 AM</b>
<b>COUNTRY CLUB, and S &amp; &amp; FAMILY,</b>	)	
<b>LLC,</b>	)	
	)	
<b>Third-Party Plaintiffs,</b>	)	
	)	
<b>ACE WESTCHESTER FIRE INSURANCE</b>	)	
<b>COMPANY</b>	)	
	)	

**OPPOSITION TO WESTCHESTER FIRE INSURANCE COMPANY'S**  
**MOTION TO SEVER**

COME NOW defendants/third party plaintiffs Jonathan L. Kimerling, William A. Ochsenhirt, III, Inverness Holdings, LLC d/b/a Inverness Country Club, and S & J Family, LLC (“Defendants/Third Party Plaintiffs”), and as insureds under the policies at issue, do hereby oppose

third party defendant Westchester Fire Insurance Company's ("Westchester Insurance") motion to sever. In support of this opposition, defendants/third party plaintiffs submit the following:

1. By Order dated October 3, 2013, this Court granted all the parties' request to add Westchester Insurance as a third party defendant for a bifurcated jury trial for coverage disputes, pursuant to the procedures established in *Universal Underwriters Insurance Company v. East Central Alabama Ford-Mercury, Inc.*, 574 So. 2d 716 (Ala. 1990).

2. Westchester Insurance now asks this Court to sever the coverage claims asserted against it, arguing that:

(a) Alabama law requires separation of insurance coverage issues from liability (we agree);

(b) the bifurcated trial procedure set forth in *Universal Underwriters* is inapplicable in this case (we disagree); and

(c) the third party complaint is a breach of the subject insurance policies (we disagree).

3. The parties have never disputed or challenged the rule requiring separation at trial of coverage and liability matters, and in fact the rule is recognized and honored in *Universal Underwriters*, and is the very reason for the Court's recommended bifurcated trial procedure. Westchester Insurance fails to explain or acknowledge that the bifurcation procedure established in *Universal Underwriters* honors that rule. Additionally, Rule 18(c) of the Alabama Rules of Civil Procedure mandates a bifurcated trial "to prevent a joint trial on the issue of insurance coverage and a related damage claim." Comments to Rule 18(c).

4. Westchester Insurance issued Director and Officer liability policies to Heatherwood and Inverness, one of which is providing a defense here through appointed defense

counsel at Lloyd Gray Whitehead & Monroe, P.C. Yet, Westchester Insurance argues that the coverage claims asserted against it in the third party complaint are “entirely independent” from the claims asserted by the homeowner plaintiffs against the defendants/third party plaintiffs. This is not correct. The claims asserted by the homeowner plaintiffs directly implicate the Westchester Insurance policies. Whether or not indemnity is owed is the subject of the third party complaint against Westchester Insurance. Westchester Insurance’s denial of indemnity coverage directly relates to the claims of the homeowner plaintiffs.

5. Westchester Insurance relies on *SouthTrust Bank v. Jones, Morrison, Womack & Dearing, P.C.*, 939 So. 2d 885 (Ala. Civ. App. 2005), for the proposition that Alabama courts do not allow third party plaintiffs to use Rule 14 (third-party practice) to pursue independent causes of action. However, *SouthTrust* is not a coverage dispute, and did not involve an insured seeking to bring third party claims against its insurer for indemnification. Nevertheless, the rule articulated by the Court of Civil Appeals in *SouthTrust* applies in this case—citing Ohio law and Rule 14, the Court noted that the foundation for third party claims must be that the third party defendant is or may be liable to the defendant for all or part of the plaintiff’s claims against the defendant/third party plaintiff. *Id.* at 898.<sup>1</sup> As the defendants’/third party plaintiffs’ insurer, and the issuer of at least two D&O insurance policies that cover the claims asserted by the homeowner plaintiffs, Westchester Insurance is, or may be, liable to the defendants/third party plaintiffs for all or part of plaintiffs’ claims. The third party claims against Westchester Insurance, then, are not independent causes of action, but instead fall squarely within the parameters of Rule 14.

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<sup>1</sup> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.

Ala. R. Civ. P. 14(a) (emphasis added).



6. Westchester Insurance then mistakenly argues that the bifurcated trial procedure set forth in *Universal Underwriters* is not applicable in this case because *Universal Underwriters* involved an intervention request, whereas here the defendants/third party plaintiffs have impleaded Westchester Insurance. This is a difference without distinction, because the procedure is the same, whether by intervention or impleader—the insurer is added and the trial is bifurcated. Westchester Insurance has not cited any Alabama law specifically limiting the bifurcated trial procedure to cases involving intervention, and the undersigned have not found any such authority. The Court in *Universal Underwriters* actually based its bifurcated trial procedure on a similar procedure adopted by the Wisconsin legislature, which expressly gave Wisconsin courts authority to order bifurcated trials when a third party was impleaded<sup>2</sup>. *Id.* at 726. The Alabama Supreme Court in *Universal Underwriters* cited favorably the Wisconsin statute. 574 So. 2d at 725-726. The Court’s reliance on the aforementioned Wisconsin law establishes without question that the bifurcated trial procedure is as appropriate for an impleader as well as an intervention.

7. Essentially relying on the dissenting opinion in *Universal Underwriters*, Westchester Insurance claims it will be unduly prejudiced by a bifurcated trial. In fact, as the majority Court recognized, it is the defendants/third party plaintiffs who would be prejudiced if their claims against Westchester are severed. Rule 42(b) provides that the court “in furtherance of

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<sup>2</sup> The Wisconsin legislature provided:

If an insurer is made a party defendant pursuant to this section and it appears at any time before or during the trial that there is or may be a cross issue between the insurer and the insured or any issue between any other person and the insurer involving the question of the insurer’s liability if judgment should be rendered against the insured, the court may, upon motion of any defendant in the action, cause the person who may be liable upon such cross issue to be made a party defendant to the action and all the issues involved in the controversy determined in the trial of the action or any 3<sup>rd</sup> party may be impleaded. . . Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting separate trials on the issue of liability to the plaintiff or other party seeking affirmative relief on the issue of whether the insurance policy in question affords coverage.

*Universal Underwriters*, 574 So. 2d at 726 (emphasis added).

convenience or to avoid prejudice . . . may order a separate trial of any claim . . . or third-party claim, or of any separate issue . . .” *Ala. R. Civ. P.* 42. The Court in *Universal Underwriters* recognized that this rule “may be used to separate the issues of liability from those of damages.” *Universal Underwriters*, 574 So. 2d at 724. As set forth in the third party complaint, Westchester Insurance not only owes the defendants/third party plaintiffs a defense for the claims asserted by the homeowner plaintiffs, but also indemnity for any judgment entered against the defendants/third party plaintiffs. Severing the claims against Westchester Insurance would exponentially increase the time and cost associated with reaching a final conclusion of all of the claims at issue in this lawsuit. As the Court recognized in *Universal Underwriters*, a bifurcated trial is the most efficient way to approach this matter, and in full compliance with Alabama law.

8. Finally, Westchester Insurance claims severance is warranted because the defendants/third party plaintiffs have somehow breached a clause in the insurance policies which purportedly prohibits the insureds from joining Westchester Insurance as a party to any action against the insureds (“no action” or “no impleader” clause). However, a leading commentary on Federal Rule 14 notes that such clauses are generally not enforced because they “are inconsistent with the policy in favor of accelerating the determination of liability that underlies Rule 14.” 6 *Fed. Prac. & Proc. Civ.* § 1449 (3d ed.). “[S]ince the leading case of *Jordan v. Stephens* [7 F.R.D. 140 (W.D. Mo. 1945)], federal courts have given effect to the impleader device at the expense of these insurance policy provisions.”<sup>3</sup> At least one court has held that an insurer was properly impleaded, even though the insurer was conducting a defense, because the insurer was contesting liability on the policy. *Rosalis v. Universal Distributors, Inc.*, 21 F.R.D. 169 (D. Conn. 1957).

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<sup>3</sup> While federal Rule 14 is not identical to its Alabama counterpart, both rules provide that a defendant may bring in a party who is or may be liable to him for all or part of the plaintiff’s claim against the third party plaintiff.

Westchester Insurance relies solely on an unreported Middle District of Alabama opinion (*Roberson v. Alabama Trucking Ass'n Workers' Compensation Fund*, 2012 WL 4477648) which in turn relied upon Georgia law (*Hall v. Allstate Ins. Co.*, 880 F. 2d 394 (11<sup>th</sup> Cir. 1989)), for its argument about no action clauses. *Roberson* dealt with a motion to remand and a fraudulent joinder argument. On the issue of no impleader/no action clauses, the *Roberson* Court actually held that it could not conclude that an Alabama court “would not find a ‘no impleader’ clause to have been waived by an insurer who fails to tender a defense.” *Roberson*, 2012 WL 4477648 at \*4. Here, Westchester Insurance waived its right to assert the no action clause in this case by denying indemnity coverage on the eve of the previously-set first of many jury trials on liability.

WHEREFORE, THE PREMISES CONSIDERED, defendants/third party plaintiffs respectfully request that Westchester Insurance’s motion to sever be DENIED.

/s/ Bruce F. Rogers

Bruce F. Rogers

Sela S. Blanton

Attorneys for Defendants

BAINBRIDGE, MIMS, ROGERS & SMITH, LLP

Post Office Box 530886

Birmingham, Alabama 35253

205-879-1100

205-879-4300 (fax)

brogers@bainbridgemims.com

sblanton@bainbridgemims.com

**CERTIFICATE OF SERVICE**

I hereby certify that on March 4, 2014, the foregoing was electronically filed with the Clerk of Court using the Alafile system which will send notification of such filing to the following:

James Gray  
E. Britton Monroe  
Taffi S. Stewart  
LLOYD GRAY WHITEHEAD & MONROE, P.C.  
2501 20<sup>th</sup> Place South, Suite 300  
Birmingham, Alabama 35223-1702

Stephen D. Heninger  
HENINGER GARRISON DAVIS, LLC  
P.O. Box 11310  
Birmingham, Alabama 35202

Joel S. Isenberg  
Candace L. Hudson  
ELY & ISENBERG, LLC  
2100-B SouthBridge Parkway, Suite 380  
Birmingham, Alabama 35209

Rachel J. Moore  
NAJJAR DENABURG, P.C.  
2125 Morris Avenue  
Birmingham, Alabama 35203

J. Frank Head  
WALLACE ELLIS FOWLER HEAD & JUSTICE  
Post Office Box 587  
Columbiana, Alabama 35051

s/ Bruce F. Rogers  
\_\_\_\_\_  
Of Counsel



## AlaFile E-Notice

58-CV-2009-000358.00

Judge: HEWITT L CONWILL

To: HUDSON CANDACE LEANN  
chudson@elylawllc.com

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

MIKE WESLER ET AL VS JONATHAN L KIMERLING ET AL  
58-CV-2009-000358.00

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205-669-3760  
mary.harris@alacourt.gov



IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

MIKE AND CATHY WESLER, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 JONATHAN L. KIMERLING, et al. )  
 )  
 Defendants. )

Case No. CV-2009-358

**CONSOLIDATED WITH**

HCG, INC., et al, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 WILLIAM A. OCHSENHIRT, III, et al. )  
 )  
 Defendants. )

JONATHAN L. KIMERLING, WILLIAM )  
 A. OCHSENHIRT, III, INVERNESS )  
 HOLDINGS, LLC d/b/a INVERNESS )  
 COUNTRY CLUB, and S & J FAMILY, )  
 LLC, )

Case No. CV-2008-1251

Third-Party Plaintiffs, )  
 )  
 v. )  
 )

WESTCHESTER FIRE INSURANCE )  
 COMPANY a/k/a/ ACE )  
 WESTCHESTER FIRE INSURANCE )  
 COMPANY, )  
 )  
 Third-Party Defendant. )

**ORDER GRANTING MOTION TO SEVER**

Upon consideration of the submissions and arguments of the parties, it is hereby ORDERED that Third-party Defendant Westchester Fire Insurance Company a/k/a ACE Westchester Fire Insurance Company's Motion to Sever is GRANTED. All claims asserted through the Third-party Complaint are hereby SEVERED. The Clerk of Court is directed to assign a new case number to the severed claims based upon this Order and shall docket a copy of this Order as the first entry. The new case shall be treated as an entirely separate action for all purposes, with Jonathan L. Kimerling, William A. Ochsenhirt, III, Inverness Holdings, LLC d/b/a Inverness Country Club, and S & J Family, LLC designated as the Plaintiffs and Westchester Fire Insurance Company a/k/a ACE Westchester Fire Insurance Company designated as the Defendant.

Done this the 7<sup>th</sup> day of October, 2014.



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CIRCUIT JUDGE

**IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA**

**JONATHAN L. KIMERLING;  
WILLIAM A. OCHSENHIRT, III;  
INVERNESS HOLDINGS, LLC d/b/a  
INVERNESS COUNTRY CLUB; and,  
S&J FAMILY, LLC,**

**Plaintiffs,**

**vs.**

**WESTCHESTER FIRE INSURANCE  
COMPANY a/k/a ACE WESTCHESTER  
FIRE INSURANCE COMPANY,**

**Defendant.**

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**CIVIL ACTION NUMBER**

**NOTICE OF REMOVAL**

TO THE PLAINTIFF IN THE ABOVE-STYLED CAUSE AND HER ATTORNEY OF RECORD:

Please take notice that on the 7<sup>th</sup> day of October, 2014, the undersigned, as attorneys for Defendant Westchester Fire Insurance Company a/k/a ACE Westchester Fire Insurance Company (“Westchester”), filed on its behalf a Notice of Removal in the United States District Court for the Northern District of Alabama, Southern Division, to remove the above-entitled cause of action from the Circuit Court of Shelby County, Alabama (CV-2014-303) to said United States District Court, and also filed a true copy of said Notice of Removal with the Clerk of the Circuit Court of Shelby County, Alabama.

Respectfully submitted,

s/Candace L. Hudson  
Joel S. Isenberg (ISE001)  
Candace L. Hudson (HUD026)  
Attorneys for Westchester Fire Insurance  
Company d/b/a ACE Westchester Fire  
Insurance Company



**OF COUNSEL:**

ELY & ISENBERG, LLC  
2100-B SouthBridge Pkwy., Suite 380  
Birmingham, Alabama 35209  
Telephone: (205) 313-1200  
Facsimile: (205) 313-1201  
[jisenberg@elylawllc.com](mailto:jisenberg@elylawllc.com)  
[chudson@elylawllc.com](mailto:chudson@elylawllc.com)

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and accurate copy of the foregoing has been served on all parties of record via the CM/ECF system or U.S. Mail on this the 7<sup>th</sup> day of October, 2014.

Bruce F. Rogers  
Sela S. Blanton  
BAINBRIDGE, MIMS, ROGERS & SMITH, LLP  
P.O. Box 530886  
Birmingham, AL 35253

s/Candace L. Hudson  
OF COUNSEL