



# Reliance, the Bachelor: Will Experience Answer the Open Questions of Reasonable Reliance?

By Wilson F. Green

*“That is no excuse,” replied Mr. Brownlow. “You were present on the occasion of the destruction of these trinkets, and indeed are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction.”*

*“If the law supposes that,” said Mr. Bumble, squeezing his hat emphatically in both hands, “the law is a ass—a idiot. If that’s the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience.”*

*Charles Dickens, Oliver Twist, Ch. 51*

**B**rownlow, ever the punctilious prosecutor, gave sound interpretation to the facts under the controlling law. Although Mr. Bumble had pleaded the “Adam Defense” (it was all Mrs. Bumble’s idea to pawn that jewelry, so he claimed), Brownlow rejoined that the law supposes—one might say conclusively presumes—that a wife acts under her husband’s direction. Mr. Bumble, at once outraged and confounded, then uttered his unforgettable line—“the law is a[n] ass.”

Non-lawyers (some lawyers, too) often quote this mantra about the—er—darker side of the law when speaking of a legal result which defies the perceived equities of a case. What we all usually forget is the rest of Mr. Bumble’s statement, and no doubt his most significant words. For Mr. Bumble, the law is an ignorant bachelor who, having never been married, does not understand the otherworldly

idiocy of the controlling legal principle. Regardless of what the “rule” is, a wife does not, in any semblance of reality, act under a husband’s direction. The rule of law belies the teaching of experience.

I thought about poor Mr. Bumble a few months ago. I was buying a new cell phone for my wife, and renewing my contract, at a wireless provider’s retail store. After an hour’s wait, my number was called, and the representative led me to a kiosk containing a computer terminal (for him) and a credit card scanner and signature pad (for me). I hurriedly explained what I wanted (I was already late for a meeting). The representative handed me the new phone and then made the changes to my account on his computer. He explained the terms of the new service agreement generally—how many lines I would have, how many package minutes and the like—and then instructed me to sign the signature pad with the

magnetic pen. I looked down, and the blank computer signature pad had a box for my signature, indicating my agreement to the “Terms of Service.” The only problem, of course, was that I had no “Terms of Service.” I was signing my new contract, though I had been provided no contract at all. Eager to leave, I signed, grabbed the goods and rushed to my car.

As I fractured a few traffic laws dashing down Highway 82, I began to think about what I had done. I entered into a contract without knowing all—for that matter, any—of its terms. I began asking myself questions:

- Did I sign an arbitration agreement? (Wait, that’s not a question.)
- Did the representative get the service package that I requested?
- Am I obligated to pay an activation fee on the new phone?
- What about termination fees?
- What terms don’t I know about?

I asked more questions of myself than in the Talking Heads’ song “Once in a Lifetime”—but it included the last question from that song: “WHAT HAVE I DONE?”

This, of course, brings us to reasonable reliance. The fraud law in Alabama would say that I acted irresponsibly, even heedlessly, in signing a contract without reading its terms. Perhaps that’s so (though I would protest that I should not be held to a document that I never even received). Mr. Bumble would defend me, however, arguing that the law has never experienced waiting in a cell phone store for an hour, or being late for a meeting. Indeed, one could argue that no one with experience would adopt such a rule of law. Have you actually read your cell phone contract? How about your home or car insurance policy? How about your credit card terms and conditions? (If you answered all of these “yes,” you’re lying.) And it doesn’t stop with everyday contracts, either. How many of you have counseled corporate clients—sophisticated businesspeople—concerning their rights under a contract which they tell you they have never read? I have, and many times.

Although experience would suggest a different rule, my point is neither to revisit nor to question the “duty to read” principle under-girding reasonable

reliance law. Since *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997), Alabama law has revived the duty imposed upon fraud plaintiffs to read their contracts. *Foremost* was designed to “provide a mechanism whereby the trial court [ould] enter a judgment as a matter of law in a fraud case where the undisputed evidence indicates that the party or parties claiming fraud in a particular transaction were fully capable of reading and understanding their documents but nonetheless made a deliberate decision to ignore written contract terms.” *Foremost*, 693 So. 2d at 421.

To my point, then, which is to examine some (though not all)<sup>1</sup> of the unanswered questions of “reasonable reliance” law remaining after almost 13 years of *Foremost*—and in the process, to attempt to synthesize most of the cases dealing with reasonable reliance issues. With Mr. Bumble, we hope that experience—experience which largely comes from developed fact patterns in future cases—can teach some valuable lessons in reaching sound resolutions to those still-unanswered questions, which are more plentiful than one might suppose.

## Four Unanswered Questions

*Foremost* and its progeny establish that a fraud plaintiff cannot reasonably rely on an oral statement which is contradicted by a conspicuous, understandable, unambiguous, contractual writing. Thus, in virtually all of the post-*Foremost* cases, including the most recent decisions in *AmerUS Life Ins. Co. v. Smith*, 5 So. 3d 1200 (Ala. 2008) and *Cook’s Pest Control, Inc. v. Rebar*, 2009 WL 418074 (Ala. Feb. 20, 2009), all four features of the contradictory writing—conspicuous, understandable, unambiguous and contractual—were either present or, at least, not seriously contested. Our supreme court has not definitively answered whether judgment as a matter of law is appropriate as to reasonable reliance when one (or more) of those four conditions is not present:

- What if the portion of the writing which contradicts the alleged oral

misrepresentation is not conspicuous or readily apparent?

- What if the plaintiff testifies that she actually read, but could not understand, the controlling contractual provision?
- What if there is ambiguity in the controlling contractual provision?
- What if the writing which allegedly contradicts the oral misrepresentation is outside the controlling contract—even if the writing is conspicuous, understandable and unambiguous?

If any of these conditions are not met, the question of reasonableness may be one for the fact-finder, even under the existing post-*Foremost* law.

### 1. What to do with the inconspicuous contradiction?

Looking over the post-*Foremost* cases, it is striking that virtually every post-*Foremost* case has involved a conspicuous written disclosure which flatly, and admittedly, contradicted the oral misrepresentation. This is particularly true for the “four horsemen” of universal life insurance cases: *Alfa Life Ins. Co. v. Green*, 881 So. 2d 987 (Ala. 2003); *Liberty National Life Ins. Co. v. Ingram*, 887 So. 2d 224 (Ala. 2004); *Baker v. Metropolitan Life Ins. Co.*, 907 So. 2d 419 (Ala. 2005); and *AmerUS Life Ins. Co. v. Smith*, 5 So. 2d 1200 (Ala. 2008). In *AmerUS* and the other universal life insurance cases, the writings plainly and clearly disclosed that the scheduled premiums might not be sufficient in future years, and that future premiums might need to be increased to maintain insurance coverages. The court has never, so far as my review has revealed, faced an argument that a written disclosure was not conspicuous, though arguably (or even admittedly) contradictory, and that its lack of obviousness in the contradiction between the writing and the oral misrepresentation should render the question of reasonableness one for the fact-finder.

Consider an example. Suppose that the document in issue is lengthy or complex. The oral misrepresentation pertains to a contract term appearing well into the document, but that the controlling contract term’s operation depends upon other interplay with other sections of the contract

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(such as definitions), thus requiring the reader to cross-reference multiple times to ascertain the meaning of the controlling contract terms. Or, perhaps, the controlling contractual provision requires the reader to perform one or more mathematical calculations to determine the financial impact (in, for example, an annuity contract containing a formula for calculating an early termination charge). Even with a relatively sophisticated reader, deciphering the meaning of such a contract term might prove challenging, and actually calculating the financial impact from a formula might be impossible or, at the very least, might require considerable expertise beyond the average ken. In the end, the contract does not contain a clear and concise refutation of the oral misrepresentation, as has been the case in prior reasonable-reliance decisions.

There is some post-*Foremost* precedent suggesting that the question of reasonableness in such circumstances might be one of disputed fact. First, in *Ex parte Seabol*, (Ala. 2000), the supreme court established an exception to the application of *Foremost* for what might be called “complex transactions.” The plaintiff in *Seabol* was a real estate professional, claiming fraud in connection with the scope of a mortgage on property. Given the plaintiff’s expertise in real estate, one would have assumed a more stringent test for reasonableness, since the plaintiff unmistakably had possession of the mortgage documents, and since those documents spelled out clearly what property was encumbered, and what debts the mortgage secured. But the court, finding the transaction one in which the documents were “not so easily understood,” held that an exception to *Foremost* applied.

The court has never developed the contours of *Seabol*, except to discuss its facts and holding, without altering its scope, in two subsequent cases, *Potter v. First Real Estate Co.*, 844 So. 2d 540 (Ala. 2002), and *Gilmore v. M & B Realty Co., LLC*, 895 So. 2d 200 (Ala. 2004). But if (as in *Seabol*) a real estate professional can claim that a real estate transaction, with which he should be uniquely familiar, is sufficiently complex as to warrant a *Foremost* exception, such would suggest a broader scope of application.

One other case merits mention as possibly creating a “complex transaction” or other exception to the operation of

*Foremost*. In *Ex parte Alabama Farmers Cooperative, Inc.*, 911 So. 2d 696 (Ala. 2004), AFC hired PriceWaterhouse Coopers LLP (“PWC”) to perform an internal audit to assess AFC’s liability under certain long-term leases (which were presumably in AFC’s possession), which were entered into by a high-ranking AFC officer who had committed malfeasance. PWC issued an audit report opining that AFC had no obligations, even though PWC never reviewed the underlying leases. AFC relied on the report, though a review of the underlying leases (again, presumably in AFC’s possession) would have indicated otherwise. The court held that AFC could reasonably rely on the audit report itself, particularly since PWC was being hired to assess the underlying leases themselves.

Admittedly, both *Seabol* and *AFC* addressed statute of limitation questions, rather than substantive reasonable reliance questions. As discussed under question 3, the conflation of reasonable reliance principles and the discovery rule in fraud’s limitations period has created some confusion in reasonable reliance law. It is also noteworthy that in *AmerUS Life Ins. Co. v. Smith*, 5 So. 3d 1200, 1215 (Ala. 2008), the court implicitly rejected the plaintiff’s effort at making a “complex transaction” counterargument to the defendant’s unreasonable reliance position. However, the court in *AmerUS* specifically noted that the plaintiff’s evidence of complexity was insufficiently specific to create an issue of fact regarding reasonableness. Thus, for now, *Seabol* and *AFC* could support a “complex transaction” exception to *Foremost* in a manner not inconsistent with *AmerUS*, so long as the complexity infected the specific matter made the basis of the oral representation.

## 2. What if plaintiff actually tried to read the document, but did not understand the contradiction?


Post-*Foremost* decisions, almost without exception, have involved plaintiffs who admittedly did not read their documents. Indeed, the animating principle behind the re-adoption of “reasonable reliance” in *Foremost* was the court’s stated desire to jettison the automatic denial of summary judgment commanded under justifiable-reliance law, in situations where the plaintiffs never read clear

documents, and instead blindly trusted the oral representations to the contrary. Where plaintiffs “were fully capable of reading and understanding their documents but nonetheless made a deliberate decision to ignore written contract terms[,]” reliance on oral representations is inherently unreasonable. *Foremost*, 693 So. 2d at 421.

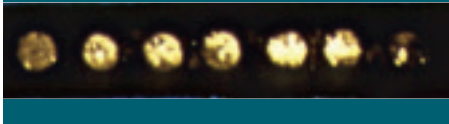
Thus, facing a plaintiff who admittedly did not read her documents, the supreme court in post-*Foremost* cases has looked for one of two additional facts, or factors, to determine the reliance issue. First, in many post-*Foremost* cases, the plaintiff has admitted both that she did not read and that, if she had read the documents, she would have understood the truth. In those cases, judgment as a matter of law has been uniformly granted (*ala* the universal life cases). Alternatively, if there is no record evidence from plaintiff that she would have understood if she had read the document (or sometimes, in addition to such evidence), the court has then examined the relative sophistication of the plaintiff, in order to determine whether the circumstantial evidence indicates that she would have understood the documents if she had read them.

However, the cases have not considered, or answered definitively, what happens if the plaintiff testifies that she actually tried to read the documents, but for some reason failed in subjectively understanding the contradiction between the written document and the oral misrepresentation. One case tangentially related to the point is *Gilmore v. M&B Realty Co., LLC*, 895 So. 2d 200 (Ala. 2004), in which plaintiffs claimed that they intended to buy the house they had been shown, but the closing documents showed they were buying a different house. The court held that the issue of reasonable reliance was one of fact, because the plaintiffs were first-time home buyers and therefore were not as familiar with transactional documents, even though the closing documents showed clearly that they were buying a different house than they were shown. Thus, plaintiffs’ status as first-time home buyers proved critical to their creating a fact issue as to their “subjective understanding” of the transaction. The circumstantial “markers” of sophistication, in other words, created a fact issue.

A fact dispute would probably exist if the plaintiff can demonstrate that she tried



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to read or understand the documents, but for some reason failed in subjectively apprehending the contradiction between the writing and the oral representation. On the one hand, the plaintiff will have stated that she tried to read but failed to understand, and under such circumstances, the plaintiff has discharged her *Foremost* duty to read. On the other hand, there may be circumstantial indicia, or markers, that plaintiff could have understood the contradiction. Perhaps the plaintiff is college-educated, or has experience in business affairs—or perhaps the plaintiff understands the contradiction while sitting in a deposition, but for whatever reason did not understand the contradiction at the time she initially read the document. Regardless, the question of reasonableness in such circumstances would quite possibly be for the jury, in that the plaintiff’s subjective failure to understand the contradiction would be purely an issue of the plaintiff’s credibility, a uniquely factual determination.

Obviously, the development of an evidentiary record will prove critical to further development of reasonable reliance law in this area. As a general proposition, however, we can say that to allow for a jury question under these circumstances would not necessarily be inconsistent

with *Foremost*. Indeed, the court in *Foremost* specifically contemplated that the fact-finder would consider “the issue of reliance based on all of the circumstances surrounding a transaction, including the mental capacity, educational background, relative sophistication, and bargaining power of the parties.” *Foremost*, 693 So. 2d at 421. Mental capacity would, one assumes, encompass subjective understanding. Finally, recognizing a fact issue under these conditions would not undermine the policy, espoused in *Foremost*, that parties read their contracts, because in this hypothetical situation, the plaintiff would have read her contract. Thus, the plaintiff would have discharged her duty to read.

### 3. What if the writing is ambiguous?

*Foremost* and its progeny have dealt with unambiguous writings which unmistakably, or admittedly, contradict the alleged oral misrepresentation. No case of which I am aware has ever found a summary judgment issue based on the “contradictory document” rule of reasonable reliance, where the controlling document was ambiguous, or in any way unclear, on the particular point made the basis of the fraud claim.

Logic would say, of course, that a jury question is present if there is some question as to what the pertinent provisions of the controlling writing mean. However, there is some language in *AmerUS Life Ins. Co. v. Smith*, 5 So. 3d 1200 (Ala. 2008), which could be used by a fraud defendant to argue that even an ambiguous document triggers “inquiry notice,” and that if the plaintiff makes no further inquiry in the face of an ambiguous writing, the defendant could argue that it is still entitled to judgment as a matter of law. Such was not the issue in *AmerUS*, because the documents in *AmerUS* were admittedly unambiguous on the seminal question. Moreover, such a broad reading of “inquiry notice” would likely be a substantial departure from the first principles of *Foremost*.

The problem of how far “inquiry notice” goes is rooted in the intermingling of discovery-rule statute of limitations and substantive reasonable reliance principles, the genesis of which is in *Foremost* itself. Though we often forget it, it is significant that *Foremost* was

actually more a statute of limitations case than a reliance case. The *Foremost* plaintiffs, who sued more than two years after receiving their contract documents, testified that they did not read their documents, but admitted that if they had done so, they would have known the truth. Though the court returned to the “reasonable reliance” standard for proof of substantive fraud, the primary issue was whether the plaintiffs’ receipt of the documents, coupled with their admission that had they read the documents they would have understood the truth, triggered the running of the statute of limitations under the discovery rule. In other words, the issue was whether a reasonable person in the plaintiffs’ position should have discovered the fraud.

Four years after *Foremost*, in *Auto-Owners Ins. Co. v. Abston*, 822 So. 2d 1187, 1195 (Ala. 2001), the court accentuated this aspect of the *Foremost* holding, stating that “[u]nder *Foremost*, the limitations period begins to run when the plaintiff was privy to facts which would ‘provoke inquiry in the mind of a [person] of reasonable prudence and which, if followed up, would have led to the discovery of the fraud.’” The court quoted *Wilcutt v. Union Oil Co.*, 432 So. 2d 1217, 1219 (Ala. 1983), a pre-*Foremost* case, in support of this iteration of the statute-of-limitations standard. Thus, *Abston* explicitly and pointedly reintroduced to the post-*Foremost* world the concept of “inquiry notice” as being

sufficient to trigger the running of the statute of limitations.

*AmerUS Life Ins. Co. v. Smith*, 5 So. 2d 1200 (Ala. 2008), contains language, though arguably *dicta*, which could be read to extend the concept of “inquiry notice” beyond the statute-of-limitations world, and into the substantive proof of reasonable reliance. Like the other universal life cases, the plaintiff in *AmerUS* admitted that he did not read his documents. The documents, moreover, clearly contradicted the alleged oral statements. Though the court likely could have stopped its analysis right there, the court proceeded, stating that the receipt of documents contradicting the oral representation actually triggered a duty to inquire:

In light of the language of the documents surrounding the insureds’ purchase of the life-insurance policies at issue in this case and the conflict between [the agent’s] alleged misrepresentations and the documents presented to [plaintiff], it cannot be said that [plaintiff] reasonably relied on [the agent’s] representations. As this court stated in *Torres [v. State Farm Fire & Cas. Co.]*, 438 So. 2d 757 (Ala. 1983): “[T]he right of reliance comes with a concomitant duty on the part of the plaintiffs to exercise some measure of precaution to safeguard their interests.” 438 So. 2d at 759. The insureds here took no precautions to safeguard their interests. If nothing else, the language in the policies and

the cost-benefit statement should have provoked inquiry or a simple investigation of the facts by [plaintiff.]

Moreover, the testimony . . . does not resolve the issue whether, as a matter of law, a reasonable person, upon reading the entire policy and the cost-benefit statement, would be put on inquiry as to the consistency of those documents with the previous representations by [the agent]. Of course, if so, that person is then charged with knowledge of all of the information that the inquiry would have produced. We conclude that no reasonable person could read the policies and the cost-benefit statement and not be put on inquiry as to the existence of inconsistencies, thereby making reliance on [the agent’s] representations unreasonable as a matter of law.

*AmerUS*, 5 So. 3d at 1215-16 (citations omitted). Thus, under *AmerUS*, a plaintiff who receives an unambiguous document which flatly contradicts an oral representation (a) has a duty to read the document, and (b) upon apprehension of the inconsistency between the writing and the oral statement, has a duty to inquire further.

The court’s treatment of the “inquiry notice” concept has not, however, been entirely consistent. Within the past year, the court may have (unintentionally) revived a pre-*Foremost* iteration of statute of limitations principles in fraud, which, in turn, would eradicate “inquiry notice.” In *Jones v. Alfa Mut. Ins. Co.*, 1 So. 3d 23 (Ala. 2008), Alfa argued that the statute of limitations had expired on a bad-faith claim, and in support of that argument analogized to the fraud statute of limitations. The court’s treatment of that issue could be read to endorse an “actual knowledge,” pre-*Foremost* standard for triggering the limitations period:

Alfa notes that this court has previously held that “‘fraud is discoverable as a matter of law for purposes of the statute of limitations when one receives documents which would put one on notice that the fraud reasonably should be discovered.’” *Kelly v. Connecticut Mut. Life Ins. Co.*, 628 So. 2d 454, 458 (Ala. 1993) (quoting *Hickox v. Stover*, 551 So. 2d 259, 262 (Ala. 1989), overruled



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on other grounds, *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997)). **The sentence immediately preceding the above-quoted sentence from *Kelly*, however, states: “The question of when a plaintiff should have discovered fraud should be taken away from the jury and decided as a matter of law only in cases where the plaintiff actually knew of facts that would have put a reasonable person on notice of fraud.”** 628 So. 2d at 458 (quoting *Hicks v. Globe Life & Acc. Ins. Co.*, 584 So. 2d 458, 463 (Ala. 1991), overruled on other grounds, *Foremost Ins. Co.*, *supra*); see also *Gilmore v. M & B Realty Co.*, 895 So. 2d 200, 210 (Ala. 2004) (“[t]he question of when a party discovered or should have discovered fraud is generally one for the jury”) (quoting *Ex parte Seabol*, 782 So. 2d 212, 216 (Ala. 2000)).

*Jones*, 1 So. 3d at 31 (emphasis added). The bold-faced language was the language rejected in *Foremost*, language which obviated any inquiry requirement. While the court in *Jones* might have intended only to point out a case of perceived selective quotation on the part of the arguing litigant (Alfa), the court did not explicitly disclaim the accuracy of the substantive legal principle.

So where does all of this leave us? If a plaintiff relies on an oral representation and then is presented with an ambiguous, unclear or complex document, does “inquiry notice” compel the plaintiff to ask more questions? Or, on the other hand, is the duty to inquire triggered only where the plaintiff receives an oral representation, then is delivered a document which flatly, plainly and palpably contradicts the oral representation? Certainly, no Alabama case has held that a duty to inquire was triggered upon receipt of a document which was unclear or ambiguous on the subject matter of the oral representation. As a matter of policy, a rule which would require a plaintiff faced with an ambiguous document to inquire further, after receiving a clear oral representation, would actually encourage the drafting of deliberately ambiguous writings—hardly a desirable outcome. Moreover, on its facts, *AmerUS* supports only the proposition that the duty to inquire is triggered upon the receipt of an unambiguous document contradicting the

alleged oral misrepresentation. What to do with *Jones*, finally, is a “puzzlement” (as the King of Siam would say).

#### 4. What if the contradictory writing is outside the contract?

Several post-*Foremost* cases have inconsistently applied *Foremost* principles to documents outside the contract. On the one hand, several of the universal life insurance cases, notably both *AmerUS* and *Baker v. Metropolitan Life Ins. Co.*, 907 So. 2d 419 (Ala. 2005), appear to involve a mixture of contractual documents and non-contractual disclosures or schedules, which separately and severally clearly contradicted the oral representations. However, in neither of these cases did the plaintiff argue that the non-contractual documents should not be considered on the reliance issue, because those documents were not contractual in nature, and therefore not binding on the parties.

Interestingly, however, a plaintiff has been barred from placing any reasonable reliance on non-contractual written representations, on the basis that only the underlying contracts could be reasonably relied upon. In *Alabama Elec. Coop., Inc. v. Bailey’s Construction Co., Inc.*, 950 So. 2d 280 (Ala. 2006), Bailey’s delivered an insurance certificate to AEC indicating that AEC was listed as an additional insured on Bailey’s insurance policies. The certificate, however, stated that it was issued for information purposes only and conferred no rights upon the certificate holder, and that the certificate did not amend, extend or alter the coverage under the policy. AEC did not obtain copies of the underlying policies. The court held that AEC could not reasonably rely upon the certificate, which was outside the policy contracts, when the underlying policies did not confer additional insured coverage.

This presents somewhat of a conundrum. One possible reading (a broad one) of the universal life cases is that, under the *Foremost* rule, the plaintiff has a duty to read documents outside the contract, and if those extra-contractual writings contradict the oral representations, there is no reasonable reliance. On the other hand, *AEC* holds that the plaintiff cannot reasonably rely upon documents outside

the contract, even those provided by the defendant, if those documents are in fact outside the contract. Thus, the inconsistency: a party cannot have a duty to read a document that, as a matter of law, the party cannot reasonably rely upon.

The analysis is even more burdened, moreover, if the controlling contract contains a merger or integration clause. If the contract is intended to be full and complete expressions of the parties’ agreement, then any writing outside the contract is parol evidence—in the same way that any oral representations (whether or not they are contradicted by the extra-contractual writing) are parol evidence. In that event, it would seem that the oral representation and the extra-contractual writing would be on even footing—both are parol evidence, and neither is dispositive as to the reasonable reliance question. The parol-evidence status of extra-contractual writings, in the end, may definitively relegate reliance questions to the fact-finder.

#### Conclusion

As its 13-year age and teenage status would suggest, reasonable reliance law is a bachelor of limited experience. To Mr. Bumble’s delight, the experience of additional cases and fact patterns will undoubtedly lead to a more robust, and more nuanced, maturity. ▲▼▲

#### Endnote

1. This article does not address, for example, the scope and (perhaps shifting) contours of the “special relationship” exception established in *Potter v. First Real Estate Co., Inc.*, 844 So. 2d 540 (Ala. 2002), as discussed at length in *AmerUS Life Ins. Co. v. Smith*, 5 So. 3d 1200 (Ala. 2008).

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