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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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| PRONATIONAL INSURANCE COMPANY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIVIL ACTION NO. 08-PWG-2022-S |
| | ) | |
| AXA LIABILITIES MANAGERS, INC., | ) | |
| | ) | |
| Defendant. | ) | |

MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION

On September 24, 2008 ProNational Insurance Company (hereinafter "ProNational"), a Michigan corporation, initiated this civil action with a September 24, 2008 complaint filed in the Circuit Court of Jefferson County, Alabama. (CV 2008-03090, Exhibit A to Doc. #1). The complaint alleged that AXA Liabilities Managers, Inc. (AXA LM) had breached a fiduciary duty owed to ProNational, (count one); had negligently and wantonly investigated or handled a claim made by ProNational to AXA Re under a contract of re-insurance, (count two); that AXA LM had been unjustly enriched because AXA Re ",[ ] improperly denied ProNational's request for reimbursement in the amount of $1,725,788.15" (count 3).[1/] ProNational sought declaratory relief which sought *inter alia* a declaration that "..., the agreements at issue placed an obligation on AXA LM to pay ProNational's AXA Re's proportionate share of the submitted [ ] claim as required by the agreements;..." (count four). (See doc. #1, Attachment, pp.8-21). AXA LM removed the matter from the Alabama Circuit Court to the United States District Court for the Northern District of

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[1/] It is of no consequence that ProNational's claims sound in tort law. Whether the claim is one of contract or tort is not material to whether the claim, whatever the nomenclature, is subject to arbitration. "[I]t is well established ... that a party may not avoid broad language in an arbitration clause by attempting to cast the complaint in tort rather than contract." *Beaver Construction Co. v. Lakehouse, LLC*, 742 So.2d 159, 165 (Ala. 1999).

Alabama asserting both diversity jurisdiction and the removal provisions of the Federal Arbitration Act, 9 U.S.C. § § 202-205. (Doc. #1). ProNational filed a motion to remand. (Doc. #6). In accord with the provisions of paragraph 5 of the General Order of Reference and Rule 72 of the *Federal Rules of Civil Procedure*, in addition to 28 U.S.C. § 636, this court denied the motion for remand. (Doc. #26). Remaining before the court is the motion of AXA LM for a stay of the consideration of the underlying merits of the action as filed in the Jefferson County Circuit Court and an order compelling arbitration. (Doc. #4). The issues having been fully briefed by the parties and supplemental authority having been tendered, the matter is ripe for disposition. The matter is before the undersigned pursuant to the provisions of 28 U.S.C. § 636(b); Rule 72 of the *Federal Rules of Civil Procedure*; LR 72.1; and the General Orders of Reference dated July 25, 1996, May 8, 1998, as amended July 27, 2000.

## UNDISPUTED FACTS

As filed in the Circuit Court of Jefferson County, Alabama, ProNational's complaint alleged that "**AXA LM acts as the agent/servant of AXA Re** and investigates, services, and administers claims made under reinsurance agreements to which AXA Re is a party." (Doc. #1, p. 10 of 35) (emphasis added). The complaint acknowledged that on December 16, 2004 ProNational **and AXA Re** entered into "... excess of loss reinsurance agreements...." (*Id*., p. 10) (emphasis added). ProNational had underwritten a medical malpractice insurance policy for a Florida physician. When a malpractice action was brought against the insured, ProNational provided notice to AXA Re and nine other reinsurers. According to the complaint "... AXA Re ultimately appointed AXA LM to service, investigate, and administer ProNational's claim [ ] on behalf of AXA Re." (*Id*., p. 11, ¶

14). A jury verdict was returned in October, 2007, and ProNational's insured was found liable for $30,000,000 in damages. ProNational ultimately settled the case after the verdict and before appeal. In February, 2008, "..., ProNational placed AXA LM and the other nine reinsurers that [were] parties to the agreements [of reinsurance] on notice of the settlement. [ ], ProNational submitted requests for payment to each reinsurer for its portion of the coverage under the agreements." (*Id*., p. 12). According to the complaint:

> All reinsurers other than AXA Re [ ] paid their requests in full. ProNational's request for payment to AXA Re totaled $1,727,911.19. AXA LM, **acting on AXA Re's behalf** (emphasis added), is the only party ProNational submitted a reimbursement request to on the [ ] claim that refuse[d] to honor the obligations of the Agreements... [ ] ... other reinsurers, who were each party to the Agreements and, thus, bound to the same provisions as **AXA Re/AXA LM,** all promptly paid.... (Underscore of the word "only" in the original)

On June 3, 2008, AXA LM notified ProNational that coverage was denied under the agreements. According to the complaint:

> Upon information and belief, AXA LM ha[d] been provided with a substantial reserve of funds to use in running out and winding down existing claims for reimbursement from AXA Re under reinsurance agreements, including the Agreements. Upon information and belief, once all existing claims for reimbursement from AXA Re under its reinsurance agreements are paid or closed, AXA LM will be allowed to keep for its own use whatever amounts remain in this reserve. Consequently, AXA LM unquestionably has a financial motive to improperly deny a legitimate claim by ProNational that AXA LM has previously paid without contest in several, prior instances involving circumstances similar to the [ ] claim.

(*Id*., p. 16, ¶ 25).

Each reinsurance agreement contained an arbitration clause. The arbitration clause reads:

**ARTICLE 22 – ARBITRATION (BRMA 6M)**

A. As a condition precedent to any right of action hereunder, **any dispute arising out of the interpretation, performance or breach of this Agreement,** including the formation or validity thereof, shall be submitted for decision to a panel of three arbitrators. Notice requesting arbitration will be in writing and sent certified or registered mail, return receipt requested. (emphasis added).

(Doc. #29-2, p. 15 of 30).[2/]

It is not disputed that ProNational is a signatory to the Agreement with the arbitration clause and that AXA LM, identified by ProNational as the agent/servant of AXA Re is not. It is also undisputed that the Casualty First Reinsurance Agreement of October 1, 2003 was issued to

> PROASSURANCE CORPORATION AND ITS OPERATING SUBSIDIARIES THE MEDICAL ASSURANCE COMPANY, INC., BIRMINGHAM, ALABAMA AND PRONATIONAL INSURANCE COMPANY, OKEMOS, MICHIGAN TOGETHER WITH ALL SUBSIDIARY AND AFFILIATED COMPANIES
>
> (hereinafter called the "Company")
>
> (and) by
>
> AXA RE
>
> PARIS, FRANCE

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[2/] Indeed, ProNational affirmatively invoked its right of arbitration under the agreement with a September 24, 2008, letter in which ProNational stated:

> In further response to **AXA Re's June 3, 2008** letter (attached here as Exhibit A), ProNational Insurance Company, pursuant to Articles 22 and 26 of [ ] [the] reinsurance agreements [ ] hereby provides notice of its request to submit to arbitration its existing dispute with AXA Re arising out of AXA Re's improper denial of coverage associated with insured...."

(Doc. #4, p.76) (emphasis added). There may be some evidentiary significance to the fact that at least insofar as this letter was concerned, the notice of denial of the claim in June, 2008, appears to have come from AXA Re rather than AXA LM. The actual letter referred to in the arbitration demand does not appear to be in the record before this court.

(Doc. #29-2, p.26).

APPLICABLE LAW

Jurisdiction - Remedies

The Notice of Removal asserted jurisdiction "... pursuant 28 U.S.C. § 1332, ... as well as the removal provisions of the Federal Arbitration Act, 9 U.S.C. § 202-205." (Doc. #1, p.1). ProNational has not disputed that the parties are diverse nor that the amount in controversy exceeds $75,000. The Notice of Removal also asserts jurisdiction under 9 U.S.C. § 203. That is important because the Federal Arbitration Act is "something of an anomaly" as the Act "bestow[s] no federal jurisdiction but rather requir[es] [for access to a federal forum] an independent jurisdictional basis" over the parties' dispute. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, ____, 128 S.Ct. 1396, 1402, 170 L.Ed.2d 254 (2008) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 25, n.32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Section 3 of the Federal Arbitration Act entitled litigants in federal court to a stay of any action that is "referable to arbitration under an agreement in writing." 9 U.S.C. § 3. Section 16(a)(1)(A) allows for an appeal from "an order ... refusing a stay of any action under § 3." Section 3 applies to "... any suit or proceeding [ ] brought in any of the courts of the United States ... [in] the court in which such suit is pending, [ ... is ...] satisfied that the issue involved in such a suited proceeding is referable to arbitration under the agreement, shall ... stay the trial of the action until such arbitration has been had...." 9 U.S.C. § 3. In the event a district court refuses stay under § 3, § 16(a)(1)(A) allows for an immediate appeal. *Arthur Anderson, LLP v. Carlisle*, ____ U.S. ____, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009). With the removal of this action to this court, the FAA controls the procedural posture. All claims made by ProNational are either subject to arbitration or they are not. Section 4 of the Act authorizes

the district court to compel the parties to arbitrate claims properly within the ambit of an agreement to do so. *Vaden v. Discover Bank*, ____ U.S. ____, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009). AXA LM seeks a stay and an order compelling arbitration.

Motion to Compel Arbitration

Consideration of a motion to compel arbitration predicated upon a contract clause is a judicial inquiry rather than one for a private arbitrator. See e.g. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 82, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) ("The question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability' is 'an issue for judicial determination [u]nless the parties clearly and unmistakenly provide otherwise.'") (quoting *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). That judicial inquiry is guided by an unmistakably admonition that, as a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration...." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Indeed, the FAA was designed to "overrule the judiciary's long standing refusal to enforce agreements to arbitrate" and to put the agreements "upon the same footing as contracts." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). This policy preference for arbitration, however, does not alter the underlying principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which has not agreed so to submit." *MS Dealers Services Corporation v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). Thus, as a general rule, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Id.*, citing to *Mitsubishi Motor Corporation v. Soler*

*Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). In order to decide whether to grant a motion to compel arbitration, a district court is required to apply a two-prong analysis. See *Patriot Manufacturing, Inc. v. Dixon*, 399 F. Supp. 2d 1298, 1300-1301 (S.D. Ala. 2005). First, the court must determine whether the parties agreed to arbitrate their disputes. See, e.g., *Mitsubishi Motors,* 473 U.S. at 626; *Klay v. Pacificare Health Systems, Inc.*, 389 F.3d 1191, 1200 (11th Cir. 2004). Second, if the court finds that the parties agreed to arbitrate, the court must consider "whether the legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors*, 473 U.S. 628. "In determining whether the parties agreed to arbitrate a particular dispute, courts consider: (1) whether there is a valid agreement to arbitrate; and (2) whether the dispute in question falls within the scope of that agreement." *Patriot Manufacturing Co*., 399 F. Supp. 2d at 1301 (internal citations omitted).

Under the federal law, despite the policy imperative, it remains clear that arbitration is "a matter of consent, not coercion." *Volt Information Science Services*, 489 U.S. at 479, 109 S.Ct. _____. Accordingly, a party ordinarily will not be "compelled to arbitrate unless that party has entered into an agreement to do so." *Employer's Insurance of Wausau v. Bright Metal Specialties*, 251 F.3d 1316, 1322 (11th Cir. 2001). "The purpose of Congress in 1925 was to make arbitration agreements enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 404 n.12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

In determining whether the parties have agreed to arbitrate a particular matter, courts are generally required to apply ordinary state law principle as to the formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 1115 S.Ct. 1920, 84 L.Ed.2d 158 (1985). "Federal law establishes the enforceability of arbitration agreements, while state law governs the

interpretation and formation of such agreements." *Employer's Insurance of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d at 1322 (citing *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)). The Alabama Supreme Court has recognized that the FAA "mandates the arbitration of claims encompassed by arbitration clause that is contained in a binding contract that involves interstate commerce." *Ex parte Conference America, Inc.*, 713 So.2d 953, 955 (Ala. 1998). Likewise, Alabama law with respect to the arguability of claims, makes clear that "the substance of the plaintiff's allegation control, not the effort given by the plaintiff to style claims throughout the litigation." *Bailey v. Faulkner*, 940 So.2d 247, 253 (Ala. 2006), quoted in *Assurant, Inc. v. Mitchell*, ____ So.3d ____, 2009 WL 1818653 (Ala. 2009) (not yet released for publication).

Enforcement of an Arbitration Agreement by Non-Signatories

"'[I]t matters whether the party resisting arbitration is a signatory or not.'" *American Personality Photos, LLC v. Mason*, 589 F. Supp. 2d 1325, 1330 (S.D. Fla. 2008), quoting *Merrill Lynch Investment Managers v. Optibase, LTD*, 337 F.3d 125, 131 (2d Cir. 2003) (for the proposition that a willing non-signatory to an arbitration agreement is postured more favorably than a willing signatory seeking to compel arbitration by an unwilling non-signatory), citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers*, *Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993)

Alabama has long recognized the general rule of the right to arbitrate is contractual and a party may not be compelled to arbitrate a dispute unless it has agree to do so. *Ex parte Cain*, 838 So.2d 1020, 1026 (Ala. 2002); *Ex parte Lovejoy*, 790 So.2d 933, 937 (Ala. 2000); *A. G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358, 361 (Ala. 1990). The Alabama courts have also expressly recognized that there are exceptions to that general rule whereby a non-signatory – one who is not

a party to the contract containing an arbitration provision "may, nevertheless, compel a signatory to submit a dispute to arbitration." *Ex parte Stamey*, 776 So.2d 85, 89 (Ala. 2000).[3/]

In determining whether the parties have agreed to arbitrate a particular matter, courts are generally required to apply ordinary state law principle as to formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 1115 S.Ct. 1920, 84 L.Ed.2d 158 (1985). "Federal law establishes the enforceability of arbitration agreements, while state law governs the interpretation and formation of such agreements." *Employers Insurance of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d at 1322 (citing *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). The Alabama Supreme Court has recognized that the FAA "mandates the arbitration of claims encompassed by an arbitration clause that is contained in a binding contract that involves interstate commerce." *Ex part Conference America, Inc.*, 713 So.2d 953, 955 (Ala. 1998). Likewise, Alabama law with respect to the arbitrability of claims makes clear that "the substance of the plaintiff's allegation control, not the effort given by the plaintiff to style claims throughout the litigation." *Bailey v. Faulkner*, 940 So.2d 247, 253 (Ala. 2006) (quoted in *Assurant, Inc. v. Mitchell*, ____ So.3d ____, 2009 WL 1818653 (Ala. 2009)).

The prevailing law is that a party need not necessarily be a signatory to an arbitration agreement to invoke an arbitration clause. *MS Dealers,* 177 F.3d at 947 (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers*, 10 F.3d 753, 756-57 (11th Cir. 1993)). The Eleventh Circuit has enumerated at least three independent bases under which non-signatories may be permitted to compel arbitration:

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[3/] *Stamey* is distinguishable from that line of cases in which a signatory to an arbitration agreement seeks to enforce its provisions against a non-signatory. Alabama courts, like most, are more reluctant to impose the duty of arbitration on a non-signatory because such a party has not agreed with anyone to arbitrate anything. In cases such as the one before this court, however, a party situated such as ProNational has expressly agreed to arbitrate claims related to the reinsurance contract. If a non-party may invoke the clause, the question becomes whether the agreement is broad enough to encompass the claims made by the signatory against the non-signatory.

(1) equitable estoppel; (2) agency or related principles; and (3) beneficiary. *MS Dealers*, 177 F.3d at 947. Equitable estoppel in turn applies in two circumstances. *MS Dealer*, 177 F.3d at 947. First, the theory applies when the signatory to a written agreement containing the arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the non-signatory. See *Id.*, citing *Sunkist Soft Drinks*, 10 F.3d at 757. Where each claim by a signatory against a non-signatory either "makes reference to" or "presumes the existence of" the written agreement, then the signatory's claims "arise [ ] out of and relate [ ] directly to the [written agreement,]" such that arbitration is appropriate. See *Id.*, citing *Sunkist Soft Drinks*, 10 F.3d at 758. Second, where a signatory to an agreement containing an arbitration clause "raises 'allegations of ... substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract," arbitration should be permitted because "otherwise the arbitration proceeding [between two of the signatories] would be rendered meaningless and the federal policy in favor of arbitration effective thwarted.'" *Id.*, quoting *Sam Reisfeld & Son Import Co. v. S. A. Eteco,* 530 F.2d 679, 681 (5th Cir. 1976). To determine whether equitable estoppel applies, a court must examine the nature of the claims raised by the signatory against all non-signatories to determine if the claim falls within the scope of the arbitration clause contained in the written agreement. (*Id.* at 948).

Eleventh Circuit jurisprudence related to non-signatory enforcement is wholly consistent with that of the state of Alabama. Alabama has made clear "that under certain circumstances 'a signatory will be "equitably estopped from contesting [the non-signatory's] standing to invoke the [arbitration] clause.'" *Ex parte Isbell*, 708 So.2d 571, 576 (Ala. 1997) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d at 753). The Alabama Supreme Court has held that estoppel is

appropriate at a minimum when the "description of the parties subject to the arbitration agreement is not so restrictive as to preclude arbitration by the party seeking it." *Stamey*, 776 So.2d at 89.

ANALYSIS

ProNational contends first that the arbitration agreement "excluded" by definition AXA LM apparently because of an expansive identification of subsidiaries and related companies of ProNational and the fact that AXA Re alone was a signatory. Presumably ProNational contends that as a non-signatory, AXA LM is prevented from enforcing an arbitration agreement because the terms of the agreement unambiguously excluded the non-signatory. ProNational's analysis is incomplete and therefore erroneous. As noted above, equitable estoppel precludes the party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that the contact imposes. *Blinco v. Green Tree Servicing, LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005). When a party relies on the terms of a written agreement in asserting its claims, equitable estoppel prevents the party from seeking to avoid the arbitration clause within the agreement. *Becker v. Davis*, 491 F.3d 1292, 1300 (11th Cir. 2007). The injury ProNational asserts is the denial of its claim by AXA Re. The injury indisputably cannot exist without reference to the contract which contains the arbitration clause. Under Alabama law, the "doctrine of equitable estoppel operates to prevent a signatory to an arbitration agreement from frustrating arbitration of a related claim against a non-signatory where the non-signatory seeks arbitration." *Ex parte Tony's Towing, Inc.*, 825 So.2d 96, 98 (Ala. 2002). If, as ProNational contends, there is a right to recover damages because of a biased or incompetent investigation, that right relates solely to benefits it claims under the reinsurance agreement. See *Auvil v. Johnson*, 806 So.2d 343, 346-350 (Ala. 2001) (the development of non-signatory enforcement of arbitration agreements). ProNational is required to arbitrate claims made against the

non-signatory AXA LM because the non-signatory has agreed to do so and ProNational's claims are directly derived from the agreements with valid arbitration clauses.

The Scope of the Arbitration Agreement

ProNational also contends that it is not compelled to arbitrate the claims against the non-signatory by terms of the agreement. Having concluded that AXA LM is a party with the right to enforce the arbitration agreement, the question remains whether the arbitration agreement itself is actually broad enough to permit arbitration of the specific claims made. Under Alabama law, an arbitration agreement will be enforced if it is broad enough to cover "'[a]ll disputes, claims or other controversy arising from or relating to this contract or to the relationship's result from this contract, or the validity of the arbitration clause or the entire contract, ....'" *Ex parte Gates*, 675 So.2d 371, 374, quoting *Paine, Webber, Jackson & Curtis, Inc. v. McNeal*, 143 GA. App. 579, 239 S.E.2d 401 (1977) (emphasis added). "Absent violation of public policy," a federal court must "refer controversies to arbitration where controversies are covered by the arbitration agreement." See *International Underwriters AG & Liberty Re-Insurance Corporation v. Triple I: International Investments, Inc.*, 533 F.3d 1342, 1344 (11th Cir. 2008). "[A]ny doubts concerning the scope of the arbitrable issue should be resolved in favor of arbitration." *International Underwriters*, 533 F.3d at 1344-45 (quoting *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25). ProNational entered into an agreement in which it expressly became obligated to arbitrate "any dispute arising out of the interpretation, performance or breach of [the agreement]." (See doc. #1). As a matter of both federal and state law, the arbitration agreement itself is sufficiently broad to cover the claims ProNational has made against AXA LM. There is no "legal constraint external to the parties' agreement [to] foreclos[e] the arbitration of these claims." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,

473 U.S. 628. While ProNational contends that it is unfair to request it to arbitrate the claims against AXA LM, that is not so. ProNational has claimed the interpretation of the re-insurance contract was flawed because of AXA LM. That claim is precisely within the range of issues the parties agreed to arbitrate.

MOTIONS FOR SANCTIONS

AXA LM contends that it is entitled to sanctions under Alabama Code § 12-19-270, the Alabama Litigation Accountability Act, which permits a party to obtain attorneys fees and costs when an action has been commenced "without substantial justification" or "interpose for delay harassment." AXA LM alleges that because ProNational has committed to arbitrate with AXA Re the AXA LM claims were "duplicative and the relief sought the same, ...." (Doc. #5). AXA LM contends that "the sole reason ProNational instituted this action was to harass AXA LM and subject it to unnecessary costs." (*Id*., p. 21). The Alabama Litigation Accountability Act defined without substantial justification as

> ... including without limitation any motion, means that such action, claim, defense or appeal (including any motion) is frivolous, boundless in fact or in law, or vexation, or interposed for an improper purpose, including without limitation, to cause unnecessary delay or needless increase in the cost of litigation, as determined by the court.

*Alabama Code*, § 12-19-271.

A review of authorities cited by AXA LM illustrates that sanctions are inappropriate. While this court has concluded that ProNational is required to arbitrate its claims with AXA LM, there is unquestionably a good faith basis for contending that it is not. Neither federal nor Alabama law is so dispositive of the question that it can be said that a plaintiff seeking civil damages from a third party for causing the denial of a claim under a reinsurance agreement because of a bias or ineptitude

is foreclosed in all cases by an arbitration decision. In fact, the claim is sufficiently intertwined that it should be arbitrated together with the claims made by ProNational against AXA Re but asserting a legal distinction between the claims against each entity is more than frivolous or vexatious.[4/]

It is respectfully RECOMMENDED that the motion to compel arbitration be GRANTED. See 28 U.S.C. § 636(b) and Rule 72, *Federal Rules of Civil Procedure*. It is ORDERED that the motion for imposition of sanctions be DENIED. See 28 U.S.C. § 636(b) and Rule 72, *Federal Rules of Civil Procedure*. The parties are specifically DIRECTED to review Rule 72, *Federal Rules of Civil Procedure* and 28 U.S.C. § 636(a) and (b). Because this recommendation is dispositive of all matters pending in the United States District Court for the Northern District of Alabama and the parties have declined to consent to the jurisdiction of the undersigned magistrate judge, the clerk is DIRECTED to reassign this action to an Article III Judge.

As to the foregoing it is SO ORDERED this the 11th day of January, 2010.

Paul W. Greene

PAUL W. GREENE
CHIEF MAGISTRATE JUDGE

[4/] That is not to say AXA LM is not vexed. The issue is whether the lawsuit removed to this court was legally vexatious. It is not.