The Alabama Lawyer

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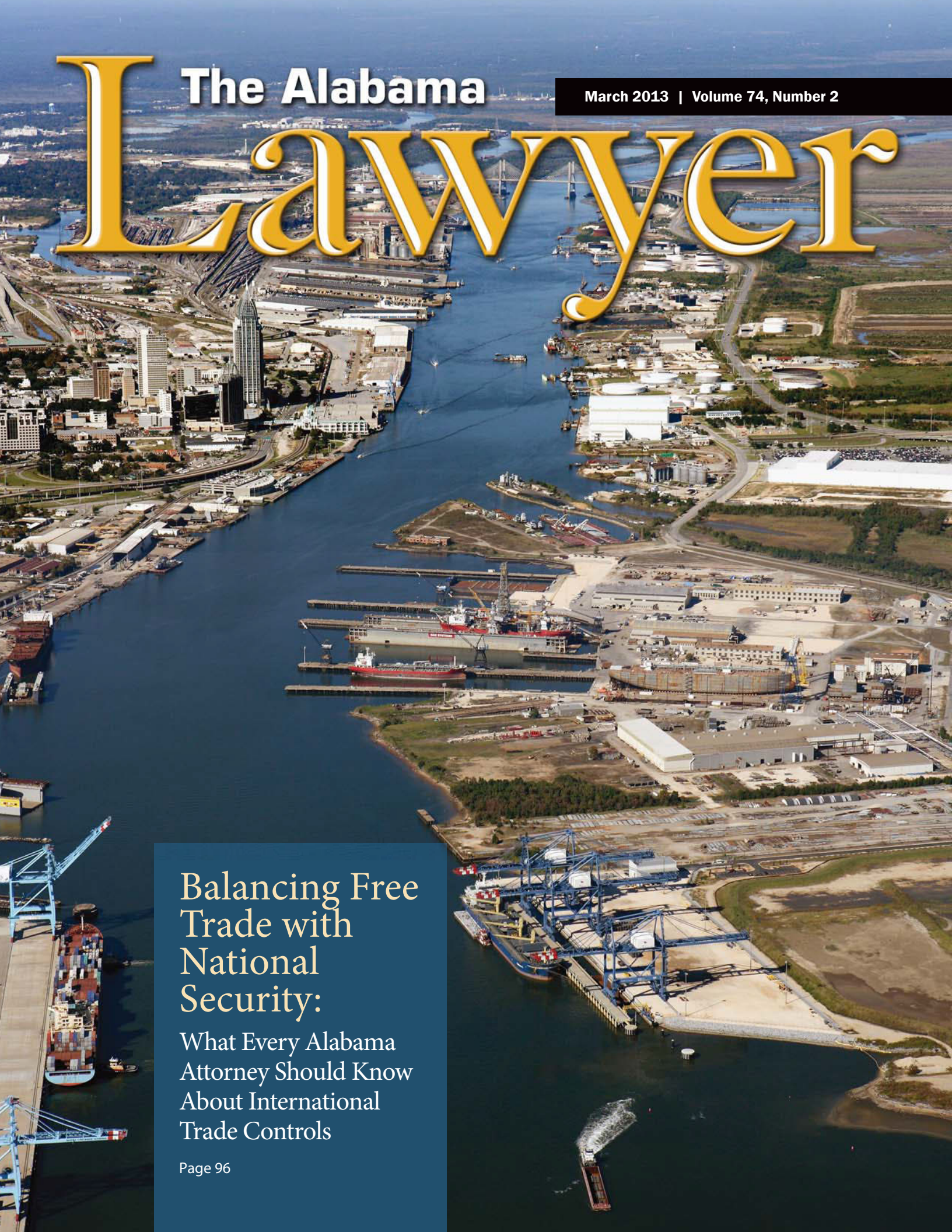

Balancing Free Trade with National Security:

What Every Alabama Attorney Should Know About International Trade Controls

Page 96

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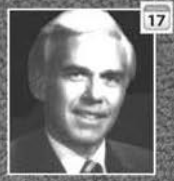
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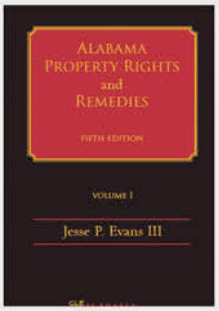
ALABAMA PROPERTY RIGHTS AND REMEDIES
By Jesse P. Evans III, author



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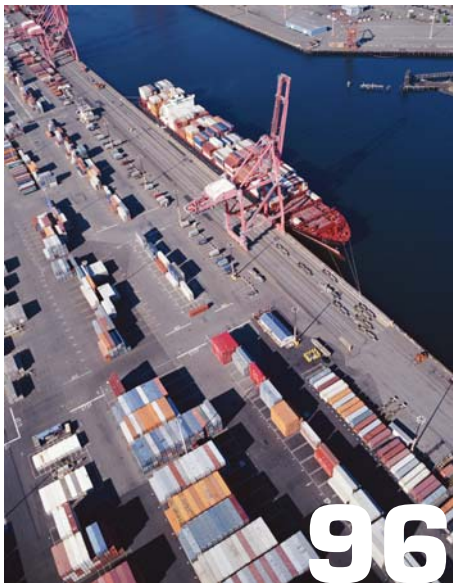

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COLUMNS

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Walter J. Price, III *is a partner in the Birmingham firm of Huie, Fernambucq & Stewart LLP. Much of his practice is devoted to insurance-related matters and medical malpractice litigation. He is the author of "Uninsured/Underinsured Motorist Coverage—A Desk Reference for Alabama Lawyers,"* The Alabama Lawyer, *May 2008. Price is admitted to practice before the United States Supreme Court, the Court of Appeals for the Eleventh Circuit and the U.S. District courts for the Northern, Middle and Southern districts of Alabama.*

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Just What Is a "Super, Duper" Lawyer?

It seems like on a daily basis I receive an e-mail concerning the nomination or selection process for a publication's best, top or super lawyer list. Because I have been assured that the standards to make these lists are rigorous, I'm always flattered if my name manages to slip past a screening committee. Heck, I'm not even the best lawyer in my own house. That distinction goes to my wife, **Kelley**, who gave up a successful practice to wrangle kids and be in charge of crisis management, which is no small task around our household. One of the things that Kelley does particularly well is handle communications with our teenagers. While it always has been my policy not to negotiate with terrorists, she somehow has the tact, patience and diplomacy to find common ground on almost any issue. The same characteristics that made Kelley a good lawyer also make her a wonderful mom and wife. That got me thinking about what really makes someone a "super, duper" lawyer.

Kelley

While most everyone would agree that many lawyers possess strong communication skills, have keen analytical abilities and are driven to succeed, there are certain additional traits, in my opinion, that make "super, duper" lawyers. My selection criteria are based upon personal experiences–consisting primarily of what not to do–and having had the good fortune to observe quite a few excellent lawyers at work. Not all top lawyers are alike or share the same skill sets. Many have weaknesses, but instead have learned to play to their strengths. Most of the attributes that I think make a good lawyer are the same I would use to assess the quality of any person.

Super lawyers love what they do


Methvin

Good lawyers never go around saying that they are miserable or hate their job. They may experience some grief from the occasional unimpressed client, unsavory case, ornery opposing lawyer or inhospitable judge; but, all in all, lawyers who excel genuinely enjoy their work. Like a star athlete, skilled medical provider or inspirational performer, good lawyers "bring it" consistently because it is in their blood. My law partner, **Bob Methvin**, is a good example. Bob puts the same passion and energy into a hundred-dollar case as he does a million-dollar case. He will work through the night on a pro bono case, not only because he has made a commitment to help someone, but also because he truly enjoys and receives fulfillment from being in a position, as a lawyer, to render assistance to those with no other options.

It always motivates me when I see an older lawyer who still has the same enthusiasm for the practice of law as a recent graduate who is intent on conquering the world. I'm certainly not saying the law should be the jealous mistress of our lives to the detriment of faith, family or friends; but, in my book, the really top lawyers embrace and love what they do in the "work" aspect of their lives.

Super lawyers are involved

Two attributes that are shared by most great lawyers are that they are selfless and are committed to serve. Whether being involved in their local bar associations or leaders in their communities, schools or civic organizations, people I consider


Brewer


Carroll


Ward


DeMarco

to be great lawyers are also great humanitarians. For instance, lawyers such as former **Governor Albert Brewer** have been instrumental in efforts to bring constitutional reform, **Dean John Carroll** devoted his later career to the education of our younger lawyers, **Senator Cam Ward** and **Representative Paul DeMarco** have committed themselves to public service and the list goes on and on. There are countless lawyers who contribute tirelessly to their local communities. Indeed, I would say that but for lawyer involvement and leadership, many community groups would not be effective or even exist. Good lawyers understand the important role they play outside the practice of law and are among the first to serve.

Super lawyers have sound judgment and exercise humility

While some people may consider a lawyer's financial success to be a basis of greatness, this is not the measuring stick for my list. I know some very mediocre lawyers who have achieved success, in spite of themselves. I also know some very gifted lawyers who have toiled mightily only to have run-of-the-mill results. While I certainly agree that many great lawyers have had enormous professional success, they also know it's not, in the words of Charlie Sheen, all about, "Duh? Winning!"

A great lawyer has sound judgment and understands that a "win-at-all-costs" mentality can be counter-productive, create resentment and lead to a bad result. Caught up in emotions, the initial reaction of some clients is to retain a "warrior-type" lawyer to eviscerate their opponent, whether in the courtroom or in negotiating a transaction. At the end of the day, however, it is not the "absolutist" attorney, but the "problem-solving" attorney, willing to speak candidly, who ends up with the most satisfied clients and the respect of his or her peers.

Continued from page 89


Brown

I remember some sound advice my mentor in the District Attorney's office, **Roger Brown,** gave me. After working up a difficult case for trial, a respected defense lawyer asked me to join him in a request for a continuance. Knowing I had the upper hand, I opposed the request. When the defense lawyer sought a continuance anyway, the judge became agitated and completely humiliated the defense lawyer in front of a crowded courtroom. Upon hearing what had occurred, Roger gave me the following sage advice: "While you should always be prepared and aggressive in pursuing cases, don't forget that a truly great lawyer also knows when to exercise humility. Sometimes, the best outcome is to give that lawyer you have over a barrel a break, particularly if you still get the intended result. In the end, the lawyer you could have embarrassed, but didn't, will never forget it, and your reputation will benefit." Roger emphasized that, "What goes around, comes around!"

Super lawyers are great listeners


Franklin


Pratt


Crosby


White

Many people associate being a spellbinding orator with being a great lawyer. While I agree that persuasive argument is sweet to the ears, more often than not, I'll take a lawyer who is an astute observer and a careful listener. Really good lawyers listen to their clients and deliver to their needs. If a judge asks a good lawyer what time of day it is, a good lawyer will give the judge the precise time and not provide an eloquent description of how a watch is built. Very rarely have I heard a judge say "You didn't answer my question" to a good lawyer. Because they are good listeners and don't simply talk to hear themselves talk, when great lawyers speak, they are afforded respect. I have been in numerous meetings, sometimes intense, with lawyers such as **Sam Franklin, Jim Pratt, Sam Crosby** and **Mark White**. Invariably, after listening and considering an issue, when they do weigh in, it is received with deference and respect.

Super lawyers act like super lawyers

Great lawyers understand that all their actions are directly reflective of them, whether it is their appearance, the associations they keep, their work product (including e-mails, correspondence, documents, pleadings, etc.) or even the way their office phones are answered.

I must say, I learned that lesson the hard way. As a young lawyer, I made the mistake of dictating a demand letter to a certain insurance company that was giving my client a particularly difficult time. In somewhat of a foul mood, I picked up a Dictaphone and directed a letter to the mean-spirited insurance company. Unfortunately, instead of using the insurance company's actual name, I used a somewhat unflattering pseudonym for the company. Equally unfortunate, my temporary secretary, who was eager to make a good impression, phonetically and painstakingly, I'm sure, typed out the pseudonym I had used. Of course, neither I, nor my supervising attorney, caught the error before the letter was mailed. The letter made its way to a high-level executive who just happened to be a close, personal friend of my boss. I will never forget being driven to headquarters so that I could apologize profusely. My boss told me that every word, action and deed that came out of his office had a direct reflection upon him. He was right, and it was one of the most important lessons I learned as a young lawyer.

The great lawyers I know are not baited into sending out angry letters or needlessly vilifying their adversaries in court filings. As a reminder of this attribute, I keep taped to my wall a fortune cookie message I received many years ago that states, "Strong and bitter words indicate a weak cause." Great lawyers, I believe, understand that as professionals we should *act* like professionals.

Of course, the standards I use to evaluate lawyers are subjective and based upon my experiences and people who have influenced me. Some people may wonder why I haven't mentioned such traits as character, honesty, reliability and accountability. It is not that I minimize these attributes in lawyers; rather, I expect them out of *all* the lawyers in our bar, and not just from "super, duper" lawyers. I am optimistic that every lawyer in our state will strive not only to be a top lawyer, but also a great role model and servant in his or her community, and, thereby, a "super, duper" lawyer. | AL

SAVE THE DATE and JOIN US!

The Journey for Justice Gala Dinner, an event to honor the valiant efforts of courageous attorneys and judges in Birmingham who used their skills and talent to help end racial inequality during the Civil Rights Movement

Cahaba Grand Conference Center
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Keith B. Norman
keith.norman@alabar.org

Free Online Resources Keep You Informed and Improve Your Practice

For a long time, citizens, lawyers and public officials have been in the dark about exactly what court costs were paying for. Once the filing fee was paid, few people had a clear picture about the actual statewide distribution of these fees. The problem has been compounded with many fees being tacked on over the years, but designated for a specific state or local purpose other than operating the courts.

Now, a comprehensive study of state and local court costs in each of the state's 67 counties is complete. This 20-month project includes the distribution of state-mandated fees and a breakdown of local court costs established by statute or constitutional amendment. Scanning the accompanying

QR Code will take you to the study, or you may review it county by county at *www.ala court.gov./distributioncharts.aspx.*

If you have not used **Casemaker** in a while, I encourage you to visit and use this free online member benefit. Not only can you search in all 50 state libraries, you have access to an extensive federal library. This includes the district, circuit and supreme court decisions, Federal Court Rules, IRS Revenue Rulings, Tax Court decisions, Code of Federal Regulations, United States Code, Court of Appeals for the Armed Forces, and bankruptcy opinions, among other materials. The Alabama materials include the administrative code, constitution, Attorney General opinions, local federal court rules, session laws, state court rules, and legal articles from *The Alabama Lawyer* back to 2006. Also available on an individual subscription basis is **CaseCheck+**. This tool can help you validate your legal research and let you know if your case citations are still good law.

Utilizing these online legal resources can help you practice smarter, as well as keep you informed. | AL

Education Debt Update

For the bar examination in February, more than 50 percent of the first-time takers had education debt. Debt ranged from a low of $2,000 to a high of $350,000. The average amount was $103,272.

Client Security Fund Annual Mandatory Assessment

Notice is given to all regular and special members of the Alabama State Bar that the *deadline* for payment of the $25 Annual Mandatory Client Security Fund Assessment is **March 31, 2013.**

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented July 20 during the Alabama State Bar's 2013 Annual Meeting at the Grand Hotel in Point Clear.

Local bar associations compete for these awards based on their size–large, medium or small.

The following criteria will be used to judge the contestants for each category:

- The degree of participation by the individual bar in advancing programs to benefit the community;
- The quality and extent of the impact of the bar's participation on the citizens in that community; and
- The degree of enhancements to the bar's image in the community.

To be considered for this award, local bar associations must complete and submit an award application by **June 1, 2013**. Applications may be downloaded from *www.alabar.org* or by contacting Christina Butler at (334) 517-2166 or *christina.butler@alabar.org*.

Notice of Election and Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners*.

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

1st Judicial Circuit
3rd Judicial Circuit
5th Judicial Circuit
6th Judicial Circuit, Place 1
7th Judicial Circuit
10th Judicial Circuit, Place 3
10th Judicial Circuit, Place 6
13th Judicial Circuit, Place 3
13th Judicial Circuit, Place 4
14th Judicial Circuit
15th Judicial Circuit, Place 1
15th Judicial Circuit, Place 3
15th Judicial Circuit, Place 4
23rd Judicial Circuit, Place 3
25th Judicial Circuit
26th Judicial Circuit
28th Judicial Circuit, Place 1
32nd Judicial Circuit
37th Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2013 and vacancies certified by the secretary no later than March 15, 2013. All terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. PDF or fax versions may be sent electronically to the secretary as follows:

Keith B. Norman, secretary, Alabama State Bar
P.O. Box 671, Montgomery, AL 36101
keith.norman@alabar.org
Fax: (334) 517-2171

Either paper or electronic nomination forms must be received by the secretary no later than 5 p.m. on the last Friday in April **(April 26, 2013)**.

As soon as practical after May 1, 2013, members will be notified by e-mail with a link to the Alabama State Bar website that includes an electronic ballot. *Members who do not have Internet access should notify the secretary in writing on or before May 1 requesting a paper ballot*. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. Ballots must be voted and received by the Alabama State Bar by 5 p.m. on the third Friday in May **(May 17, 2013)**. Election rules and petitions are available at *www.alabar.org*.

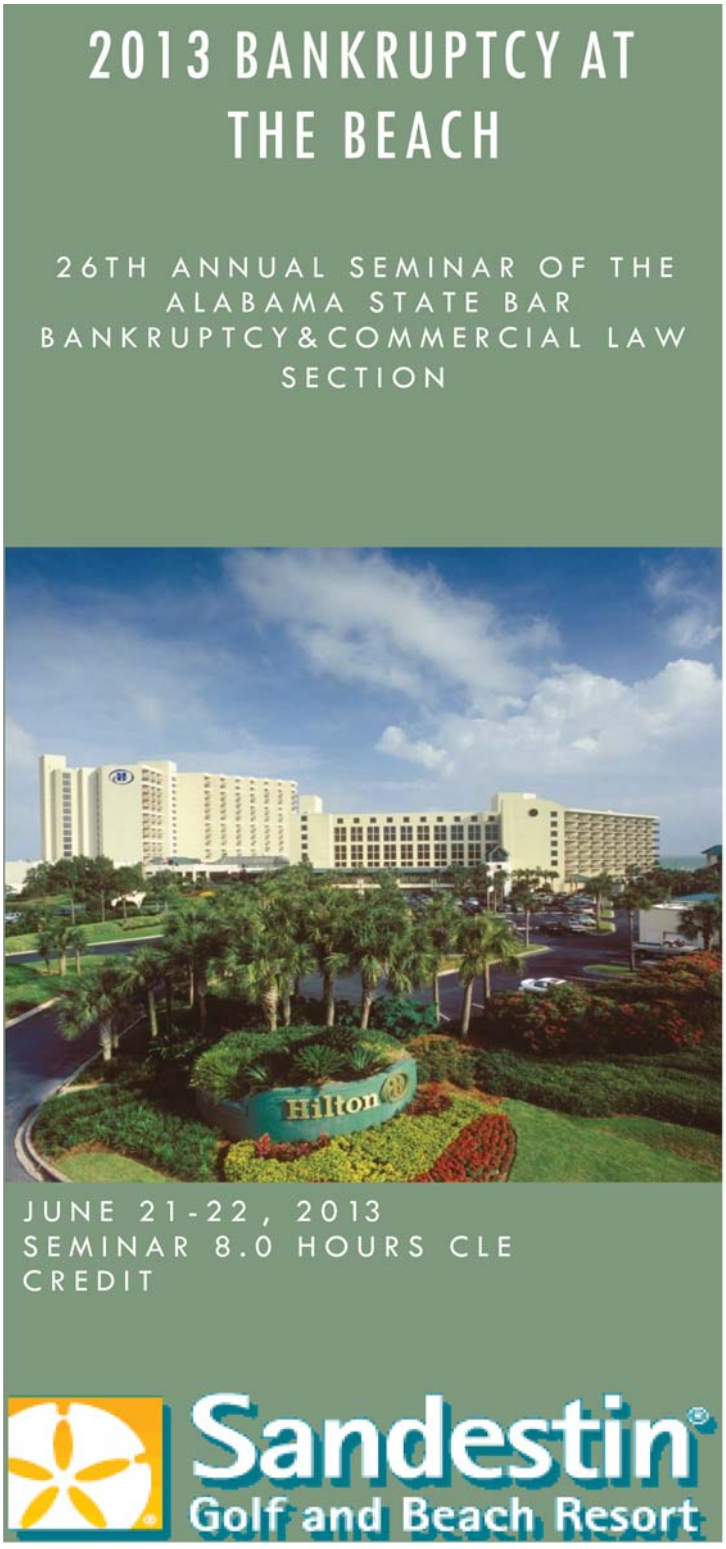
At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 2, 5 and 8. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by **April 1, 2013**. A petition form to qualify for these positions is available at *www.alabar.org*.

Save the Date!

26th Annual Bankruptcy at the Beach: June 21–22, 2013

The Bankruptcy and Commercial Law Section invites you to join us for our 26th Annual Bankruptcy at the Beach seminar to be held Friday June 21 and Saturday June 22, 2013 at the beautiful Hilton at Sandestin Golf and Beach Resort. The hotel has begun accepting reservations, so please book your room now while our block is open. Reserve your room by calling (877) 705-6641 or (850) 267-9600 or online at *www.sandestinbeachhilton.com*. Our group code is BOB. Be on the lookout for our upcoming newsletter with more details on the seminar. If you have any questions, please contact Sabrina McKinney, section chair, at *mckinneys@ch13mdal.com*. | AL




STOP

Balancing Free Trade with National Security:

What Every Alabama Attorney Should Know about International Trade Controls

By Alan F. Enslen, Bryan A. Coleman and David T. Newton

The volume of international business

conducted by Alabama companies is growing at an impressive pace. Led by the automotive industry, Alabama exported almost $18,000,000,000 in goods during 2011–and almost $13,000,000 during the first eight months of 2012–increases of more than 15 percent over the previous periods.[1] Businesses in Alabama and throughout the United States are increasingly exporting products and technologies to establish or expand their overseas market share. The United States currently has multilateral or bilateral free trade agreements with 20 countries, including recent trade agreements with Panama, Columbia and South Korea, which help to foster the continued expansion of foreign trade.[2]

While most of the products and technologies exported from Alabama have dual civil-military uses, a significant number of exports feature specific military applications. Alabama and the surrounding region is home to a variety of businesses that support the national defense industry–particularly within the aerospace sector. From Redstone Arsenal to Fort Rucker and across the Florida panhandle, government contractors provide goods, services, technology and software to all branches of the U.S. military and to U.S. Government agencies, as well as to allied nations via direct commercial sales, foreign military sales or to other assistance programs. U.S. international trade controls were enhanced during the Cold War primarily to ensure that sensitive technology would not be sent or diverted to nations, entities or individuals hostile to the United States. Export and other international trade laws are enforced through a variety of federal agencies, most of which administer comprehensive regulatory regimes that implement underlying statutes. Violating international trade laws can cause immediate harm to U.S. national security. As a result, violations of such controls carry strict civil and criminal penalties for offending parties.

This article outlines the international trade controls generally applicable to both commercial and defense industries, describes the compliance framework and enforcement provisions associated with these controls and highlights typical compliance issues that international businesses may encounter. The key takeaway from this overview is that effective international trade compliance efforts must span the full spectrum of international trade controls–not just the particular control area presenting the immediate concern.

International Trade Controls

Although most international trade compliance programs tend to be anchored by export control concerns, parallel consideration of U.S. economic sanctions programs, anti-boycott restrictions, customs/import controls, anti-corruption laws, and foreign direct investment considerations are necessary to ensure full compliance. There is no single agency, statute or set of regulations that spell out the precise requirements for a company to follow in order to comply with all U.S. international trade controls. Instead, a multitude of federal agencies–many with their own (sometimes overlapping) regulatory schemes–govern the transfer of technology, the provision of services and the shipment of products to or from overseas destinations. These agencies are scattered throughout the U.S. departments of Commerce, State, Treasury, Defense, Homeland Security, Energy, and others.

Export Controls

At their core, U.S. export laws and regulations require a company to (1) determine the export control jurisdiction for its products, (2) classify its products and determine both the type and level of applicable licensing requirements, (3) conduct due diligence screening on intended end-users, destinations and end-uses for its products, (4) obtain required licenses and/or governmental approvals, and (5) monitor export transactions for unusual developments (called "red flags") that may trigger export compliance concerns.[3]

Commercial/ Dual-Use Items

Most exports are regulated by the U.S. Department of Commerce through its Bureau of Industry and Security ("BIS").[4] The BIS performs its regulatory function pursuant to the Export Administration Regulations ("EAR"), which are a set of federal regulations promulgated to serve the national security, foreign policy, nonproliferation and short supply interests of the United States.[5] The statutory authority for the EAR is found in the Export Administration Act of 1979 ("EAA").[6] The EAA is not permanent legislation, although the President of the United States generally authorizes the continuation of the EAA pursuant to authority granted by the International Emergency Economic Powers Act ("IEEPA").[7]

Although the EAR focuses on the export of U.S.-origin items denominated as commodities, technology or software, its application extends beyond the mere export of items from the U.S. The EAR also covers the "re-export" of certain controlled items that originate in the United States, but are then sent from one foreign destination to another.[8] In addition, the EAR regulates "deemed exports," which refers to the release of controlled technology or source code to a foreign person, even if that person is located in the U.S at the time of the release.[9] Examples of deemed exports include the visual inspection of controlled technology by a foreign national during a tour of a U.S. manufacturing facility, an oral exchange of controlled information between U.S. and non-U.S. persons within the U.S. or abroad, or controlled software being e-mailed by a U.S. company to a foreign person located in the U.S.[10] Deemed export compliance is often overlooked (particularly by companies that do not actively export technology) because the concept it is somewhat counter-intuitive. The "export" occurs entirely within the U.S., but is "deemed" to be an export to the country of the non-U.S. person recipient. The subject of deemed exports has arisen for many Alabama companies since February 2011, when U.S. Customs and Immigration Services began requiring petitioners to make an export control attestation in connection with a petition for certain non-immigrant visas (including H-1B, L-1, and O-1 visas).[11]

The EAR controls the export of commercial "dual use" items. A "dual-use" item under the EAR is an item that, while designed for civilian use, also has potential military application.[12] If the item is required to be controlled for export, it will be listed/described on the EAR's Commerce Control List ("CCL"), which also sets forth the export licensing requirements and restrictions applicable to each particular item.[13] Items located on the CCL are assigned a five-character Export Control Classification Number ("ECCN") that enables the exporter to identify the applicable export controls.[14] Depending on the reason(s) for control and the intended country of destination, an exporter may be required to obtain an export license (or justify a license exception) from the BIS prior to shipping the item to a foreign end-user/destination.[15] Items not specified on the CCL, but which remain subject to the U.S. Commerce Department's jurisdiction under the EAR, are designated as "EAR-99." EAR-99 items will generally not require an export license unless mandated by one of the EAR's general prohibitions (such as a prohibited end-use/user or an embargoed destination). The vast majority of items exported from the U.S. is designated as EAR-99 and are exported without a license.

Violations of the EAR are subject to severe civil and criminal penalties. Civil penalties may result in fines equaling the greater of $250,000 or twice the value of the transaction per violation.[16] Criminal penalties include fines of up to $1,000,000 and/or imprisonment of up to 20 years.[17] Violating the EAR may also result in the denial of export privileges, the seizure and forfeiture of items intended for export, and the suspension of a person or entity's right to contract with the U.S. Government.[18]

Defense Trade

The U.S. Department of State, through its Directorate of Defense Trade Controls ("DDTC"), regulates the export, manufacture and brokering of defense articles and defense services and the transfer of technical data.[19] The State Department controls defense trade pursuant to the statutory authority found in the Arms Export Control Act ("AECA"), as well as the AECA's implementing regulations, the International Traffic in Arms Regulations ("ITAR").[20]

The ITAR defines a "defense article" as any item (including technical data and software) specifically designed, developed, configured, adapted, or modified for a military application, and which does not have either predominant civil application or the performance equivalent to an article used for a civil application.[21] Items designated as defense articles are specified on the United States Munitions List ("USML"), which is a categorized listing of all defense-oriented items such as weapons, munitions, aircraft, tanks, sea vessels, and military equipment.[22] A "defense service" under the ITAR is the furnishing of assistance (to include training) to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles.[23] Defense services also include the furnishing of controlled technical data to foreign persons, whether in the United States or abroad.[24] ITAR technical data is defined as information required for the design, manufacture, operation, repair, or modification of defense articles.[25]

Under the ITAR, any entity that manufactures *or* exports defense articles, defense services or technical data must be registered with the DDTC.[26] In addition, any export (or even temporary import) of defense articles, defense services or ITAR-controlled technical data must be licensed in advance by the DDTC.[27] Similar to the EAR controls on dual-use items, the

ITAR controls apply to re-exports, re-transfers and "deemed" exports to foreign persons.[28] However, unlike the EAR, which offers multiple bases for license exceptions and exemptions, there are only a few narrowly-tailored ITAR exemptions available (*e.g.,* for certain shipments to close allies or in support of U.S. government operations).

While no blanket export licenses exist under the ITAR *per se*, companies may obtain approval from the DDTC for ongoing exchanges/transfers via one of three agreements–Technical Assistance Agreements, Manufacturing License Agreements or Warehouse Distribution Agreements. Once the appropriate agreement is approved by the State Department and executed by the U.S. and foreign parties involved, it essentially serves as an export license for the ongoing exchange (usually of ITAR-controlled technical data) between the parties to the agreement.

Because of the restrictive, trade-inhibitive nature of ITAR controls, a manufacturer or exporter believing that one of its products should be controlled under the EAR instead of the ITAR may request a "commodity jurisdiction," or "CJ determination in an attempt to change the export control regulations that apply to the product.[29] After submitting detailed information about the product at issue, the manufacturer/exporter will attempt to persuade reviewing authorities from the departments of State, Commerce, Treasury and Defense that the product does not meet the definition of an ITAR defense article. If successful, changing the export control jurisdiction from the State Department to the Commerce Department (*i.e.,* from the ITAR to the EAR) can have far-reaching positive effects for a company, including increased access to foreign markets.

Penalties for violating the ITAR are set forth in the Arms Export Control Act[30] and, like penalties under the EAR, can be draconian. The maximum civil penalty is $500,000 per ITAR violation.[31] Criminal penalties for violating the ITAR include fines up to $1,000,000 per violation and imprisonment up to 20 years.[32] Violations of the AECA and the ITAR may also result in the seizure and/or forfeiture of the items at issue, and could subject the violator to permanent debarment from participating in the export of defense articles or the furnishing of defense services.[33]

In August 2009, the Obama administration launched a broad interagency review of the U.S. export control system.[34] The administration's general aim was to focus control efforts on the threats that matter most, increase interoperability with our allies around the world and reduce incentives for foreign manufactures to "design out" U.S. components due to the export controls that accompany them.[35] Although it is increasingly apparent that even the second Obama administration will not meet its goal of creating a single list of controlled items to be administered under a single export regulator,[36] there is a significant migration of items underway from the U.S. Munitions List to the Commerce Control List, as well as a reduction in the controls applicable to some items.[37] However, the U.S. system of administering two export control regulatory regimes is not going away anytime soon and, thus, U.S. exporters must continue to comply with both the ITAR and EAR, as applicable.

Economic Sanctions Programs

The Office of Foreign Assets Control ("OFAC") within the U.S. Department of the Treasury enforces economic and trade sanctions against certain foreign countries, entities and individuals.[38] These unilateral sanctions target activities that threaten the national security and economic stability of the United States.[39] Generally, economic sanctions deprive the target of the use of its assets by either blocking the assets subject to U.S. jurisdiction or by prohibiting transactions involving the target through trade embargoes.[40] Because economic sanctions programs are direct tools of foreign policy, they are subject to changes in interpretation and implementation on a more frequent basis than other U.S. international trade controls. Moreover, the U.S. tendency to assert extra-territorial jurisdiction in executing its sanctions policies may increase tensions among global trading partners. As a result, complying with these policies involving economic sanctions is a difficult task for U.S. companies that conduct international business.

The OFAC administers a variety of programs, both comprehensive (*e.g.,* Iran) and limited (*e.g.*, Libya), which may affect a company's ability to conduct trade in certain countries or geographic areas, currently including the Balkans, Belarus, Burma, Cote d'Ivoire (Ivory Coast), Cuba, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Somalia, Sudan, Syria, Yemen, and Zimbabwe.[41] The OFAC also enforces many activity-based sanctions programs against entities and individuals linked to disfavored activities such as terrorism, narcotics trafficking, weapons proliferation, disruption of democratic processes, conflict diamond trading, and transnational criminal organizations.[42]

The Treasury Department relies on multiple statutes, such as IEEPA, the Trading with the Enemy Act ("TWEA"), the Antiterrorism and Effective Death Penalty Act and the United Nations Participation Act, as the basis for U.S. economic sanctions programs.[43] The OFAC utilizes a host of regulations, collectively termed the Foreign Asset Control Regulations ("FACR"), to administer and enforce sanctions programs against specific targets.[44] Because the evolution of U.S. economic sanctions programs is based on differing foreign policy objectives and international events, each program is unique. For example, an activity that may be permissible under the Sudanese Sanctions Regulations may be prohibited under the Cuban Assets Control Regime. Companies conducting international business must therefore carefully evaluate the circumstances of a given situation under the regulations for the applicable sanctions program and avoid the temptation to apply general principles across the board.

However, there are common threads that exist in most U.S. economic sanctions programs. First, U.S. sanctions programs generally apply to U.S. citizens (and U.S. resident permanent aliens) worldwide, and to all individuals physically located in the U.S. Entities established under U.S. law, as well as their foreign branches, are subject to U.S. jurisdiction, as are all entities physically located in the U.S. Foreign subsidiaries that are *truly* independent of U.S. control/influence are generally not considered to be subject to U.S. jurisdiction under most sanctions programs. This principle, however, has been diluted by recent enhancements to the Iran-related sanctions being advanced by the United States.

Second, under comprehensive U.S. sanctions programs such as those currently targeting Cuba, Iran, Sudan and Syria, import and export activities to the destination are generally prohibited. However, under limited sanctions programs such as those currently targeting North Korea and Conflict Diamond Trading, prohibitions are focused on specific activities or industries. As a result, trade in other areas may be permitted. The Treasury Department also "designates" individuals, entities, banks, vessels, and organizations that are owned, controlled and/or acting on behalf of sanctions targets and places them on the "Specially Designated Nationals and Blocked Persons List" (the "SDN List"). U.S. persons are prohibited from doing business (directly or indirectly) with a Specially Designated National ("SDN").[45] Currently, there are approximately 6,000 SDNs.[46]

Third, under most U.S. economic sanctions programs, U.S. persons are prohibited from "facilitating" transactions that are otherwise unlawful under the program.[47] In other words, U.S. persons cannot do (or assist others in doing) indirectly what they are prohibited from directly doing. Attempts to circumvent U.S. economic sanctions laws or to facilitate unlawful transactions are aggressively enforced by Treasury and the Justice Department.

Fourth, the best preventive medicine for avoiding a violation of U.S. economic sanctions laws is to "know your customer" through a series of overlapping due diligence mechanisms. Prior to allowing an international sales transaction, joint venture, service contract, *etc.*, to move forward, it is crucial that a U.S. company (1) conduct list-based screening, such as checking the SDN List, as well as other applicable control/prohibition lists maintained by U.S. Government agencies, to ensure that no problematic party is involved, (2) conduct destination-based screening (such as determining whether any of the countries involved are subject to comprehensive or limited economic sanctions and, if so, the nature of any prohibitions), (3) conduct activity-based screening, such as determining whether any known activities prohibited under economic sanctions programs (or export control prohibitions) are involved, and (4) maintain awareness of any "red flags" associated with the transaction that may signal a compliance problem and diligently follow-up on any such indicators.

Maximum civil penalties for violations of U.S. economic sanctions laws are determined by the underlying statutory basis for the program at issue. For example, violations of IEEPA-based programs may warrant a fine of $250,000 per violation (or twice the value of the transaction at issue), a program based on the TWEA carries a maximum fine of $65,000 per violation and a violation of sanctions brought under the Foreign Narcotics Kingpin Designation Act can result in a fine of $1,075,000.[48] In cases involving egregious violations, the OFAC may refer the matter to the U.S. Justice Department for criminal prosecution.[49] In making a penalty determination, the OFAC considers whether the action was willful or reckless, the subject person's awareness of the violation, the harm to the sanctions program and the particular circumstances surrounding the violation.[50] The OFAC also evaluates whether the subject person possessed an effective economic sanctions compliance program at the time of the violation, as well as any response taken voluntarily to remedy the harm caused.[51] Finally, the OFAC analyzes the subject person's level of cooperation in the investigation, including whether

the matter was voluntarily disclosed to the OFAC, and the future compliance/deterrence effect that any administrative action will have on promoting future sanctions compliance.[52]

Anti-Boycott Restrictions

U.S. anti-boycott laws generally prohibit U.S. persons and U.S. businesses from participating in unsanctioned foreign boycotts. The purpose of these laws is to prevent U.S. entities from being used by foreign nations, entities or persons to implement policies and advance objectives that run contrary to U.S. foreign policy. Chief among the prohibited foreign boycotts affecting U.S. trade abroad is the Arab League's boycott of Israel.

The 1977 amendments to the EAA and the Ribicoff Amendment to the Tax Reform Act of 1976 form the basis of the current U.S. anti-boycott restrictions.[53] The U.S. Department of Commerce has implemented anti-boycott regulations that are administered by the Office of Antiboycott Compliance ("OAC"). U.S. persons may be penalized under these regulations for conduct that includes: (1) agreeing to refuse or refusing to do business with a boycotted country or with a blacklisted company; (2) agreeing to discriminate or discriminating against other persons based on race, religion, sex, national origin, or nationality; (3) agreeing to furnish or furnishing information about business relationships with a boycotted country or with a blacklisted company; or (4) agreeing to furnish or furnishing information about the race, religion, sex or national origin of another person.[54] Boycott requests are often located (and sometimes buried) in transaction documents, such as contracts, purchase orders, letters of credit, bills of lading, or certificates of origin.

A U.S. person who receives an improper boycott request not only is prohibited from complying with the request, but must also report receipt of the request to the Commerce Department.[55] Failure to report receipt of an improper boycott request to Commerce may result in administrative penalties, including monetary fines, denial of export privileges and exclusion from professional practice before the BIS. Even if no boycott request is received, if a U.S. person conducts business in a "boycotting country," it must file an International Boycott Report with the Internal Revenue Service. Failure to file the requisite report may result in the loss of any foreign tax credits that the U.S. person would otherwise receive.[56] The Treasury Department's determination of what constitutes a "boycotting country" is fluid. However, Treasury's current list of the nine countries associated with carrying out the Arab League's boycott of Israel (and thus are certainly considered to be "boycotting countries") are Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, UAE, and Yemen.[57]

Customs/ Import Controls

U.S. Customs and Border Protection ("Customs") is responsible for border security and facilitating the arrival of foreign goods and visitors to the United States.[58] Given the breadth of Customs' mission, this section will focus on two key points. First, in its enforcement of U.S. laws and the regulations promulgated by various federal agencies, Customs is empowered to seize and forfeit goods arriving into the U.S.[59] Second, Customs is charged with assessing the applicable duties for goods arriving at a U.S. port of entry for importation into the United States.[60]

Customs seizures and forfeiture actions primarily arise in two situations. Customs *will* seize and forfeit property that has been involved in illegal activity, such as stolen merchandise or smuggled contraband.[61] Customs *may* seize and forfeit property under certain conditions, such as goods imported without the required licenses or permits and goods which may violate certain U.S. trademark, copyright or trade name laws.[62] Once goods have been seized at the port by Customs, the matter will be referred to a Customs Fines, Penalties and Forfeiture ("FP&F") office.[63] Following an appraisal of the seized goods,[64] the FP&F officer assigned to the matter will send a notice of the seizure to parties with an interest in the goods, such parties usually being determined from the documents and other information (*e.g.*, bill of lading) associated with the shipment.[65] The notice will advise these interested parties of the particular laws alleged to have been violated, the circumstances giving rise to Customs' determination that these laws had been violated and the parties' right to apply for relief from forfeiture of these goods.

Upon receipt of the seizure notice, most interested parties will pursue administrative relief from the seizure by filing a petition for relief.[66] Customs will review the petition and make a decision fully granting, partially granting or denying the interested party's petition. Should the interested party find Customs' decision unsatisfactory, it has the option of filing a supplemental petition.[67]

Assuming imported goods are not targets for seizure and forfeiture, importing companies must navigate the entry process at the U.S. port or entry, which includes several administrative and regulatory requirements.[68] While most companies seek the assistance of a knowledgeable customs broker, certain aspects of this process must be understood by the importer. For example, imported goods must be designated with a proper tariff classification under the U.S. Harmonized Tariff Schedule ("HTS").[69] This designation controls the rate of duty assessed for a particular imported good.[70] Each section and chapter of the HTS contains explanatory notes to aid importers in determining the appropriate tariff classification under the HTS.[71]

Moreover, imported goods must be properly valued, since in most cases the duty on an imported good is based on a percentage of its value.[72] Customs uses several different types of valuation methods,[73] but typically prefers the "transaction value" method,[74] which is the price "actually paid or payable" for the goods to the seller, plus certain costs (if not already included in the price), such as any packing expenses or sales commissions incurred by the buyer.[75]

Finally, subject to certain limited exceptions,[76] imported goods must be accurately marked with their country of origin,[77] and importers must declare this country of origin to Customs upon entry into the United States.[78] According to Customs regulations, "country of origin" is generally defined as "the country of manufacture, production, or growth of any article of foreign origin entering the United States."[79] However, to the extent the imported good is comprised of materials from or was processed in more than one country, the last country to effect a "substantial transformation" on the imported good will be designated as the country of origin.[80]

Though Customs regulations focus on the import of goods into the United States, the export practitioner should be cognizant of how these rules relate to the U.S. Government's overall trade control process. Penalties for violating customs regulations can be severe. For example, the penalties for making a materially false statement (written or oral) or a material omission regarding the importation of goods can lead to monetary penalties up to the domestic value of the merchandise, depending on the level of culpability.[81] Consequently, every company's compliance program should address Customs' role in the international trade process.

Anti-Corruption Compliance

U.S. companies should conduct thorough anti-corruption compliance in connection with their business operations abroad. The most important areas for trade-based anti-corruption compliance are anti-bribery laws, such as the U.S. Foreign Corrupt Practices Act ("FCPA") and applicable foreign country anti-corruption laws, as well as relevant anti-money laundering restrictions.

The FCPA makes it unlawful for certain classes of persons and entities to corruptly give, promise, offer or knowingly allow a third party to give, promise or offer anything of value to a foreign (non-U.S.) government official for the purpose of influencing the official's actions, securing an improper advantage, obtaining/retaining business or directing business to any person.[82] The FCPA also has record-keeping provisions that apply to all companies issuing securities (or American Depository Receipts ("ADR")) on a United States stock exchange.[83]

FCPA prosecutions have expanded markedly since 2007 and it appears that the trend will continue indefinitely. Formal guidance regarding what is permissible and impermissible under the FCPA is limited. There are no implementing regulations to clarify the statute's meaning or to provide practical guidance for compliance. Companies must therefore look to cases, FCPA Opinions and other materials issued by the U.S. Department of Justice ("DOJ"), as well as to private sector "best practices," for interpretive guidance. Few FCPA cases result in published legal opinions, as most cases are resolved through plea agreements or deferred prosecution agreements. These agreements are individualized and fact-specific, and while they can help identify trends in enforcement, they cannot give parties concrete assurances with respect to FCPA compliance. In such an environment, companies must make individualized assessments regarding the level of resources to devote to anti-corruption compliance based on their own risks for FCPA violations.

The bribery provisions of the FCPA apply (1) to United States citizens, nationals, residents and companies, wherever located,[84] and (2) to non-United States citizens or companies who: (a) have registered securities on the United States stock exchange, (b) act as an agent or intermediary of another party governed by the FCPA[85] or (c) cause something to be done in the United States in furtherance of an FCPA violation. Although an in-depth treatment of the FCPA's elements is beyond the scope of this article, it is critical for companies doing business abroad (particularly if they are dealing with intermediaries and/or foreign government officials) to conduct an anti-corruption risk assessment and implement an effective anti-corruption compliance program that complements their other international trade compliance efforts.[86]

The DOJ is the chief enforcement agency for criminal violations of the bribery provisions of the FCPA. Penalties for such violations include a fine of up to $2,000,000 for business entities[87] and a $100,000 fine and a prison term of up to five years for officers, directors, employees and agents.[88] Under the U.S. Sentencing Guidelines, courts may impose higher fines, including up to twice the defendant's gross gain from the bribe.[89] The Securities and Exchange Commission or the Attorney General may sue in the civil court system for fines of up to $10,000 per violation against a culpable business[90] and any officer, director, employee or agent of the business who violates the FCPA's bribery provisions.[91] In addition to criminal and civil penalties, violations of the FCPA may result in a debarment from participating in U.S. Government contracts and a loss of export privileges.[92]

Foreign Direct Investment Considerations

The Committee on Foreign Investment in the United States ("CFIUS") is an inter-agency committee established to review proposed transactions involving an investment in a U.S. company by a foreign entity to determine the probable effect of the proposed transaction on U.S. national security.[93] The CFIUS was authorized pursuant to section 721 of the Defense Production Act of 1950, but the law and procedures governing CFIUS reviews (also called "Exon-Florio reviews") have been amended significantly over time, primarily by the Exon-Florio Amendment of 1988, the Foreign Investment and National Security Act of 2007 ("FINSA") and five Executive orders between 1975 and 2008.[94] The CFIUS is chaired by the Secretary of the Treasury, but includes the heads of the departments of Defense, State, Commerce, Justice, Homeland Security, and Energy, as well as the U.S. Trade Representative and the Director of the Office of Science & Technology Policy.[95]

Although the CFIUS review process is often overlooked by U.S. business due to the narrow circumstances in which it becomes relevant, any U.S. company that is a potential recipient of foreign investment should be aware of the existence of this process. It allows parties to a covered transaction to voluntarily submit transaction information to CFIUS for review.[96] In accordance with its formal procedures, the CFIUS reviews the information provided and identifies any national security risks associated with the transaction.[97] This review takes 30 days (sometimes less) to accomplish. If the CFIUS does not identify national security risks associated with the proposed transaction, the parties may proceed.[98] The transaction will then receive a "safe harbor" from further reviews.[99] However, without the safe harbor protection, the investment transaction may be unilaterally reviewed by the CFIUS at any time and is subject to being amended or, at worst, unwound, in the event unacceptable national security risks are discovered.[100]

Companies facing foreign direct investment scenarios should consider the prospect of submitting the proposed transaction for CFIUS review–particularly if the company deals in technology controlled under the ITAR or EAR, or if the foreign party to the proposed transaction is a foreign government (or is controlled by a foreign government). However, due to the review times involved,[101] parties must decide whether to pursue a CFIUS review well in advance of the anticipated closing date.[102]

International Trade Compliance

The most important step that an Alabama company conducting international business can take with respect to international trade compliance is to maintain a comprehensive and effective compliance program. The company's program should be in writing, should state senior management's commitment to strict compliance, should address all international trade regulatory schemes implicated by the company's operations and must be understood by all employees. The company should also designate an international trade compliance officer whose duties include the implementation and maintenance of the company's compliance program.

U.S. Government regulators usually consider the existence of an *effective* international trade compliance program as a significant mitigating factor when determining whether, and to what extent, a penalty should be assessed for violations. However, it is not enough to merely have a program gathering dust on the shelf. The program must be effectively implemented and employees must receive training in the applicable areas of control. Senior management must take an active role in international trade compliance and be pro-active in continually evaluating risk in connection with the company's international operations. Most effective international trade compliance programs provide for audits to be conducted by internal and external elements in order to evaluate the effectiveness of the program and to keep it headed in the right direction.

Companies seeking to acquire, merge or partner with businesses that perform international trade activities, whether from/in the U.S. or abroad, should conduct due diligence that includes an audit of the subject company's international trade compliance efforts. In addition to measures necessary to "know" the subject company itself (as well as its owners), an appropriate audit includes a review of the company's international trade compliance program, research into previous trade-related penalties or actions received by the company and an evaluation of the effectiveness of the company's record-keeping policy. Due diligence also requires an analysis of the specific items exported or imported; jurisdiction, classification and controls applicable to those items; export destinations and end uses; any intermediaries affiliated with international transactions; and the customers/end users who receive the company's items.

If at any time during the conduct of international business activities a company suspects that a potential violation exists, it is imperative that the company immediately conduct an investigation into the suspected violation. This is necessary to determine if actions should be taken to prevent imminent problematic conduct and to evaluate the need to submit a voluntary disclosure to the applicable federal regulator/agency. U.S. Government entities regulating international trade, including the BIS, DDTC and OFAC, have formal mechanisms in place that permit companies to voluntarily disclose known or suspected violations of the respective international trade regulations that they administer. While the determination of whether a company discloses a violation is always a business decision, international trade regulators generally afford substantial mitigation "credit" to a company for such disclosure–provided the Government does not discover the violation first.

International trade controls are a complex web of statutes, regulations, policies and guidelines administered by multiple federal agencies. Changes in the economy, shifts in the global balance of power and the continued existence of hostile foreign regimes add to the complexity by ensuring that trade restrictions remain in a constant state of flux. Often, businesses with limited resources become overwhelmed in their attempt to navigate the export and other international trade laws applicable to their business. The end result is often either abstention from foreign markets or an increased risk of doing business overseas without having the proper international trade compliance mechanisms in place.

Neither of these situations is preferred or necessary. By helping businesses better understand their international trade compliance obligations and their opportunities in the international marketplace, the Alabama lawyer can assist clients in achieving the optimal balance between conducting robust trade and protecting U.S. national security. | AL

Endnotes

1. Budd McLaughlin, *Alabama Exports for 2011 Surge to Record High*, The Huntsville Times, Feb. 24, 2012, *http://blog.al.com/huntsville-times-business/2012/02/alabama_exports_for_2011_surge.html*.
2. Office of the U.S. Trade Representative, Free Trade Agreements, *http://www.ustr.gov/trade-agreements/free-trade-agreements*. The U.S.-Panama Free Trade Agreement, known as the "Panama Trade Promotion Agreement," was signed by President Obama on October 21, 2011, but has not been implemented as of this writing.
3. Examples of "red flag indicators" provided by the Bureau of Industry and Security are located at *http://www.bis.doc.gov/enforcement/redflags.htm*.
4. *See* 15 C.F.R. § 730.1 (2012).
5. 15 C.F.R. § 730.6 (2012).
6. 50 U.S.C. app. §§ 2401-2420 (2011); 15 C.F.R. § 730.2 (2012).
7. 50 U.S.C. § 1701 (2012); 15 C.F.R. § 730.2 (2012). The most recent extension of the Export Administration Act was set forth in the Continuation of the National Emergency with Respect to Export Control Regulations, 77 Fed. Reg. 49697 (Aug. 16, 2012), available at *https://federalregister.gov/a/2012-20378*.
8. 15 C.F.R. § 730.5(a) (2012); 15 C.F.R. § 734.2(b)(4)-(8) (2012).
9. 15 C.F.R. § 730.5(c) (2012); 15 C.F.R. § 734.2(b) (2012).
10. *See* 15 C.F.R. § 734.2(b)(3)(i)-(iii) (2012).
11. *See* USCIS Form I-129, Petition for a Nonimmigrant Worker, pt. 6 (Rev. Oct. 7, 2011). An important distinction to understand when navigating U.S. export controls is that, while a Lawful Permanent Resident of the U.S. (which includes a U.S.

Citizen and a "Green Card" holder) is a "U.S. Person" for the purposes of U.S. export laws, someone in the U.S. under a non-immigrant visa (*e.g.*, H-1B) is *not* considered to be a "U.S. Person" and thus may be subject to additional export compliance measures. *See* 22 C.F.R. pts. 120.15-120.16 (2012); 15 C.F.R. § 772.1 (2012).

12. 15 C.F.R. § 730.3 (2012).
13. 15 C.F.R. §§ 738.1-738.4 (2012); 15 C.F.R. § 774.1 (2012); 15 C.F.R. pt. 774, Supp. 1 (2012).
14. 15 C.F.R. § 738.2(d) (2012).
15. See 15 C.F.R. § 738.4 (2012).
16. Int'l Emergency Economic Powers Enhancement Act, Pub. L. No. 110-96, § 2, 121 Stat. 1011 (2007).
17. *Id.*
18. 15 C.F.R. § 764.3(a)(2)-(3) & (c) (2012).
19. *See* 22 C.F.R. § 120.1 (2012).
20. 22 U.S.C. § 2778 (2011); 22 C.F.R. pts. 120-130 (2012).
21. *See* 22 C.F.R. § 120.3 (2012). It is important to note that the designation of "defense article" under the ITAR is not dependent upon the item's intended "use." Thus, decisions about whether or not an item constitutes a defense article should be evaluated strictly against the definition.
22. 22 C.F.R. § 120.6 (2012) (defining a defense article); 22 C.F.R. § 121.1 (2012) (defining the United States Munitions List).
23. 22 C.F.R. § 120.9 (2012). Although the U.S. State Department has proposed a revision to the definition of Defense Service aimed at reducing its scope, no final rule has been adopted as of this writing. International Traffic in Arms Regulations: Defense Services, 76 Fed. Reg. 20590-01 (Apr. 13, 2011), available at *http://www.pmddtc.state.gov/FR/2011/76FR20590.pdf*.
24. 22 C.F.R. § 120.9 (2012).
25. 22 C.F.R. § 120.10 (2012). Technical data is considered to be a defense article under the ITAR. 22 C.F.R. § 120.6 (2012).
26. 22 C.F.R. § 122.1 (2012). Although the DDTC administers the ITAR, it works closely with the Defense Technology Security Administration ("DTSA") within the U.S. Department of Defense.
27. 22 C.F.R. § 123.1 (2012).
28. *See* 22 C.F.R. § 120.17 (2012) (defining export); 22 C.F.R. § 120.19 (2012) (defining re-export). Although the ITAR does not use the EAR term "deemed export," the same concept applies to transmissions of ITAR-controlled technical data to foreign persons, whether in the U.S. or abroad.
29. 22.C.F.R. § 120.4 (2012).
30. 22 U.S.C. § 2778(c)&(e) (2011); 22 C.F.R. § 127.3 (2012).
31. 22 U.S.C. § 2778(e) (2011).
32. 22 U.S.C. § 2778(c) (2011).
33. 22 .C.F.R. § 127.6 (describing seizure and forfeiture) (2012); 22 .C.F.R. § 127.7 (2012) (defining debarment procedures).
34. Statement of the Press Secretary (Aug. 13, 2009), available at *http://www.whitehouse.gov/the_press_office/Statement-of-the-Press-Secretary*.
35. Press Release, Office of the Press Secretary, White House Chief of Staff Daley Highlights Priority for the President's Export Control Reform Initiative (Jul. 19, 2011), available at *http://www.whitehouse.gov/the-press-office/2011/07/19/white-house-chief-staff-daley-highlights-priority-presidents-export-cont*.
36. Commerce Control List: Revising Descriptions of Items and Foreign Availability, 75 Fed. Reg. 76664 (Dec. 9, 2010); Revisions to the United States Munitions List, 75 Fed. Reg. 76935 (Dec. 10, 2010).
37. Press Release, Office of the Press Secretary, Fact Sheet: Latest Steps to Implement the President's Export Control Reform Initiative (Mar. 7, 2012), available at *http://www.whitehouse.gov/the-press-office/2012/03/07/fact-sheet-latest-steps-implement-presidents-export-control-reform-initi/*.
38. Economic Sanctions Enforcement Guidelines, 73 Fed. Reg. 51933 (Sept. 8, 2008), available at *https://www.federalregister.gov/articles/2008/09/08/E8-20704/economic-sanctions-enforcement-guidelines. See also* U.S. Department of Treasury, Office of Foreign Assets Control, Mission available at *http://www.ustreas.gov/offices/enforcement/ofac*.
39. *See id.*
40. Economic Sanctions Enforcement Guidelines, 73 Fed. Reg. 51933 (Sept. 8, 2008), available at *https://www.federalregister.gov/articles/2008/09/08/E8-20704/economic-sanctions-enforcement-guidelines*.
41. U.S. Department of Treasury, Office of Foreign Assets Control, Sanctions Programs and Country Information, *available at http://www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml*.
42. *See id.*
43. 50 U.S.C. §§ 1701-1707 (2011); 12 U.S.C. § 95a, *et seq.* (2011); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996); 22 U.S.C. § 287c (2011).
44. 31 C.F.R. pts. 500-598 (2012).
45. *See, e.g.,* 31 C.F.R. §§ 515.201, 515.306 (2012); 31 C.F.R. §§ 536.201, 536.312 (2012).
46. The SDN List is available at *http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx*.
47. *See, e.g.,* 31 C.F.R. §§ 515.201(c), 535.208(a), 536.204 (2012).
48. *See* 50 U.S.C. § 1705 (2011); 31 C.F.R. § 501.701(a)(3) (2011); 31 C.F.R. § 598.701(a)(3) (2011).
49. *See* 31 C.F.R. §536.705 (2012).
50. *See* 31 C.F.R. pt. 501, App. A (2012).
51. *See id.*
52. *See id.*
53. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (Jun. 22, 1977); 26 U.S.C. § 999 (2005). The anti-boycott provisions under the Export Administration Act and the Tax Reform Act should be evaluated separately. In general, the EAA prohibits certain boycott-related conduct, while the TRA provides for the denial of tax benefits for certain boycott-related agreements. Also, while the Commerce Department has promulgated anti-boycott regulations, *see* 15 C.F.R. pt. 760 (2012), the Treasury Department has only issued guidelines.
54. 15 C.F.R. § 760.2 (2012).
55. 15 C.F.R. § 760.5 (2012); 26 U.S.C. § 999 (2005).
56. 15 C.F.R. § 764.3(a) (2012).
57. *See* 26 U.S.C. § 999(c)(2) (2005).
58. 26 U.S.C. § 999 (f) (2005).
59. *See* 19 U.S.C. § 1595a (2011); 19 C.F.R. § 162.23 (2012).
60. *See* 19 U.S.C. § 1500 (2011); 19 C.F.R. § 141.1 (2012).
61. *See* 19 U.S.C. § 1595a(c)(1) (2011).
62. *See* 19 U.S.C. § 1595a(c)(2) (2011).
63. *See* U.S. Customs & Border Prot., What Every Member of the Trade Community Should Know About: Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages (Feb. 2004).
64. *See* 19 U.S.C. § 1606 (2011).
65. *See* 19 C.F.R. § 162.31 (2012).
66. The regulations governing seizures and petitions for relief can be found at 19 C.F.R. parts 162 and 171. The petition for relief must be filed no later than 30 days from the date on the

seizure notice, unless the notice states otherwise or specifically permitted more time by the FP&F officer, and, while there is no required format for a petition for relief, many petitions take the form of a letter. The factors considered by Customs when evaluating a petition for relief are listed in appendices A-D to part 171 and Customs publications, and interested parties should tailor their petition to these factors as applicable to the facts of the individual case. *See* U.S. Customs & Border Prot., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: MITIGATION GUIDELINES: FINES, PENALTIES, FORFEITURES AND LIQUIDATED DAMAGES (Feb. 2004).

67. The supplemental position must be filed within 60 days of the date on the notice of Customs' decision, unless the notice of decision states otherwise. *See* 19 C.F.R. §§ 171.61-64 (2012).
68. S*ee* U.S. Customs & Border Prot., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: ENTRY (Mar. 2004).
69. Although not published in the *U.S. Code*, *see* 19 U.S.C. § 1202 (2011), the HTS is available at *http://www.usitc.gov/tata/hts/index.htm.*
70. *See* 19 C.F.R. § 152.11 (2012) ("Merchandise shall be classified in accordance with the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) as interpreted by administrative and judicial rulings.").
71. *See also* U.S. Customs & Border Prot., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: TARIFF CLASSIFICATION (May 2004).
72. *See* 19 U.S.C. §§ 1401a, 1500(a) (2011). *See also* U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: CUSTOMS VALUE (Jul. 2006).
73. *See* 19 C.F.R. §§ 152.100-108 (2012).
74. *See* 19 C.F.R. § 152.101(b) (2012).
75. *See* 19 C.F.R. § 152.103 (2012).
76. *See* 19 C.F.R. §134.32 (2012).
77. *See* 19 C.F.R. §134.11, which states, in pertinent part: Unless excepted by law, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article, at the time of importation into the Customs territory of the United States.
78. *See* CBP Form 7501, U.S. Customs and Border Protection Entry Summary, pt. 10 (Rev. Jun. 2009).
79. *See* 19 C.F.R. § 134.1(b) (2012). Note however, that "for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin." *Id.*
80. *See* 19 C.F.R. Part 102 (2012).
81. *See* 19 U.S.C. § 1592 (2011).
82. 15 U.S.C. §§ 78dd, *et seq.* (2011). The full text of the FCPA may be reviewed online at *http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf*. The U.S. Department of Justice website also provides unofficial translations of the FCPA in select languages. The FCPA does not address giving, promising or offering things of value to United States officials or state officials. However, other laws, such as the United States' bribery statute, 18 U.S.C. § 201 and the Alabama bribery statute, *Ala. Code* § 13A-10-61, prohibit such conduct.
83. 15 U.S.C. § 78m (2011).
84. The FCPA specifically applies to "domestic concerns," which are United States citizens or residents and business entities organized under United States law (or which have their principle place of business in the United States). U.S. subsidiaries of foreign parent companies are "domestic concerns" for purposes of the FCPA. The FCPA applies to all officers, directors, employees or agents of "domestic concerns" regardless of their nationality.
85. A controlled foreign subsidiary of a U.S. company, or a foreign company registered on a U.S. exchange, may be subject to the FCPA as an agent or instrumentality.
86. For a more in-depth treatment of the FCPA, see Bill Athanas's article published in the September 2010 issue of *The Alabama Lawyer*.
87. 15 U.S.C. § 78dd-2(g)(1)(A) (2011).
88. 15 U.S.C. § 78dd-2(g)(2)(A) (2011). Fines against individuals for criminal violations of the FCPA may not be paid by the individual's employer.
89. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B4.1(b) (2011).
90. 15 U.S.C. § 78dd-2(g)(1)(B) (2011).
91. 15 U.S.C. § 78dd-2(g)(2)(B) (2011). The SEC is the primary enforcement agency for violations of the Books and Records provisions of the FCPA.
92. *See* 2 C.F.R. 180.800 (2012).
93. 50 U.S.C. app. § 2170(b)(1) (2011). Similarly, under 50 U.S.C. app. § 2170a, entities controlled by foreign governments may not merge with, acquire or take over certain U.S. defense contractors. This restriction applies to contractors working with the departments of Defense or Energy under a national security program, as well as contractors working on programs valued in excess of $500,000,000. *See* 50 U.S.C. app. § 2170a(a) (2011).
94. Foreign Investment and National Security Act of 2007, Pub. L. 110-49, 121 Stat. 246 (Jul. 26, 2007), codified at 50 U.S.C. app § 2170 (2011). In addition, CFIUS Regulations are located at 31 C.F.R. Part 800 (2012).
95. 50 U.S.C. app. § 2170(k) (2011). *See also* Executive Order 11858 of May 7, 1975, 40 Fed. Reg. 20263, 3 CFR, 1971-1975 Comp., p. 990, *as amended by* Executive Order 13456 of Jan. 23, 2008, 73 Fed. Reg. 4677 (Jan. 25, 2008), *available at https://federalregister.gov/a/08-360*. The Director of National Intelligence and the Secretary of Labor are non-voting members of CFIUS. *See* 50 U.S.C. app. § 2170(k)(2).
96. 50 U.S.C. app. § 2170(b)(1)(C) (2011); 31 C.F.R. § 800.402 (2012).
97. 31 C.F.R. § 800.501 (2012); 50 U.S.C. app. § 2170(b)(1) (2011). Pursuant to FINSA, the Treasury Department issued guidelines regarding CFIUS reviews in December 2008. Office of Investment Security; Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567 (Dec. 8, 2008) ("CFIUS Guidance"), *available at https://federalregister.gov/a/E8-28791*.
98. 31 C.F.R. §800.504 (2012); 50 U.S.C. app. § 2170(b)(6) (2011).
99. *See* 31 C.F.R. § 800.601 (2012); Executive Order 11858 of May 7, 1975 § 7(f), 40 Fed. Reg. 20263, 3 CFR, 1971-1975 Comp., p. 990, *as amended by* Executive Order 13456 of Jan. 23, 2008, 73 Fed. Reg. 4677 (Jan. 25, 2008), *available at https://federalregister.gov/a/08-360*. If national security risks or other potentially problematic issues are identified in the initial 30-day review, the CFIUS may conduct an additional 45-day investigation. Simultaneously, the CFIUS would likely work with the parties in an attempt to mitigate identified risk areas. If issues still remain after the second CFIUS investigation, the proposed transaction may be submitted to the President for a decision. 31 C.F.R. §§ 800.503, 800.505, 800.506 (2012).
100. 50 U.S.C. app. § 2170(d)(3)&(4) (2011).
101. *See* 31 C.F.R. §§ 800.501–800.506 (2012).
102. *See also* CFIUS Guidance, 73 Fed. Reg. 74567 (Dec. 8, 2008).

More Uninsured/Underinsured Motorist Coverage—

An Addition to the Lawyers' Desk Reference

By Walter J. Price, III and Eris Bryan Paul

Introduction

The following is a complement to "Uninsured/Underinsured Motorist Coverage–A Desk Reference for Alabama Lawyers," 69 *Alabama Lawyer* 203 (2008). Many of the issues faced in handling uninsured and underinsured motorist claims require a more detailed review and this article is an effort to address several of the more common, and complicated, uninsured and underinsured motorist questions.

In the opinion of *Bailey v. Progressive Specialty Ins. Co.,* 72 So. 3d 587 (Ala. 2011), in the opening paragraph of the court's written analysis, Justice Glenn Murdock expressed a viewpoint shared by many practicing attorneys and judges in this state:

> In one sense, the parties' arguments on appeal are straightforward ... [However,] actions for UM benefits are anything but straightforward, ... so evaluating the parties' arguments involves an exacting analysis.

Id. at 592-593. Keeping in mind Justice Murdock's instruction, we begin our own analysis.

Whose Rejection Is Effective?

Of course, it is well established that for rejection of uninsured motorist coverage to be effective, the rejection must be made by all named insureds and in writing. A rejection form signed by one spouse where both are named insureds is not effective as to the one who did not sign, nor is a waiver signed by the agent on behalf of the named insured. *State Farm Mut. Auto. Ins. Co. v. Martin*, 292 Ala. 103, 289 So. 2d 606 (1974); *Progressive Cas. Ins. Co. v. Blythe*, 350 So. 2d 1062 (Ala. Civ. App. 1977). Consistent with general contract law, failure of the named insured to read the rejection language before signing the waiver will not void that rejection. *Nance v. Southerland*, 79 So.3d 612 (Ala. Civ. App. 2010). Note, however, that the named insured can reject for some, but not all, additional insureds. *Federal Mut. Ins. Co., Inc. v. Vaughn*, 961 So. 2d 816 (Ala. 2007) (employer allowed to retain UM coverage for directors, officers, owners and family members who qualified as insureds, though it effectively rejected coverage for any other person qualifying as an insured).

Frequently, insureds have sought to equate spouses or other applicants to named insureds to avoid prior rejection and invoke UM coverage. For example, a plaintiff unsuccessfully asserted that the definition of "you" and "your," which included the "named insured . . . and that person's spouse," gave the spouse the same policy rights as the named insured including the power to reject uninsured motorist coverage. *Progressive Speciality Ins. Co. v. Green*, 934 So. 2d 364 (Ala. 2006). Similarly, another argued that multiple policy references to "your application" combined with the same definition of "you" and "your" found in *Green* entitled both applicants to be treated equally though only one was identified as a named insured. This argument was also rejected. *Progressive Specialty Ins. Co. v. Naramore*, 950 So. 2d 1138 (Ala. 2006). Though not defined, the "named insured" is exactly that–the person or entity in whose name the policy was issued. *Rimas v. Progressive Ins. Co.*, 292 Fed. Appx. 833 (11th Cir. 2008).

Identification of one as a named excluded driver under a policy has been interpreted as rejection of uninsured motorist coverage as to that person. *Funderburg v. Black's Ins. Agency*, 743 So. 2d 472 (Ala. Civ. App. 1999). However, rejection of the coverage on one policy does not prevent recovery of UM benefits under another policy covering the claimant even if the accident involved a vehicle covered by the policy for which uninsured motorist coverage had been waived. *Peachtree Cas. Ins. Co. v. Sharpton*, 768 So. 2d 368 (Ala. 2007). Naturally this is because UM coverage is said to follow the person instead of the vehicle.

Is the Tortfeasor an Uninsured Motorist?

It doesn't take a lawyer to determine that a motor vehicle, in which neither the owner nor operator carries liability insurance, is considered an "uninsured vehicle." This common-sense approach was established as early as 1973 in the case of *Higgins v. Nationwide Mutual Ins. Co.*, 282 So. 2d. 301, 305 (Ala. 1973); *see also Wilbourn v. Allstate Ins. Co.*, 305 So. 2d 372, 373 (Ala. 1974) ("It is well-settled and common knowledge that a motorist or a vehicle carrying no liability insurance is 'uninsured'"). Therefore, the operator of such a vehicle is clearly an "uninsured motorist."

In Alabama, a motorist may be declared to be "uninsured" for a myriad of reasons. For example, the particular insurance policy involved may fail to cover the injury involved, applicable policy limits may be set below the statutory minimum or the motorist's insurer may have become insolvent after the particular insurance policy has been issued. *Wilbourn* at 373. Moreover, other vehicle operators have been deemed uninsured when the particular owner or operator of the vehicle is unknown (i.e., hit-and-run cases)[1] or when the offending vehicle or operator is *under*-insured with respect to the claimant's injuries.[2]

In 1984, the Alabama legislature amended the "Uninsured Motorist Act"[3] and codified the above-referenced case law at *Ala. Code* § 32-7-23 (1975):

> (a) No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of Section 32-7-6, under provisions approved by the Commissioner of Insurance for the protection of persons insured thereunder *who are legally entitled to recover damages* from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, that the named insured shall have the right to reject such coverage; and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.
>
> *(b) The term "uninsured motor vehicle" shall include, but is not limited to, motor vehicles with respect to which:*
>
> *(1) Neither the owner nor the operator carries bodily injury liability insurance;*
>
> *(2) Any applicable policy liability limits for bodily injury are below the minimum required under Section 32-7-6;*
>
> *(3) The insurer becomes insolvent after the policy is issued so there is no insurance applicable to, or at the time of, the accident; and*
>
> *(4) The sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident is less than the damages which the injured person is legally entitled to recover.*
>
> (c) The recovery by an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages within such contract.
>
> *Ala. Code* § 32-7-23 (emphasis added).

In *Higgins, supra,* an insured brought suit under the uninsured motorist provision of her father's insurance policy. Prior to the implementation of the *Alabama Rules of Civil Procedure* in 1973, the trial court granted a pre-trial motion in the defendant's favor. The plaintiff appealed on the grounds that the applicable insurance policy contained an express exclusion of "an automobile which is owned by the United States of America, Canada, a state, a political subdivision of any such government or agency of any of the foregoing" from the definition of the term "uninsured automobile." Both the Alabama Court of Civil Appeals and the Alabama Supreme Court held that the provision was more restrictive than the Uninsured Motorist Act and was therefore void as being contrary to public policy. This holding was a catalyst for Alabama's appellate courts ensuring that policy provisions did not degrade or run afoul of the obvious legislative purpose in mandating a minimum level of insurance coverage offered to drivers who are deemed financially and ethically responsible enough to obtain automobile liability insurance from those who are not so responsible.

Motor vehicle accidents caused by unknown owners or operators, more

commonly known as "hit-and-run" cases, are also classified as uninsured motorist cases. *Wilbourn v. Allstate Ins. Co.,* 305 So. 2d. 372, 373-74 (Ala. 1974); *Criterion Ins. Co. v Anderson,* 347 So. 2d 384, 386 (Ala. 1977). In these cases (as with all UM and UIM cases), "[a] ny policy exclusion that is 'more restrictive than the uninsured motorist statute... is void and unenforceable.'" *Peachtree Casualty Ins. Co. v. Sharpton,* 768 So. 2d. 368, 370 (Ala. 2000) (quoting *Watts v. Preferred Risk Mutual Ins. Co.,* 423 So. 2d. 171, 175 (Ala. 1982)). Clearly, unknown phantom drivers are included within the definition of an "uninsured motorist." *Criterion Ins. Co., supra.*

In the case of *Walker v. GuideOne Specialty Mutual Ins. Co.,* 834 So. 2d. 769 (Ala. 2002), the supreme court held as a matter of first impression that any corroborative evidence requirement stating that an insurer would only accept competent testimony of a person other than a claimant if the accident involved no physical contact with an uninsured motorist was void. This case overruled *Hannon v. Scottsdale Ins. Co.*, 736 So. 2d 616 (Ala. Civ. App. 1999). Specifically, the *GuideOne* court concluded that GuideOne's corroborative evidence requirement was "more restrictive" than the language included within *Ala. Code* 32 -7-23, (1975). This case further extended the holding reached by the Alabama Supreme Court in *State Farm Fire and Casualty Co. v. Lambert*, 285 So. 2d 917 (Ala. 1973), wherein the Alabama Supreme Court determined that the physical contact requirement in a hit-and-run provision of an automobile liability insurance policy was also more restrictive than the statute and, therefore, void against public policy. Please note, however, that in cases where the corroborative-evidence provision is governed by another jurisdiction's substantive law, this requirement may be upheld. *Cherokee Ins. Co., Inc., v. Sanches,* 975 So. 2d 287 (Ala. 2007).

Several other "phantom" driver or vehicle cases are worth studying. In *Khirieh v. State Farm Mutual Automobile Ins. Co.*, 594 So. 2d 1220 (Ala. 1992), the Alabama Supreme Court held that evidence that the plaintiff's vehicle struck a truck bench seat left in the middle of Interstate 20/59 was evidence that the plaintiff's injuries were caused by an unknown driver's negligence in the ownership, maintenance or use of the motor vehicle and that the evidence was sufficient to defeat the insurer's summary judgment motion on the plaintiff's uninsured motorist claim. The Alabama Supreme Court clearly stated that proof of the "phantom" motorist's negligence could be met by applying the doctrine of *res ipsa loquitur*. Similarly, in both *Alfa Mutual Ins. Co. v. Beard,* 597 So. 2d 664 (Ala. 1992) and *Franks v. Alfa Mutual Ins. Co.,* 669 So. 2d 971 (Ala. 1995), the Alabama Supreme Court held that gravel struck by the plaintiff's vehicle was sufficient evidence that the plaintiff's injuries were caused by an unknown driver's negligence in the ownership, maintenance or use of the respective motor vehicle. Finally, in the case of *Jones v. Nationwide Mutual Ins. Co.,* 598 So. 2d 837 (Ala. 1992), the Alabama Supreme Court reversed and remanded an entry of summary judgment for Nationwide, stating that there was a genuine issue of material fact as to whether oil on the road was deposited through the negligence of an unknown driver through the ownership, maintenance or use of his motor vehicle, and whether this negligence potentially caused the insured's vehicle to slide off the road.

The court of civil appeals acknowledged that, typically,[4] *accepting* less than the underinsured tortfeasor's policy limits prevents an insured from seeking to make up the difference with UIM benefits.

As previously stated, in Alabama, underinsured motorist coverage is actually a subset of uninsured motorist coverage as contemplated by *Ala. Code* § 32-7-23 (1975). The recent court of civil appeals' decision in *Progressive Specialty Ins. Co. v. Kyle,* 36 So. 3d 565 (Ala. Civ. App. 2009) is worthy of discussion here. In *Kyle*, an automobile insurer brought an action seeking judgment declaring the amount of underinsured motorist benefits owed to its insured. This case is a perfect example of how various UM and UIM issues overlap. However, the particular issue in this case, i.e., set-off, does seem to involve the ultimate question of whether the tortfeasor is an uninsured motorist.

In *Kyle*, the claimant's vehicle was struck by the tortfeasor. The tortfeasor's liability policy limits were $25,000 *per person* and $50,000 *per occurrence*. The tortfeasor's insurer offered policy limits of $50,000 per occurrence in settlement of the claims of the five occupants of the Kyle automobile. Progressive Specialty Insurance Company previously issued an automobile insurance policy to Jerry Kyle. The combined total of the damages incurred by the five occupants of the Kyle vehicle exceeded the $50,000 per occurrence limit. To resolve a dispute regarding the amount of UIM benefits to Mrs. Kyle under her husband's policy and the UM/UIM statute, Progressive filed a declaratory judgment action.

The parties agreed that at the time the case was filed, no Alabama case was directly on point where multiple claims exhausted the per occurrence limit of an underinsured motorist liability policy and a UIM claim was made by one of those multiple claimants. Essentially, Progressive argued that its policy language governed the determination of its liability for UIM benefits. Kyle argued that the language of Progressive's policy was overly broad and therefore ran afoul of the language it used in the UM/UIM statute, under which any terms in the insurance policy that conflict with it are considered void. The court of civil appeals acknowledged that, typically,[4] *accepting* less than the underinsured tortfeasor's policy limits prevents an insured from seeking to make up the difference with UIM benefits. *See State Farm Mutual Auto Ins. Co. v. Scott*, 707 So. 2d 238, 242 (Ala. Civ. App. 1997). However, Mrs. Kyle specifically argued that Progressive's application of its policy provision in attempting to reduce the amount of her damages by the $25,000-per-person limit violated § 32-7-23(b)(4) because the $25,000-per-person limit of Mr. Kyle's policy was never actually fully available to her. The trial court agreed with Mrs. Kyle, noting at the summary judgment hearing that per-person limits of Mr. Kyle's policy should not be considered because the settlement of the multiple claims was based

upon the *per occurrence* limit of the policy. Ultimately, the court of civil appeals found that the application of Progressive's policy provision resulted in a more restrictive definition of "underinsured motor vehicle," by failing to consider the coverage available to Mrs. Kyle. Accordingly, the court affirmed a summary judgment in favor of Mrs. Kyle.

In addition to the appellate cases finding certain vehicles or operators to be "uninsured," there are other cases holding that some operators or vehicles were not an "uninsured motor vehicle" as defined by Alabama's statute, or the relevant policy at issue. For example, in the case of *Burt v. Shield Ins. Co.,* 902 So. 2d 692 (Ala. Civ. App. 2004), an insured who had been involved in an accident with an automobile dealership's customer during a test drive brought an action against their automobile insurer to recover uninsured motorist benefits after settling their claim against the dealership. The trial court entered summary judgment in favor of the insurer, specifically holding that:

> [Burt] has failed to exhaust the limits under all bodily injury insurance policies available to [him] and therefore, the motion for summary judgment filed by ... Shield ... is due to be, and hereby is, granted, and the case is dismissed.
>
> *Id* at 694.

The Alabama Court of Civil Appeals agreed with the trial court, affirming its decision by noting that the statute defines "uninsured motorist vehicle" based upon the difference between damages in the sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident. *Id.* at 695-96. Moreover, the court noted that the limits of the dealership's liability coverage were available to the accident victim, and the accident victim failed to or was unable to exhaust those limits when settling with the dealership for its claims of negligence. *Id.* at 696. "Therefore, pursuant to the plain language of § 32-7-23, the limits of Capitol Chevrolet's liability were available for Burt. Burt failed to or was unable to exhaust those limits. Accordingly, the trial court's entry of summary judgment in favor of Shield is due to be affirmed." *Id.*

In *Rich v. Colonial Ins. Co. of California,* 709 So. 2d 487 (Ala. Civ. App. 1997), an insured sued his automobile insurer, seeking uninsured motorist benefits for injuries he sustained during an attempted carjacking when two individuals approached him on foot as he was stopped in his automobile at a traffic signal. The individuals then shot the plaintiff after he refused to hand over his keys and his money. The trial court entered judgment for the insurer, and the insured appealed. The Alabama Supreme Court transferred the case to the court of civil appeals, and the court of civil appeals held that the insured's injuries did not arise from the ownership, maintenance or use of an uninsured motor vehicle as required for UM coverage under the policy, and the coverage was not mandated by § 32-7-23 or by public policy. *Id.* at 489.

Alabama courts have upheld policy provisions within the uninsured motorist portion of a policy which preclude coverage for a vehicle that is regularly used by the insured or which is covered under the liability portion of the same policy.

Finally, the Alabama Supreme Court case of *Kendall v. United Services Auto. Assoc.,* 23 So. 3d 1119 (Ala. 2009), presents the interesting question of whether a plaintiff who is ultimately capped in his recovery at an amount less than his actual damages is considered uninsured or underinsured under Alabama's statute. In *Kendall*, the insured settled a personal injury action against Elmore County for the statutory maximum amount of $100,000. The insured then brought an action against her automobile insurer, seeking an award of underinsured motorist benefits under her automobile insurance policy, with the insured having incurred approximately $175,000 in medical expenses as a result of suffering injuries associated with the accident. The tortfeasor was held to have been acting within the line and scope of her employment with the county at the time of the accident, and obviously the plaintiff suffered serious injury.

USAA filed a motion for summary judgment in the Circuit Court of Elmore County on the basis that the plain language of § 32-7-23 limits an injured party's recovery to damages that the party is "legally entitled to recover," and mandated that the insured was due summary judgment. The trial court agreed, and ultimately the Alabama Supreme Court held that the insured was not legally entitled to recover damages from the county beyond that which he had already received at settlement. As a result, based on the statute, the supreme court held that Kendall was not entitled to UIM benefits, and, theoretically, the tortfeasor was not "underinsured."

Exclusions– Void or Not?

Although addressed briefly above, much of the appellate review of UM cases has involved the assessment of policy exclusions. Alabama courts have upheld policy provisions within the uninsured motorist portion of a policy which preclude coverage for a vehicle that is regularly used by the insured or which is covered under the liability portion of the same policy. In *Watts v. Preferred Risk Mut. Ins. Co.*, 423 So. 2d 171 (Ala. 1982), the policy provision at issue provided that an "'uninsured motor vehicle' shall not include: (1) *an insured automobile* or an automobile furnished for the regular use of the named insured or a relative." *Watts* involved a one-car accident in which the passenger was injured and sought damages. Preferred Risk refused to provide liability coverage as a result of the failure of the insured to provide timely notice of the suit. As a result of the inapplicability of liability coverage, the insured asserted that he became uninsured, thereby entitling the passenger to recovery under the uninsured motorist provision of the policy.

Writing for the court, Justice Shores found the argument "an interesting one, but not persuasive in this case." *Id.* at 174. The insured's claim that the vehicle became uninsured as a result of the unavailability of liability coverage was rejected, as was the assertion that the policy provision was void and unenforceable as being more restrictive than the uninsured motorist statute. In

doing so, the court noted that the "statute necessarily contemplates that the motorist against whom liability is sought to be imposed is operating an uninsured vehicle." *Id*. at 175.

Watts was followed by other similar decisions, including *Dale v. Home Ins. Co.*, 479 So. 2d 1290 (Ala. Civ. App. 1985). *Dale* also involved a one-vehicle accident. The plaintiff, a fireman, was a passenger in a fire truck involved in an accident while returning from an emergency call. The vehicle was being driven by one of the plaintiff's co-employees, also a fireman.

Liability coverage did not apply because of a "fellow employee" exclusion contained in the insurance policy issued by Home Insurance Company. As in *Watts*, the passenger plaintiff maintained that, since liability coverage was unavailable, the fire truck was "'uninsured' as to him," in light of the policy exclusion. Relying on prior opinions of the Supreme Court of Alabama, the court of civil appeals noted "an insured automobile does not become uninsured because liability coverage may not be available to a particular individual." *Id*. at 129 (citations omitted).

Denial based upon corresponding liability coverage was upheld in *Phyall v. Allstate Ins. Co.*, 551 So. 2d 303 (Ala. 1989). Finding that it had "consistently upheld exclusions within an uninsured motorist portion of a policy that deny coverage for a vehicle that is covered under the liability portion of the same policy," the supreme court again enforced Allstate's policy provision in *Allstate Ins. Co. v. Hardnett*, 763 So. 2d 963, 964 (Ala. 2000). Likewise, the court of civil appeals, relying upon *Hardnett*, enforced the provision further noting that the supreme court did not limit the application of the provision to cases involving fraud. *Broughton v. Allstate Ins. Co.*, 842 So. 2d 681 (Ala. Civ. App. 2002).

On the other hand, the court of civil appeals previously found that a "household exclusion," providing that an uninsured automobile did not include "an automobile owned by the Named Insured or by any resident of the same household," void as against public policy. *Alabama Farm Bureau Mut. Cas. Ins. Co., Inc. v. Mitchell*, 373 So. 2d 1129 (Ala. Civ. App. 1979). In *Mitchell*, the owner of the vehicle was assaulted and then placed in the trunk of her own car. The representative plaintiff asserted that Mitchell's death was related to the operation of the vehicle while Mitchell was trapped in the trunk. The plaintiff argued that since the vehicle was driven by a non-permissive operator, liability coverage did not apply, thereby making the vehicle uninsured. The insurer sought to enforce the exclusion, but the court of civil appeals found it to be void as more restrictive than the uninsured motorist statute. The court further determined that under these facts a jury question was presented concerning the issue of whether the death resulted from the use of the vehicle.

Note that following *Mitchell*, the Supreme Court of Alabama addressed another claim arising out of a one-vehicle accident in *Ex parte O'Hare*, 432 So. 2d 1300 (Ala. 1983). State Farm's policy included a provision which stated that an uninsured motor vehicle did not include an insured motor vehicle as defined by the policy. In other words, the policy provided that an uninsured motor vehicle

was not one which was insured. The court rejected the claimed conversion of the insured vehicle into an uninsured vehicle simply because of the unavailability of liability coverage and further refused to find the provision void as more restrictive than the uninsured motorist statute.

Mitchell and *O'Hare* are intertwined, and their relationship clouds the status of the household exclusion and its application generally. In *Mitchell,* the court of civil appeals specifically declared that the policy definition of "uninsured automobile," which included a definitional exclusion, i.e., an automobile owned by the named insured or resident of the same household is not an uninsured automobile, was void. The basis for this holding was a review of prior decisions leading to the conclusion that the statute did not authorize exclusions and the inclusion of exclusions limited or restricted UM coverage, thus conflicting with the statute.

On the other hand, in *O'Hare*, decided after *Mitchell*, the Supreme Court of Alabama approved the court of civil appeals' application of the household exclusion (considering the above definitional exclusion to be an extension of that exclusion). In doing so, the court of civil appeals factually distinguished *Mitchell*. As such, it appears that if *Mitchell* remains good law its holding is limited to those facts.

As indicated above, *Mitchell* also presented a question about whether or not injury or death resulted from the use of the vehicle. The court of civil appeals found that injuries resulted from an attempted car-jacking at a traffic signal did not result from use of the vehicle in *Rich v. Colonial Ins. Co. of California*, 709 So. 2d 487 (Ala. Civ. App. 1997), *supra*. In doing so, it relied upon a test outlined in *United States Fidelity & Guar. Co. v. Lehman*, 579 So. 2d 585 (Ala. 1990). The court noted the need for a "causal relation or connection" between the accident or injury and the ownership, maintenance or use of the vehicle. In *Lehman*, the court noted that the vehicle was the location of the attack as opposed to the instrument used in the killing as was alleged in *Mitchell*.

Policy provisions excluding UM and UIM coverage until the limits of liability of the liability policies have been exhausted by payment of judgment or settlement have also been declared void. *State Farm Mut. Auto. Ins. Co. v. Scott*, 707 So. 2d 238 (Ala. Civ. App. 1997). However, in the event of settlement for less than the liability limits, the underinsured motorist carrier is entitled to a set-off of the full liability limits. In addition, provisions purporting to exclude coverage for injury occurring while riding in vehicles owned by the insured, but not insured under the policy, have also been declared void. *Gatson v. Integrity Ins. Co.*, 451 So. 2d 361 (Ala. Civ. App. 1984). Finally, an insurer may not exclude punitive damages in the UM context. *Hill v. Campbell*, 804 So. 2d 1107 (Ala. Civ. App. 2001).

Why are some exclusions allowed and others not? Appellate courts have not directly answered this question other than providing that provisions more restrictive than the statute are void. The above decisions do, however, point to a pattern which is consistent with that explanation. Generally, uninsured motorist coverage is intended to place the insured in the same position, regarding insurance coverage, as it would have been if the tortfeasor had had insurance coverage. In the cases noted above, the exclusions were upheld where the claim involved the act of another in the same auto which, for various reasons, eliminated the availability of liability coverage (with the exception of *Broughton* where the court of civil appeals followed the *Hardnett* approval of the definitional exclusion providing that a vehicle insured under the liability portion of the policy is not "uninsured"). The insured's position was not affected because liability coverage was not available anyway. The comparative restrictiveness of the exclusion and the statute may be judged from the perspective of the impact on the insured in addition to simply comparing policy terms with the statute itself.

On the other hand, in those cases when exclusions were voided, application of the exclusion would have altered the insured's position in relation to whether the tortfeasor was insured. For example, in *Gatson*, the exclusion sought to eliminate coverage if the injury did not occur in a vehicle insured under the policy. Not only does the statute fail to include such a limitation, enforcement would have affected the insured's position. The coverage ideally maintained by the tortfeasor would not be present via the uninsured motorist provision. In other words, liability coverage was not affected as in the above cases and UM coverage had to be available to

place the insured in the position of protection provided by the statute. Similarly, in *Scott*, the insured's position was the same had additional liability coverage been available to the insured because UIM recovery could be made, though the position was not bettered because the full liability limits were set off.

This analysis must return to *Mitchell*. Assuming that it remains viable, it differs from the trend seen in *Watts*, *Dale*, *Phyall* and *Hardnett* because, in *Mitchell*, no liability coverage was available under the Farm Bureau policy, yet the UM exclusion was voided, allowing for coverage. The distinction must, however, be that the driver was a stranger to the household and vehicle. Had he possessed liability coverage, there would have been the potential for recovery, meaning that Mitchell's estate was in the same position as if the tortfeasors had been insured. Again, the common theme in decisions addressing exclusions is that those exclusions which affect the general purpose of uninsured motorist coverage are unacceptable while those which do not place the insured in a worse position may survive.

Was the Claimant "Occupying" the Vehicle?

The Alabama Supreme Court has examined several cases wherein it was questionable whether the plaintiff seeking uninsured motorist coverage was actually "occupying" a vehicle at the time of injury. Essentially, this issue becomes a coverage question as defined by the terms of the particular uninsured motorist policy at issue. As always, in construing the terms of an insurance contract, the appellate courts are mindful of the principle that "[a] contract of insurance will be construed strictly against the insurer and liberally in favor of the insured. Ambiguous provisions of an insurance policy are construed most strongly against the insurer and in favor of the insured." *Twin City Fire Ins. Co. v. Alfa Mutual Ins. Co.* 817 So. 2d 687, 695 (Ala. 2001).

In the case of *Cook v. Aetna Ins. Co.*, 661 So. 2d 1169 (Ala. 1995), the Alabama Supreme Court was asked to construe the meaning of the term "occupying" in the context of an uninsured motorist provision. In *Cook*, the particular policy at issue defined "occupying" as "in, upon, getting in, on, out or off." *Id* at 1171. Cook was an inmate at the Demopolis City Jail. Throughout his incarceration, Cook was allowed to work daily as a welder for a local company through a work release program. Every day, Cook walked across the street to a convenience store to get coffee before the owner of the company arrived to take him to his welding job. On the morning at issue, Cook just walked across the street to get coffee but left his jacket and lunchbox at the jail. Upon leaving the convenience store, Cook realized the owner's vehicle was waiting in the parking area in front of the jail. When he was approximately one foot from the owner's vehicle, Cook was struck by another vehicle. His lunchbox and jacket remained inside of the jail. Cook sued the driver of the vehicle that hit him and the insurance company that insured the welding company, seeking damages under the uninsured motorist provision of the policy. In its analysis, the Alabama Supreme Court viewed all of the facts in Cook's favor and concluded that he was not "getting in" the vehicle at the time he was struck by the other vehicle. The evidence, viewed in Cook's favor, showed that he was at least a foot away from the owner's vehicle, and that it was clear he was not approaching the vehicle to get in it. Instead, Cook would have had to first enter the city jail to retrieve his lunchbox and jacket before entering the vehicle.

The Alabama Supreme Court has examined several cases wherein it was questionable whether the plaintiff seeking uninsured motorist coverage was actually "occupying" a vehicle at the time of injury.

The issue of whether the plaintiff was occupying the vehicle was also raised in *Lambert v. Coregis Ins. Co.*, 950 So. 2d 1156 (Ala. 2006). In *Lambert,* the plaintiff employee was standing between his company vehicle and another vehicle owned by his employer. An oncoming vehicle swerved off the road and struck the employee. The employee was then dragged several feet until he hit the bumper of his company vehicle, at which point he rolled underneath the company vehicle. The employee sued the insurer of his company vehicle seeking uninsured motorist coverage. The policy defined an insured for UM purposes as "[a]nyone else 'occupying' a covered 'auto' or a temporary substitute of a covered 'auto.'" *Id* at 1159. The policy also defined "occupying" as "in, upon, getting in, on, out or off." *Id.*

In its analysis, the Alabama Supreme Court stated:

> It should be noted at the outset that the word "getting" appears to modify the prepositions "in, on, out, or off" in the policy provision defining "occupying" because the policy could not possibly cover everyone who was "out" or "off" the vehicle.
>
> *Lambert*, 950 So. 2d at 1160.

The court noted in *Lambert* that "Alabama has not adopted a specific test under which to examine the phrase 'in, upon, getting in, on, out or off' in order to determine whether a person is 'occupying' a vehicle in the context of the insurance agreement at issue in the case." *Lambert*, 950 So. 2d at 1160. However, other jurisdictions have. "The majority of the jurisdictions hold that the meaning of the term 'occupying' must be determined on a case-by-case basis, depending on the facts of the accident and the use of the vehicle, and that there must always be some causal connection between the injuries and the use of the vehicle." *Id.* at 1156. However, in determining that there was no causal connection between the plaintiff's injuries and his covered company vehicle, the court stated that "Lambert was not 'vehicle oriented' at the time the accident occurred because he was not engaged in a transaction essential to the use of the insured vehicle; instead, Lambert was merely standing on the side of the road waiting for his fellow employee to complete a task." *Id.* at 1161.

What Does Legally Entitled to Recover Mean?

Alabama courts have held that the inability of the insured to recover against an alleged tortfeasor does not trigger uninsured motorist coverage. *Ex parte Carlton*, 867 So. 2d 332 (Ala. 2003). There, the court held that an employee injured in an automobile accident, while a passenger in a vehicle driven by a co-employee, could not recover uninsured motorist benefits under his mother's policy that included him as an insured. Unlike *Dale, supra,* no specific policy provision was relied upon; instead, the question was whether the employee was "legally entitled to recover" against the uninsured motorist. In finding that the employee was not entitled to uninsured motorist benefits under the uninsured motorist portion of his mother's policy, the court reviewed the long line of cases in which it had expanded the scope of uninsured motorist statutes and uninsured motorist coverage under various contracts of insurance. Specifically, the court revisited *Hogan v. State Farm Mut. Auto. Ins. Co.*, 730 So. 2d 1157 (Ala. 1998); *State Farm Mut. Auto. Ins. Co. v. Jeffers*, 686 So. 2d 248 (Ala. 1996); and *State Farm Auto. Ins. Co. v. Baldwin*, 470 So. 2d 1230 (Ala. 1985).

First, in *Baldwin*, the Feres Doctrine precluded the insured, a member of the Armed Forces, from maintaining a tort action against the government for injuries sustained when the insured was involved in a collision with a government vehicle being operated by a civil employee of the United States government. The court held that this did not preclude coverage under the uninsured motorist provisions of Baldwin's automobile policy.

Second, in *Jeffers*, the United States District Court for the Middle District of Alabama certified to the Supreme Court of Alabama a question arising out of a collision between an automobile driven by the plaintiff, Jeffers, and an automobile driven by a Houston County Sheriff's deputy. The issue was whether a vehicle covered under an insurance policy could be an uninsured vehicle "when the claim ... is barred ... because the other party from liability by substantive immunity." *Jeffers*, 686 So. 2d at 248. The *Jeffers* court held that "[b]ecause of the application of the doctrine of substantive immunity, [the sheriff's deputy], in effect, was not insured." *Id.* at 250. Thus, *Jeffers* allowed the action in federal court to proceed against the insurance carrier for UM benefits.

In other words, the insured may pursue uninsured motorist benefits after the two-year tort statute of limitations has passed and even without obtaining a judgment against the tortfeasor.

Finally, in *Hogan*, the court addressed the issue of whether uninsured motorist coverage applied where the tortfeasor was the driver of the vehicle and the injured party was a guest passenger. Again, the court rationalized that the inability to recover against the driver triggered uninsured motorist coverage.

In *Carlton*, the court reversed each of these decisions, reasoning that the statute only comes into play when the person carrying uninsured motorist insurance is legally entitled to recover. In so ruling, the court stated that "today we returned to the point from which this court never should have departed–the language of the statute." *Carlton*, 867 So. 2d at 337. Thus, *Carlton* confirms that an insured is not entitled to uninsured motorist coverage simply because he or she cannot otherwise recover against the tortfeasor.

The confirmation in *Carlton* that the insured must establish that he or she is legally entitled to recover damages was again addressed in *Continental Nat. Indem. Co. v. Fields*, 926 So. 2d 1033 (Ala. 2005). In *Fields*, the Supreme Court of Alabama considered a case where the insured claimant died prior to the time that suit was filed. The court recognized that the uninsured motorist contract claim survived the death, though it noted that the tort claim against the uninsured motorist did not survive in favor of the personal representative of the deceased. Therefore, the representative plaintiff was unable to prove that the decedent was legally entitled to recover from the uninsured motorist, thus mandating entry of summary judgment in favor of the insurer.

Note, however, that an insurer may not assert the tort statute of limitations as a defense to coverage. In other words, the insured may pursue uninsured motorist benefits after the two-year tort statute of limitations has passed and even without obtaining a judgment against the tortfeasor. *State Farm Mut. Auto. Ins. Co. v. Bennett*, 974 So. 2d 959 (Ala. 2007).

Avoiding the Dangers of Settling with the Tortfeasor

Most automobile insurance policies include provisions requiring that the insured obtain the consent of the insurer before settling with the uninsured or underinsured motorist. The rationale is that a settlement, with an accompanying release, would impair the uninsured or underinsured motorist carrier's right of subrogation. In addressing the application of such provisions, the Supreme Court of Alabama outlined "general rules" applicable to the settlement process. *Lambert v. State Farm Mut. Auto. Ins. Co.*, 576 So. 2d 160, 167 (Ala. 1991). Specifically, when presented with the potential for an underinsured motorist claim and an offer to settle with the tortfeasor, the recommended process is as follows:

(1) The insured, or the insured's counsel, should give notice to the underinsured motorist insurance carrier of the claim under the policy for underinsured benefits as soon as it appears that the insured's damages may exceed the tortfeasor's limits of liability coverage.

(2) If the tortfeasor's liability insurance carrier and the insured enter into negotiations that ultimately lead to a proposed compromise or settlement of the insured's claim against the tortfeasor, and if the settlement would release the tortfeasor from

all liability, the insured, before agreeing to the settlement, should immediately notify the underinsured motorist insurance carrier of the proposed settlement and the terms of any proposed release.

(3) At the time the insured informs the underinsured motorist insurance carrier of the tortfeasor's intent to settle, the insured should also inform the carrier as to whether the insured will seek underinsured motorist benefits in addition to the benefits payable under the settlement proposal, so that the carrier can determine whether it will refuse to consent to the settlement, waive its right of subrogation against the tortfeasor or deny any obligation to pay underinsured motorist benefits. If the insured gives the underinsured motorist insurance carrier notice of the claim for underinsured motorist benefits, as may be provided for in the policy, the carrier should immediately begin investigating the claim, conclude such investigation within a reasonable time, and notify its insured of the action it proposes with regard to the claim for underinsured motorist benefits.

(4) The insured should not settle with the tortfeasor without first allowing the underinsured motorist insurance carrier a reasonable time within which to investigate the insured's claim and to notify its insured of its proposed action.

(5) If the underinsured motorist carrier refuses to consent to a settlement by its insured with the tortfeasor, or if the carrier denies the claim of its insured without a good faith investigation into its merits, or if the carrier does not conduct its investigation in a reasonable time, the carrier would, by any of those actions, waive any right to subrogation against the tortfeasor or the tortfeasor's insurer.

(6) If the underinsured motorist insurance carrier wants to protect its subrogation rights, it must, within a reasonable time, and in any event before the tortfeasor is released by the carrier's insured, advance to its insured an amount equal to the tortfeasor's settlement offer.

Id. An insured must be careful to follow these steps, as failure to do so may result in loss of the right to recover underinsured motorist benefits.

A key question involves the reasonableness of the time for the insurer's investigation. The Supreme Court of Alabama has not set a firm period, though it has confirmed that the reasonableness of notice "depends on the particular facts and circumstances of each case." *Ex parte Morgan*, 13 So. 3d 385, 389 (Ala. 2009). In *Morgan*, the court refused to adopt the underlying conclusion of the court of civil appeals that a 30-day period, "absent 'compelling circumstances,' should be considered the standard for a reasonable investigation." *Id.* at 388. There, the court further held that the 10-day period between notice of the potential settlement and culmination of the settlement was insufficient and the insurer's denial of UIM benefits was upheld.

Note that the period of time at issue is calculated from notice of the proposed settlement, not simply notice of a potential underinsured motorist claim. *Overstreet v. Safeway Ins. Co. of Alabama, Inc.*, 740 So. 2d 1053 (Ala. 1999); *Allstate Ins. Co. v. Beavers*, 611 So. 2d 348 (Ala. 1992). In *Overstreet*, the court also held that, in the uninsured or underinsured motorist context only, prejudice to the insurer is a factor to be considered when assessing the reasonableness of the time allowed for investigation. Initially it is the burden of the insured to present a reasonable explanation for the failure to notify the carrier of the statement. If such evidence is presented, the insurer must then counter with evidence demonstrating prejudice, at which time the issue of notice becomes a jury question.

A key element of the process described above is the requirement that, if the underinsured motorist carrier refuses to consent to settlement, it must advance or "front" the tortfeasor's insurer's settlement offer. While this serves to protect the UIM carrier's subrogation interest, the more likely reason for undertaking this process is to force the tortfeasor's carrier to continue defending the claims. This saves the UIM insurer defense costs and also allows the UIM carrier to "opt out," thus keeping the existence of additional, underinsured motorist insurance from the jury.

The underinsured motorist insurer should consider this process where it is expected that any verdict may exceed the tortfeasor's offer. Because advancing the amount of the tortfeasor's offer is tantamount to fulfilling the tortfeasor's settlement bargain, in the event of a verdict which is less than the amount advanced by the tortfeasor's insurer's obligation, a subrogation claim would only recover the amount of the verdict, and the claimant would be entitled to keep the difference.

Stacking

By statute, an uninsured or underinsured motorist claimant may stack up to two additional coverages for vehicles insured under the same policy. *Ala. Code* § 32-7-23(c) (1975). With the abolition of classes of insureds, the determination of who may stack has been greatly simplified. A passenger who qualifies as an insured person is entitled to stack under the owner's policy insuring more than one vehicle. *Traveler's Ins. Co. v. Jones*, 529 So. 2d 234 (Ala. 1988). As an aside, the policy covering the vehicle in which the claimant was a passenger is primary over any policy naming the claimant as an insured. *Illinois Nat. Ins. Co. v. Kelley*, 764 So. 2d 1283 (Ala. Civ. App. 2000). However, where the

single policy is issued to a corporation, and the corporation is the only named insured, an injured employee is not entitled to stack if the only reason he or she falls within the definition of insured is by virtue of his or her occupancy of the insured vehicle. *Bright v. State Farm Ins. Co.*, 767 So. 2d 1111 (Ala. 2000).

Of course, one may stack more than three coverages where separate, single vehicle policies are issued. *State Farm Mut. Auto. Ins. Co. v. Fox*, 541 So. 2d 1070 (Ala. 1989). However, a passenger may not stack UM coverage under separate single-vehicle policies insuring other vehicles as the passenger does not qualify as an insured or insured person under the policies covering the other vehicles. *State Farm Mut. Auto. Ins. Co. v. Faught*, 558 So. 2d 921 (Ala. 1990).

Is the Claimant an "Insured"?

Quite often, UM/UIM issues revolve around the question of whether the claimant is actually insured under the relevant policy. Several recent decisions have examined this question in detail.

In *Progressive Spec. Ins. Co. v. Steele,* 985 So. 2d 932 (Ala. 2007), the insured vehicle owner's automobile liability insurer filed a declaratory judgment action against the driver, the owner and the minor pedestrian, seeking a judgment declaring that it had no duty to defend against the pedestrian's personal injury action or to provide liability insurance coverage to the driver.

In that case, the minor's parents' uninsured/underinsured motorist insurer intervened as a defendant and subsequently filed a cross-claim complaint for declaratory judgment, seeking a determination that it had no obligation to provide UM or UIM coverage to the pedestrian and her parents for their unreasonable delay in notifying them of the accident. The trial court granted the automobile-liability insurer's motion for summary judgment and denied the UM/UIM insurer's motion for summary judgment. Both the parents and the UM/UIM insurer filed separate appeals. The appeals were consolidated and this opinion resulted.

The UM/UIM insurance policy at issue required that notice be given to the insurer "as soon as practicable." The court noted that in the uninsured/underinsured motorists insurance situation, the court has stated that this language has "been generally construed to mean that notice be given 'within a reasonable time' in view of all the facts and circumstances of the case." *Id.* at 991 (citing *Southern Guar. Ins. Co. v. Thomas*, 334 So. 2d 879, 882 (Ala. 1976)). As noted above, the court also confirmed that the rules governing the determination of whether a delay in notice to an uninsured/underinsured motorist insurer is reasonable differ from those governing the determination in the context of liability insurance. The court further explained that in uninsured motorist insurance cases, unlike liability insurance cases, prejudice to the insurer is a factor to be considered, along with the reasons for and length of delay in determining the overall reasonableness of a delay in giving notice of the accident. The *Steele* court quoted from *State Farm Mutual Automobile Ins. Co. v. Burgess*, 474 So. 2d 634, 637 (Ala.1985), stating:

> In the typical case, the insured must, at a minimum, put on evidence showing the reason for not complying with the insured's notice or requirement. This pre-requisite satisfied, the insurer may then demonstrate that it was prejudiced by the insured's failure to give time and notice. If the insurer fails to present evidence as to prejudice, then the insured's failure to give notice will not bar his recovery. When the insurer puts on evidence of prejudice, however, the reasonableness of the failure to give notice then becomes a question of fact for a jury to decide.
>
> *Steele*, 985 So. 2d at 941.

The UM/UIM insurer submitted an affidavit stating that its standard procedure upon receiving a claim was to contact the drivers and owners of all vehicles involved in the accident. The insurer argued that it was prejudiced by the delay because, had it been informed of the accident, it would have contacted the liability insurer, the owner, and the driver. The insurer contended that its contacting the liability insurer would have resulted in the liability insurer's providing liability insurance to the driver and therefore the UM/UIM insurer would only have been required to pay underinsured motorist benefits, if any, instead of a greater amount of uninsured motorist benefits. As a result, the supreme court found that the trial court erred in failing to submit this issue to the trier of fact and reversed and remanded the case to the trial court for further proceedings consistent with the opinion.

In *Jackson v. State Farm Fire and Cas. Co.*, 999 So. 2d 499 (Ala. Civ. App. 2008), an insured parent, individually and on behalf of her two minor children, brought an action against her own automobile insurer to recover uninsured or underinsured benefits for an accident before the reinstatement of her policy, which had lapsed for nonpayment of premium. The trial court entered summary judgment in favor of the insurer and the insured appealed. In the opinion, the court of civil appeals held that the insurer did not waive any right to deny coverage by accepting the premium to reinstate the policy after the accident. Specifically, the court noted there was *no evidence* indicating the insurer accepted any premiums from the insured with knowledge of the accident at issue in the litigation. *Id.* at 502. Therefore, the court concluded that the trial court properly entered a summary judgment in favor of the insurer.

In *State Farm Mutual Automobile Ins. Co. v. Brown,* 26 So. 3d 1167 (Ala. 2009), a minor, by and through her divorced parents, filed suit against her father's automobile insurer, seeking to recover uninsured/underinsured motorist benefits. The insurer filed a motion for summary judgment and the trial court issued an order denying the motion but certified the order for permissive review. The supreme court held that the minor did not qualify as the father's "relative" under the policy and therefore was not entitled to UM/UIM benefits.[5]

In *Brown*, the court noted the following facts were relevant. The minor was an unmarried and unemancipated minor with divorced parents who were awarded joint custody. At the time of the accident which was the subject of the litigation, the minor lived primarily with her mother and attended a local high school. In seeking uninsured/underinsured motorist benefits, the minor claimed she was her insured father's "relative," a term defined by the subject policy as follows: "Relative means a person related to you or your spouse by blood, marriage or adoption *who lives primarily with you*. It includes your unmarried and unemanciated child *away at school*." (emphasis added).

The court correctly noted the permissive appeal and question of law stated by the trial court assumed the minor was not living primarily with the insured at the time of the accident.

In reaching their holding, the *Brown* court held the term "relative" as defined by the policy, was not ambiguous and that the words in the policy were to be construed by using their common, everyday meaning. As such, the policy clearly only provided coverage for a policyholder's child who lived primarily in the policyholder's home. The court noted the second sentence of the definition of "relative" was to expand on the first sentence and to "indicate that a child who is away at school is not excluded from the term 'relative' in the policy by virtue of the language 'lives primarily with you.'" *Id.* at 1167. Therefore, the court held the minor not to be the claimant's "unmarried and unemanciated child away at school," most certainly because she did not live "primarily" with Mr. Brown.[6] *Id.*

Conclusion

In Alabama, UM/UIM coverage is unique and requires an "exacting analysis" for a number of reasons. First, this statutorily required coverage pits an insured as an adversary to his own insurer. Additionally, the Alabama statute, while short, has been the subject of much litigation over the past four decades. As with any insurance dispute, the careful practitioner will often start with a review of the policy language itself, keeping in mind the language of the statute and public policy reasons for its existence. Hopefully, in addition to this starting point, a review of the topics covered in both this article and the 2008 article will assist in advising your clients on these issues. | AL

Endnotes

1. *Walker v. GuideOne Specialty Mutual Ins. Co.*, 834 So. 2d 769, 772 (Ala. 2002) ("Unknown phantom drivers, like the one Walker claims caused her accident, are included within the definition of an uninsured motorist.") (citing *Criterion Ins. Co. v. Anderson*, 347 So. 2d 384 (Ala. 1977)). Also, although commonly referred to as "hit-and-run cases," physical contact is not required. *State Farm Fire & Cas. Co. v. Lambert*, 285 So. 2d 917 (1973).
2. *State Farm Mutual Automobile Ins. Co. v. Scott,* 707 So. 2d 238, 240-41 (Ala. Civ. App. 1997) ("In Alabama, UIM coverage is actually a subset of the uninsured motorist ('UM') coverage statutorily mandated by § 32-7-23…"); *see also Lowe v. Nationwide Ins. Co.*, 521 So. 2d 1309, 1309 n.1 (Ala. 1988) ("as statutorily defined, 'uninsured motorist' includes *'under* insured' motorist.").
3. Alabama's original statute was enacted in 1965, becoming effective in 1966. *Acts of Alabama* 1965, No. 866, p. 1614.
4. Note the term "typically." The insured is not always required to *exhaust* the tortfeasor's liability limits before recovering underinsured motorist benefits. *Scott*, 707 So. 2d at 242.
5. Please note that these cases are very fact-specific and largely turn on the policy language itself. For an example, please see Justice Houston's dissent in *State Farm Mut. Auto. Ins. Co., v. Harris*, 882 So. 2d 849, 849 (Ala. 2003).
6. What does this mean for a divorced father whose high school-aged child lives with his/her mother and the father is ordered to pay for car insurance for the child? This assumes the child is injured while not driving his/her car-or the father's car, i.e., a friend. Our hypothetical would also assume rejection by the father on the child's UIM coverage which, theoretically, the child may not be old enough to do.

International Commercial Arbitration, Southern-Style

By Frank M. Young, III

Over the past two decades, the state of Alabama has benefitted greatly from the economic globalization trend sweeping the world. Several international automobile companies have located plants here, resulting in numerous job opportunities and related growth. Alabamians have also benefited from increased exports. All of this has created many opportunities in the international field for Alabama lawyers, which only will increase in the future.

Alabama lawyers are accustomed to incorporating arbitration provisions in international business contracts, often designating arbitral venues far from the Yellowhammer State. The vast majority of international arbitrations take place in just a handful of cities. London, New York, Geneva, Paris, Hong Kong, and Stockholm are among the traditional leaders. An important new initiative launched by a coalition of southeastern law firms and law schools aims to promote an arbitral center closer to home–Atlanta. This could mean more work for Alabama lawyers in this growing field and reduced costs for Alabama companies engaged in cross-border trade and investment.

International Commercial Arbitration

International arbitration is the leading method for resolving cross-border business disputes, in part because companies naturally fear litigating in a foreign court. Arbitration, which is usually faster and less complex than court proceedings, allows the parties to resolve their dispute in a neutral forum before arbitrators of their choosing. An international treaty also makes it easier to enforce an arbitration award across borders than a court judgment. While the United States has no treaties with any other country for the enforcement of our court judgments, over 140 countries, including the U.S., and most of our major trading partners, are parties to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Worldwide, the success rate in enforcing foreign arbitration awards is approximately 90 percent, although experience varies by country.[1]

As previously indicated, most international arbitrations are conducted in a relatively small number of cities. As noted in a recent

survey of corporate counsel and international arbitration specialists, however, parties are "increasingly looking beyond the 'traditional' seats of arbitration."[2] For instance, Singapore, Dubai and Miami have become leading venues for international arbitration in just the past decade, and the island nation of Mauritius recently launched an initiative to become a center for arbitrations in Africa. In effect, arbitrations are migrating closer to the locus of the disputes. With the emerging global business in the Southeast, this creates a great opportunity.

Using World Bank figures, the core southeastern states–Alabama, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee–would, as an independent country, represent the 11th largest economy in the world. With Florida included, the region would be seventh. Given its economic clout, the Southeast merits its own international arbitral venue.

Why Atlanta?

So, why Atlanta? And why not Birmingham, Huntsville, Montgomery or Mobile?

One of the attractions of international arbitration is the ability to resolve the dispute in a neutral forum before impartial arbitrators. While an Alabama company might have difficulty negotiating with a foreign company for an Alabama venue, it may have an easier time persuading the other party that Atlanta is a sufficiently "neutral" site to resolve future disputes.

While an Alabama company might have difficulty negotiating with a foreign company for an Alabama venue, it may have an easier time persuading the other party that Atlanta is a sufficiently "neutral" site to resolve future disputes.

Surveys of corporate counsel indicate that the most important factor in picking an arbitral venue is the legal infrastructure, including the jurisdiction's arbitration law and track record in upholding arbitration agreements and arbitral awards.[3] Atlanta has much to commend itself in that regard. Georgia enacted an international arbitration-friendly state statute in 1988.[4] The statute is based in part on the United Nations Commission on International Trade Law (UNCITRAL) model international arbitration law. Among other provisions, the law guarantees that arbitrators may be of any nationality and that "[s]election of this state as the place of arbitration shall not in itself constitute selection of the procedural or substantive law of that place as the law governing the arbitration."[5]

In addition, Georgia, like Alabama, is in the Eleventh Circuit, which is arguably the most international arbitration-friendly court in the U.S. For instance, the Eleventh Circuit is one of only a few circuits that preclude challenges to arbitration awards on the basis of "manifest disregard for the law."[6] This eliminates a concern expressed by some non-U.S. lawyers with respect to conducting international arbitrations in the U.S.[7] The Eleventh Circuit is also the only federal circuit to eliminate domestic arbitration law as a basis for vacating international arbitration awards rendered in the United States.[8] Furthermore, the Eleventh Circuit has taken a no-nonsense approach to sanctioning parties who make frivolous challenges to arbitration agreements and awards.[9]

Moreover, subject to minor restrictions, Georgia allows parties to be represented by counsel of their choice in international arbitration proceedings, including attorneys not licensed in any U.S. jurisdiction.[10] This is critical to parties selecting a venue for the resolution of cross-border disputes. If the underlying contract is governed by, say, German law, the parties will naturally want German lawyers involved in the case. Unlike Georgia, the vast majority of states, including other states in the Southeast (with the exception of Florida), have failed to adopt a progressive bar rule in that regard, thereby effectively disqualifying them as major international arbitral venues.[11]

Atlanta is also easy for foreign parties to access. Hartsfield-Jackson is the world's busiest passenger airport, serving non-stop flights to 151 U.S. destinations and more than 90 international destinations in 55 countries. Atlanta is very close to all of the major business centers in Alabama, easily accessible by automobile.

Atlanta's global brand has benefited from the '96 Olympics, the Carter Center, CARE, CNN, and the legacies of Martin Luther King and Andrew Young. It has a reputation as a Fortune 500 headquarters city, all of which helps ease the job of "selling" Atlanta as an appropriate arbitration venue to a non-U.S. party.

Atlanta also has the necessary infrastructure for an arbitration center. The offices of the American Arbitration Association, Henning Mediation and Arbitration Service and JAMS offer hearing rooms equipped with the latest videoconferencing technology. Local hotels and state-of-the-art conference facilities provide endless other possibilities at affordable rates. According to the 2010 Hotel Price Index, the average rate for a hotel in Atlanta was only 47 percent of the average rate in New York City. And Atlanta compares favorably to other major non-U.S. arbitral centers, with corresponding figures of 41 percent with respect to Geneva, 51 percent for Paris, 52 percent for London, 58 percent for Singapore, 60 percent for Stockholm, 63 percent for Dubai, and 74 percent for Hong Kong.

Finally, a common element in the rise of all successful arbitral venues is an active collective effort by the local legal community to market and brand the city as an international arbitral seat. A coalition consisting of the major U.S.-based arbitral institutions, southeastern law firms, law schools and chambers of commerce has come together to proactively promote the city in the international arbitration marketplace. The Atlanta International Arbitration Society (AtlAS), established and funded by a coalition of more than two dozen organizations, is seeking to have lawyers in neighboring states view international arbitration in Atlanta as a business opportunity. Georgia's bar rules allow Alabama and other non-Georgia lawyers to represent clients in

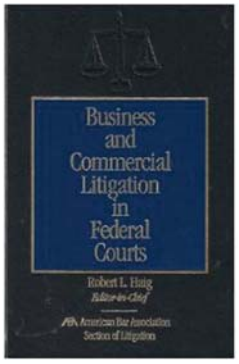
international arbitrations in Georgia. No pro hac vice admission or other permission is required.

Conclusion

Having a major international arbitration center in close proximity should be a benefit to Alabama companies and lawyers. The availability of a credible southeastern arbitration venue will also reduce the cost and uncertainty of international business for Alabama companies by better positioning them to negotiate into their contracts a nearby dispute resolution forum. | AL

Endnotes

1. Albert Jan van den Berg, *Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few*, Arbitration in the next decade–special supplement 1999, ICC Court of Arbitration.
2. Paul Friedland and Loukas Mistelis, *2010 International Arbitration Survey: Choices in International Arbitration* at 19 (http://www.whitecase.com/articles-10062010/); see also *Survey Highlights Importance of Choice of Law*, GLOBAL ARBITRATION REV. (Oct. 5, 2010).
3. *Id.*
4. O.C.G.A. § 9-9-30 *et seq.*
5. O.C.G.A. §§ 9-9-36.
6. *Frazier v. CitiFinancial Corporation,* 604 F.3d 1313 (11th Cir. 2010).
7. See, e.g., *The US Restatement on International Arbitration: First European Reactions,* GLOBAL ARBITRATION REV. (Dec. 9, 2010) (quoting a French arbitration expert who "warned that if the doctrine of manifest disregard of the law were to be maintained by the US courts, it would seriously endanger the attractiveness of the US as a venue for international arbitration.").
8. *Industrial Risk Insurers v. M.A.N. Gutenhoffnungsbutte,* 141 F.3d 1434 (11th Cir. 1998).
9. *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006), *overruled on other grounds, Hall Street Associates LLC v. Mattel*, 552 U.S. 576 (2008), *as recognized by Frazier v. Citifinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010) (holding that courts must "ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest," the court stated that it was "ready, willing, and able to consider imposing sanctions in appropriate cases"); *see also World Business Paradise, Inc. v. Suntrust Bank,* 403 Fed.Appx. 468 (11th Cir. 2010).
10. *See* Georgia Bar 5.5(e)(3). Foreign lawyers can also appear in state court on a pro hac vice basis. *See* Uniform Rules, Superior Courts of the State of Georgia, Rule 4.4. The American Bar Association's Task Force on International Trade in Legal Services notes that, "Georgia has assumed a leadership position in adopting rules that specifically address and regulate some of the various means by which lawyers from foreign countries may seek to perform services in that state." Memorandum from American Bar Association's Task Force on International Trade in Legal Services to State Supreme Courts and State and Local Bar Associations on International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience, Feb. 4, 2012, at 1.
11. The other states having a liberal rule allowing foreign lawyers to participate in international arbitrations are Delaware, Florida, New Hampshire, New York, Pennsylvania, and Virginia. *See* David D. Caron and Leah D. Harhay, *A Call to Action: Turning the Golden State into a Golden Opportunity for International Arbitration*, 28 Berkeley J. Int'l L. 497 (2010).



Business and Commercial Litigation in Federal Courts (3rd Ed.)

By Robert L. Haig, editor-in-chief

Published by Thomson Reuters and the ABA Section of Litigation (2011)

Reviewed by W. Percy Badham, III and Brannon J. Buck

Treatise Review

Any lawyer who represents a client in a business dispute in federal court will find *Business and Commercial Litigation in Federal Courts* to be a remarkable resource. The 3rd Edition is the first comprehensive revision of the treatise since 2005, and it offers significantly more substance and practice tools than the 2nd Edition.

With 11 volumes, 130 chapters and 12,742 pages, *Business and Commercial Litigation* (3rd) provides in-depth analysis of every aspect of commercial trial practice, from case evaluation and investigations all the way through appeals. In addition to this step-by-step practice guide (which includes strategy pointers for both plaintiffs and defense counsel), the treatise contains 63 substantive law chapters addressing subjects such as securities, antitrust, banking, intellectual property, arbitration, admiralty and maritime law, derivative actions, ERISA, RICO, white collar crime, environmental claims, class actions and many others. The treatise is chocked full of annotations to primary authorities that will jump-start, if not completely address, virtually any research project.

One example of the utility of *Business and Commercial Litigation* can be found in Chapter 20 which deals with stockholder derivative actions. Addressing a confusing and often misunderstood area of the law, the treatise walks the practitioner through the nuts and bolts of derivative actions, starting with a succinct explanation of the difference between a derivative action and a direct action by a stockholder. It then addresses the demand/futility requirements and lays out strategic

considerations for plaintiffs and defense counsel. The derivative action chapter explains the role and utility of the special litigation committee and the procedural and substantive impact of the Business Judgment Rule. It concludes with an analysis of the challenges associated with settling a derivative action and guides plaintiffs' counsel through the process of filing a petition for fees and costs.

The derivative action chapter is but one of many insightful sections that analyze a wide array of issues facing commercial litigators. Other chapters cover both substantive and procedural issues commonly encountered in most cases, such as subject-matter jurisdiction, venue, removals, experts, discovery, and damages, to name just a few.

As with the earlier editions, Editor-in-Chief Robert Haig, a partner in Kelley, Drye & Warren LLP in New York City, has utilized the talents of the best and brightest from the civil litigation bar. The 3rd Edition contains the work of 251 authors, including 22 distinguished judges. Among the authors are Alabama's **N. Lee Cooper** (former president of the American Bar Association) and **Scott S. Brown** (partner at Maynard, Cooper & Gale), who co-authored Chapter 28, "Selection of Experts, Expert Disclosure and the Pre-Trial Exclusion of Expert Testimony."

Although other treatises on federal practice and procedure certainly exist, it would be difficult to find one as comprehensive or as user-friendly as *Business and Commercial Litigation*. Its well-organized and thoughtful analysis will save many hours of painstaking research. Every commercial trial lawyer should have it within reach. | AL

A.J. Coleman

Eddie Leitman

Daniel J. Meador

Harold Layman Speake

A.J. Coleman

A pillar has fallen. Abraham Jordan "A.J." Coleman, III, a 50-year-plus member of the Alabama State Bar, passed away November 8, 2012. A.J. was born in Huntsville on January 22, 1928 and came to Decatur in 1936, remaining there until his death.

A.J., not surprisingly, was an Eagle Scout. He was co-captain of the football team and was in the band at the old Decatur High School, also known as Riverside. Upon graduation, he served in the U.S. Army for 18 months, the major portion of which was in Seoul, where he was a member of the 282nd Army Band. After discharge, he attended Auburn University where he played with the Auburn Knights Orchestra. Upon graduating from Auburn, he enrolled in the University of Alabama School of Law. He graduated in 1953 and began the practice of law in Decatur. In short order, he was named a bankruptcy referee in the days before that position was a formal judgeship, and served the City of Decatur as city attorney until the hiring of a full-time counselor in the late 1970s. His advice was sought statewide on issues of municipal law, and he gave many lectures and seminars on that subject.

Although somewhat trite, the phrase "lawyer's lawyer" fit A.J. perfectly. He mentored under John A. Caddell and Phillip Shanks, giants of the Morgan County Bar, and, in turn, was always available to any young lawyer to discuss, without promise of recompense, any issue where his vast level of experience could prove helpful. The undersigned in particular, who practiced with him for some 20 years, specifically learned the virtue of holding a "mad" letter for at least 24 hours so as to allow a cooling-off period, after which the letter was invariably rewritten to be more professional and, indeed, more effective.

A.J. always treated every person with whom he had contact, whether attorney or lay person, with the utmost courtesy and respect, even if he were in opposition to that person. He would often bend over backwards not to take advantage of a *pro se* opponent, to the degree that it would almost seem as though he were representing that party. He was that concerned with not using his superior position to intimidate or coerce.

And, no person ever outworked him on any case, win or lose. He was meticulous in his preparation and legal research, and if anybody ever had a title examination done by A.J. Coleman, he or she could be absolutely certain that there was no defect missed, however minor.

A.J. was an active member of the Decatur Kiwanis Club from 1953 until his death, serving as president in 1961 and being honored with the Kiwanis Lifetime Award in 2008. He was elected to the Alabama State Bar Board of Bar Commissioners for multiple terms, was a member of the American Bar Association and the Morgan County Bar and was admitted to practice before the U.S. Supreme Court. He also served as a trustee of the Eleventh Circuit Historical Society for many years, being named trustee emeritus in 2010, and was a longtime member of the Alabama Law Institute. A lifelong Presbyterian, he was a member of the denomination's Permanent Judicial Commission from 1978 through 1984, serving as chair for two years. During his course of 56 years as a lawyer, he practiced at various times with Albert Brewer, David Cauthen, David Bibb and Jon Sedlak. At his retirement, he was senior partner in Coleman & Sedlak.

After laying down his horn for 30 years, A.J. joined a group that was to become "The Sophisticated Swingers Big Band," playing for various public and private events. He also enjoyed playing with several combos around the area, and his clarinet playing on Glenn Miller's "Moonlight Serenade" and others was legendary.

A.J. is survived by his wife of 59 years, Shirley Braswell Coleman; son Brian L. Coleman and wife Nancy H. Coleman; daughter Melissa C. Enslen and husband Alan F. Enslen (also a member of the Alabama State Bar); and several beloved grandchildren and other relatives. His son, Taylor Coleman, predeceased him, and following Taylor's death in an automobile accident in 1972, A.J. and Shirley, along with Dr. Tom Salter, had the initiative to organize a group for grieving parents, which still exists today and is known as The Compassionate Friends.

A.J. Coleman will be sorely missed, but his deep legacy and high level of professionalism will never be forgotten, and the family also takes great comfort in knowing that his salvation in Jesus Christ was secure. In summation, A.J.'s self-stated life objective was to "do justly, love mercy, and walk humbly with his God." (Micah 6:8). This he certainly accomplished, in spades.

–Jon R. Sedlak, Morgan County Bar Association

Eddie Leitman

Eddie Leitman, a lifelong resident of Birmingham and a distinguished member of the Alabama State Bar, was born May 15, 1941 and died October 22, 2012. He was 71. His life speaks louder than words as he was engaged in many civic and philanthropic activities.

Eddie graduated from Shades Valley High School and received his undergraduate degree in business administration from the University of Alabama, where he served as vice president of the Student Government Association and was a member of Jasons Honor Society. He was a member of Zeta Beta Tau fraternity and received a Juris Doctorate from the University of Alabama School of Law.

Eddie served as a captain in the United States Army and received the Bronze Star for his service in Vietnam. He was a member of the Birmingham Bar Association and Alabama State Bar for over 40 years and a founding partner and president of Leitman, Siegal, Payne & Campbell PC.

Many honors were bestowed on Eddie, including selection to Alabama Super Lawyers and Birmingham's Top Attorneys. Eddie was a wonderful husband to his wife of many years, Gayle, and a terrific father to sons Jeremy and Michael.

A great sense of humor was a hallmark of Eddie's and he was liked and admired by all who knew him. He will be missed.

Daniel J. Meador

Alabama lost an honored native son and the legal profession lost a true giant when Daniel J. Meador passed away on February 9, 2013 at the age of 86.

Dan was born on December 7, 1926 in Selma, the son of Mabel Kirkpatrick and Dr. Daniel John Meador, Jr. After graduation from

Continued from page 125

Auburn University and the University of Alabama Law School, he attended the Harvard Law School, where he received his Master of Laws in 1954. He served in the U.S. Army in the artillery corps and Judge Advocate General's Corp in Korea.

One of his favorite times was the time (1954-55) he spent as law clerk to Justice Hugo Black of the United States Supreme Court. He kept in regular contact with Justice Black over many years. After a short period of practicing with Lange Simpson in Birmingham, in 1957 he joined the law school faculty at the University of Virginia. From 1966 to 1970, he served as dean of the University of Alabama Law School, where his service greatly contributed to the growth of the law school and he helped lay the foundation for the law school's great rise in standing over the following years.

Dean Meador was a great writer and he authored several important legal works as well as several novels. He recently wrote a very fine history of his four years at the law school, entitled *The Transformative Years of the University of Alabama Law School: 1966-70*. Dean Meador was a brilliant teacher and wrote as well as he taught. All lawyers will enjoy this informative work. Scores of his students would say he was the best teacher they ever had. "Alabama is a better state and the University of Alabama Law School is an infinitely better place due to his four years of service to his alma mater." This comment is from Robert Potts, chancellor emeritus of the Arkansas State University, in a recent book review and profile of Dean Meador for this magazine. (November 2012, volume 73, no. 6).

In 1970, Dean Meador returned to the Virginia Law School faculty as James Monroe Professor of Law, where he retired in 1994.

He had a special interest in state and federal appellate matters and was regarded as one of the true experts in the field. For many years, he was a principal adviser to the Federal Judicial Center and the National Center for State Courts. Attorney General Griffin Bell brought him to the Justice Department in 1977 where he served as an Assistant Attorney General in a new role as head of the Office for Improvements in the Administration of Justice. From 1979 to 1995 he served as the director of the graduate program for judges at the University of Virginia Law School. At the University of Virginia, he received numerous honors, including the university's highest honor, the Thomas Jefferson Award.

His wife, Jan, died in 2008, after 52 years of marriage. He is survived by his wife, Alice Meador of Charlottesville, and three children, Barrie Boyd (Robert) of Atlanta, Anna Palms (John) of Dallas and Daniel J. Meador Jr. (Mary) of Charlottesville; seven grandchildren; and a brother, Dr. Clifton Meador of Nashville.

Dan Meador was a true giant in the legal profession and he strongly influenced his many students and colleagues over his career but none more so than the members of the University of Alabama Law School Class of 1969.

–Fournier J. "Boots" Gale, III,
Regions Financial Corporation, Birmingham

Harold Layman Speake

Harold Layman Speake passed away in Moulton September 29, 2012 at the age of 90.

He attended Florence State Teachers College from 1940-1943, where he lettered three years in basketball. In August 1942, he volunteered for the U.S. Army Air Corps, and was called into active duty in April 1943. He proudly served his country in World War II and was honorably discharged in October 1945. The following day, he became a law student at the University of Alabama. Upon earning his law degree, he accepted employment with the Federal Bureau of Investigation as a special agent where he served in Washington, D.C., Cleveland and Los Angeles.

In 1951, Rust Engineering Company hired the young Harold Speake to work on a wide range of projects at the company's Tullahoma and Oak Ridge facilities, as well as in Los Angeles. Beginning in 1958, he worked on a joint venture with four national engineering firms in Los Angeles, which resulted in the development of the first underground missile silos. In May 1963, Morton Thiokol hired Speake to serve as director of finance. He worked in that capacity in Huntsville until May 1970 when he made the decision to enter into the private practice of law with his brother, James G. "Jimmy" Speake.

The Speake brothers were later joined in practice by Harold's son-in-law, Philip A. Reich, who left the practice in 1988 when he was elected circuit judge of the 36th Judicial Circuit. Harold and Jimmy continued their successful partnership until Jimmy died in 1998. Harold Speake carried on

in the active practice of law until he retired in 2008 at age 87. During those 38 years of private practice, Mr. Speake advised and counseled clients from all walks of life, and was respected and admired throughout the north Alabama legal community for his unparalleled knowledge of probate and real estate law. He served for more than 20 years as a director of Attorney's Insurance Mutual. Mr. Speake's life had taken him to foreign countries, corporate boardrooms and courtrooms, but his heart never strayed far from Lawrence County.

Harold Speake was born May 2, 1922 and grew up in the Speake Community of Lawrence County, which was named for his family. His parents ran a country store and farmed. Harold Speake was an avid sportsman who enjoyed bird hunting and the game of basketball. He often participated in field trials and served as a judge in several events.

In his community and his profession, he was a servant. He was an active member of the First United Methodist Church of Moulton, where he taught Sunday School and was president of the Men's Group for two terms. He was president of the Lawrence County Chamber of Commerce for two terms, and a longtime member of The Rotary Club. In 2012, that organization awarded him the Paul Harris Fellow Award.

Among the local bar, Mr. Speake was known for his kindness and generosity toward young lawyers. There are few attorneys in Lawrence County who have not called upon Harold Speake for advice and guidance at some point in their career. He was honest, to the point and always ready with a story to tell. He had so many stories to tell and lived a truly remarkable life. Lawrence County and the Lawrence County Bar were fortunate to have known Harold Speake and to have benefited from his love of life, his passion for his community and his keen intellect and leadership.

Harold Speake is survived by his wife of 58 years, Mary Ann Moon Speake of Moulton; a daughter, Ruth Louise Speake; a son-in-law, Philip A. Reich; two grandsons and two great-grandsons. Mrs. Jerri Gilbreath faithfully served as Harold Speake's assistant throughout his legal career. He was preceded in death by daughter Vikki Speake Reich, son Scott Layman Speake and brothers John Lee Speake and James G. "Jimmy" Speake.

The following is a favorite poem of Mr. Speake's, entitled "The Song." The author is unknown.

"In youth because I could not be a singer I did not even try to write a song. I set no little trees along the roadside because their growth would take so long. But now from wisdom that the years have brought me I know that it may be a blessed thing to plant a tree for someone else to water or make a song for someone else to sing."

Harold Speake planted many seeds in his lifetime, and he leaves behind a chorus in his family, community and profession that will forever sing his praises.

–Christy Williams Graham,
Lawrence County Bar Association

Bell, Maurice Solomon
Montgomery
Admitted: 1950
Died: December 24, 2012

Featheringill, William Waddell
Birmingham
Admitted: 1971
Died: December 9, 2012

Gurley, Michael Edward
Talladega
Admitted: 1972
Died: October 30, 2012

Head, David Henderson, Sr.
Point Clear
Admitted: 1962
Died: February 3, 2012

Holt, John Neal
Birmingham
Admitted: 1951
Died: November 24, 2012

Robertson, Hon. Hubert Paul
Mobile
Admitted: 1952
Died: June 29, 2012

Spencer, James Owen
Alex City
Admitted: 1965
Died: December 30, 2012

Thomas, Robert Lee
Birmingham
Admitted: 2001
Died: November 21, 2012

Thomley, William Woodham
Birmingham
Admitted: 1990
Died: November 20, 2012

Wilson F. Green

Marc A. Starrett

By Wilson F. Green

Wilson F. Green *is a partner in Fleenor & Green LLP in Tuscaloosa. He is a* summa cum laude *graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.*

By Marc A. Starrett

Marc A. Starrett *is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.*

UPCOMING DECISIONS OF NOTE

One introductory note is included before we review the appellate decisions from the last several months of 2012.

The November 2012 *AL* featured two articles on the current state of Alabama law regarding dispositions of excess proceeds from property tax sales–an issue which turns on the construction of *Ala. Code* § 40-10-28. Since that time, the court of civil appeals decided *First United Security Bank v. McCollum*, No. 2110828 (Ala. Civ. App. Nov. 30, 2012), in which the court held that a mortgagee which foreclosed after a tax sale was not the "owner" of the real property entitled to the excess proceeds from the tax sale (the proceeds, instead, were to be paid to the former owner and mortgagor). The mortgagee in *McCollum* has now filed a petition for certiorari review to the Alabama Supreme Court (Case No. 1120302). This area of law continues to shift under our feet. We will continue monitoring developments in the area and will report new decisions as they arise.

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Negligence

***Wilbanks v. United Refractories, Inc.*, No. 1111164 (Ala. Nov. 16, 2012)**

Wilbanks brought action against United, which supplied equipment used in repairing coke oven batteries, for personal injuries sustained in workplace accident, based on a theory of improper or inadequate inspections. Trial court granted summary judgment to United based on lack of evidence that his injuries were proximately caused by any act or omission of United. The supreme court affirmed, concluding there was no evidence that an inspection of the valve within the three months preceding the accident would have prevented the explosion.

Sufficiency of Pleadings

Snider v. Morgan, No. 1101535 (Ala. Nov. 30, 2012)

Rule 12(b)(6) dismissal based on the rule of repose was improper because the circuit court incorrectly presumed that the failure to allege a specific date for default meant that a default did not occur within the 20-year period. Under Alabama's motion to dismiss standard, dismissal is proper only if plaintiff can "prove no set of facts" based on the pleading to support a viable claim. (Ed.–this is another case illustrating that Alabama has not adopted the federal *Twombly-Iqbal* standard.)

Domestic Law; Venue

Ex parte Brandon, No. 1111538 (Ala. Nov. 30, 2012)

Issue: whether the exclusivity of venue established by *Ala. Code* § 30-3-5 applies where multiple claims are joined, where some of the claims are not governed by that section's exclusivity provision. The case involved a split-custody arrangement involving multiple children. The court held that the father's invoking his rights under this last sentence had a clear legal right to a transfer of that portion of the action regarding the child as to whom the father was the custodial parent.

Inverse Condemnation

HABD v. Logan Properties, Inc., No. 1111015 (Ala. Dec. 7, 2012)

Logan purchased a distressed multifamily development and began rehabilitation work. Shortly thereafter, HABD constructed a major public housing project across the street, which attracted much of the tenant demand for apartments in the area. HABD did not interfere with the access to Logan's site or with Logan's ability to rehab and rent units. The trial court entered judgment on a jury verdict for $350,000 in inverse condemnation, the theory being that HABD's construction and development of the HOPE Project eliminated demand for Logan's property. The supreme court reversed, holding that HABD's conduct did not amount to a taking of Logan's property because HABD did not enter onto Logan's property, and did not interfere with its access or use. The court overruled *McEachin v. City of Tuscaloosa*, 164 Ala. 263, 51 So. 153 (1909).

Arbitration; Scope

MTA, Inc. v. Merrill Lynch, No. 1111167 (Ala. Dec. 7, 2012)

In fairly complex fact pattern concerning a brokerage arrangement between third-party trustee and ML concerning funds payable to deferred comp agreement between MTA and its employee, the court reversed the trial court's order compelling arbitration, holding that regardless of other non-signatory enforcement issues, the arbitration clause covered claims between ML and the "customer" and/or "client." Since MTA was undisputedly neither, the scope of the clause was too narrow to compel MTA to arbitrate.

Automobiles; Loss of Use

Ex parte S&M, LLC, No. 1111210 (Ala. Dec. 7, 2012)

Reversing the court of civil appeals and overruling *Hunt v. Ward*, 262 Ala. 379, 79 So. 2d 20 (1955), the court held that in total-loss situations, it is not a double recovery, and is therefore compensable loss, to recover both the replacement value of the vehicle and for loss of use.

Fraud; Reasonable Reliance

Target Media Partners Operating Co, LLC v. Specialty Marketing Corp., No. 1091758 (Ala. Dec. 21, 2012)

This is a must-read decision for commercial and business litigators concerning fraud law. Specialty contracted with Target to distribute a trucking publication to be placed in truck stops. Contract called for certain distributions in certain locations, which distribution Target agreed to provide and for which Specialty would make payment. Evidence at trial demonstrated that Target did not make the required contractual distributions, and that Target provided distribution reports to Specialty which misstated the distributions taking place. Case was submitted on both fraud and contract

Continued from page 129

claims, and jury returned a verdict on both claims. On appeal, the supreme court reversed in relevant part. The majority opinion, authored by Justice Main (and joined by Malone, Stuart, Woodall, Parker, and Bolin), rejected, on two grounds, the fraud claim on the basis that Specialty could not have reasonably relied on any distribution data provided by Target in connection with its contractual performance: (1) even though distribution spreadsheets containing inaccurate or even fabricated data was provided to Specialty, Specialty continued to work with Target under the contract for over two years after receiving the last such spreadsheet, which should have put Specialty on "inquiry notice;" and (2) the majority endorsed a statement of then-Justice Houston from *Deupree v. Butner*, 522 So. 2d 242, 245 (Ala. 1988): "to assert a fraud claim that stems from the same general facts as one's breach-of-contract claim, the fraud claim must be based on representations independent from the promises in the contract and must independently satisfy the elements of fraud." On this alternative rationale, the majority apparently concluded that a fraud claim does not lie for misrepresentations of a party regarding its performance of contract obligations. Justice Shaw (joined by Justice Wise) dissented, arguing that the evidence of fraud was sufficient for that claim to go to the jury, and that the alternative rationale regarding the viability of a fraud claim in contractual performance was never raised at the trial court or on appeal, and, thus, could not a basis for reversal. Justice Murdock dissented, arguing that the majority had inappropriately reweighed the evidence. Justice Murdock further noted that the court's majority had repeatedly rejected Justice Houston's *Deupree* position.

Rule 54(B) Certifications

Wallace v. Belleview Properties Corp., No. 1100902 (Ala. Dec. 21, 2012)

Trial court entered judgment on some claims and certified order as final under Rule 54(b). Losing party did not immediately appeal, but instead waited until many months later, after final judgment had been entered on all claims. Appellee argued that there was no jurisdiction over appeal because the order being challenged had been certified under Rule 54(b), and no appeal was taken in timely fashion. Appellant contended that the Rule 54(b) certification was improper to begin with, and so he was not required to take appeal at that time. The supreme court held that the appeal was untimely. The upshot is that once the trial court enters an order containing a Rule 54(b) certification, a timely appeal will be required, potentially without regard to the propriety of the Rule 54(b) certification.

Inverse Condemnation; Regulatory Takings

Town of Gurley v. M&N Materials, Inc., No. 1110439 (Ala. Dec. 21, 2012)

The court held that an inverse condemnation claim based on a "regulatory" taking asserted against town by landowner is not cognizable under Ala. Const. Sec. 235, despite the fact that such a claim is cognizable under the Fifth Amendment to the United States Constitution. Instead, a section 235 takings claim requires either a physical invasion of the property or active interference with its access. The court also held that a section 23 takings claim under the Alabama Constitution requires a complete physical taking of the property. Justice Murdock dissented with opinion.

Insurance; Environmental Law

Travelers Cas. & Ins. Co. v. Alabama Gas Corp., No. 1110346 (Ala. Dec. 28, 2012)

Federal court certified the following question for answer: Under Alabama law, is a "Potentially Responsible Party" ("PRP") letter from the Environmental Protection Agency ("EPA"), issued under CERCLA, sufficient to satisfy the 'suit' requirement under a liability policy of insurance? The court answered this question in the affirmative. Justices Murdock, Shaw and Wise dissented on the basis that the construction of an insurance policy does not involve the answering of an unsettled question of state law.

From the Court of Civil Appeals

Substitution of Parties

Carter v. Carter, No. 2110907 (Ala. Civ. App. Nov. 2, 2012)

Held: Under Alabama law, when a suggestion of death is not filed in the trial court, the six-month period for the substitution of parties under Rule 25 is not triggered, and the action cannot be properly dismissed for the failure to substitute parties.

Default Judgments

Camping World, Inc. v. McCurdy, No. 2110241 (Ala. Civ. App. Nov. 16, 2012)

The court reversed the trial court's denial of a Rule 55(c) motion to set aside default, reasoning that the defendant satisfied the three *Kirtland* factors by presenting a meritorious defense (in the form of evidence that the wrong corporate entity had been sued), and in demonstrating that simple

negligence, as opposed to willful conduct, caused the failure to answer or plead.

Venue; Corporations

Ex parte H&M Industrial Services, Inc., No. 2110945 (Ala. Civ. App. Nov. 16, 2012)

Trial court directed to transfer action from Washington County to Mobile County in workers' comp action against H&M and negligence action against Thyssen Krupp arising from accident occurring at TK's Mobile facility. Although there was evidence that TK's industrial site is situated in both counties, the undisputed evidence was that the location of the work and the accident was in Mobile County.

Negotiable Instruments; Depositary Agreements

ADDS, Inc. v. Regions Bank, No. 2110494 (Ala. Civ. App. Dec. 21, 2012)

ADDS's agreement with Regions required that ADDS dispute unauthorized transactions (i.e. unauthorized use of signature stamp on account) within 30 days, shortening the 180-day period under *Ala. Code* § 7-4-406(f) for such reporting. ADDS disputed charges past the 30-day deadline, and further disputed allegedly unauthorized wire transfers beyond the one-year period in *Ala. Code* § 7-4A-505. ADDS contended that the time periods did not apply in situations where the bank acted in bad faith or without exercising ordinary care. The court of civil appeals rejected these arguments, holding that the 406(f) deadline applied regardless of ordinary care and that, in any event, the evidence was insufficient to support any inference of bad faith.

Premises Liability; "Open and Obvious" Dangers

Waters v. Paul Enterprises, Inc., No. 2110683 (Ala. Civ. App. Jan. 4, 2013)

Waters (an Ace deliveryman) was delivering equipment and goods at Paul's facility, where delivery trucks would connect to the loading dock through Paul's maintenance and use of metal connector "plates." In making his first delivery at Paul's facility, Waters was injured when the plate slipped. The court of civil appeals reversed the trial court's summary judgment

Continued from page 131

to defendant, reasoning that there was a fact question as to whether the danger was open and obvious, given that it was Waters's first time at the facility, and Waters did not have knowledge of the potential for the slippage of the metal plates, given the expert testimony offered by Waters.

From the United States Supreme Court

Arbitration

Nitro Lift Techs. LLC v. Howard, No. 11-1377 (U.S. Nov. 26, 2012)

In a *per curiam* smackdown of the Oklahoma Supreme Court, the Supreme Court held that the state court had ignored the FAA's preemptive effect and numerous cases interpreting section 2 of the FAA by nullifying, on state law grounds, a non-compete agreement in a contract involving arbitration, where the party opponent argued (properly) that the issue of the non-compete's validity was one for the arbitrator.

Takings

Arkansas Game & Fish Commn. v. US, No. 11-597 (U.S. Dec. 4, 2012)

The Federal Circuit below held that government-induced flooding of property could give rise to a taking claim only if the flooding is "permanent or inevitably recurring." The Supreme Court reversed, holding that standard was unduly restrictive and that no such *per se* rule applied. Thus, government-induced flooding of limited duration may be compensable.

From the Eleventh Circuit

Hearsay

Wright v. Farouk Systems, Inc., No. 12-10378 (11th Cir. Nov. 29, 2012)

The Court reversed summary judgment for hair product manufacturer in product liability action brought under GA law. The significant issue in the case was whether an affidavit containing statements of Farouk's chair and chief

researcher, Farouk Shami, concerning notice of the adverse effects of the "Blondest Blonde" product was admissible. The district court considered the statements hearsay. The Eleventh Circuit vacated the summary judgment, reasoning that the statements were of a party opponent's agent and thus were non-hearsay under *Fed. R. Evid.* 801(d).

ADEA

Kargor v. Takeda Pharm. America, Inc., No. 11-16052 (11th Cir. Dec. 20, 2012)

Under the ADEA, a contradiction of the employer's proffered reason for the termination of an employee is sometimes enough, when combined with other evidence, to allow a jury to find that the firing was the result of unlawful discrimination. In this case, the corporate executive who terminated the plaintiff later said that the plaintiff was an exceptional employee who had done nothing wrong, had done everything right and should not have been fired. *Held*: such evidence, when combined with a prima facie case, creates a triable issue.

RECENT CRIMINAL DECISIONS

From the Court of Criminal Appeals

Probation Revocation Adequacy

Singleton v. State, CR-11-1635 (Ala. Crim. App. Dec. 14, 2012)

Trial court's revocation judgment improperly failed to permit the defendant to call a witness to rebut the state's allegation that he had committed a new charge.

"Plain-View" Doctrine

State v. Moore, CR-11-1079 (Ala. Crim. App. Dec. 14, 2012)

Following the lawful stop of the defendant's vehicle for running a stop sign, the presence of crack cocaine in plain view on the vehicle's floorboard supported a warrantless search.

"Exigent Circumstances"

Dardy v. State, CR-10-1835 (Ala. Crim. App. Dec. 14, 2012)

Detective's swabbing of defendant's hands after noticing dried blood on them constituted a warrantless search. However, search was proper under the "exigent circumstances" exception due to the possibility that the defendant would destroy the evidence by washing his hands or putting his fingers in his mouth.

Confrontation Clause Cases

C.L.H. v. State, CR-11-1053 (Ala. Crim. App. Dec. 14, 2012)

Admission of hearsay evidence of the juvenile defendant's accomplice violated the defendant's confrontation clause rights and could not be viewed as harmless error.

Turner v. State, CR-09-0739 (Ala. Crim. App. Dec. 14, 2012)

Admission of statements of the defendant's accomplices without the accomplice's presence at trial violated the hearsay rule and the confrontation clause, especially since these were the state's strongest evidence of the defendant's offense.

Naquin v. State, CR-11-0503 (Ala. Crim. App. Dec. 14, 2012)

SCAN (sexual abuse and neglect) report was inadmissible hearsay without the testimony of the doctor who performed the test. Report's admission violated the confrontation clause because it was prepared by an expert who concluded that a date-rape drug had been administered to facilitate a rape.

Community Notification

Billingsley v. State, CR-10-0540 (Ala. Crim. App. Dec. 14, 2012)

Defendant's prior "carnal knowledge" conviction in the United States Military Court was sufficient to require registration.

From the Eleventh Circuit

Habeas Limitations Periods

Smith v. Comm., Ala. Dept. of Corr., No. 11-13802 (11th Cir. Dec. 28, 2012)

Under the AEDPA, a Rule 32 petition filed with no filing fee or request for *in forma pauperis* status does not constitute a "properly filed" post-conviction petition for purposes of statutory tolling. The performance of defense counsel in this case also did not constitute abandonment that would support the award of equitable tolling.

Ineffective Assistance

Pooler v. Sec'y, Ala. Dept. of Corr., No. 12-12059 (11th Cir. Dec. 17, 2012)

Defense counsel's performance was not ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) in the investigation and presentation of mitigation evidence, including a decision to rely on evidence from court-appointed mental health experts. | AL

Notice

- **Dana Posey Gentry**, whose whereabouts are unknown, must answer the Alabama State Bar Disciplinary Board's order to show cause why reciprocal discipline should not be imposed within 28 days of March 15, 2013 or, thereafter, the reciprocal discipline shall be entered against him pursuant to Rule 25(a), *Alabama Rules of Disciplinary Procedure*, in Pet. No. 2012-1932.

Transfer to Disability Inactive Status

- Huntsville attorney **David Eugene Worley** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective October 11, 2012. [Rule 27, Pet. No. 12-1785]

Suspension

- Hueytown attorney **George William Beasley, Jr.** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 91days, effective December 10, 2012. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel III, of the Alabama State Bar wherein Beasley was found guilty of violating rules 1.8(a), 1.8(b), 8.4(a) and 8.4(g), *Ala. R. Prof. C.* Beasley was also ordered to make restitution to the client in the amount of $989.13. Beasley was retained to represent a client in several matters, including a divorce, options resulting from the client's financial difficulties and filing suit against individuals who owed her money. The client disclosed to Beasley personal financial information such as assets, debts, creditors and real property she owned, for which she was in arrears on both the first and second mortgages. Beasley was also made aware that the client had cognitive impairments due to an

accident in which she suffered closed-head injuries. Beasley took advantage of his client, made sexual advances toward her and had a sexual relationship with her. Furthermore, Beasley gained knowledge about his client's financial dilemma, the availability of her only real asset and her need to sell that asset, and used this information to her disadvantage. Beasley entered into a business transaction with the client in which the terms were not fair, reasonable or transmitted in writing to the client. The client was not provided an opportunity to seek the advice of independent counsel nor did she consent in writing to waive Beasley's conflict. [ASB No. 09-1109(A)]

Public Reprimands

- On November 2, 2012, Birmingham attorney **Charles Earl Davis, Jr.** received a public reprimand with general publication for violating rules 1.15(d) and 8.4(g), *Ala. R. Prof. C.* In May 2009, Davis conducted a closing involving an investment company. The investment company was to provide $36,000 in lender funds for the transaction; however, the check from the investment company bounced. In the interim, Davis had disbursed the proceeds of the sale, leaving his IOLTA account short by approximately $36,000. Davis did not have the money to replace the

Continued from page 135

missing funds, and failed to do so as required by Rule 1.15(d), *Ala. R. Prof. C.* As a result, Davis began placing personal funds into the IOLTA account to cover shortfalls as needed, which resulted in overdrafts on several occasions. [ASB No. 2011-416]

- Bessemer attorney **Dan Cicero King, III** received a public reprimand without general publication on November 2, 2012 for a violation of Rule 1.12, *Alabama Rules of Professional Conduct*. King, as one of the attorneys with Stewart & Stewart PC, met with a group of coal miners in October 2010 to review documents that had to be signed for them to participate in the settlement of a class-action case. King assisted in explaining to at least one class-action plaintiff the contents of the documents he was signing, the legal effect of the documents and the effect on his case if he declined to sign the documents. Prior to joining the Stewart firm, King served as a judge in the underlying civil action that was the subject of the October 2010 meeting. Although King could not and did not share in any of the fees received by the firm, and never made an appearance as an attorney in the case, he violated Rule 1.12, *Ala. R. Prof. C.*, by participating in a matter wherein he had previously participated personally and substantially as a judge. [ASB No. 12-274]

- Montgomery attorney **Johnnie Lynn Branham Smith** received a public reprimand without general publication on November 2, 2012 for violations of rules 1.3 and 1.4(a), *Ala. R. Prof. C.* In 2001, Smith was retained to represent a client in an action regarding injuries she sustained in an automobile accident. In June 2006, Smith negotiated a settlement for policy limits, from which disbursements were made, and an additional sum was placed in trust, pending a final demand from Medicare. In May 2007, the client received her portion of the settlement proceeds and assumed the matter was resolved. Sometime later, the client received notice that Smith had not paid Medicare, and the client's account remained open. Thereafter, the client made several attempts to contact Smith; however, Smith failed to return her calls or correspond with the client in any manner. [ASB No. 2010-1416]

- On November 2, 2012, Tuscaloosa attorney **James Dwight Smith** received a public reprimand without general publication for violations of rules 1.2(c), 1.3 and 1.4(a), *Ala. R. Prof. C.* In August 2007, Smith entered into a contract with the complainant to represent her in an Equal Employment Opportunity Commission (EEOC) employment discrimination matter as well as a workers' compensation case. The complainant alleged she was the victim of discrimination by the Tuscaloosa Police Department because she was transgendered. Smith did not pursue the complainant's workers' compensation case and allowed the statute of limitations to expire. Initially, Smith informed the complainant he carried malpractice insurance. However, when he admitted to the complainant he failed to pursue her workers' compensation case, he also admitted to her he no longer carried malpractice insurance. Smith failed to inform the complainant he was not pursuing the workers' compensation case. Additionally, he did not diligently pursue both her cases. His conduct in this matter violated rules 1.2(c) and 1.3, *Alabama Rules of Professional Conduct*. Although the complainant attempted to contact Smith on a weekly basis, he failed to adequately communicate with her during a large part of the time that he represented her. Therefore, his conduct violated Rule 1.4(a), *Ala. R. Prof. C.* [ASB No. 2011-515]

- Birmingham attorney **Jonathan K. Vickers** received a public reprimand without general publication on November 2, 2012 for violations of rules 1.3, 1.8(h) and 8.4(g), *Ala. R. Prof. C.* In March 2008, Vickers was hired to represent a client in an automobile accident and/or a workers' compensation case. In March 2009, Vickers sent a $15,000 demand letter to State Farm on behalf of his client. Counsel for State Farm responded to the demand letter by stating that they would not pay the claim because the statute of limitations had run. On May 26, 2009, Vickers met with the client and explained that he had missed the statute of limitations, and advised the client to speak with other attorneys regarding the situation. Vickers did not advise the client in writing to seek independent representation. Vickers ultimately agreed to pay the client $5,500 in monthly installments of $500 to settle the matter, but has not paid the client since April 2, 2010 and still owes the client approximately $1,500. In addition to receiving a public reprimand without general publication, Vickers was ordered to pay the client $1,500. [ASB No. 2010-1931] | AL

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J. Anthony McLain

The Tripartite Relationship of Insurance Defense Counsel

QUESTION:

"The purpose of this letter is to request an opinion from the Alabama State Bar concerning whether our firm has a conflict of interest in representing a defendant, A & B Trucking Company, in a lawsuit filed against it by the XYZ Insurance Company.

"A & B Trucking Company is a regular client of our firm for which we have handled numerous legal matters. Our firm also represents insureds of XYZ in some litigation. Our firm does not have any cases where we represent XYZ directly. All of the current files we have are where we represent an insured of XYZ in some type of litigation and XYZ is providing the defense and indemnity for any judgment.

"The suit filed by XYZ against A & B is a claim for fraud arising out of workers' compensation insurance issued by XYZ to a company named Acme Driver Leasing, Inc. A & B's involvement in the case arises out of the fact that it leased truck drivers from Acme Driver Leasing. The allegation by XYZ is that Acme Driver Leasing, A & B and the insurance broker conspired to defraud XYZ by misrepresenting the nature of the Acme Driver Leasing operation and the relationship of that company to A & B. XYZ alleges that it is entitled to additional workers' compensation insurance premiums for a three-and-a-half-year period because of those misrepresentations. A & B, Acme Driver Leasing and the insurance broker are all defendants in the lawsuit filed by XYZ.

"Our firm has never been involved in any litigation similar to the lawsuit filed by XYZ. By virtue of our representation of XYZ's insureds in the past and at present, our firm has never been privy to or had access to any information which would have any bearing on the issues in the XYZ lawsuit. All of these facts have been disclosed to A & B and A & B wishes for our firm to defend them in the XYZ lawsuit."

ANSWER:

Your situation is covered by the application of Rule 1.7. Rule 1.7(a) states that you cannot undertake legal representation that will be directly adverse to another existing client. This is so even if the two matters are totally unrelated.

Is XYZ an existing client? If so, would your defense of A & B be "directly adverse" to XYZ? The Comment to Rule 1.8 "Person Paying for Lawyer's Services" makes it clear that when a lawyer is retained to defend an insured, the lawyer has two clients in the absence of a coverage dispute. The insurance company is not a "third party."

In *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988), the Alabama Supreme Court implied the same thing stating: "When an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interests of each." Id. at 198.

Since you are currently representing some of XYZ's insureds, XYZ is an existing client of your firm. XYZ is seeking monetary damages from A & B so their interests are directly adverse.

Therefore, you are not able to defend A & B in the suit brought by XYZ if XYZ objects to it. [RO-94-08] | AL

SAVE THE DATE

JULY 17-20 2013

Alabama State Bar Annual Meeting Grand Hotel Marriott Resort, Golf Club & Spa, Point Clear, Alabama All the cool kids will be in Point Clear. Will your kids be there? While you attend the annual meeting and earn a year's worth of quality CLE credit, your family will be having a blast! And for anyone who's over the age of 30 there will be the usual cocktail parties, a Presidential reception, informal networking opportunities, law school alumni gatherings and more. Let out your "inner child." Plan to attend the annual meeting.

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Shepard

Tazewell T. Shepard, managing partner at Sparkman, Shepard & Morris PC in Huntsville, has been elected vice chair *pro tem* of the Board of Trustees at Athens State University. He is also the current president of the Madison County Bar Association.


Ritch

Joe H. Ritch, with Sirote & Permutt's Huntsville office, has been confirmed by the Senate to serve on the Board of Directors of the Tennessee Valley Authority (TVA). Ritch, who was appointed by President Barack Obama, is only the second Alabamian to be appointed to the board in the TVA's 79-year history.


Mbyirukira

Shema Mbyirukira, an associate with Maynard Cooper, has been elected vice president of the Magic City Bar Association (MCBA). The MCBA was formed in 1984 to advance the needs of African-American attorneys within the Birmingham-metro area.


Quick

Frances King Quick, a shareholder with Maynard Cooper, was recently named recipient of the Birmingham Bar Association's (BBA) L. Burton Barnes III Public Service Award. The award is given annually to a member of the BBA who has given selflessly of his or her time for the betterment of the community. Quick is the third attorney from Maynard Cooper to receive this prestigious award; Kirby Sevier was a recipient in 2005 and Drayton Nabers Jr. received the award in 2011.

The Alabama Fellows of the American College of Trial Lawyers announces that **S. Allen Baker, Jr.** with Balch & Bingham LLP, **S. Greg Burge** with Burr & Forman LLP, and **Frank J. Stakely** with Rushton, Stakely, Johnston & Garrett PA have been inducted into the Fellowship.


Denson, Sr.


Denson


Denson, Jr.

Samford & Denson LLP of Opelika recently celebrated its 100th birthday. **Judge N.D. Denson, Sr.** retired from the Alabama Supreme Court and started the firm of Denson & Sons in 1912 and was later joined by his two sons, **John V. Denson** and **N.D. Denson, Jr.** Judge Denson's grandsons, **Yetta G. Samford, Jr.** and **Judge John V. Denson, II**, are senior partners. Other members of the firm are **William F. Horsley, Robert H. Pettey, Joshua J. Jackson, Jennifer M. Chambliss, Andrew Stanley,** and **Chad Wachter.** | AL

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About Members
This section announces the opening of new solo firms.

Among Firms
This section announces the opening of a new firm, a firm's name change, the new employment of an attorney or the promotion of an attorney within that firm.

About Members

Tommy Chapman, former district attorney for Conecuh and Monroe counties, announces the opening of his office at 119 Rural St., Evergreen 36401. Phone (251) 578-2220.

LaKeesha S. Griffin announces the opening of **The Law Office of L.S. Griffin LLC** at 4144 Carmichael Rd., Ste. 11, Montgomery 36106. Phone (334) 356-8033.

Among Firms

Abbott Law Firm LLC of Pell City announces that **Tim Davis** has joined as an associate.

Adams, Umbach, Davidson & White LLP of Opelika announces that **Mindi Robinson** has been named a partner and **Paul A. Clark** and **Jason A. Forbus** have joined as partners.

Allegiance Title Company of Dallas announces that **Kevin Hays** has joined as general counsel.

Richard T. Davis has joined the Birmingham office of **Baker, Donelson, Bearman, Caldwell & Berkowitz PC.**

Balch & Bingham LLP announces that **Alexia B. Borden, Paul H. Greenwood, Jason B. Tompkins** and **Donald Alan Windham, Jr.** are now partners.

Burr & Forman LLP announces that **George David Bronner** has joined as an associate in its Mobile office.

Capell & Howard announces that **W. Allen Sheehan, William R. Cunningham** and **Richard F. Calhoun, Jr.** have joined as shareholders and **Clinton A. Richardson** and **Allison Marshall Wright** have joined as associates.

Cory Watson Crowder & DeGaris announces that **Jon C. Conlin, B. Kristian W. Rasmussen, III** and **F. Jerome Tapley** are now shareholders.

Christian & Small LLP announces that **Jeremy L. Carlson, Jonathan W. Macklem** and **J. Paul Zimmerman** are now partners.

Nathan R. Norris announces that he is now the CEO of the **Downtown Development Authority** of Lafayette, Louisiana.

Farmer, Price, Hornsby & Weatherford LLP announces that

Ashton H. Ott is now a partner and **Lindsay S. Reese** has joined the firm.

Fortson, Bentley & Griffin PA announces that **Trevor T. Jones** has joined the firm.

Bennett L. Pugh of Birmingham announces that he has joined **Franco Signor LLC** as a partner.

Friedman, Dazzio, Zulanas & Bowling PC announces that **Charles A. Nelson, II** has joined as an associate.

Fuller Hampton LLC announces the opening of an office at 200 S. Brundidge St., Troy 36081, and that **Michael T. Bunn** has joined as an associate. Phone (334) 770-0302.

Gaines, Gault, Hendrix & Bishop PC announces that **Charles Todd Buchanan** has joined as an associate in the Birmingham office.

Hagwood Adelman Tipton PC was recently formed and **Hunter C. Carroll, Christopher L. Shaeffer** and **James M. Smith** will practice in the Birmingham office.

Holtsford Gilliland Higgins Hitson & Howard PC announces that **Rebecca L. Chambliss** has joined as an associate.

Huie, Fernambucq & Stewart LLP of Birmingham announces that **Reed Lawrence** and **Jimmy Brady** have become partners.

Jaffe & Erdberg PC announces that **Valrey W. Early, III** and **David Murphree** have joined the firm.

Lanier Ford of Huntsville announces that **David Canupp** has been named a shareholder.

Maynard, Cooper & Gale PC announces that **T. Wesley Brinkley, Kem Marks Bryant, Bryan A. Coleman, Lauren C. DeMoss, W. Brad English, Jessica Stetler Grover, Christopher S. Kuffner, J. Ethan McDaniel, Christopher E. Smith,** and **Donald F. Winningham, III** have been named shareholders. **C. Randall Minor** has joined the firm's Birmingham office as *of counsel* and **Catherine Phillips Crowe** and **Kara Massey Garstecki** have joined as new associates. **Jaime Betbeze** has joined the firm's Mobile office as a shareholder and **Gary L. Rigney** has joined the Huntsville office.

Matthew J. Landreau has been named general counsel of **MedTek Systems LLC** and **CTG Energy Company Inc.** in Auburn.

The **Mobile County Sheriff's Office** announces that **Adam Bourne** has joined as civil division manager.

Larry B. Moore, Ian M. Berry and **Kimberly E. Linville** announce the formation of **Moore, Berry & Linville** at 211 N. Court St., Florence 35631. Phone (256) 718-0120.

Norman, Wood, Kendrick & Turner of Birmingham announces that **William H. McKenzie, IV** and **W.M. Bains Fleming, III** are now partners.

Ogletree, Deakins, Nash, Smoak & Stewart PC announces that **Matthew Tae Phillips** and **Jeremiah J. Rogers** have joined as associates in the Birmingham office.

Prince, Glover & Hayes PC announces that **Blake Williams** has joined as an associate.

Riley & Jackson PC of Birmingham announces that **Nolan Awbrey** and **Jeremiah Mosley** have joined the firm.

Shinbaum & Campbell of Montgomery announces that **H. Arthur Leslie** is no longer associated with the firm.

Former Alabama Supreme Court **Justice Thomas A. Woodall** has joined **Sirote & Permutt PC** as a shareholder in the Birmingham office.

Starnes Davis Florie LLP announces that **Lindsey T. Druhan, Michael T. Scivley, Scott D. Stevens** and **J. Bennett White** are now partners.

Sullivan & Gray LLC announces that **Sarah K. Dunagan** has become a member.

Retired **Jefferson County Presiding Circuit Judge J. Scott Vowell** and **M. Alex Goldsmith** announce the opening of **Vowell & Goldsmith LLC.** Offices are located at 569 Brookwood Village, Ste. 901, Birmingham 35209 (in the offices of Johnston Barton Proctor & Rose LLP). Phone (205) 214-7320.

Wallace & Jordan announces that **Matthew D. Fridy** has become a member. | AL

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For more information about the Institute, visit www.ali.state.al.us.

Spotlight on Local Legislation

With the 2013 legislative session well underway as of the publication of this article, I thought it might be useful to provide a brief primer on how the legislature deals with local legislation–bills which usually constitute a majority of those passed each year.

How local issues are dealt with in Alabama has been a topic of much discussion over the years. In fact, the Constitutional Revision Commission and the legislature are currently considering changes to the Alabama Constitution that, if ratified, could change some of the dynamics of how local governance is shaped, but for the time-being the local legislation process is alive and well.

Home Rule

Local legislation is that which applies to a specific city, county or location as opposed to the state as a whole. The Alabama Constitution of 1901 greatly limits the powers of local government. The power of local government to take action is sometimes called "home rule." Because of the general lack of power at the local government level, most local issues are dealt with by the legislature.

In addition to restricting which bodies have the authority to legislate for local government, the Alabama Constitution of 1901 has some specific requirements related to local legislation. First and foremost, certain subjects are constitutionally banned from consideration in the form of local laws. Section 104 of the Alabama Constitution of 1901 has a list of 31 items prohibited from consideration as local laws. Second, Section 105 prohibits the passage of a local law on a subject already provided for by general law. Third, in order to pass a local law, notice must be provided pursuant to the terms of Section 106.

Notice and Proof

The notice requirement is the one that has created the most problems. Section 106 of the Alabama Constitution of 1901 provides that no local law may be passed unless notice of the legislation is provided in some newspaper published in the affected county or counties at least once a week for four consecutive weeks. Proof that the notice requirement has been met must then be exhibited prior to the introduction of the legislation. This process is called "notice and proof."

The specificity of the published notice is a topic that has been the fodder for debate and litigation over time. The Alabama Supreme Court has most recently restated the requirements as follows:

> The standard that governs this Court's review of the adequacy of notice under § 106 is well settled: "The Constitutional framers adopted the notice requirements of Section 106 intending that 'the essential or material part, the essence, the meaning or an abstract or compendium of the law, was to

be given, and not its mere purpose or subject.' *Wallace v. Board of Revenue*, 140 Ala. 491, 37 So. 321 (1904). Out of the many decisions which have considered that section, four well-defined canons of construction have evolved: (1) the 'substance' means an intelligible abstract or synopsis of its material and substantial elements; (2) the substance may be sufficiently stated without stating the details subsidiary to the stated elements; (3) the Legislature may shape the details of proposed local legislation by amending bills when presented for consideration and passage; and (4) the substance of the proposed act as advertised cannot be materially changed or contradicted. *State ex rel. Wilkinson v. Allen*, 219 Ala. 590, 123 So. 36 (1929)." *Hoadley,* 414 So. 2d at 899. The statement in the notice of the "'substance of the proposed law' means not merely the subject of it, but an intelligible abstract or synopsis of its material and substantial elements," *State ex rel. Murphy v. Brooks*, 241 Ala. at 56, 1 So. 2d at 370.[1]

This requirement often leads to legislators erring on the side of publishing the entirety of proposed legislation. The required specificity can also lead to reluctance to amend the legislation once it has been noticed and introduced.

Prior to the late 1970s, most legislation dealing with local issues was passed by the legislature through the passage of laws that applied to a location having a certain population. These bills were passed in the same manner as a general law and, therefore, bypassed the constitutional requirements pertaining to local legislation. However, in 1978 the Alabama Supreme Court in *Peddycoart v. City of Birmingham* held that such a procedure for passing legislation applying only to certain locations was invalid.[2]

Following the *Peddycoart* decision, the legislature passed, and the citizens ratified, a constitutional amendment that allowed for the creation by statute of classifications of municipalities.[3] The legislature then enacted §11-40-12 of the *Alabama Code* that established eight classes of municipalities. This system allows the legislature to pass general laws that apply to a specific class or classes of municipalities.

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While the classification system now provides a method to pass general legislation that only applies to a grouping of municipalities, no such option exists for dealing with other local legislation. Such legislation, dealing, for instance, with one county, follows another track through the legislative process.

When local bills are filed they are assigned to an appropriate local legislation committee. Unlike most committees that are broken into categories based on the substance of the bill, these committees are based on geography and include the legislators who represent the affected area. In some instances, only one representative or senator might represent an entire county.

Once the bill is favorably reported out of the local legislation committee, it can be placed on the calendar. Both the house and the senate give priority to uncontested local legislation and allow such bills to come up ahead of items on the special order or regular calendar.[4] Any single legislator may contest a local bill and prevent that bill from being passed in this manner. Local bills, just as general bills, follow the same process in the second house, once passed by the house in which they were filed. Following passage by the second house, local bills are forwarded on to the governor for action in the same manner as other legislation.[5]

*Please welcome **Michael Hill,** a visiting Fellow for 2013, to the Alabama Law Institute. Michael has a history of working on energy and water law issues both in Congress and in other states and we look forward to having his expertise this year.* | AL

Endnotes

1. *Jefferson County v. Weissman*, 69 So. 3d 827, 838-839 (Ala. 2011)
2. 354 So.2d 808 (Ala. 1978)
3. Amendment 375, Alabama Constitution of 1901
4. Rule 6 of the Alabama House of Representatives and Rule 8 of the Alabama Senate
5. Significantly more detail on the topic of local legislation may be found in Alabama Legislation (Seventh Edition, 2010) edited by Robert L. McCurley, Jr. and published by the Alabama Law Institute.


free•dom:
noun
the power to determine action without restraint.
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