THE ALABAMA LAWYER

JULY 2020 | VOLUME 81, NUMBER 4

MILITARY LAW ISSUE

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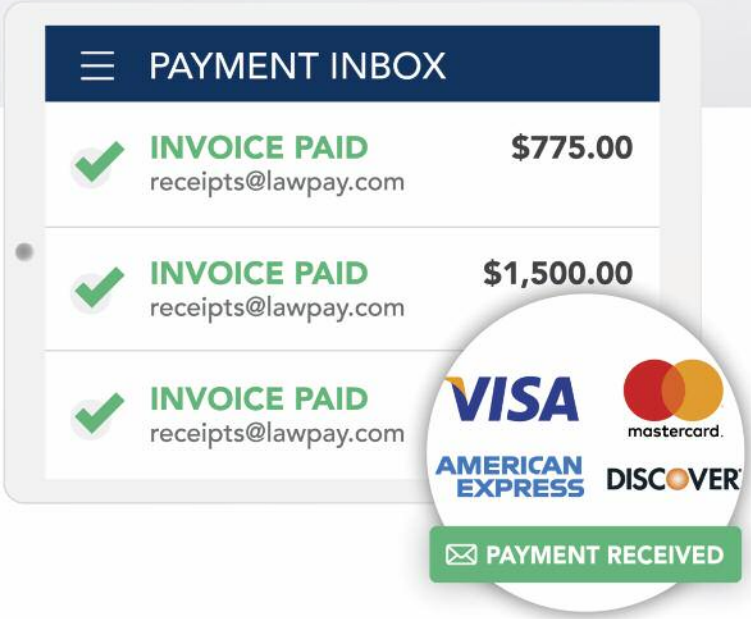

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On The Cover

Nothing could be a more appropriate cover for this edition than Old Glory festooned across the sky, just as it is at every American military base.

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The Alabama Lawyer (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36103-4156.

PRESIDENT'S PAGE

Christina D. Crow
ccrow@jinkslaw.com

A Year in the Life of a Bar President

When I was originally planning my final "President's Page" for *The Alabama Lawyer*, I had envisioned this as a funny, engaging article that would detail all the adventures I have had in my year as state bar president. And, to be sure, there have been plenty of adventures this year. I made it to all four corners of the state with visits to our bar members in Jackson County, Houston County, Mobile and Florence, and many places in between. I had the pleasure of welcoming hundreds of new admittees to our Alabama State Bar. I brought greetings to the Alabama Lawyers Association and met inspirational figures who were on the front lines of the Civil Rights Movement. I have been blessed to get to know a lot of new people, from the members of our appellate courts to the members of the smallest circuits in the state. I thought that by the end of my term as president I would be able to use the words of Johnny Cash, "I've been everywhere, man."

In spite of the carefully-laid plans and programming we had lined up for the rest of my term as your bar president, the Coronavirus had other ideas. What we had envisioned for the spring and summer fell apart. *When Things Fall Apart* author Pema Chodron reminds us that:

Things falling apart is a kind of testing and also a kind of healing. We think that the point is to pass the test or to overcome the problem, but the truth is that things don't really get solved. They come together and they fall apart. Then they come together again and fall apart again. It's just like that. The healing comes from letting there be room for all of this to happen: room for grief, for relief, for misery, for joy.

As my plans fell apart for the end of my term, I grieved the loss of the presidency I planned. But, as I was grieving the loss of what I had planned, I continued serving the presidency I had.

And what a spring it was! With the help of the amazing staff at the Alabama State Bar and the support of our members across the state, we continued to serve our members and the people of Alabama. Over the course of March, April and May, we:

- Presented 11 webinars on managing during the pandemic, working remotely, keeping the courts open, wellness during stressful times and more;
- Held our first ever virtual Board of Bar Commissioners meeting in May with over 90 percent of our commissioners attending virtually;
- Presented the Big Ideas Campaign from the Diversity & Inclusion in the Profession Committee (thanks **Marcus Maples** and **Judge Kelly Pate**);
- Premiered a documentary on Women's Suffrage in Alabama (thanks **Jenna Bedsole, Tom Heflin** and **Allison Skinner**);
- Provided information to teachers around the state on Women's Suffrage for a Virtual Law Day Celebration (thanks **Felicia Long** and the **Judge Frank M. Johnson, Jr. Institute**);
- Welcomed our spring 2020 new admittees (virtually, of course!);
- Helped the Alabama State Bar Young Lawyers' Section set up a disaster hotline (thanks **Robert Shreve, Ryan Duplechin, Linda Lund** and the Volunteer Lawyers programs).
- Started a Wills for Heroes for the new heroes of the pandemic–the health care workers around our state (thanks **Tom Ryan** and **Linda Lund**);
- Offered three free virtual CLEs on health and wellness that counted for your annual ethics CLE and had a virtual Wellness Challenge for the month of May (thanks **Brannon Buck, Susan Han** and **Emily Hornsby**);

(Continued from page 257)

- Kicked off our sponsorship for our Association Health Care Plan so that our members can purchase health insurance through the bar from Blue Cross/Blue Shield of Alabama (thanks **Manesh Patel, Brian Murphy** and **Davis Smith**);
- Had a virtual Legal Food Frenzy and raised over $32,000, which translates to 160,000 meals for Alabama families (thanks **Andrew Blake, Courtney Morman, Jeanne Rizzardi, Jordan Jenkins, Matthew Parten** and all of the Alabama State Bar members and firms that participated);
- Worked with the court system on a COVID-19 Bench & Bar Task Force to make recommendations on how to navigate court appearances and trials post pandemic; and
- Planned a virtual annual meeting offering significantly discounted CLEs to our members, which hopefully a lot of you attended and enjoyed (thanks **ASB staff**, **Kitty Brown** and all our presenters).

The list could go on and on. It also does not include the many amazing things we accomplished prior to the pandemic. I celebrate and am grateful for what we were able to accomplish together, even when it didn't line up with our original plans.

So, after I made room to grieve what I had planned for the spring, I made room for relief. Relief that I was able to spend more time with my family and work at my firm and–quite honestly–relief that I was spending less time on the road. I also made room to sit with pain. Pain of those who are victims of the pandemic and its associated economic aftermath, pain of all of those who are suffering in our world and pain of our divided and hurting country.

Now, I am also making room for joy. While there is much in the world to mourn, I am taking this moment of personal privilege to share my gratitude and joy for all the good I found during my year as your bar resident.

Thank you to the hundreds of people who give of their time to ensure that the Alabama State Bar works hard for all of its members. While I cannot list them all here, I give a special thanks to my Executive Council for all their hard work:

- **Rebekah McKinney**, VP extraordinaire, who was always willing to kick her boys out of their bedroom so I could have a place to stay in north Alabama;
- **Diandra Debrosse**, who I always want to have with me in the trenches;
- **George Parker**, who can pinch a penny until it squeaks, and who put together more member benefits for the bar this year than ever before;
- **Cliff Mendheim**, the voice of reason in the group, even if that voice comes with a musical beat;
- **Robert Shreve**, YLS president and most grateful person to be at the EC retreat because it meant he could sleep through the night without his young babies waking him up; and
- **Glenda Freeman**, Alabama Lawyers Association immediate past president and hostess of one of the most meaningful events I attended this year, the ALA Hall of Fame dinner.

I thank **Sam Irby**, immediate past president, and all of the ASB past presidents I have called on for advice and guidance during the last few months, although many of them started by saying, "Wow! We had some strange things happen during my year but this…." I knew when I became president that I would need advice and guidance from those who served our bar before me, and I appreciate each of you who so graciously provided a listening ear and sage advice.

I also thank **Bob Methvin**, who will have been installed as the 145th president of our state bar by the time this article is printed. Helping our members navigate through a pandemic was not what Bob had planned for his presidency either, but having worked closely with him throughout my career, I know he will bring an energy to this position and a passion for our members that will shine through in everything he does.

Finally, thank you to all our members for the honor of allowing me to serve as the 144th president of the state bar. It has been an incredible and extremely rewarding experience for me, and, at times, a lot of fun. For those who watched our Facebook Live videos, shared our social media posts, supported our communication efforts and provided feedback, I hope it made you feel more connected to the Alabama State Bar and its many wonderful members.

Most of all, thank you to my husband and children, my law firm, the co-counsel and opposing counsel who worked around my schedule this year, the members of the Board of Bar Commissioners, and the staff of the Alabama State Bar for their support and wisdom throughout this journey.

I look forward to continuing the good work we have all done together this year and for remembering that we are always:

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EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org

New Normal

On St. Patrick's Day this year, we made the decision to close the bar building to the public and send our employees home to work remotely. Law firms throughout the state were making similar decisions amid the concerns over the spread of COVID-19.

This worldwide pandemic affected all industries, and the legal profession is no different. Some lawyers found themselves working around the clock to help clients navigate the new and uncharted legal waters. Others were grappling with the substantial decrease in their workload and livelihood.

On top of all that, attorneys took on the challenge of serving clients remotely, implementing new technology to meet with and respond to clients through video-conference.

Through it all, our staff worked hard to keep the business of the bar on track. We immediately developed a COVID-19 webpage to keep Alabama attorneys informed of the rapidly changing situation. Our page featured continuous updates from the supreme court as well as an interactive map which allowed attorneys to view local orders from every judicial district.

Bar leadership regularly met with judicial leaders to address questions and find solutions to keep cases moving forward and the court system open, even though the courthouses themselves were closed to the public.

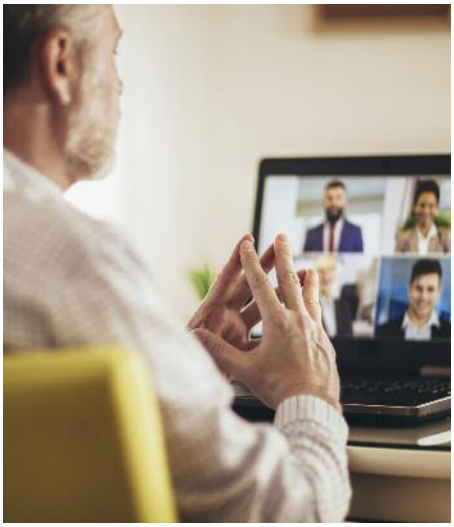
Alabama already had a state-of-the-art electronic filing system, and the courts added the ability to use Zoom video-conferencing within the same platform.

Alabama's attorneys and courts systems stepped up to the plate and used innovative solutions to allow legal proceedings to continue despite the necessary precautions put in place.

If there was one thing we learned from COVID-19, it's that the urgency for modernization has never been greater. Today, the building is back open, as are many law firms, but I believe the legal landscape has been changed forever.

Bar leaders are focused on working with the courts to identify the needs arising from the pandemic, make recommendations to address those needs, and determine solutions to safely and fully re-open the courts.

We have many hurdles to cross, but the Alabama State Bar is committed to providing continued assistance and services to our members as we all navigate this new normal. ▲



IMPORTANT NOTICES

- **Harold Albritton Pro Bono Leadership Award**
- **Notice of and Opportunity for Comment–Amendments to the Rules of the United States Court Of Appeals for the Eleventh Circuit**
- **Position Available–Attorney-27A, Judge Advocate General Corps, Alabama Army National Guard**

Harold Albritton Pro Bono Leadership Award

The Harold Albritton Pro Bono Leadership Award seeks to identify and honor individual lawyers who through their leadership and commitment have enhanced the human dignity of others by improving pro bono legal services to our state's poor and disadvantaged. The award will be presented in October, which has been officially designated Pro Bono Month.

To nominate an individual for this award, submit no more than two single-spaced pages that provide specific, concrete examples of the nominee's performance of as many of the following criteria as apply:

1. Demonstrated dedication to the development and delivery of legal services to persons of limited means or low-income communities through a pro bono program;
2. Contributed significant work toward developing innovative approaches to delivery of volunteer legal services;
3. Participated in an activity that resulted in satisfying previously unmet needs or in extending services to underserved segments of the population; *or*
4. Successfully achieved legislation or rule changes that contributed substantially to legal services to persons of limited means or low-income communities.

To the extent appropriate, include in the award criteria narrative a description of any bar activities applicable to the above criteria.

To be considered for the award, nominations must be submitted by **August 1.** For more information about the nomination process, contact Linda Lund at (334) 269-1515 or *linda.lund@alabar.org*.

Notice of and Opportunity for Comment

Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. The public comment period is from August 5 to September 4, 2020.

A copy of the proposed amendments may be obtained on and after August 5, 2020 from the court's website at *http://www.ca11.uscourts.gov/rules/proposed-revisions*. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta 30303 (phone 404-335-6100).

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address, or electronically at *http://www.ca11.uscourts.gov/rules/proposed-revisions*, by 5:00 p.m. ET on September 4, 2020.

Position Available

Attorney-27A, Judge Advocate General Corps, Alabama Army National Guard

Starting date for position is flexible based on processing time as an applicant to complete vetting through the U.S. Army. Applicants must be members of the Alabama State Bar with an undergraduate degree of 120 semester hours in any discipline and a Juris Doctorate from an ABA-accredited institution. Applicants must be under 33 years of age at the time of commissioning, within U.S. Army height and weight standards and able to obtain a security clearance. Requires no additional experience other than a desire to serve the 10,000 soldiers assigned to the Alabama Army National Guard. The JAG is a part-time employee under Title 32 USC and serves the Alabama Army National Guard. Unit of assignment can be geographically close to the applicant's residence. Starting salary for this position is $505 per individual drill-training weekend and $1,767 for two-week annual training period. While on active duty orders for training and service, salary is increased to $3,787 per month.

Judge Advocates (JAGs) are responsible for offering legal support that involves military operations. They primarily focus on the areas of criminal law, legal assistance, civil/administrative law, labor/employment law, international/operational law, intelligence law, and contract/fiscal law. Duties for the National Guard JAG include prosecution of criminal cases under the Uniform and State Codes of Military Justice, providing legal advice to soldiers and their families, offering legal reviews, ethics opinions, and advice to commanders and their staff, and representing soldiers at court-martials and before administrative separation boards. Interested individuals should contact CH(CPT) Gary Riddle with the Alabama Army National Guard JAG Recruiting office at (334) 590-1587 or *gary.w.riddle4.mil@mail.mil*. ▲

Bradley, Marc Edmund
Mobile
Admitted: 1977
Died: March 15, 2020

Hull, Daniel Talmadge, Jr.
Birmingham
Admitted: 1973
Died: March 15, 2020

Perloff, Mayer William
Mobile
Admitted: 1957
Died: April 5, 2020

Wiseman, Holly Lee
Mobile
Admitted: 1979
Died: April 17, 2020

Arnold Charles Freeman


Freeman

Arnold Charles "Charley" Freeman, supernumerary district attorney from Tuscaloosa County, passed away on December 26, 2018 at the age of 80. Charley served as the district attorney for the Sixth Judicial Circuit from 1980 until 1997. He was a member of the Alabama State Bar for over 50 years.

Charley attended Howard College (now Samford University) before graduating from the University of Alabama with a B.A. degree and a Juris Doctor degree, class of 1967. He was inducted into Omicron Delta Kappa for Outstanding Alumni in 1994.

Charley married Annette Smith while they were in college, and they were married for 57 years until his death. Charley was born in Lamar County, and he graduated from Kennedy High School in 1956. Annette was a native of Fayette County, but moved to Birmingham in 1956. Charley and Annette were active members in the Methodist Church and were members of Forest Lake United Methodist Church and later First United Methodist Church, both in Tuscaloosa.

After graduation, Charley joined the Tuscaloosa firm of Dominick, Roberts & Davidson, and later served as a deputy district attorney for District Attorney Louis Lackey from 1969 until 1974 when he was appointed assistant attorney general for the State Oil and Gas Board and Geological Survey of Alabama. He served in that office until he was elected district attorney in 1980. Charley was elected D.A. three consecutive terms, running unopposed in the second and third elections in 1986 and 1992.

When Charley ran for D.A., his campaign motto was "Firm but Fair." For Charley, that was not just a motto, but a mantra that guided his career and service to the people as well as to the legal profession. Charley worked tirelessly to hold those who committed crimes accountable for their actions. But, he also worked just as tirelessly to implement programs designed to help both the victims of crime as well as defendants to give them a fresh start and fight recidivism.

Charley taught his assistant district attorneys that we were the attorneys for the people, but also we were there not only to convict the guilty, but to exonerate the innocent. We were there to do justice, but also, as he often said, "remember to add some mercy." Charley was a tough prosecutor who fought tirelessly for victims and their rights, but he was never overzealous with the power the office gave him. He was a man of great compassion and integrity. He had the strength to make the hard decisions, but he showed great compassion for people. Charley Freeman stood for whatever was the fair and honorable thing to do, even though it may have been very difficult on him personally or in the office he so honorably served. He never lost sight of the humanity of the people on both sides of the cases he and his office handled. Charley first sought what was right, and then never gave up until the right thing came to pass.

Charley Freeman was instrumental in forming and implementing several innovative programs for Tuscaloosa County, including the Children's Center, Crime Stoppers Program, Drug Court, and Worthless Check Unit. He was a member of the Fraternal Order of Police, served on the Executive Committee of the Alabama District Attorneys Association, and the Advisory Committee of the Alabama Law Enforcement Academy, and was a graduate of the FBI National Academy in Virginia. Charley also served on the Board of Directors for Turning Point and Child Abuse Prevention Services (C.A.P.S.). He hired the first victim service officers in Tuscaloosa County who helped victims obtain restitution and other services needed by traumatized victims and sent notices for court appearances to victims and witnesses. Charley was active in many professional, civic, and charitable organizations, including the Jaycees, Kiwanis Club of Tuscaloosa County, United Way, and advisory boards for the Salvation Army and American Red Cross.

Charley was recognized for his leadership and accomplishments by several organizations, including the Appreciation Award by V.O.C.A.L., the Victims' Advocate Award for "outstanding service to victims of domestic violence" by Turning Point, and the Appreciation Award by the Alabama Coalition Against Domestic Violence for "compassion and contributions on behalf of battered women and children." In 1993, he was awarded the Bishop Barron Award for outstanding community service by the Alabama State Employees Association, and in 1994 he received the Volunteer of the Year Award by United Way. In 2007 he was named a "Pillar of the Community" by the Community Foundation of West Alabama.

Charley loved being of service to others. He was a real person. We remember as much as anything Charley's great sense of humor, as well as his unselfish giving of himself to public service–a true calling. We will miss Charley, and we are all so much the better for his having served Tuscaloosa County, the State of Alabama, and our legal profession.

–Former Assistant District Attorneys Tommy Smith, Clark Summerford, Dennis Steverson, and Daniel Lemley

Judge Roger Dale Halcomb


Halcomb

Judge Roger Halcomb passed away Thursday, February 13, 2020 at the age of 75. Roger was born to Clements Leon and Johnnie Hortense Halcomb. He was preceded in death by his brother, Lionel Judson Halcomb (Kay). He is survived by the love of his life of 50 years, Charlotte Mann Halcomb; two children, John Forrest Halcomb (Suzanne) and Sally Halcomb Mizell (James); his two treasured grandchildren, Jackson and Julianna; his sister and brother, Karen Halcomb Sanders (Fred) and Larry Leon Halcomb (Marilyn); and many nieces and nephews.

He was born in Birmingham on November 2, 1944. Despite having contracted polio at the age of two, he went on to have a successful career and an exceptional life. He graduated with honors from Hueytown High School in 1963, where he was also the senior class president. He then graduated from the University of Alabama and obtained his law degree from Cumberland School of Law in 1974. He dedicated his life in a career to public service, serving as an assistant district attorney, district court judge, and circuit court judge until he retired in 1997. After retiring, he continued his public service as municipal judge for both Hoover and Pleasant Grove, as well as a legal mediator to help others resolve their disputes outside of court.

Roger worked hard for his family, a tireless provider who always put them first. As a judge, he was approachable and kind while being just and fair. He loved the law, but above all loved helping others. To know Roger was to know strong character, honesty, and integrity, and to always feel welcomed. He brought so much joy and laughter to those who knew him and heard his stories. He will be greatly missed and forever remembered.

Judge George S. Wright


Wright

Retired U.S. Bankruptcy Judge George Wright passed away February 10, 2020. Judge Wright, a Tuscaloosa native, was graduated from the United States Naval Academy in 1948. After 10 years of active duty, he returned to Tuscaloosa to attend the University of Alabama School of Law. Judge Wright was a founding member of the Rosen, Wright & Harwood firm. He continued to serve his country in the Naval Reserve and retired as a commander.

In 1961, Judge Wright was appointed as a bankruptcy referee to the United States Bankruptcy Court for the Northern District of Alabama. In 1979, he was appointed as the first United States Bankruptcy Judge for the Western Division of the Northern District of Alabama. He served as Chief Bankruptcy Judge for 10 years. Judge Wright was a five-year member of the National Conference of Bankruptcy Judges and served on the board of governors. The Alabama State Bar awarded him the Eugene Carter Medallion as a judge in recognition of his public service. He was also named as a Pillar of the Bar by the Tuscaloosa County Bar Association.

While serving on the bench, Judge Wright taught bankruptcy law from 1973 to 1996 as an adjunct professor at the University of Alabama School of Law. Judge Wright was also an educator in the courtroom. He taught many a creditor's attorney how to be a graceful loser.

Judge Wright retired from the bench on December 31, 1994. ▲

Practicing Law at the Speed of War

By Lt. Gen. Charles N. Pede, Judge Advocate General, U.S. Army, and Maj. Gen. Stuart W. Risch, Deputy Judge Advocate General, U.S. Army

As the Judge Advocate General and Deputy Judge Advocate General for the United States Army, we have the honor of leading a regiment of over 10,000 of our nation's most dedicated professionals– judge advocates, paralegals, legal administrators, civilian attorneys, and paraprofessionals. Every day, their commitment to selfless service– whether in response to the COVID-19 pandemic, natural disaster relief, prosecuting cases before court-martial, advising and protecting the rights of sexual assault and domestic violence victims, providing counsel to commanders in the field on complex targeting decisions, or defending soldiers facing trial before court-martial–never ceases to impress and amaze us. Members of the nation's oldest law firm are tenacious, driven, and experts in their craft.

Whether serving on active duty, in the Reserves, or as members of our National Guard–whose work is featured in the pages of this journal–the members of our Corps stand ready to serve. We were each called to service and are honored and privileged to serve the greatest clients in the world. We

provide premier legal advice and principled counsel to commanders, soldiers, and family members.

And we do so at the speed of war.

We are everywhere commanders and soldiers can be found, assisting them in making split-second and complex decisions, always with an eye toward getting it right. For us, there is no other way, particularly when it comes to the Law of Armed Conflict. The principles of the Law of Armed Conflict are easy enough to understand; they are intuitive and reflect our values and ideals. However, it is one thing to read the Geneva Conventions, for example, in a classroom or in a discussion with colleagues while enjoying a cup of coffee. It is quite another to apply it in a tent, standing next to a commander with decades of combat experience while troops on the ground are in contact with the enemy, and civilians may be vulnerable to the conflict raging around them. We are there to calmly, coolly, professionally assess the situation and provide precise legal advice–in the moment. There is no practice of law on earth like it.

Similarly, there are few responsibilities more solemn than representing the United States government, as a prosecuting attorney (called "trial counsel" in the Armed Forces), litigating a case before court-martial. We prosecute and defend everything from desertion to drug use to sexual assault and murder, anywhere around the world, including in combat zones.

On one side of the courtroom stand our prosecuting attorneys with the awesome responsibility of protecting the soldiers in the unit from harm, as well as protecting the community that surrounds and supports that formation of soldiers.

On the other side of the courtroom, we have the best trained, most dedicated, courageous, and talented defense counsel anywhere in the world. We are proud to provide them, free of charge, to our nation's sons and daughters who find themselves accused of a crime.

And we have always had the most portable system of justice in the world–by necessity. It must go where our Army goes–to right the wrongs closest to where the wrong occurred and to defend those accused, zealously, and effectively.

The court-martial–which is a federal criminal trial–is the more visible reminder that the Army and its soldiers are not perfect, but we are accountable for our actions.

As different as our military culture may be, we remain a microcosm of society; we see the best and the worst of the human condition–on and off the battlefield. So the JAG Corps plays a key role in the Army's ability to ensure a disciplined and well-ordered fighting force.

Simply put, we are extraordinarily proud of our system of justice–a system rooted in the Constitution and driven by George Washington's belief that "discipline is the soul of an Army."

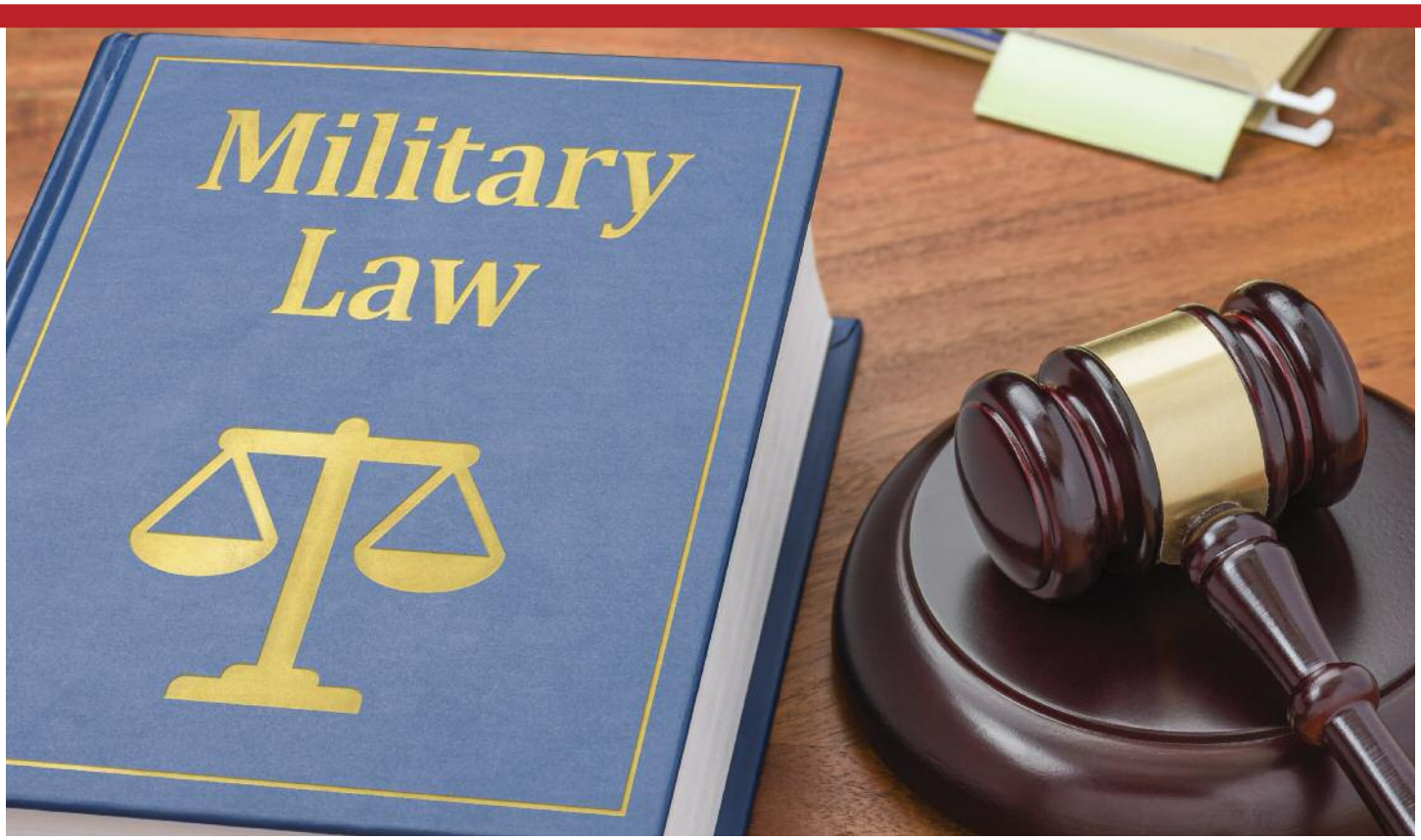
For those of you who have served our great nation, we thank you. If you have read this and see yourself joining our team, or know someone who is up to the challenge, visit us at *www.goarmy.com/jag*. ▲

Lt. Gen. Charles N. Pede

Lt. Gen. Charles Pede graduated from the University of Virginia receiving a commission through R.O.T.C. He then attended the University of Virginia Law School. Lt. Gen. Pede holds an LL.M in military law and a master's degree in national security and strategic studies. He attended the Judge Advocate Officer Basic and Graduate Courses, the Army Command and General Staff College, and the Industrial College of the Armed Forces. Lt. Gen. Pede most recently served as the Assistant Judge Advocate General for Military Law and Operations at Headquarters, Department of the Army in the Pentagon, Washington, DC.

Maj. Gen. Stuart W. Risch

Maj. Gen. Stuart Risch, a native of Orange/West Orange, NJ, was initially commissioned a second lieutenant in the field artillery in 1984. He served as a platoon leader, executive officer, and company commander in the 78th Infantry Division, U.S. Army Reserve, while attending law school. He entered active duty and the Judge Advocate General's Corps in 1988. Prior to assuming duty as the Deputy Judge Advocate General on August 2, 2017, Maj. Gen. Risch most recently served as the Commander, United States Army Legal Services Agency and Chief Judge, United States Army Court of Criminal Appeals, Fort Belvoir, Virginia.



Introduction to the Military Law Edition

By Col. Charles A. Langley

I write to express my appreciation to the staff of *The Alabama Lawyer*, on behalf of the Alabama Military Law Committee of the Alabama State Bar, for dedicating an edition of this publication to focus on the unique aspects of military law. I hope the following articles provide each of you a valuable reference tool that will help prepare you should you encounter issues involving military personnel. The topics selected–the Servicemembers Civil Relief Act (formerly the Soldiers and Sailors Civil Relief Act), the Uniform Services Employment and Reemployment Rights Act (USERRA), the Honoring American Veteran's in Extreme Need (HAVEN Act), and military members' family support, child custody, and paternity obligations–discuss legal issues that are likely to be implicated during almost any attorney's career, but especially those in general civil or family law practices.

The use of the description "military law issue" is a bit of a misnomer. To use a military idiom, the appropriateness of the description depends on the view from your foxhole. Most of the articles in this issue are meant to familiarize civilian practitioners with federal laws enacted to make service to our country less burdensome on those who join the military. For example, employment and economic protections were provided to protect servicemembers ordered to leave their

homes, and their loved ones, to deploy to a foreign land. Violations of many of these laws carry criminal or civil sanctions, enforceable by federal agencies. On the other hand, military regulations were promulgated to protect the children and dependents of servicemembers from being financially abandoned by a parent or spouse (who might be serving in a foreign county with no readily ascertainable address). A failure to meet these familial-support obligations can carry criminal or civil sanctions for the servicemember.

So, just as the laws discussed in this issue provide protections to, or place obligations on, members of the military, they likewise provide protections to, or place legal obligations on, civilian individuals and businesses. It is for this reason these topics are timely and relevant for members of our organization, even those who have never been affiliated with the military.

In addition to these substantive articles, we have included profiles of six members of the bar who serve proudly as judge advocates in the Alabama National Guard. These men and women live out the state bar's motto, "Lawyers Render Service." When these judge advocates are in uniform, they practice in one of six functional areas of military law: military justice, national security law, administrative law, claims, legal assistance, and contract and fiscal law.

The Army Judge Advocate General's Corps (JAG Corps) has a storied history; it is, in fact, America's oldest law firm. Lt. Col. William Tudor was appointed as the first Judge Advocate four weeks after Gen. George Washington took command of the Continental Army. Today, in Alabama, there are 45 Alabama National Guard judge advocates, while there are more than 4,439 Army judge advocates serving in an active or reserve capacity worldwide. For more information about the JAG Corps, or how you can serve as a judge advocate or paralegal, please feel free to contact me.

Finally, this issue is heading to the printer as our nation grapples with the issue of the use of federal and state military forces to maintain peace in our communities. The decision to employ military forces at the state or national level is made by civilian leaders who, hopefully, seek advice from their civilian counsel and military commanders, who will seek advice from the servicing judge advocate. In April 2011, I had the privilege of serving as the command judge advocate for the task force commander in charge of Alabama National Guard's response to the devastating tornado in Tuscaloosa. The extent of the damage necessitated the use of armed soldiers to man traffic-control checkpoints and to enforce curfews. The fact that there was not a single incident involving the use of force by a soldier against any citizen speaks to the professionalism of Alabama's citizen-soldiers and to the intense, focused training provided by our judge advocates. The active and reserve components of the military need future generations of lawyers willing to carry out "Lawyers Render Service" in order to ensure that our civilian and military leaders continue to receive sound, professional, and conflict-free legal advice during these times of crisis.

I hope our efforts in this issue are helpful to you and your practice. In the future, if you have a client with an issue that touches on military law, please reach out to our judge advocates or members of the Military Law Committee. ▲

Col. Charles A. Langley

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SERVICE TO THE FAMILY: The Military Member's Obligation to Support Their Dependents

By Maj. Bryan M. Taylor

Military members have a unique obligation under service regulations

to provide financial support for their family members. Their obligation to provide familial support exists even in the absence of a divorce decree or other child support order,[1] and while each service maintains its own regulation, a failure to meet the obligations of an applicable regulation can have dire consequences. Such consequences even include criminal prosecution under the Uniform Code of Military Justice for failure to obey a lawful order or regulation; more commonly known as a court-martial. To provide competent representation, a lawyer should possess familiarity with these military regulations prior to representing a client in a divorce or child-custody matter where one of the parties is a military servicemember.

This article discusses the family-support requirements imposed by Army Regulation (AR) 608-99, which may apply to Army reservists and National Guard personnel in some instances.[2] While this article does not specifically address the Air Force, Navy, Marine Corps, and Coast Guard regulations requiring family support, familiarity with the Army's regulations will facilitate an understanding of the corresponding provisions in each Armed Service's regulations.

What obligations does a soldier have to support his or her family?

Active-duty soldiers are legally required "to provide financial support to family members."[3] The soldier's obligation to support their family is such that they are expected to keep "reasonable contact with family members, as well as others who have a legitimate need to know" to resolve family-support issues without command involvement.[4] "Allegations or even proof of desertion, adultery, or other marital misconduct, or criminal acts on the part of a [*current*] spouse" do not excuse a soldier's obligation to provide support to their family.[5]

In the Army, AR 608-99 provides the regulatory mechanism for determining, calculating, and enforcing this support obligation; not just in the context of divorce, paternity, or child support proceedings, but whenever a dispute arises–typically between spouses–as to whether the servicemember has failed to provide financially for their family. Under this regulation, a soldier cannot fall into arrears on financial support to their family without violating AR 608-99.[6] And when a soldier fails to meet their obligation to financially support their family, their military commander is responsible for directing and enforcing compliance, including the use of punitive disciplinary action if necessary.[7]

In cases where children are involved, the obligation of financial support terminates on the child's 18th birthday unless a written agreement or court order mandates post-minority support.[8] In cases involving financial support for a prior spouse, soldiers are not required to provide support unless mandated by a final divorce decree or other court order.[9] In certain circumstances–usually when spouses have been separated for more than 18 months or when a child is placed in the custody of a person who is not the lawful custodian of the child–a commander can release a soldier from a support obligation that exists solely by virtue of regulation.[10]

A lawyer representing a soldier's family members, including a guardian ad litem appointed to represent a dependent child, should understand that a complaint of nonsupport may be lodged even when divorce is not contemplated (for example, when a soldier is deployed overseas and cuts off financial support to his family for any reason). A lawyer advising a soldier should understand their client's obligations under Army regulations in order to protect them from financial hardship and adverse personnel actions.

How do I calculate the amount of financial support a solider is required to provide?

In cases involving a soldier, the amount of financial support owed to their family will be determined by a court order, a written agreement, or a regulation.[11] Where a court order exists, the provisions of AR 608-99 do not replace, and cannot reduce, the family-support obligation imposed by the court.[12] Soldiers, like their civilian counterparts, must follow court orders.

In the absence of a court order, any *specific* amount of financial support contained in a written agreement controls.[13] Written agreements can include a signed marital-settlement agreement awaiting court approval, an informal separation agreement between spouses, or a stand-alone agreement between unmarried parents who have worked out a child support plan without court involvement. If a written agreement between spouses establishes an agreed-upon amount of financial support, Army commanders are obliged to enforce it "without making interpretations that depart from the clear meaning of the agreement."[14] Keep in mind, however, that parties cannot "revise" a court order through prior or subsequent written agreement. In such cases, a commander would be required to enforce the court order, rather than the written agreement.

Finally, where no court order or written support agreement exists, soldiers must provide financial support in an amount determined by a relatively simple formula contained in AR 608-99. The Army's formula is based on a monthly allowance known as the Basic Allowance for Housing, or BAH. A soldier's BAH is based on their geographic duty location, pay grade, and whether they have dependents. For purposes of determining the amount of family support owed in the absence of a court order or written agreement, AR 608-99

uses a derivative rate referred to as "BAH II-WITH," which is the BAH rate for a soldier *with* dependents and *without* regard to duty location. Fortunately, soldiers, commanders, and lawyers can easily determine the applicable BAH II-WITH amount by using a one-page chart maintained by the Department of Defense's travel office: *https://www.defensetravel.dod.mil/Docs/perdiem/browse/Allowances/Non-Locality_BAH/2020-Non-Locality-BAH-Rates.pdf* (last accessed May 11, 2020).

Once the BAH II-WITH amount is determined for a soldier, the amount of the required financial support obligation is reached by dividing the BAH II-WITH amount by the total number of family members supported by the soldier. In other words, each family member is entitled to their pro-rata share. If a soldier's family members reside in military-provided housing, however, no additional financial support is required.[15] Additionally, a former spouse is not counted as a "family member" for purposes of this calculation, even if the soldier is providing financial support pursuant to a court order or written agreement.[16] Finally, a spouse on active duty in an Armed Service is not considered a "family member" for purposes of this formula.

In the simplest case, a single-family unit living apart from the soldier and not in military-provided housing, the soldier's monthly support obligation would be the entire BAH II-WITH rate. Other cases may be slightly more complicated. For example, if a soldier is separated from her spouse and their only child resides temporarily with a grandparent, the soldier's monthly obligation would be to contribute one-half of the BAH II-WITH amount to her spouse and the other half to the grandparent, on behalf of the minor child. A more complex example involving multiple family units would be presented where a deployed soldier's minor child resides with a prior spouse, the soldier has remarried and had another child, and does not live in military-provided housing. In that case, the soldier would be obligated to financially support three family members (the current spouse and the two minor children), with the financial support obligation consisting of the court-ordered child support amount for the minor child residing with the prior spouse, payment of one-third of the BAH II-WITH amount to the current spouse, and one-third of the BAH II-WITH amount to the current spouse on behalf of the minor child.[17]

For example, if a soldier is separated from her spouse and their only child resides temporarily with a grandparent, the soldier's monthly obligation would be to contribute one-half of the BAH II-WITH amount to her spouse and the other half to the grandparent, on behalf of the minor child.

As noted earlier in this article, a soldier's family-support obligation under AR 608-99 continues even in cases of alleged desertion, adultery, or marital misconduct, unless the obligation is terminated by an appropriate officer. Thus, in a case where a divorce decree requires a soldier to pay $100 per month in child support for each of his three children from a prior marriage (a total of $300), and where his current spouse abandons him and the child they share, the soldier would be obligated to pay the $300 per month in child support, plus one-fifth of the BAH II-WITH amount to his current spouse. The financial obligation to the current spouse would continue until superseded by a court order or written agreement, or until the soldier's battalion commander releases him from the requirement (typically, after 18 months).[18] While it is not possible to cover all of the possible scenarios, the rules contained in AR 608-99 are straightforward and Appendix B of the regulation contains a number of helpful examples.

Unless otherwise required by a court order or written agreement, monthly support obligations are due no later than "the first day of the month following the month to which the financial support payment pertains."[19] For example, a support payment for the month of July would be due by August 1. For a partial month–for example, where the spouses separated on June 15–

the BAH II-WITH amount is pro-rated according to the number of days the family was separated. For example, a married soldier without children would be required to pay one-half of BAH II-WITH to her estranged husband on July 1 for the 15 days of June that he lived outside of military-provided housing.[20]

Representing a Family Member in a Nonsupport Claim

One important goal of Army Regulation 608-99 is having soldiers manage the financial support of their families in a manner that does not bring discredit upon the United States Army and avoiding having the financial needs and welfare of military dependents become official matters of concern.[21] When a complaint is lodged that a soldier is failing to provide support to their family, however, the financial needs and welfare of the military dependents become official matters of concern and Army commanders must get involved.[22] While commanders have no power to collect arrearages or to order soldiers to pay arrearages, commanders must take action to require compliance with the regulation from the date of the complaint.

There is no specific format for a complaint. A lawyer representing a family member who is not receiving the required financial support should initiate a complaint by letter or email to the soldier's immediate commander or, if unknown, to the first higher-level commander known to be in the soldier's chain of command. If necessary, a complaint can be sent to the installation commander or the staff judge advocate's office.

An inquiry, or complaint, is "any telephone call, letter, facsimile transmission, e-mail, or other form of communication from, or clearly on behalf of, an affected family member" that requests information, makes a claim for money, or asks for other relief about financial support involving a soldier.[23] As a matter of best practices, a complaint should provide the names and addresses of the family members entitled to support, a statement of the monthly amount to which they are entitled, and the basis for the claim. Additionally, if the basis of the financial support owed is a court order or written agreement, a copy of the relevant document should be attached. Where the basis of the financial support owed is AR 608-99, a complaint should explain how the calculation was made, including the BAH II-WITH amount relied upon. Finally, a complaint should state a request for a particular method of payment (e.g., personal check, money order, or voluntary allotment (similar to payroll deduction)).

A commander is required to investigate an allegation of nonsupport and respond directly to the family member or their attorney within 14 days of receipt of the complaint.[24] If the soldier is unable to substantiate compliance with their support obligations (for example, by cancelled checks, bank statements, etc.) and there is no legal basis for the soldier to be relieved of the support requirement, then a commander must order the soldier to begin complying with the regulation and to make payment no later than 30 days from receipt of the complaint.[25]

Lodging a complaint with a military commander does not affect any other legal recourse that a family member may have. For example, a soldier's pay can be garnished for failure to pay court-ordered alimony or child support. An involuntary allotment can be administratively initiated if a soldier is behind in child support or spousal support payments. Initiation of a garnishment or an involuntary allotment requires action by a court or an administrative agency, such as the Defense Finance and Accounting Service (DFAS).

Representing a Soldier in A Nonsupport Claim

As indicated previously, a claim of nonsupport can have a significant impact on a soldier's military career. A lawyer whose military client has been the subject of a nonsupport complaint must be knowledgeable of the soldier's obligations, must communicate them clearly, and should explain the range of potential consequences of noncompliance. If the soldier raises mitigating circumstances, the lawyer should understand the available, though limited, avenues for relief provided by regulation.

While soldiers in this position are entitled to free legal counsel from their serving judge advocate's office, judge advocates cannot represent soldiers in civilian court proceedings. Consequently, there is a great opportunity for cooperative representation between a soldier's civilian and military attorneys to provide

maximum legal protection while reducing the financial burden on the servicemember/client. Civilian attorneys should not hesitate to encourage their military clients to form an attorney-client relationship with a judge advocate and to authorize a joint representation arrangement.

When a soldier is informed by his or her commander that an allegation of financial nonsupport has been made, the commander must notify the soldier of their rights–similar to a *Miranda* warning–under Article 31 of the Uniform Code of Military Justice.[26] Because of the potential criminal penalties for violating AR 608-99, it is usually wise to advise the soldier to exercise their right to remain silent, unless the soldier can clearly substantiate their compliance with supporting documentation. If a soldier admits that they have violated a court-ordered support obligation, a written agreement, or the regulatory requirements for support, the commander may charge the soldier with a criminal violation of the Uniform Code of Military Justice, administer non-judicial punishment, issue a reprimand, or subject the soldier to other adverse administrative action. In the vast majority of first-time cases, however, a commander will simply order the soldier to bring themselves into compliance. The best advice for soldiers in that situation is to acknowledge the commander's order, salute, and start making payments as required.

Under certain circumstances, soldiers may request relief from their family support obligations. The circumstances include: (1) that a court order was issued by a court without jurisdiction; (2) that a court order is silent as to the soldier's obligation to provide financial support; (3) that the income of the spouse exceeds the military pay of the soldier; (4) that the soldier has been the victim of a substantiated instance of physical abuse by the spouse; (5) that the supported family member is in jail; (6) that the supported child is in the custody of another who is not the lawful custodian; or (7) that the soldier has provided the support required by regulation to an estranged spouse for at least 18 months.[27] Requests for relief can only be granted by a special court-martial convening authority, a battalion commander, or higher level of command.

A lawyer whose military client has been the subject of a nonsupport complaint must be knowledgeable of the soldier's obligations, must communicate them clearly, and should explain the range of potential consequences of noncompliance.

Conclusion

Family law practitioners have many legal options to secure financial support for family members in various domestic relations scenarios. An understanding of the various military regulations requiring servicemembers to support their spouses and dependent children, including AR 608-99, adds an additional option whenever a servicemember's family is involved. Conversely, lawyers representing military clients in the domestic relations context must understand the extra-judicial requirements of support imposed by military regulation, to protect their clients from the adverse administrative or criminal consequences that can result from nonsupport. Considering the large (and growing) number of military installations in and around Alabama,[28] knowledge of these requirements is critical to those in the domestic-relations field. ▲

Endnotes

1. *See, e.g.*, Air Force Instruction (AFI) 36-2906. *Personal Financial Responsibility*, 9 July 2013; Army Regulation (AR) 608-99. *Family Support, Child Custody, and Paternity*, 29 October 2003; Coast Guard Commandant Instruction Manual (CIM) 1600.2. *Discipline and Conduct*, October 2018 (Chapter 2.E, Support of Dependents); Marine Corps Order (MCO) 5800.16-V9. *Legal Support and Administration Manual*, 20 February 2018 (volume 9, Dependent Support and Paternity); Naval Military Personnel Manual (MILPERSMAN) 1754-030. *Support of Family Members*, 26 April 2006.
2. AR 608-99 applies to members of the Reserve Component (including members of the National Guard) on active duty orders of at least 30 days or while mobilized on Title 10 orders. AR 608-99, p. i. Whenever a member of the National Guard serves on Title 32 orders, the punitive provisions of the AR 608-99 do not apply.
3. AR 608-99, para. 2-1a. As to members of the Army Reserve and National Guard, see note ii, *supra*.
4. AR 608-99, para. 2-1c.
5. Para. 2-6a.
6. *Id.*, at para. 2-5c.
7. *Id.*, at para. 2-5b.

Practice Pointers

1. Encourage your client to speak with a legal assistance attorney in the military installation's Staff Judge Advocate's office. Form a cooperative relationship and consult often with your client's military attorney to take advantage of their specialized legal and military expertise. In cases involving the Army, both servicemembers and dependents are entitled to legal assistance.
2. Determine the servicemember's BAH II-WITH rate. Armed with that amount, you can determine whether any proposed written support agreement or the regulatory financial support obligation imposed by Army Regulation 608-99 would be in your client's best interests.
3. When a court requires child-support payments, but not spousal support, in a pendente lite order, the non-military spouse can seek the amount of financial support owed by AR 608-99.
4. Familiarize yourself with the range of consequences in each branch of service for a violation of the servicemember's family support obligations. Your knowledge can be used to obtain the required amount of financial support, if you represent the family member, or to protect the financial interests and military career of the servicemember.

8. AR 608-99, Glossary, Section II, *Family Member*.
9. *Id.*, at para. 2-3b(3)(a).
10. AR 608-99, para. 2-14.
11. AR 608-99, para. 2-5a.
12. *Id.*, at para. 2-4a. In very limited circumstances, a military commander may release a soldier from compliance with an order issued by a court without jurisdiction. AR 608-99, para. 2-14b(1). Even then, the soldier would be required to comply with the order until released from the obligation.
13. *Id.*, at para. 2-3b. If a written agreement does not contain a specific amount, the support obligation will be determined under paragraph 2-6, as if there was no written agreement.
14. *Id.*, at para. 2-3b(2).
15. Soldiers are not required to provide support for family members who are still living in government housing. AR 608-99, para. 2-6d(2).
16. *Id.*, at para. 2-6c.
17. *See generally* AR 608-99, Appendix B-5a.
18. Although a special court-martial convening authority, or battalion commander, can release a soldier from the regulatory requirement imposed by AR 608-99, this authority is limited, and requests are subject to legal review by a judge advocate. AR 608-99, para. 2-12. In cases of spousal separation, release of a soldier from providing support to a spouse requires the provision of support for 18 months. *Id.*, at para. 2-14b(6).
19. AR 608-99, at para. 2-9b.
20. *Id.*, Appendix B-4c.
21. *Id.*, at para. 1-5.
22. *Id.*, at para. 2-1b.
23. *Id.*, at para. 3-1a.
24. *Id.*, at para. 3-5.
25. *Id.*, at para. 3-6.
26. *Id.*, at para. 3-3.
27. *Id.*, at para. 2-14.
28. Alabama is host to Coast Guard Sector Mobile and the Coast Guard Aviation Training Center in Mobile, Fort Rucker near Enterprise, Maxwell Air Force Base in Montgomery, the Anniston Army Depot, and Redstone Arsenal in Huntsville, while portions of Fort Benning, Georgia, cross into our state. Additionally, full-time, active duty soldiers and airmen are assigned to National Guard bases at Fort McClellan in Anniston, Sumter Smith Air National Guard Base in Birmingham, and Dannelly Field Air National Guard Base in Montgomery.

Maj. Bryan M. Taylor

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An Overview of the Servicemembers Civil Relief Act and the Uniformed Services Employment and Reemployment Rights Act

By Capt. James R. Houts and Maj. O. Scott Hewitt

Alabama, home to three active-duty military installations, an Army depot, and a robust structure of National Guard and Reserve units, has approximately 27,000 uniformed servicemembers residing within its borders at any time. Additionally, each year between 2,000 and 3,000 Alabamians join the Armed Forces. These factors mean that many Alabama lawyers will encounter legal issues that are implicated by an individual's military service at some point in their practice of law, whether the lawyer represents the servicemember (or veteran) or another party.

Two federal laws enacted to protect members of the Armed Forces are the most likely to be encountered at least once during a lawyer's career. They are the Uniformed Services Employment and Reemployment Rights Act ("USERRA") and the Servicemembers Civil Relief Act ("SCRA"). The intricacies of these laws cannot be conveyed in a single article, but this should be a good starting point.

Servicemembers Civil Relief Act

The SCRA provides certain legal protections to servicemembers "to enable such persons to devote their entire energy to the defense needs of the Nation" and "to provide for the temporary suspension of judicial and administrative proceedings and transactions that [might] adversely affect the civil rights of servicemembers during their military service."[1] Due to the scope of the protections provided by the SCRA–impacting debt-collection practices, contracts, and civil procedure–civil practitioners should have some familiarity with this law.

SCRA's Rights, Protections, And Applicability

The SCRA allows servicemembers to cap interest rates,[2] to avoid default judgments,[3] to avoid nonjudicial foreclosure,[4] to cancel installment contracts,[5] to stay judicial proceedings,[6] to avoid repossessions,[7] to terminate leases,[8] and to prevent enforcement of storage liens[9] under certain circumstances. For members of the National Guard and Reserve components, the servicemember must be on Title 10 orders, orders for full-time training duty, annual training duty, or attendance at a school designated as a service school activated under 32 U.S.C. § 502(f) (2018), for a period of 30 consecutive days or more.[10] Any person who enlists or accepts a commission for service in the Army, Navy, Air Force, Marine Corps, Coast Guard, or for "active service" in the Public Health Service or the National Oceanic and Atmospheric Administration is protected upon entry into such service.[11]

As to default judgments, plaintiffs are required to file an affidavit stating that the defendant is either not in the military service, is in the military service, or the plaintiff, after making a good faith effort, does not know the defendant's status.[12] This requirement is reflected in item 7 of the Unified Judicial System's Form C-25, *Application and Affidavit for Entry of Default*. Plaintiff's counsel can satisfy this requirement, as to military servicemembers, by using a Department of Defense website established for this purpose.[13] Where the servicemember has notice of the action and is serving on active duty, or is within 90 days of release from active duty, they are entitled to a stay.[14] Upon application by the servicemember, or on a court's own motion, a court must stay a legal action for not less than 90 days when the servicemember submits a letter explaining why military duty requirements materially affect their ability to appear and state when he may appear along with a letter from their commanding officer stating that the servicemember's duty prevents their appearance and that they are not authorized leave.[15]

Installment contracts and leases are another area where the SCRA can have significant application. Cell phone contracts, apartment leases, automobile leases, gym memberships, and similar contractual relationships can be terminated by a servicemember upon entry into qualified service.[16] In addition to residential leases, the SCRA also applies to a lease of premises "occupied, or intended to be occupied" by a servicemember for "professional, business, agricultural, or similar purpose[s]."[17] A servicemember's dependents may also enjoy the SCRA's rights and protections as to installment contracts and leases, although this typically requires an application to a court for relief.[18]

In order for a contract or lease to be unilaterally terminated under the SCRA, the contractual relationship must have been entered prior to the servicemember's entry into qualified service. Of importance, the average National Guardsman or Reservist does not enter into a period of qualified service simply by virtue of their military membership. It is only upon receipt of orders for qualifying service–such as an active duty deployment to Kuwait or Afghanistan–that the servicemember is considered to have attained "entry" into military service. Businesses and individuals who engage in "self-help" against a servicemember, contrary to the terms of the SCRA, are subject to criminal prosecution.[19]

Although a servicemember may waive any of the SCRA's rights and protections, any such waiver is effective only if it is (1) in writing, (2) is executed as an instrument separate from the obligation or liability to which it applies, and (3) is in at least 12-point font.[20] Additionally, in the case of waivers of rights involving (1) the modification, termination, or cancellation of a contract, lease, or bailment; (2) an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage; or (3) the

repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that is security for any obligation, or was purchased or received under a contract, lease, or bailment, the waiver will only be effective if the written agreement is executed *during* or *after* the qualifying period of military service.[21]

Finally, the SCRA provides some protections in child-custody cases. A thorough discussion of the practical application of those provisions, however, would exceed the limited purpose of this article. Family law practitioners are encouraged to become familiar with the SCRA's child-custody protections when faced with "best interest of the child" determinations predicated on a parent's military service.[22]

Enforcement of SCRA's Provisions

The United States Department of Justice's Civil Rights Division is tasked with enforcing the SCRA. The United States Attorney General is authorized to file a federal lawsuit against any person or entity who engages in a pattern or practice of violating the SCRA, or where the facts in a case raise "an issue of significant public importance."[23] These lawsuits may seek monetary damages for a servicemember, civil penalties, equitable relief, and/or declaratory relief.[24] Examples of federal enforcement against those who have violated the SCRA's provisions can be found on the Department of Justice's SCRA website.[25]

State-Law SCRA Protections

Alabama law provides SCRA-like protections to members of the National Guard who are ordered into active military service by the state governor, who perform homeland security operations under 32 U.S.C. § 502(f), or who perform state active duty for 30 days or more.[26] In such cases, state law incorporates the provisions of the SCRA and USERRA (discussed below).[27]

Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights provides certain employment and reemployment rights to those who have served satisfactorily in the Armed Forces or who are currently serving in the National Guard or Reserve components of the military.[28] USERRA arose out of the Selective Training and Service Act of 1940 and the Universal Military Training and Service Act of 1951.[29] The United States Supreme Court, describing the purpose of the original 1940 legislation, wrote that the law protected "[h]e who was called to the colors" such that the servicemember would not "be penalized on his return by reason of his absence from his civilian job."[30] The veteran was "to gain by his service for his county an advantage to which the law withheld from those who stayed behind."[31] According to the Court, such protections were "to be liberally construed for the benefit of those who left private life to serve their county in its hour of great need."[32]

In 1994, Congress codified these protections for veterans and servicemembers by enacting USERRA. The specific purposes for the law are set forth in the act itself; namely, "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service," "to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service," and "to prohibit discrimination against persons because of their service in the uniformed services."[33] As federal law has evolved from the Selective Training and Service Act of 1940 to USERRA, the Supreme Court has consistently required liberal construction of federal employment and reemployment rights in favor of veterans and servicemembers.[34]

USERRA prohibits discriminatory hiring practices against persons who serve in the uniformed services.

USERRA's Rights, Protections, And Applicability

USERRA prohibits discriminatory hiring practices against persons who serve in the uniformed services. Servicemembers or veterans cannot be denied initial employment, reemployment, retention, promotion, or other benefits on the basis of their status.[35] An employer is considered to have engaged in prohibited actions if an employee's membership, application for membership, service, application for service, or obligation of service in the uniformed services is a motivating factor in the employer's action, "unless the employer can prove that the action would have been taken in the absence of such" service.[36] In a 2011 opinion in a "cat's paw" case, the Supreme Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[37]

Although the demands caused by the part-time military service of an employee can be difficult on both employer and employee, the "timing, frequency, and duration of the person's training or service" or the voluntary nature of such service, "shall not be a basis for denying protection" if the servicemember complies with USERRA's requirements.[38] Those requirements include the servicemember's having given her employer advance written or verbal notice of the required absence for uniformed service, applying or reporting for reemployment within the statutorily-imposed period (based on the length of uniformed service), and having not been cumulatively absent from that employer for uniformed service in excess of five years.[39] The pre-service notice requirement can be waived if provision of notice was precluded by military necessity or

was impossible or unreasonable.[40] Similarly, the five-year limit on cumulative length of service-connected absence is not absolute, as numerous types of uniformed service are excluded from consideration, such as mobilizations in times of war or national emergency, or for certain operational support missions.[41] Most notably, the "one weekend a month, two weeks a year" periods of service associated with the National Guard and Reserve are also excluded from the five-year limit.

Depending on the length of the employee's uniformed service, the employee has between eight hours to 90 days to report to their employer and seek reinstatement.[42] An employee's notice or application can be oral or written.[43] The employer must provide "prompt reemployment," which can range from "the next regularly scheduled work day" following weekend National Guard or Reserve duty to several weeks "following several years of active duty" when the employer has to "reassign or give notice to another employee who occupied the returning employee's position."[44]

Employers are permitted to require those seeking reemployment under USERRA to provide documentation that the person's application for reemployment is timely, that they have not exceeded the five-year limit on absences for uniformed service (or, that certain time in uniformed service was exempt from the limit), and that they remain eligible based on their characterization of service or discharge.[45] Employers, however, cannot delay prompt reinstatement of an employee by requesting documentation that does not exist or is not readily available.[46] The United States Secretary of Labor has specified certain types of documents as sufficient to satisfy an employee's obligation to provide documentation to her employer.[47]

Employers are not required to reemploy a servicemember if the employer's circumstances changed during the servicemember's absence such that reemployment would be impossible or unreasonable.[48] For example, if the manufacturing plant where the employee had worked was closed during her military service, and the employee would have been terminated from employment with the other plant employees, the employer is not required to grant her reinstatement.[49] Further, if a servicemember was injured and disabled while performing uniformed service, an employer is not required to train or accommodate the servicemember if doing so would impose an undue hardship on the employer.[50] Finally, reemployment of a servicemember is not required where the previously employment was for a brief, nonrecurrent period where there had been no reasonable expectation that the employment would continue indefinitely or for a significant period.[51] These exceptions, however, are affirmative defenses that must be raised and proved by the employer.[52]

A significant protection offered by USERRA pertains to a servicemember's right to seniority, and certain other benefits, upon their reemployment; seniority and benefits sufficient to restore the employee to the position they would have been in but for military service.[53]

A significant protection offered by USERRA pertains to a servicemember's right to seniority, and certain other benefits, upon their reemployment; seniority and benefits sufficient to restore the employee to the position they would have been in but for military service.[53] While the scope of the rights and seniority protections required to be accorded to the servicemember vary based on the length of the uniformed service and whether injury or disability to the servicemember occurred,[54] the Supreme Court's "escalator" principle provides a basic understanding of USERRA's requirements. A reemployed servicemember or veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[55] Today, the escalator principle applies to USERRA claims through the Department of Labor's rulemaking authority.[56]

Thus, as a general rule, an employee "is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service," including pay, benefits, seniority, and other job perquisites "that he or she

would have attained if not for the period of service."[57] Such benefits may include entitlement to FMLA coverage,[58] bonuses or leave time based on longevity or length of service,[59] merit-based pay increases (based on the employee's pre-service work history),[60] and pension plan contributions and service credit.[61] Although the "escalator principle" generally results in favorable treatment for an employee, some adverse results are possible. For example, if the employee's seniority and job classification places them in a category of workers currently laid off by the employer, the employee can be reinstated into a laid-off position.[62]

USERRA does not automatically require the grant of non-seniority-based benefits to reemployed servicemembers. In the case of non-seniority-based benefits, an employer must only provide those benefits or privileges that are given to similarly-situated employees who are on furlough, leave of absence, or similar leave status.[63] For example, accrual of vacation leave is a non-seniority benefit that must be provided to an employee returning from a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[64] Where an employer has multiple categories of furlough or leaves of absence, a USERRA-covered employee is entitled to the most favorable treatment accorded under any comparable form of leave.[65]

Once reemployed, USERRA provides the employee protection from discharge. If an employee performed uniform service more than 30 days, she cannot be discharged, except for cause, for 180 days.[66] If she served more than 180 days, the protection from discharge grows to one year.[67]

The protections provided by USERRA supersede state and local laws and ordinances, or any "contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit" provided under the statute.[68] For example, a police department's "return-to-work" policy cannot be used to delay reinstatement of a returning servicemember, even if the policy applies to all the department's employees.[69] Similarly, an employment contract basing seniority credit on "actual days of work in the place of employment" would be superseded by USERRA, due to the fact it requires seniority credit for periods of absence due to uniformed service.[70] Most courts to have addressed the issue, including the Eleventh Circuit, have found that arbitration clauses are not superseded by USERRA and can be enforced.[71]

USERRA applies to almost all public and private employers, including federal, state, and local governmental bodies without regard to their size or overall number of employees.[72] Foreign businesses with physical locations inside the United States must comply with USERRA as to any employees inside the United States.[73] American companies operating in foreign countries must comply with USERRA for all operations (domestic and foreign), unless compliance would violate the law of a foreign country where the workplace is located.[74] USERRA also applies to successors-in-interest of a servicemember's employer.[75] Although USERRA does not apply in the student-educational institution context, practitioners should note that USERRA-like protections are available to post-secondary students whose educational studies are interrupted by voluntary or involuntary military service under federal and state law.[76]

Enforcement of USERRA

USERRA is primarily enforced through the United States Department of Labor, Veterans' Employment and Training Service.[77] An individual who believes their rights under USERRA have been violated may file a complaint with the United States Secretary of Labor for investigation.[78] If the Secretary of Labor finds a complaint against a state or private entity to be founded, she may refer the complaint to the United States Attorney General for legal action.[79] Additionally, a private cause of action is available to an individual without regard to whether they filed a complaint with the Secretary of Labor.[80]

Non-USERRA Employment Considerations

In addition to USERRA, employers and employees should also be aware that the Family Medical Leave Act also contains provisions dealing with military service. Among the situations entitling an employee to FMLA leave, Congress added leave for a "qualifying exigency" arising out of the fact

that the spouse, son, daughter, or parent of an employee is placed on "covered active duty" or has been notified "of an impending call or order to covered active duty" in the Armed Forces.[81] For active-duty family members, the United States Department of Labor defines "covered active duty" as "during deployment of the member with the Armed Forces to a foreign country."[82] For reserve-component family members, "covered active duty" is defined as deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation."[83] "Qualified exigencies" include issues arising from a short-notice deployment (deployment within seven days of notice), deployment-related ceremonies, certain childcare and related activities arising from the servicemember's deployment, making financial and legal arrangements, attending counseling, spending time with the servicemember on "Rest and Recuperation" leave during the deployment, and certain post-deployment activities within 90 days of the end of the covered active duty period.[84]

In Alabama, employees of state and local governmental entities have state-law benefits and employment protections. State, county, and municipal employees are typically entitled to 168 working hours of military leave each year.[85] Because the statute treats state and federal military service separately, however, employees who are members of the National Guard may be entitled to more than 168 working hours of military leave. For example, the National Guard response to the April 2011 tornado event was activated on state active duty, rather than in a federal status. Additionally, state law incorporates the protections of USERRA (and the SCRA) for members of the National Guard called into active military duty by the governor.[86]

As more Alabamians heed the call to military service, in both active and reserve capacities, practitioners need to understand the scope of the SCRA and USERRA, and their state law counterparts, in order to provide competent legal counsel to their military and non-military clients.

Additionally, state employees mobilized or called into active service as part of the "war on terrorism" are entitled to supplemental pay making up any difference between their state salary and military pay.[87] County and municipal employees are not entitled to this supplemental pay, but their employers may choose to provide for such supplemental pay by way of ordinance, rule, or regulation.[88] Whenever a public employer pays supplemental income to an employee under state law, the employee may elect to continue her individual or dependent coverage under the public employer's health insurance plan.[89]

Conclusion

Federal and state law protections for servicemembers will likely impact all Alabama practitioners, even those who have no military clients, at some point. Those who represent business clients must be cognizant of the rights and protections provided to uniformed servicemembers when preparing motions for default judgment or when seeking to draft installment contracts or residential leases that would modify or waive those protections. Those who represent servicemembers preparing for entry into active duty must be prepared to assist with the termination of installment contracts, automobile leases, and business/residential leases, as needed. Family law practitioners must be familiar with the limitations on a parent's military service as a consideration of a child's best interests. As more Alabamians heed the call to military service, in both active and reserve capacities, practitioners need to understand the scope of the SCRA and USERRA, and their state law counterparts, in order to provide competent legal counsel to their military and non-military clients. ▲

Endnotes

1. 50 U.S.C. § 3902 (2018).
2. 50 U.S.C. § 3937 (2018). Interest rates are capped at six percent by the SCRA's terms. At the time of the publication of this article, this provision has little practical application outside of credit card debts and certain high-risk, consumer-lending practices.
3. 50 U.S.C. § 3931 (2018).
4. 50 U.S.C. § 3953 (2018).
5. 50 U.S.C. § 3952 (2018).
6. 50 U.S.C. § 3932 (2018).

7. 50 U.S.C. § 3952 (2018).
8. 50 U.S.C. § 3955 (2018).
9. 50 U.S.C. § 3958 (2018).
10. 10 U.S.C. § 101(d)(1) (2018); 50 U.S.C. § 3911 (2018).
11. *Supra*, note x.
12. 50 U.S.C. § 3931(b) (2018).
13. *https://scra.dmdc.osd.mil/* (last accessed on May 4, 2020).
14. 50 U.S.C. § 3932 (2018).
15. *Id*.
16. 50 U.S.C. §§ 3952, 3955, 3956 (2018).
17. 50 U.S.C. § 3955(b) (2018).
18. 50 U.S.C. §§ 3956(d), 3959.
19. 50 U.S.C. §§ 3952(b), 3955(h) (2018).
20. 50 U.S.C. § 3918 (2018).
21. *Id*.
22. 50 U.S.C. §§ 3938, 3938a (2018).
23. 50 U.S.C. § 4041(a) (2018).
24. *Id*.
25. *https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra* (last accessed on May 4, 2020).
26. ALA. CODE § 31-12-1, *et. seq.* (1975).
27. ALA. CODE § 31-12-2 (1975).
28. The protections of USERRA do not apply to a person who receives a dishonorable, bad conduct, or other than honorable conditions discharge, is dropped from the rolls of a military service, or is dismissed from the service. *See* 38 U.S.C. § 4304 (2018); 20 C.F.R. § 1002.135 (West 2020).
29. Selective Training and Service Act of 1940, 54 Stat. 885; Universal Military Training and Service Act, 65 Stat. 75, 86-87.
30. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).
31. *Id*.
32. *Fishgold*, 328 U.S. at 285 (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943)).
33. 38 U.S.C. § 4301(a)(1)–(3) (2018).
34. *See Coffy v. Republic Steel Corp.*, 447 U.S. 191, 195 (1980) (applying the Vietnam Era Veterans' Readjustment Assistance Act of 1974); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977) (quoting *Fishgold*, 328 U.S. at 285) (applying the Military Selective Service Act of 1967); *Tilton v. Missouri Pac. R. Co.*, 376 U.S. 169, 181 (1964) (quoting *Fishgold*, 328 U.S. at 285) (applying the Universal Military Training and Service Act).
35. 38 U.S.C. §§ 4311, 4312 (2018).
36. 38 U.S.C. § 4311 (2018).
37. *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011).
38. 38 U.S.C. § 4312(h) (2018).
39. 38 U.S.C. §§ 4312(a), (e) (2018).
40. 38 U.S.C. § 4312(b) (2018).
41. 38 U.S.C. § 4312(c) (2018).
42. 38 U.S.C. § 4312(e) (2018).
43. 20 C.F.R. § 1002.118 (West 2020).
44. 20 C.F.R. § 1002.181 (West 2020).
45. 38 U.S.C. § 4312(f) (2018).
46. *Id*.
47. *See* 38 U.S.C. § 4312(f)(2) (2018); 20 C.F.R. § 1002.123 (West 2020). Acceptable documents can include certificates of release or discharge from active duty (DD Form 214), copies of orders carrying an endorsement indicating completion of the required service, letters from commanders of a Personnel Support Activity (or similar authority), certificates of completion from military schools, or copies of payroll documents (leave and earnings statements).
48. 38 U.S.C. § 4312(d)(1)(A) (2018).
49. 20 C.F.R. § 1002.139 (West 2020).
50. 38 U.S.C. § 4312(d)(1)(B) (2018).
51. 38 U.S.C. § 4312(d)(1)(C) (2018).
52. 38 U.S.C. § 4312(d)(2) (2018).
53. 38 U.S.C. § 4313 (2018).
54. 38 U.S.C. § 4313(a) (2018).
55. *Fishgold*, 328 U.S. at 284-85; *see also Huhmann v. Federal Express Corp.*, 874 F. 3d 1102, 1107-09 (9th Cir. 2017) (applying "escalator principle" in the USERRA context); *Butts v. Prince William Cty. School Bd.*, 844 F. 3d 424 (4th Cir. 2016) (same); *DeLee v. City of Plymouth*, 773 F. 3d 172 (7th Cir. 2014) (same); *Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*, 730 F. 3d 49 (1st Cir. 2013) (same); *Milhauser v. Minco Products, Inc.*, 701 F. 3d 268, 271 n. 2 (8th Cir. 2012) (same); *Serricchio v. Wachovia Securities LLC*, 658 F. 3d 169 (2nd Cir. 2011) (same).
56. 20 C.F.R. § 1002.191 (West 2020).
57. *Id*.
58. 20 C.F.R. § 1002.210 (West 2020).
59. 20 C.F.R. § 1002.212 (West 2020).
60. 20 C.F.R. § 1002.236 (West 2020). At least one court has held, with the benefit of briefing by the Department of Labor, that this includes a level of pay taking into account pre-service commissions earned by the employee, as well as their access to clients or client lists upon their return. *Serrichio*, 658 F. 3d at 183-85, 187-88.
61. 20 C.F.R. §§ 1002.259-267 (West 2020); *see also Lapine v. Town of Wellesley*, 304 F. 3d 90, 108-09 (1st Cir. 2002).
62. 20 C.F.R. §§ 1002.194 (West 2020).
63. 38 U.S.C. § 4316(b) (2018).
64. 20 C.F.R. § 1002.150 (West 2020).
65. *Id*.
66. 20 C.F.R. § 1002.247 (West 2020).
67. *Id*.
68. 38 U.S.C. § 4302(b) (2018).
69. *See Petty v. Metro. Gov't of Nashville-Davidson Cty.*, 538 F. 3d 431 (6th Cir. 2008).
70. 20 C.F.R. § 1002.7 (West 2020).
71. *See, e.g.*, *Ziober v. BLB Resources, Inc.*, 839 F. 3d 814 (9th Cir. 2016); *Bodine v. Cook's Pest Control, Inc.*, 830 F. 3d 1320 (11th Cir. 2016); *Landis v. Pinnacle Eye Care, LLC*, 537 F. 3d 559 (6th Cir. 2008); *Garrett v. Circuit City Stores, Inc.* 449 F. 3d 672 (5th Cir. 2006).
72. 20 C.F.R. § 1002.34 (West 2020); *see also* 38 U.S.C. § 4301 (2018) ("It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.").
73. *Id*.
74. *Id*.
75. 38 U.S.C. § 4303(4) (2018); 20 C.F.R. § 1002.35 (West 2020).
76. 20 U.S.C. § 1091c (2018); ALA. CODE § 31-12-3 (1975).
77. 38 U.S.C. § 4321 (2018).
78. 38 U.S.C. § 4322 (2018).
79. 38 U.S.C. § 4323 (2018).
80. *Id*.
81. 29 U.S.C. § 2612(a)(1) (2018).
82. Fact Sheet #38M(c), U.S. Department of Labor, Wage and Hour Division (Feb. 2013), available at *https://www.dol.gov/whd/regs/compliance/whdfs28mc.pdf* (last viewed February 1, 2020).
83. *Id*.
84. *Id*.
85. ALA. CODE § 31-2-13(a) (1975). Although this statute also imposes a paid-military-leave requirement on private employers, that portion of the statute has been deemed unconstitutional. *White v. Assoc. Ind. of Ala., Inc.*, 373 So. 2d 616 (Ala. 1979).
86. Ala. Code § 31-12-2 (1975).
87. ALA. CODE § 31-12-5 (1975).
88. ALA. CODE § 31-12-6 (1975).
89. ALA. CODE § 31-12-7 (1975).

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In Defense of Our Veterans and Servicemembers: The Honoring American Veterans in Extreme Need Act

By Jay R. Bender, Capt. Amy Q. Glenos and Capt. John C. Hensley

Military veterans and servicemembers are not immune from financial problems, including having to file for bankruptcy. The rate at which former and current members of our Armed Forces file for bankruptcy is uncertain, as the U.S. court system does not track the number of veterans and servicemembers who file for bankruptcy each year. Statistics indicate, however, that their numbers are substantial. A recent study, for example, reflects that approximately 15 percent of people who file for bankruptcy are veterans, even though they make up only around 10 percent of the national population.[1]

The numbers are worse for disabled veterans and servicemembers. The previously-cited study reports that disabled persons comprise approximately 14 percent of the overall U.S. population, but constitute approximately 26 percent of the annual population filing for bankruptcy.[2] Although there are no statistics focusing solely on the bankruptcy rate for disabled vets and servicemembers, that population is undoubtedly large, given that there are 4.75 million American veterans–one-quarter of the entire U.S. veteran population–who are receiving Veterans Administration (VA) and/or Department of Defense (DoD) disability benefits.[3]

Alabama has its share, with approximately 100,000 veterans in our state receiving VA and/or DoD disability benefits.

However, until Congress passed The Honoring American Veterans in Extreme Need Act (the "HAVEN Act"),[4] disabled vets and servicemembers suffering financial distress did not have all of the protection that they needed.

Bankruptcy Law before the HAVEN Act's Recent Enactment

Before the HAVEN Act became law in August 2019, disabled veterans and servicemembers did not have certain protections under the U.S. Bankruptcy Code. The old law is best demonstrated through the following hypothetical:

> Three people–Xavier, Yvonne, and Zach–are in tough financial straits and are thinking about filing for bankruptcy. They all appear to be in the same exact financial condition: they each own the same assets, owe the same debts, and receive the same amount of income. The only financial difference among them is the *source* of their income. For Xavier, Social Security disability benefits are his only source of income. Yvonne's income all comes from payments she receives because she was a victim of both war crimes and international terrorism. Finally, Zach's only income is the disability benefits he receives from the Department of Veterans Affairs (the "VA") for injuries sustained while serving in combat on behalf of our country.

It would have been reasonable to expect that Xavier, Yvonne, and Zach would all have been treated identically under the Bankruptcy Code. Unfortunately, prior to the HAVEN Act's recent passage, Zach–the disabled American veteran–had more limited access to relief under the Bankruptcy Code than did Xavier or Yvonne.

How did it happen that disabled veterans and servicemembers–of all people–were disfavored under our bankruptcy laws? The answer can be traced back to 2005, when Congress revised the Bankruptcy Code to address some perceived problems in the bankruptcy system. Many in Congress believed that too many men and women with regular disposable income were abusing the bankruptcy system by filing liquidating Chapter 7 bankruptcies–which did not require them to pay any of their future earnings to their creditors–rather than Chapter 13 bankruptcies that required payment of some of their future disposable income toward partial or full payment of creditors' claims. Congress also believed that too many bankruptcy judges were being lax in permitting Chapter 7 filings, rather than requiring Chapter 13 filings, to the detriment of creditors.

In response to these perceived abuses, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[5] Among other things, BAPCPA creates an objective standard–known as the "means test"–for determining a presumption of which individuals should be required to file for Chapter 13 bankruptcy.

Because a debtor's income was the cornerstone of BAPCPA's "means test," Congress mandated what would constitute a debtor's income for bankruptcy purposes. BAPCPA established a standardized formula for determining a debtor's disposable income, with the starting point being the debtor's "current monthly income,"[6] a new term introduced to the Bankruptcy Code by the statute. BAPCPA's definition of "current monthly income" was extremely expansive, encompassing a debtor's average monthly income from *all* sources that the debtor received. From that broad definition, Congress specifically identified only three sources of income that would *not* be included as part of a debtor's bankruptcy income: (1) benefits received by a debtor under the Social Security Act; (2) payments to victims of war crimes or crimes against humanity on the account of their status as victims; and (3) payments to victims of terrorism on account of their status as victims. These three categories were the only permissible exclusions, with bankruptcy judges being stripped of the discretion to exclude any other sources of income from a debtor's "current monthly income."

As a result of this statutory scheme, disability benefits paid by the VA or the Department of Defense to disabled veterans and servicemembers could not be excluded from the definition of "current monthly income." Moreover, because Congress took away bankruptcy judges' discretion, bankruptcy judges were

rendered powerless to make a judicial exception for these disability benefits–no matter how equitable and just such an exception would be.

BAPCPA not only made it harder for disabled veterans and servicemembers to file Chapter 7 bankruptcies, it also made it more difficult for disabled veterans to successfully emerge from Chapter 13 bankruptcies. Because Congress mandated that VA and DoD disability benefits be included in the definition of "current monthly income," disabled veterans who filed for Chapter 13 were required to commit their disability benefits to the funding of the Chapter 13 plan in order to obtain approval from a bankruptcy court. This was an odd result, because VA and DoD disability benefits were exempt from garnishment and attachment by creditors outside of bankruptcy.[7]

In the years following the enactment of BAPCPA, bankruptcy courts were powerless to treat disabled veterans and servicemembers equitably because they could no longer exercise any discretion in determining income for bankruptcy purposes. This led to at least five bankruptcy court opinions reluctantly ruling against disabled veterans and their families because VA disability benefits were not specifically excluded from the Bankruptcy Code's definition of income.[8] Four of those opinions were released in 2008, when the broad economic collapse of real estate and financial markets was commanding Congress's attention, perhaps explaining why no legislative effort was undertaken then to correct this oversight.

In 2017, the United States Bankruptcy Court for the Eastern District of Wisconsin announced its decision in *In re Brah*.[9] It was not until this decision that Congress began to act on the issue. In *Brah*, Judge Susan Kelley had been asked to exclude a disabled veteran's VA disability benefits from his Chapter 13 bankruptcy income. While clearly sympathetic to the veteran's position, and clearly puzzled as to why VA disability benefits were treated differently than Social Security disability under federal bankruptcy laws, Judge Kelley ruled against the debtor. She noted that the bankruptcy laws were clear and unambiguous, leaving her no discretion to create an exception for VA disability payments. In her concluding remarks, Judge Kelley invited Congress to take legislative action to fix the problem, writing:

> In sum, the Court understands why the Debtors seek the same exclusion for their veterans' disability benefits as afforded to recipients of Social Security disability benefits. But creating this exception is a job for Congress, not the Court.[10]

Within months of the release of Judge Kelley's opinion, Wisconsin Sen. Tammy Baldwin drafted legislation–legislation that would ultimately become the HAVEN Act–to fix the Bankruptcy Code's unfair treatment of VA disability benefits. Sen. Baldwin unsuccessfully attempted to include the HAVEN Act in the National Defense Appropriations Act in an effort to expedite relief for affected veterans and servicemembers. The following year, Sen. Baldwin secured the support of Sen. Doug Jones from Alabama (the second Senate sponsor of the HAVEN Act) and Sen. John Cornyn of Texas (the third Senate sponsor and first bipartisan sponsor of the bill). At the same time, a formidable coalition of veterans' organizations, military organizations, and bankruptcy professional associations came together to support the HAVEN Act; notably, the Veterans of Foreign Wars, the American Legion, the Wounded Warrior Project, the American College of Bankruptcy, and the American Bankruptcy Institute's Task Force on Veterans and Servicemembers Affairs.

In 2019, Sen. Baldwin formally introduced the HAVEN Act in the Senate. When introduced in the Senate, the HAVEN Act had broad bipartisan support, with 10 Democrat and 10 Republican supporters named as sponsors or co-sponsors; soon thereafter, the number of named sponsors and co-sponsors swelled to 40 Senators, with an equal number of Democrats and Republicans backing the bill. After the bill was introduced in the Senate, Congresswoman Lucy McBath of Georgia introduced the HAVEN Act in the House of Representatives. In a matter of months, Sen. Baldwin and Rep. McBath secured unanimous passage of the HAVEN Act in both houses of Congress. President Trump signed the HAVEN Act into law on August 23, 2019. And, with that, the Bankruptcy Code's mistreatment of disabled veterans and servicemembers was brought to a long overdue end.

The HAVEN Act and Its Impact

The HAVEN Act created a fourth exclusion to the Bankruptcy Code's definition of a debtor's income for bankruptcy purposes. That new exclusion reads as follows:

(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.[11]

Significantly, the VA and DoD benefits excepted under the HAVEN Act include not only benefits received by disabled veterans, but also certain disability benefits received by active-duty servicemembers. Although no courts have ruled on the breadth of benefits protected by the HAVEN Act, bankruptcy commentators and military benefits experts have written articles providing excellent guidance about the scope of the HAVEN Act's protections.[12]

Meanwhile, the passage of the HAVEN Act is providing demonstrable relief to disabled veterans, servicemembers, and their families who are in financial distress. To date, two bankruptcy courts have published opinions regarding the HAVEN Act. In March 2020, the United States Bankruptcy Court for the Eastern District of Michigan issued the first opinion to consider whether the HAVEN Act applied to disabled veterans' Chapter 13 bankruptcy cases that were filed before, and pending as of, the HAVEN Act's enactment on August 23, 2019.[13] In *Gresham*, the Michigan bankruptcy court concluded that the HAVEN Act had such retroactive application, such that the debtor could modify her previously confirmed Chapter 13 bankruptcy plan to exclude her VA disability benefits, allowing the disabled veteran to retain those benefits to help facilitate her fresh start.

The United States Bankruptcy Court for the Northern District of Texas also considered the HAVEN Act's effect in its recent opinion in *In re Price*.[14] In that case, the Chapter 13 debtor filed his bankruptcy case *before* the

HAVEN Act was enacted, but the confirmation hearing on the debtor's plan was held a month *after* its enactment. The debtor's Chapter 13 plan, interestingly, did not exclude the debtor's VA disability benefits; instead, the debtor elected voluntarily to contribute those benefits to fund his Chapter 13 plan so as to enable him to keep certain of his assets. The Chapter 13 trustee objected to confirmation of Price's plan on the ground it was not filed in good faith. In finding for the debtor, the bankruptcy court cited the debtor's inclusion of his disability benefits in his Chapter 13 plan as a factor weighing in favor of the debtor's good faith. The court noted that even though Price filed for bankruptcy before the HAVEN Act was enacted, the HAVEN Act likely applied retroactively to his case, such that the debtor could have amended his plan to exclude his disability benefits. The court concluded that the fact that the debtor did not seek such a modification was evidence of his good faith.

Members of the American Bankruptcy Institute's Task Force on Veterans and Servicemembers Affairs (of which author Jay Bender is a founding member) have heard numerous stories of veterans and servicemembers who have benefitted from the HAVEN Act's passage. Thanks to the HAVEN Act, disabled veterans, servicemembers, and their families:

- Can now file for bankruptcy without concern that their VA disability benefits–exempt outside of bankruptcy–might be lost to creditors' claims if they filed for bankruptcy;
- Enjoy greater access to Chapter 7 bankruptcy;
- Are able to retain thousands of dollars in disability benefits that can be devoted to their day-to-day living expenses and to improving their distressed financial condition;

- Are shortening the amount of time they might otherwise need to spend in Chapter 13 before they can successfully emerge from bankruptcy; and,
- Can elect, voluntarily and not under unjust compulsion, to use their disability benefits to fund their Chapter 13 plans to help retain property they deem important to their financial turnaround.

The relief provided by the HAVEN Act to disabled veterans and servicemembers came without any cost to the United States taxpayers. To the contrary, the HAVEN Act has ensured that compensation paid to vets and military members for disabilities they sustained in service of our country will be retained by them if they ever encounter financial difficulties, thus ensuring that our tax dollars go to their proper use.

Conclusion

As of the submission of this article, more than three million Americans lost their jobs in one week, with more uncertainty ahead about the long-term health of the economy and the return of those lost jobs. In the months to come, many Americans–including, undoubtedly, many veterans and members of the Armed Forces–may find themselves in need of bankruptcy relief to help them move forward with their lives and their financial affairs. For those veterans and servicemembers receiving disability benefits who may find themselves in this distressed situation, the HAVEN Act helps clear the path for them to pursue and obtain the proverbial "fresh start" that the American bankruptcy system promises its people. It is imperative for the lawyers who serve these people that we advise them thoroughly of these recent bankruptcy developments affecting them and their families, and that we zealously advocate on behalf of those who have given so much for us and our country. ▲

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Capt. Amy Q. Glenos

Capt. Amy Glenos practices labor and employment law with Ogletree, Deakins. She is a JAG Corps officer in the Alabama Army National Guard and a member of the JAG Corps. She is assigned to the Joint Forces Headquarters in Montgomery and resides in Birmingham with her husband and two children.

Capt. John C. Hensley

Capt. John Hensley is an assistant attorney general for the State of Alabama in the criminal trials division. He is also currently assigned to the Trial Defense Services for the Alabama National Guard.

Alabama National Guard JAGs and paralegals

CITIZEN-SOLDIER LAWYERS:
The Lawyers of the Alabama National Guard

By Lt. Col. Thomas J. Skinner, IV

The men and women of the Alabama National Guard Judge Advocate General's Corps are more than just lawyers; they are soldiers and airmen, officers and leaders, and advocates for the principles of freedom, liberty, and justice upon which our nation was founded. Each has their own reasons for serving, but they all possess a pronounced sense of duty and love of country. They come from all walks of life and represent all geographic areas of the state; the Tennessee Valley, the Wiregrass, the Black Belt, and the Gulf Coast.

As an organization, the military has always required professional, competent legal counsel to fulfill its duty to the nation. In 1775, during the events that led to the birth of our nation, Gen. George Washington established the Army's Judge Advocate General's Corps. Then, the need for lawyers focused on ensuring good order and discipline in the ranks through an efficient military-justice system. As the concept of international law as a means of regulating armed conflict took root in the early-to-mid-20th century, military lawyers began work in both preventing and prosecuting war crimes. More recently, Article 82 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 established a requirement for all signatory nations to provide legal advisors for their armed forces for the purposes of ensuring compliance with the laws of

armed conflict. Today, in addition to their military justice and international law responsibilities, military lawyers perform a wide range of legal services including contracts and fiscal policy, adherence to laws protecting United States citizens from surveillance and military-intelligence operations, providing legal assistance to servicemembers, and resolving claims against the government for damages caused by military exercises or operations.

The purpose of this article is to introduce you to members of the Alabama State Bar–your colleagues–who currently fulfill these important roles.

Capt. Lucas Beaty, 20th Special Forces Group (Airborne)–Ardmore

Capt. Lucas Beaty lives in Limestone County where he has a criminal defense and general litigation practice. He opened his practice in Athens in April 2011, shortly after his admission to the bar. Capt. Beaty is married to Kasey, his best friend and middle school sweetheart, with whom he shares two daughters, Isabel and Reese. Capt. Beaty acknowledges that without the support of Kasey, "there is no way I could have the experiences I've had."

Capt. Beaty graduated from Ardmore High School in 2000 and spent that summer working two jobs to pay for a trip to Australia as a member of a statewide football team. When his college football aspirations did not come to fruition, he joined the Army. He enlisted as an M1A1 tank crewman–a "tanker"–on November 2, 2000. Capt. Beaty recalls, "I originally joined up because I wanted out of the house, I wanted to drive a tank, and the college money was really good. It didn't hurt that my father and both grandfathers had served, as well." After graduating basic training at Fort Knox, Kentucky, Capt. Beaty was assigned to Fort Benning, Georgia, where he learned he would be a crewman for his battalion commander's tank.

The September 11, 2001 terrorist attacks occurred during his second year on active duty. Capt. Beaty's battalion had just returned from a month-long exercise when the terrorist attacks resulted in Fort Benning's being "locked down" for security reasons, and Capt. Beaty was unable to leave the base until Christmas 2001. In March 2002, Capt. Beaty deployed to Kuwait in support of Operation Desert Spring, spending the next several months driving his tank all over the Kuwaiti Desert.

Capt. Beaty's two-year enlistment ended on November 1, 2002. After leaving the Army, he entered Athens State University. After graduating from Athens State, Capt. Beaty enrolled at the Mississippi College School of Law, earning his J.D. in December 2010. A few weeks later his first daughter was born, Capt. Beaty was admitted to the Alabama State Bar, and he spent the next four years building his practice and supporting his family.

In 2014, a colleague approached Capt. Beaty about joining the Alabama Army National Guard JAG Corps. Capt. Beaty completed the application process, and in July 2015, at 33 years of age, Capt. Beaty received a direct commission as a first lieutenant in the Alabama Army National Guard. As a judge advocate, Capt. Beaty has served in the Trial Defense Service–the branch of the JAG Corps responsible for providing legal defense for accused soldiers–and he now serves as a battalion judge advocate within the 20th Special Forces Group (Airborne). The latter assignment required Capt. Beaty to complete Army Airborne School at the ripe age of 37! In 2018, Capt. Beaty was honored for his commitment and dedication to military service by being named the Army Company Grade Officer of the Year by the National Guard Association of Alabama.

Capt. Beaty believes that "there is a difference in 'why we join' and 'why we serve.'" He explains that college money, medical insurance, retirement benefits, and military-installation privileges are some of the many perks of military membership ("why we join"), but that "the comraderies, friendships, and unique experiences are what keep me here." As an example, Capt. Beaty noted that he "can go anywhere in the State of Alabama and never be very far from another JAG officer. It truly is awesome to be part of such a team."

Capt. Amy Glenos, Joint Forces Headquarters–Birmingham

Capt. Amy Glenos is a native of Birmingham, practicing labor and employment law with Ogletree, Deakins, Nash, Smoak & Stewart PC. She represents employers in all phases of employment-related disputes and litigation, including defense of claims under Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the Family and Medical Leave Act. She also represents schools and universities in the defense of claims under Title IX and Section 1983. Her husband, Chris, is a partner at Bradley Arant Boult Cummings LLP, and they have two children, Christian and Sophia.

Capt. Glenos joined the military to continue her family's tradition of uniformed service. Both of her grandfathers fought during World War II, and her father retired from the Alabama Army National Guard as a major general. Capt. Glenos's younger brother and her nephew serve in the Alabama Army National Guard where her brother is a combat medic and her nephew is an infantryman and combat engineer. In addition, her older brother served in the Alabama Army National Guard as an infantryman and chaplain's assistant. Capt. Glenos explains, "I wanted the chance to continue my family's legacy, to serve a bigger purpose and to support the soldiers who have fought for and continue to fight for our country."

In February 2016, Capt. Glenos accepted a direct commission with the Alabama Army National Guard. Since commissioning, she has served primarily in the role of trial counsel–the Army equivalent of an assistant district attorney–and she was one of the lead attorneys in Alabama's 2018 mock courts-martial exercise, a nationally renowned training program. Military lawyers from across the country came to Alabama to watch Capt. Glenos and her fellow officers try the mock court-martial.

Capt. Glenos's service has taken her outside of the courtroom, too. In 2017, she trained with the German Army and received the German military's Mountain Infantry Badge, which required a 20-mile rucksack march, rappelling, and mountain climbing. Capt. Glenos credits the military to making her a better, more well-rounded attorney, noting, "My time in the military has provided some of the greatest opportunities of my life. The people are great–you make lifelong friends–and there has been a real benefit to my civilian practice. I was forced to find my legs in the courtroom and to develop my trial advocacy skills." Capt. Glenos finds value in the fact that the Alabama National Guard JAG Corps includes state and federal judges, assistant United States attorneys, and skilled litigators from the private sector. Looking back on the last four years, Capt. Glenos observes, "The training I have received has made me more comfortable on my feet, and it has given me the confidence to take on increasingly difficult assignments."

Maj. Matthew Davis, 117th Aerial Refueling Wing–Leeds

Maj. Matthew Davis is a bankruptcy attorney who owns the Alabama Bankruptcy Relief Center. He lives in Leeds with his wife, Kiley, with whom he shares four children: Caleb, William, Karen, and Robert. Maj. Davis is a member of the Alabama Air National Guard, where he serves as Deputy Staff Judge Advocate for the 117th Air Refueling Wing (ARW). The 117th ARW provides worldwide aerial refueling, airlift, support, logistics, intelligence, and medical services in support of our state and nation. In 2019, the United States Strategic Command awarded the 117th ARW the Omaha Trophy for their outstanding support of the United States' strategic deterrence mission. The 117th ARW was the first Air National Guard tanker unit to win this prestigious award.

As the 117th ARW's Deputy Staff Judge Advocate, Maj. Davis provides legal advice to the wing commander and

subordinate commanders on a wide range of legal issues including military justice, civil affairs, support of disaster relief operations, and other issues specific to the unique mission of the Air National Guard. He also provides legal assistance to servicemembers, dependents, and retirees.

Like many other members of the Alabama National Guard, the events of September 11, 2001 weighed heavily on Maj. Davis. Immediately after the terrorist attacks, Maj. Davis contacted a military recruiter. On October 1, 2001, he raised his right hand and swore the oath to support and defend the Constitution of the United States. Looking back after nearly 19 years of service, Davis realizes his decision literally took him to the other side of the world and back.

Maj. Davis says that there are several similarities between his military and civilian careers, both of which he views as a calling. He believes that "the military isn't for everyone, but those who find their place in it truly find work that matters to them, and they can see the difference they make in people's lives. From delivering soccer balls to children in Afghanistan, to ensuring that justice is applied fairly to servicemembers, to helping a World War II veteran with his last will and testament, there is meaning in what you do. It's not easy, but it is rewarding." Maj. Davis also credits the military with exposing him to many more areas of the law than his civilian practice would have allowed. In one month of active military service, Maj. Davis was a prosecutor, defense attorney, in-house counsel, contract attorney, ethics counselor, will and estate planner, environmental attorney, military operational lawyer, and judge.

Maj. Davis enjoys the comradery of military service. He explains that there is great comradery among soldiers, sailors, and airmen. "All the time I meet veterans who ask, 'where are you stationed?' or 'where did you deploy?' and who tell stories from their own military experience. The bonds you make with the people you meet while serving last a lifetime."

Capt. John Hensley, Trial Defense Service–Montgomery

Capt. John Hensley was born in Birmingham and spent his childhood in Hoover and Griffin, Georgia. He attended W.A. Berry High School for three years and was a member of the first graduating class of Hoover High School. He met his wife, Christy, when the two worked together waiting tables. She had just graduated from high school, and he was a sophomore in college.

After graduating from Auburn University in 2000, Capt. Hensley worked as a grants-and-contracts accountant at a university. Like many others, Capt. Hensley enlisted in the Army after September 11, 2001, serving as a linguist/signals intelligence (SIGINT) collector. He recounts, "Like many Americans at the time, I felt a call to serve my country during one of America's darkest hours. It was an easy decision for me at the time, because I was swept up in the national fervor to defend and support our country." What is unique is that–other than Hensley's maternal grandfather, who served in the Army during World War II–there was no military legacy in his family.

Capt. Hensley attended basic training at Fort Leonard Wood, Missouri with follow-on training at the Defense Language Institute in California (where he studied Arabic); Goodfellow Air Force Base, Texas; Fort Huachuca, Arizona; and Army Airborne School at Fort Benning, Georgia. Christy and John married two weeks after his graduation from Army Airborne School, and the couple moved to Fort Bragg, North Carolina. In May 2005, Capt. Hensley deployed to eastern Afghanistan where he led a SIGINT-collection team on multiple missions along the eastern Afghanistan border. He left active duty in December 2006 with no intention of further military service.

Capt. Hensley next attended Cumberland School of Law and graduated in 2010. Upon being admitted to the Alabama State Bar, he accepted a position as an assistant attorney general in the criminal trials division of the Alabama Attorney General's Office. It was in that division that Capt. Hensley met Maj. Ternisha Miles-Jones, another assistant attorney general. Maj. Miles-Jones spoke regularly about her experiences as a judge advocate, which convinced Capt. Hensley to continue his military service.

In June 2015, Capt. Hensley accepted a direct commission into the Alabama Army National Guard as a judge advocate. He served three and a half years with the Group Support Battalion, 20th Special Forces Group (Airborne). His duties ranged from advising the battalion commander on administrative investigations to preparing wills and powers of attorney for soldiers. Capt. Hensley now serves as a trial defense counsel, helping accused soldiers through difficult times in their military service. Hensley sums up his military experience by saying, "While my family and I have made numerous sacrifices, the benefits I have gained from being in the Army have far outweighed them all."

Maj. Ternisha Miles-Jones, Joint Forces Headquarters–Troy

Maj. Miles-Jones, second from left

As a high school student in rural Goshen, Alabama, Maj. Ternisha Miles-Jones spent two years in the Junior Reserve Officer Training Corps (JROTC). This experience taught her basic soldiering skills and developed a desire to serve a cause greater than herself. She fondly remembers a sign that hung in the JROTC classroom which read, "If you always do what you have always done, you'll always have what you've always had." The words on that sign were meant to inspire her class to do more, to be more, and to serve more. In her case, the sign worked.

After graduating from law school and being admitted to the bar, she commissioned into the Alabama Army National Guard as a first lieutenant. She recalls that she did so for one reason, "to serve." Military service runs deep in her family. Her great-grandfather served in the United States Army, her father served in the Alabama Army National Guard, and her uncle served in the United States Navy. Maj. Miles-Jones, however, is the first officer and the first lawyer in her family. Maj. Miles-Jones is "proud of my family's service. I am proud of those who have served before me. I am proud of those who serve with me. I am proud of those, like my 17-year-old nephew, who desire to serve in the future. The sacrifice of military service makes the freedoms we all enjoy enduring."

Maj. Miles-Jones resides in Troy with her husband, David, and their two children, Cobi and Ava. In her civilian practice, Miles-Jones serves as an assistant district attorney for Pike and Coffee counties. She finds the work in the DA's office to be dynamic, complex, and rewarding. She views the prosecution of all cases, from traffic tickets to capital murder, as important to the citizens in her jurisdiction, and believes that all of her cases are an opportunity to serve her community.

Maj. Miles-Jones states that the most rewarding part of being a judge advocate is having the ability to fight on behalf of those who fight for our nation. Just as in civilian practice, when a service member comes to a judge advocate with a legal issue, they need an attentive ear and prompt service. Each time a judge advocate assists a service member with their personal legal matters, that judge advocate advances the military mission, whether home or abroad.

Maj. Miles-Jones's military career has taken her around the state and the world. Prior to her current assignment with the Joint Forces Headquarters in Montgomery, she was assigned to the 226th Maneuver Enhancement Brigade (MEB) in Mobile as the command judge advocate. During her time with the 226th MEB she served in exotic places, such as Guantanamo Bay, Cuba, and eastern Europe. Maj. Miles-Jones does not speak much about her time at Guantanamo Bay because of the sensitive nature of that location and mission. Her 2015 mobilization to Romania, however, is a different story.

Romania is the Alabama National Guard's State Partnership Program partner country. This program allowed Maj. Miles-Jones to travel to Romania to support Operation Atlantic Resolve, a joint US/NATO training event. The multilateral operation was designed to build readiness and to increase interoperability between 16 partner nations. During this mission, Maj. Miles-Jones trained alongside members of Romania's defense forces, as well as other partner nations, and she built key, bond-enhancing relationships

with members of allied forces. Maj. Miles-Jones is proud that, "As the judge advocate, I conducted legal operations that were vital and necessary to the unit's mission within Atlantic Resolve."

Capt. Erick Bussey, 226th Maneuver Enhancement Brigade–Mobile

Capt. Frederick "Erick" Bussey is an attorney with Killion & Associates PC in Mobile. Capt. Bussey focuses primarily on insurance defense litigation, and he maintains an active trial practice. He enjoys being in the courtroom, especially in jury trials. Capt. Bussey resides in Baldwin County with his wife, DeLacy, and his newborn son, Lan. He comes from a family with a history of service in the legal profession, with six family members currently in the Alabama State Bar, and his father-in-law, the late Thomas P. "Corky" Ollinger, Jr., a previous member.

Originally from Cullman, Bussey first learned "service to others" from his father, a volunteer fire fighter for the small Johnson's Crossing community. Capt. Bussey received his undergraduate degree from Auburn University and his law degree from the Thomas Goode Jones School of Law in 2007. Wanting to follow in the footsteps of family members who had served in the military, Capt. Bussey accepted a direct commission as a judge advocate in the Alabama Army National Guard.

Capt. Bussey's military service began with basic officer courses at Fort Benning, Georgia and the United States Army Judge Advocate General's School at Charlottesville, Virginia. Afterwards, Bussey was assigned to the 167th Theater Sustainment Command (TSC) at Fort McClellan in Anniston. While at the 167th TSC, Bussey served as the lead defense counsel during the 2018 mock courts-martial training exercise, opposite Capt. Amy Glenos and Maj. Jason Britt.

Capt. Bussey serves as trial counsel for the 226th Maneuver Enhancement Brigade, which is based at historic Fort Whiting in Mobile. His duties include the responsibility for military justice matters in the brigade, in addition to providing counsel to the brigade commander, command staff, and subordinate commanders on matters involving financial, administrative, and operational law issues. Capt. Bussey also provides legal assistance to soldiers, airmen, and military retirees in the Mobile area.

What many of his colleagues in Mobile County may not realize is that Capt. Bussey is also responsible for providing legal advice to the commander of Task Force Tarpon, the Alabama National Guard task force responsible for hurricane-response operations. Capt. Bussey is proud to be part of the team responsible for ensuring the safety of his family, friends, and neighbors in the event a hurricane impacts Alabama's Gulf Coast. "When most everyone is evacuating, I get to stay and work with the first responders to assist the citizens of our state, protect their property, and ensure that law and order are maintained in affected areas."

Conclusion

These men and women are a representative cross-section of the Alabama National Guard Judge Advocate General's Corps. They represent and serve the thousands of soldiers and airmen who wear civilian attire during the week and a military uniform on the weekend. In addition to being members of our proud profession, they are patriotic citizens of the state who put others before themselves, seeking out additional ways to serve our country. ▲

Lt. Col. Thomas J. Skinner, IV

Lt. Col. Thomas Skinner is the Command Judge Advocate of the 31st CBRN Brigade of the Alabama Army National Guard. He is a graduate of the University of Alabama and Cumberland School of Law. He has his own practice with offices in Birmingham and Valley Head.

Overview of State and Local Government Powers during the Covid-19 Pandemic

By Phillip D. Corley, Jr., April B. Danielson, and Gabe M. Tucker

State and local governmental powers have been a significant focus during the COVID-19 pandemic as governmental entities of all levels have issued both guidance and directives in response to the pandemic. As more medical research is conducted and information is dispersed through news organizations, citizens may find that it is difficult to determine how to navigate the ever-changing restrictions and guidelines issued by the government at all levels. Some residents have not left their homes, while others have continued with their daily lives as best as possible. One thing is clear–the COVID-19 virus and the changes it brought came quickly.

Many states, including Alabama, are in the stage of re-opening. Re-opening brings with it many challenges and questions, specifically in regard to state and local government powers. The constitutionality of quarantines and stay-at-home orders has been questioned. Cities that are coronavirus hot-spots in states that are re-opening worry what the numbers will look like a month from now. People have lost jobs, are unable to see family members, and are now required to wear masks in certain areas. Those who live alone are living in isolation, and those who have children need a break. How much longer is this way of living sustainable? Even more so, is all of this constitutional? This article will detail the actions taken by the federal government and the State of Alabama in response to the COVID-19 pandemic and discuss the constitutionality of state and municipal response measures, enforcement of these measures, and liability issues for Alabama municipalities, business owners, and employers.

Overview of COVID-19 Timeline and Emergency Orders

The following is an overview of the response of both the federal government and the State of Alabama to the COVID-19 pandemic.

FEDERAL COVID-19 Response Timeline

JANUARY

Jan. 30: Centers for Disease Control and Prevention (CDC) identifies person-to-person transmission in US

President Trump (POTUS) establishes COVID-19 task force

Jan. 31: Department of Health and Human Services (DHHS) declares a public health emergency

Announcement of travel restrictions from China

FEB.

Feb. 6: First U.S. death related to COVID-19

MARCH

Mar. 6: POTUS signs COVID-19 bill providing $8.3B for crisis response

Mar. 11: POTUS addresses the nation

Announcement of travel restrictions from Europe

Mar. 13: POTUS declares COVID-19 a national emergency

Mar. 16: White House announces "15 Days to Slow the Spread," implementing social distancing at all levels of society

Mar. 17: All 50 states have confirmed COVID-19 cases

Mar. 18: POTUS signs Family First Coronavirus Response Act providing $3.5B in emergency funding for employment-related protections and benefits, health programs and insurance coverage requirements, and tax credits

Mar. 19: POTUS invokes the Defense Production Act

Mar. 27: POTUS signs Coronavirus Aid, Relief, and Economic Security Act providing $2T for families and small businesses

Mar. 28: POTUS invokes the Defense Production Act, requiring GM to make ventilators

Mar. 29: POTUS extends social distancing guidelines through Apr. 30

APRIL

Apr. 9: Federal Reserve announces options to provide up to $2.3T in loans to support the economy

Apr. 11: Major disaster declarations have been issued in all 50 states for the first time in U.S. history

Apr. 16: POTUS announces guidelines on the three phases of "Opening Up American Again"

Apr. 24: POTUS signs Paycheck Protection Program and Health Care Enhancement Act

Apr. 28: U.S. passes 1M confirmed COVID-19 cases

POTUS invokes the Defense Production Act to ensure Americans have a reliable supply of meat products

MAY

May 8: Bureau of Labor Statistics reports the U.S. jobless rate reached 14.7 percent in April, the highest level since the Great Depression

STATE OF ALABAMA COVID-19 Response Timeline

MARCH

Mar. 13: Gov. Ivey declares a state public health emergency

Mar. 17: State Health Officer (SHO) suspends public gatherings of 25 people or more in Blount, Saint Clair, Shelby, Tuscaloosa, and Walker counties

Mar. 18: Gov. Ivey requires the closure of all K-12 public schools

Mar. 19: SHO suspends public gatherings of 25 people or more statewide

Closes schools and beaches; prohibits visitation at hospitals and nursing home/long-term care facilities; delays elective procedures; prohibits on-premises consumption of food or drink at all restaurants, bars, and breweries

Mar. 23: Gov. Ivey postpones certain state tax obligations

Mar. 27: SHO closes non-essential businesses

APRIL

Apr. 3: SHO issues Stay at Home Order

Prohibits non-work-related gatherings of 10 people or more

Gov. Ivey orders protection against residential evictions and foreclosures

Apr. 28: SHO issues Safer at Home Order

Non-work-related gatherings of 10 persons or more remain prohibited; several businesses and offices, including retail, are allowed to re-open subject to restrictions; restaurants, bars, and breweries remain limited to no on-premises consumption; higher-risk business and activities remain closed (entertainment venues, athletic facilities, close-contact service providers); schools remain closed; elective procedures may proceed

MAY

May 8: Gov. Ivey extends State of Emergency

SHO amends Safer at Home Order

Re-opens most businesses and activities subject to restrictions, including close-contact service providers and gyms; restaurants, bars, and breweries allowed to offer on-premises consumption; certain higher-risk businesses and activities remain closed (entertainment venues, athletic activities that involve interaction with another person)

Gov. Ivey provides liability protections related to COVID-19 for businesses and health care providers

Additional COVID-19-related emergency actions taken in the future by Alabama state agencies may be found at *https://alabamapublichealth.gov/legal/orders.html*.

Constitutionality of States Implementing Stay-at-Home Orders

Individual states possess the power to establish and enforce laws to protect the public health, safety, and general welfare. This power, known as the state police power, comes from the Tenth Amendment to the Constitution which grants states the "powers not delegated to the United States."[1] Nearly 200 years ago, in 1824, Chief Justice John Marshall in *Gibbons v. Ogden* described state police powers as those "which embrace[] everything within the territory of a State, not surrendered to the general government[,] all which can be most advantageously exercised by the States themselves."[2] Chief Justice Marshall then listed examples of these laws exercisable by the states, and among them are, yes, "quarantine laws" and "health laws of every description."[3]

Several decades later, in 1905, the United States Supreme Court decided *Jacobson v. Commonwealth of Massachusetts*.[4] During the relevant time period of this case, the country was experiencing a health emergency similar to COVID-19, but with smallpox. The law at issue was a statute passed by Massachusetts that allowed cities or towns to require that all residents be vaccinated if "necessary for the public health or safety."[5] Under the authority granted by the statute, the City of Cambridge adopted a regulation requiring all of its inhabitants to be vaccinated to prevent the spread of smallpox.[6] Jacobson refused the vaccination, Cambridge prosecuted him, and a jury found him guilty.[7] Jacobson appealed his conviction

Individual states possess the power to establish and enforce laws to protect the public health, safety, and general welfare.

and the case made it to the United States Supreme Court.

The question to be addressed on appeal was whether Cambridge's vaccination law violated Jacobson's Fourteenth Amendment right to liberty. The Court, with a 7-2 majority, held that the law did not violate Jacobson's right, because the states possess the police power, which "must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety."[8] The Court made several assertions and conclusions that are directly applicable to the COVID-19 pandemic today, such as:

- "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[9]
- "Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others."[10]
- "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[11]
- "[I]t is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[12]

Ultimately, the Court held that to prevent the spread of an infectious disease, a state may use its police power to enact reasonable regulations in order to protect the public health and safety. Of course, regulations of this nature cannot be arbitrary, unusual, or unreasonable.[13] As further explained by the *Jacobson* Court, regulations that are intended to prevent the spread of an infectious disease should be based on the recommendations of a board of health.[14]

What does this mean today?

As the United States Supreme Court held in *Gibbons*, implementing and enforcing quarantine laws are well within a state's police power.[15] This means that the shelter-in-place and stay-at-home orders implemented by states thus far in response to COVID-19 are most likely constitutional. And because the police power also includes the power to pass "health laws of every description," many of the other

COVID-19 related regulations implemented thus far are most likely constitutional as well.[16] This conclusion is supported by the holding in *Jacobson*, where the Court applied the *Gibbons* principles to a health emergency similar to what we are currently experiencing. If requiring vaccination is a constitutional measure which can be justified via the protection of the public health and safety, then measures requiring people to stay at home, closing non-essential businesses, and restricting travel are likely permissible as well. This is especially true because there is no vaccine for COVID-19 yet, and the only known way to prevent its spread is through limiting contact with other people. Additionally, a court would be unlikely to find the present regulations to be arbitrary, unusual, or unreasonable, because health boards across the United States, and across the world, have recommended such regulations to protect the public health and safety.

To address the somewhat controversial mask-wearing guidelines and requirements, it is necessary to analyze the differences and similarities between a vaccination and wearing a mask. A vaccination is a comparatively invasive procedure to limit the spread of disease. Vaccinations require antigens to be injected into the body so the immune system can produce antibodies to protect from later exposure to viruses or bacteria.[17] A mask, on the other hand, is an item of clothing that covers one's mouth and nose. A mask does not require anything to be injected into a person, nor does it alter anything in a person's body. Since the Court in *Jacobson* found that a vaccination requirement did not violate a person's right to liberty, then it would likely find that governments suggesting or mandating that people wear masks to prevent the spread of COVID-19 do not violate the right to liberty either.[18]

Municipal Government Power To Implement COVID-19 Response Measures

Not only are there questions surrounding a state's power to issue stay-at-home orders, but there are also questions regarding the power that municipal governments possess to implement preventative response measures that are different from a state's orders. There are two general approaches to municipal governance and autonomy. The first, referred to as "Dillon Rule," holds that local government power is derived from the state, and that a local government's authority is therefore limited to what is delegated by the state.[19]

The second approach, known as "Home Rule," stands for the proposition that local governments enjoy at least some inherent rights that are free from the threat of state interference.[20] If a state adopts Home Rule, whether through a constitutional amendment or legislative act, local governments may pass ordinances without approval from the state legislature.[21] A majority of states have adopted some form of Home Rule, though each state varies in the counties, cities, and towns it applies to.[22]

Alabama's Approach

Alabama applies the Dillon Rule in analyzing the power of a city or town to exercise a particular power.[23] Alabama grants specific powers to municipal governments either expressly through its constitution or through statutes or acts passed by the Alabama State Legislature. This principle was discussed long ago in an opinion of the Alabama Supreme Court in the case of *City of Mobile v. Moog* wherein Justice Manning quotes Judge Dillon's THE LAW OF MUNICIPAL CORPORATIONS: "It is a general rule, and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation–not simply convenient, but indispensable."[24] Incidental or implied powers must be akin to the municipal purpose.[25] Despite Alabama's granting no general powers to municipalities, the Alabama

Constitution delegates specific powers to municipal corporations, which include cities and towns. Section 89 of the Alabama Constitution prohibits municipalities from passing "any laws inconsistent with the general laws of this state."[26]

Municipal Power to Issue Stay-At-Home Orders and Other Measures

Section 11-47-131 of the Alabama Code gives cities and towns the power to establish and regulate quarantines, such as stay-at-home orders, as long as the quarantine is "not inconsistent with laws of the state."[27] Under this statute, cities and towns have the power to "prevent the introduction of contagious, infectious, or pestilential diseases," implement a quarantine punishable by law, and adopt ordinances and regulations deemed "necessary to insure good sanitary condition in public places or in private premises."[28] The powers set forth in this statute are considered "police powers" of a municipality to protect the public's health, safety, and welfare.[29] This "umbrella" of police powers is set forth in Alabama Code §11-45-1 which states: "Municipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law and to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances."[30]

Additionally, Section 22-12-12 gives cities and towns the authority to issue a quarantine order separate from the state.[31] This statute

With many states and cities implementing stay-at-home orders, travel restrictions, and mask-wearing requirements, the next question is, how will these measures be enforced by law enforcement?

conditions a quarantine proclamation upon the recommendation of the county board of health and subject to the approval of the State Board of Health, but in emergency situations, the mayor or chief executive officer of incorporated cities and towns may proclaim a quarantine without the recommendation of the county board of health and the approval of the State Board of Health, provided that the quarantine is subject to "approval, modification or withdrawal by the board of health of the county."[32]

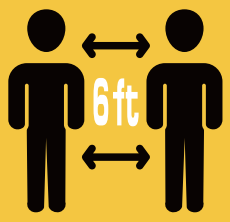
In the wake of the current COVID-19 pandemic, Alabama's attorney general has provided supplementary guidance on this topic for municipalities. The guidance issued on March 25, 2020 states, "[a] municipal ordinance proclaiming a quarantine that is more restrictive than a regulation or order by the State Board of Health is likely not 'inconsistent' or 'in conflict with' the laws of the state."[33] Subsequent guidance, issued on April 8, 2020, affirmed this position.[34]

In both statements made by the attorney general, he urged municipalities to "recite the specific circumstances that make more restrictive measures than similar State orders necessary," limit the duration of the restrictive measures, and reevaluate periodically with updated information.[35] He also advised local governments "to coordinate with their county boards of health, where applicable, and the state health officer to ensure that the municipal action in question will be supported by, and is not inconsistent or in conflict with, current or impending state actions related to quarantine."[36]

Law Enforcement And COVID-19 Response Measures

With many states and cities implementing stay-at-home orders, travel restrictions, and mask-wearing requirements, the next question is, how will these measures be enforced by law enforcement? Most of the regulations seen around the country provide for fines or short-term imprisonment (or both) for those who violate them.[37] Instead of traditional penalties, some states have provided for sanctions for non-compliant businesses.[38] For example, businesses that do not comply with Pennsylvania's laws risk losing eligibility for disaster relief funding and other loan or grant funding, and businesses in the District of Columbia and New Mexico risk losing their business licenses.[39]

Likewise, the City of Los Angeles threatened to shut off utility services to non-essential businesses that refused to close.[40] There is a push to educate and persuade the public to adhere to the COVID-19 orders rather than immediately use the criminal justice enforcement process.[41] This seems to be Alabama's approach, as the attorney general issued guidance for law enforcement to restrain from criminally enforcing the governor's orders unless "a violator has been made aware of the state health order and the refusal to comply presents a threat to public health and safety."[42] Even though Alabama is no longer under a stay-at-home order, there are still restrictions on people keeping a six-foot distance between each other and entertainment businesses remaining closed. As a result, there remain possibilities of people and businesses facing criminal consequences for violating current orders.



Even though Alabama is no longer under a stay-at-home order, there are still restrictions on people keeping a six-foot distance between each other and entertainment businesses remaining closed.

Liability Issues for Municipalities, Business Owners, And Employers

On May 8, 2020, Governor Ivey issued a proclamation providing liability protections related to COVID-19.[43] The proclamation affords protections from certain liabilities, limitations on damages, and a standard of care for negligence claims arising before the issuance of the proclamation. The protections apply to "businesses, health care providers, and other covered entities," which are defined as:

> [A]n individual, partnership, association, corporation, health care provider, other business entity or organization, or any agency or instrumentality of the State of Alabama, including any university or public institution of higher education in the State of Alabama, whether any such individual or entity is for profit or not for profit, including its directors, officers, trustees, managers, members, employees, volunteers, and agents.[44]

For liability protections, the proclamation states that there will be no liability for the death or injury to people, or for damage to property, from an act or omission related to or in connection with COVID-19, unless the claimant can show, by clear and convincing evidence, that there was wanton, reckless, willful, or intentional misconduct.[45]

For limitations on damages, the proclamation states that if liability can be established under the new liability protections, but there is no serious physical injury, then damages are limited to those that are actual economic compensatory damages. The proclamation further provides that there will be no liability for non-economic or punitive damages, unless a party asserts a wrongful death claim, in which case the plaintiff is entitled only to punitive damages.[46]

For causes of action related to COVID-19 that occurred before the May 8 proclamation, and if a court holds that the liability protections and limitations on damages do not apply, then there are still protections. The proclamation states that there will be no liability for negligence, premises liability, or any non-wanton, non-willful, or non-intentional civil causes of action related to COVID-19, unless the claimant can show, by clear and convincing evidence, that the alleged at-fault party "did not reasonably attempt to comply with the then applicable public health guidance."[47] Additionally, there will be no liability for damages from mental anguish or emotional distress, or for punitive damages; however, for causes of action that do not involve serious physical injury, there still may be liability for economic compensatory damages.[48] Finally, the proclamation states that only punitive damages may be awarded for wrongful death claims.[49]

In summary, the COVID-19 pandemic has created unique challenges for government. Governmental entities of all levels have issued both guidance and directives in response to the pandemic that have restricted individual liberties. However, the right to individual liberties is not absolute. Based upon the support

presented in this article, it is clear that a state may use its police power to prevent the spread of an infectious disease by enacting reasonable regulations to protect the public's health and safety. Likewise, Alabama municipalities may also use their police powers and the specific powers given to them by the Alabama Legislature to protect their residents' health, safety, and welfare. ▲

Endnotes

1. U.S. Const. amend. X.
2. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824).
3. *Id.*
4. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).
5. *Id.* at 12.
6. *Id.* at 12–13.
7. *Id.* at 13–14.
8. *Id.* at 25.
9. *Id.* at 26.
10. *Jacobson*, 197 U.S. at 26–27.
11. *Id.* at 27.
12. *Id.* at 29.
13. *Id.* at 27.
14. *Id.*
15. *Gibbons*, 22 U.S. at 203.
16. *Id.*
17. *Understanding How Vaccines Work*, Center for Disease Control and Prevention (last updated July 2018), *https://www.cdc.gov/vaccines/hcp/conversations/downloads/vacsafe-understand-color-office.pdf*.
18. As an aside, private businesses are also allowed to require certain sanitation standards for customers because they are on private property. Just as a private business can require customers to wear shirts and shoes for service, a private business may require mask-wearing or check customers' temperatures. The requirements must apply to every person equally, though, as issues would begin to arise if a business required masks or temperature screenings based on specific demographics, such as age, race, or place of residence.
19. Hon. Jon D. Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, American City County Exchange (Jan. 2016), *https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf*.
20. *Id.*
21. *Id.*
22. *Id.*
23. *See New Decatur v. Berry*, 7 So. 838 (Ala. 1890); *Best v. Birmingham*, 79 So. 113 (Ala. 1918).
24. *City of Mobile v. Moog*, 53 Ala. 561 (1875) (quoting John Forrest Dillon, The Law of Municipal Corporations § 55 (2d. ed. 1873).
25. *Best*, 79 So. at 116.
26. Al. Const. art. IV, § 89.
27. Ala. Code § 11-47-131(2).
28. Ala. Code § 11-47-131(1)–(3).
29. State of Alabama Office of the Attorney General, Guidance for Municipalities on Shelter-in-Place Orders/Quarantine (Mar. 25, 2020), *https://www.alabamaag.gov/Documents/files/2020-03-26-Shelter-in-place-Orders.pdf*.
30. Ala. Code § 11-45-1.
31. Ala. Code § 22-12-12. For an incorporated city or town, the power may be exercised by the mayor. *Id.*
32. *Id.*
33. Guidance for Municipalities on Shelter-in-Place Orders/Quarantine, *supra* note 29.
34. *See* State of Alabama Office of the Attorney General, Guidance for Municipalities on Use of Power during State of Emergency (Apr. 8, 2020), *https://www.alabamaag.gov/Documents/files/StayAtHomeGuidance.pdf*.
35. *Id.*
36. Guidance for Municipalities on Shelter-in-Place Orders/Quarantine, *supra* note 29.
37. Kelly Currie and Tyler Brown, *COVID-19 Stay-at-Home and Traveler Quarantine Orders Pose Enforcement Challenges for Local Officials*, American City & County (Apr. 22, 2020), *https://www.americancityandcounty.com/2020/04/22/covid-19-stay-at-home-and-traveler-quarantine-orders-pose-enforcement-challenges-for-local-officials/*.
38. *Id.*
39. *Id.*
40. *Id.*
41. Betsy Pearl, et al., *The Enforcement of COVID-19 Stay-at-Home Orders*, Center for American Progress (Apr. 2, 2020), *https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482558/enforcement-covid-19-stay-home-orders/*.
42. State of Alabama Office of the Attorney General, Guidance for Law Enforcement on Enforcement of State Health Order (last updated Mar. 27, 2020), *https://www.alabamaag.gov/Documents/files/03-27-2020-GuidanceEnforcementStateHealthOrder.pdf*.
43. State of Alabama, proclamation by the governor (May 8, 2020), *https://governor.alabama.gov/newsroom/2020/05/eighth-supplemental-state-of-emergency-coronavirus-covid-19/*.
44. *Id.* Questions have arisen as to whether a municipality is an instrumentality of the State of Alabama. However, the recent Alabama Supreme Court decision in the case of *State of Alabama v. City of Birmingham, et al.*, involving a Civil War monument in Linn Park clearly affirms that a municipality is an instrumentality of the state through the following statements. "Any discussion of this issue must begin with the well settled principle that "[m]unicipalities are but subordinate departments of state government." *Alexander v. State ex rel. Carver*, 274 Ala. 441, 443, 150 So. 2d 204, 206 (1963) (*citing Ex parte Rowe*, 4 Ala. App. 254, 59 So. 69 (1912)). As "mere instrumentalities of the state," municipalities possess "only such powers as may have been delegated to them by the legislature." *City of Leeds v. Town of Moody*, 294 Ala. 496, 501, 319 So. 2d 242, 246 (1975) (*citing State ex rel. Britton v. Harris*, 259 Ala. 368, 371, 67 So. 2d 26, 28 (1953)). *See also Winter v. Cain*, 279 Ala. 481, 487, 187 So. 2d 237, 242 (1966) ("'A municipal corporation is but a creature of the State, existing under and by virtue of authority and power granted by the State.'" (*quoting Hurvich v. City of Birmingham*, 35 Ala. App. 341, 343, 46 So. 2d 577, 579 (1950))); and *Alexander*, 274 Ala. at 443, 150 So. 2d at 206 ("Counties and cities are political subdivisions of the state, each created by sovereign power in accordance with sovereign will, and each exercising such power, and only such power, as is conferred upon it by law." (*citing Trailway Oil Co. v. City of Mobile*, 271 Ala. 218, 122 So. 2d 757 (1960))." *State of Alabama v. City of Birmingham, et al.,* No. 1180342, 2019 WL 6337424 (Ala. Nov. 27, 2019).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. State of Alabama, proclamation by the governor (May 8, 2020), *https://governor.alabama.gov/newsroom/2020/05/eighth-supplemental-state-of-emergency-coronavirus-covid-19/*.

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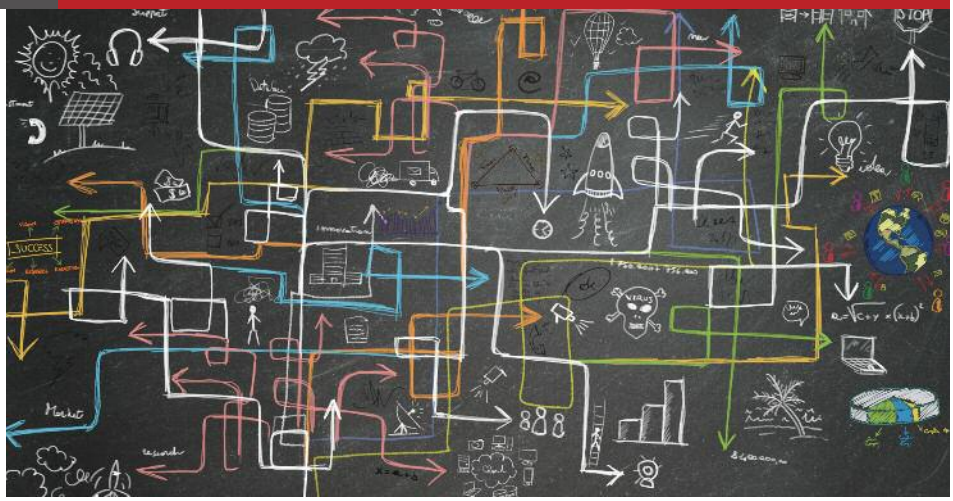

It Passed–Now What Are the Governor's Options?

Few sections of our 1901 Constitution are more confusing or difficult to parse out than Section 125 that sets out the framework for what happens to legislation once it is transmitted from the legislative to executive branches of our government. Every year I read it several times each session and second-guess myself regarding what I thought I knew and having to re-work the various options and time frames. I have created charts, graphs, diagrams, decision trees, sketches, and memos, and yet I am still never confident about how it all works until I go back to the text itself and work back through it in a way that reminds me of fourth-grade sentence-diagraming exercises. This year, as I write this in the break between our penultimate and final legislative days, it is no different.

Section 125 in all its glory has never been amended. It lays out how a bill can become a law without the governor's signature or with it, how a veto can be exercised, how the governor can propose an executive amendment, what the legislature's options are when an executive amendment is offered, and how and when the pocket veto comes into play. The "line-item veto" is established by Section 126, and we will come back to that later. Section 125 provides:

> Every bill which shall have passed both houses of the legislature, except as otherwise provided in this Constitution, shall be presented to the governor; if he approves, he shall sign it; but if not, he shall return it with his objections to the house in which it originated, which shall enter the objections at large upon the journal and proceed to reconsider it. If the governor's message proposes no amendment which would remove his objections to the bill, the house in which

(Continued from page 303)

the bill originated may proceed to reconsider it, and if a majority of the whole number elected to that house vote for the passage of the bill, it shall be sent to the other house, which shall in like manner reconsider, and if a majority of the whole number elected to that house vote for the passage of the bill, the same shall become a law, notwithstanding the governor's veto. If the governor's message proposes amendment, which would remove his objections, the house to which it is sent may so amend the bill and send it with the governor's message to the other house, which may adopt, but cannot amend, said amendment; and both houses concurring in the amendment, the bill shall again be sent to the governor and acted on by him as other bills. If the house to which the bill is returned refuses to make such amendment, it shall proceed to reconsider it; and if a majority of the whole number elected to that house shall vote for the passage of the bill, it shall be sent with the objections to the other house, by which it shall likewise be reconsidered, and if approved by a majority of the whole number elected to that house, it shall become a law. If the house to which the bill is returned makes the amendment, and the other house declines to pass the same, that house shall proceed to reconsider it, as though the bill had originated therein, and such proceedings shall be taken thereon as above provided. In every such case the vote of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journals of each house, respectively. If any bill shall not be returned by the governor within six days, Sunday excepted, after it shall have been presented, the same shall become a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevent the return, in which case it shall not be a law; but when return is prevented by recess, such bill must be returned to the house in which it originated within two days after the reassembling, otherwise it shall become a law, but bills presented to the governor within five days before the final adjournment of the legislature may be approved by the governor at any time within ten days after such adjournment, and if approved and deposited with the secretary of state within that time shall become law. Every vote, order, or resolution to which concurrence of both houses may be necessary, except on questions of adjournment and the bringing on of elections by the two houses, and amending this Constitution, shall be presented to the governor, and, before the same shall take effect, be approved by him; or, being disapproved, shall be repassed by both houses according to the rules and limitations prescribed in the case of a bill.

So now that you have read the text, let's walk through the options.

Signing of Bills

During the majority of the session, the governor must sign a bill within six calendar days, Sundays excepted (seven calendar days). If the governor fails to sign a bill or return it to the legislature in that period, the bill becomes law without the governor's signature. This time is extended if the governor is prevented from returning a bill to the legislature because of a recess until the second day of the legislature's return. This changes for bills "presented to the Governor within five days before final adjournment of the legislature." These bills must be signed by the governor within 10 days after final adjournment (also known as adjournment sine die) or otherwise the bills become pocket vetoed.

Passage without Governor's Signature

Whenever the governor fails to return a bill to the house in which it originated within six calendar days *after* it is presented to her, Sundays excepted, it becomes a law without her signature, unless the return was prevented by recess or adjournment. In that case, the bill must be returned within two days after the legislature assembles, or the bill becomes law without the governor's signature. But, when the governor is unable to return a bill on the sixth calendar day after presentation because the originating body is not in session, she must return it on the next legislative day if it is the last day on which the legislature can meet.[1] *In re Opinion of the Justices No. 104*, 52 Ala. 541, 42 So. 2d 27 (Ala. 1949).

Veto and Override

If the governor objects to a bill, she may veto it, in which case she must return it to the house in which it originated, with a message explaining her objections. If the house to which the bill is returned so chooses, it may override the governor's veto by a simple majority vote and transmit the bill to the second house to consider the same. Alabama is one of only six states where the required threshold to override a veto is a mere majority.[2] This low threshold is particularly striking since it would have taken a three-fifths vote of those present and voting to have considered the bill in the first instance if it was passed prior to the passage of both budgets.[3]

Executive Amendment

In the alternative to exercising her veto right, the governor may suggest amendments that will remove her objections, if such amendments are possible. The bill is then reconsidered, and if a majority of the members elected to each house

agree to the executive amendments, it is returned to the governor for her signature. In the event the amendment is not acceptable, the transmission converts to a veto and it may be overridden as outlined above.

Pocket Veto

Bills that reach the governor less than five days before the end of the session must be approved by her within 10 days after adjournment. Bills that are not approved within that time do not become law and are said to be "pocket vetoed." In essence, during this time period the presumption of the governor taking no action flips from becoming law without her signature to being vetoed.

Line-Item Veto

In Alabama, the governor has the power to approve or disapprove any item or items of an appropriation bill without vetoing the entire bill. This power is covered by Section 126:

> The governor shall have power to approve or disapprove any item or items of any appropriation bill embracing distinct items, and the part or the parts of the bill approved shall be the law, and the item or items disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of bills over the executive veto; and he shall in writing state specifically the item or items he disapproves, setting the same out in full in his message, but in such case the enrolled bill shall not be returned with the governor's objection.

The line-item veto is essentially a specialized form of executive amendment as it can only be exercised if the governor returns the same to the legislature while they are still in session. In the event of a line-item veto, only the parts of the bill approved become law; the item or items disapproved do not become law unless they are repassed over the governor's objection. A line-item veto is effective so long as the legislature has an opportunity to override the veto. A line-item veto of an appropriation bill made after the legislature adjourns is ineffective.

Conclusion

Under most circumstances, the governor and the legislature work in a cooperative nature on most legislation. While there are few instances where these powers come into play in an adversarial way, you can expect that when they do the stakes are very high, and the cases that result make for very interesting reading. ▲

Endnotes

1. In other words, the 30th legislative day or 105th calendar day.
2. The others are Arkansas, Indiana, Kentucky, Tennessee, and West Virginia.
3. See, Section 71.01 of the Official Recompilation of the Alabama Constitution of 1901.

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Judicial Titles Are Not Portable–They Stay with the Position, Not the Individual

Each year the Office of General Counsel receives a number of questions from judges who are leaving the bench after a period of public service and seeking to re-enter the private practice of law. One of the topics we have to counsel them on is their continued use of the term "judge." As a general rule, upon re-entering private practice, the term "judge" should not be appear before an individual's name anywhere on pleadings or even letterhead. Although the Office of General Counsel believes that a judge's prior service on the bench may be noteworthy and of general interest to prospective clients, there are limitations on the use of this moniker. The old adage that "once a judge, always a judge" is really a statement of social etiquette. The use of this phrase dates back to a long-standing British convention that judges generally are not allowed to return to the practice of law. Judiciary of England and Wales, Becoming a Judge, *http://www.judiciary.gov.uk* (last visited May 29, 2020). Judges in the United States, including Alabama, are allowed to return to private practice after leaving the bench.

The professional conduct rules implicated in deciding the appropriateness of the term "judge" include Rule 7.1 (Communication Concerning a Lawyer's Services), Rule 7.5 (Firm Names and

Letterheads), and 8.4(e) (Misconduct). Rule 7.1 provides, in pertinent, that:

> A lawyer shall not make a false or misleading communication about the lawyer or lawyer's services. A communication is false or misleading if it:…(b) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law…

Rule 7.5 prohibits the use of letterhead that violates Rule 7.1.

The majority of regulatory authorities, including the American Bar Association, have concluded that the use of the title "judge" in pleadings, office nameplates, and letterhead is misleading and likely to create an unjustified expectation about the results that a lawyer can achieve and exaggerate his or her level of influence. See *American Bar Association*, FO 95-391 (April 24, 1995); *Supreme Court of Ohio*, Op. 2013-3 (June 6, 2013); *Florida State Bar Association*, Op 87-9; *State Bar of Michigan*, Op. RI-106; *U.S. Jud. Conf.*,Op. No. 72 (June 2009). The American Bar Association opinion specifically states that:

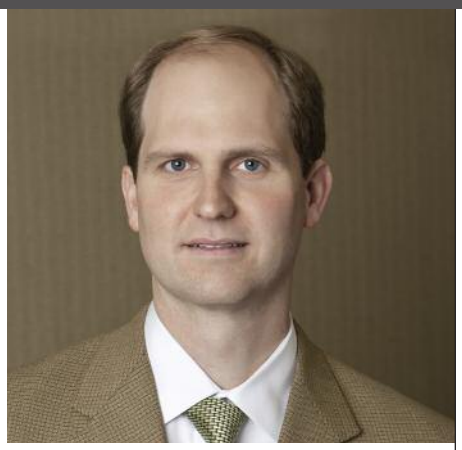
> In fact, there appears to be no reason for such use of the title [judge] other than to create such an expectation or to gain an unfair advantage over an opponent. Moreover, the use of judicial honorifics to refer to a lawyer may in fact give his client an unfair advantage over his opponents, particularly in the courtroom before a jury.

Rule 8.4(e) explains that it is professional misconduct to "state or imply an ability to influence improperly a government agency or official." It has been opined by many jurisdictions that the use of the title "judge" can be seen as an attempt to imply improper influence. Again, this is particularly true when used in a courtroom. Although it is true that a qualification or modifier such as "former" or "retired" would be more accurate, such an addition doesn't address the concern about the perception of improper influence, and therefore has generally been rejected.

It is not the desire of the Office of General Counsel to prevent the use of the title "former judge" or "retired judge" in every context. The cited limitations do not prevent former or retired judges from marketing their services in a truthful manner and explaining their prior judicial experience. There is little question that prior judicial experience could be important information to potential clients when deciding to retain legal counsel.

The last category of inquiries the Office of General Counsel receives concerning the term "judge" is related to judicial elections. The typical scenario is when a former or retired judge decides to run for judicial office. It is the position of the Office of General Counsel that a candidate for judicial office should not refer to themselves in campaign material as "judge" unless they are currently serving as a judge in some capacity. Rule 8.4(c) states that, "[i]t is professional misconduct for a lawyer to…engage in conduct involving dishonesty, fraud, deceit or misrepresentation." If a person refers to themselves as "judge" in campaign material, it is likely that many citizens would assume the individual is currently an acting judge. This impression would be both a misrepresentation and dishonest and therefore a violation of the Alabama Rules of Professional Conduct. However, the use of modifiers such as "retired" or "former" before the term judge would be ethically permissible in campaign material, unlike their use on letterheads and in pleadings. The main difference is that the campaign material is not a communication concerning the lawyer's legal services. Further, information about a candidate's prior judicial experience can be seen as helpful to citizens trying to decide for whom to vote.

As always, if you have any ethics questions or comments, please contact us at (334) 269-1515 or *ethics@alabar.org*. ▲



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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.*

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Attorney Discipline

***Walden v. Alabama State Bar*, No. 1180203 (Ala. March 27, 2020)**

Under Ala. R. Disc. P. 1(a)(1), the bar has exclusive jurisdiction over attorney discipline, with appeal to the Supreme Court of Alabama.

Rule 60

***Ex parte Huntington College*, No. 1180148 (Ala. March 27, 2020)**

Plurality opinion; action by trustees, seeking to deviate in a plan for trust distributions from a consent judgment entered decades earlier in the circuit court, was not subject to the jurisdiction of the probate court. Even though probate court could exercise general equity jurisdiction under the Alabama Trust Code absent a prior judgment, in the presence of the prior judgment, the only proper course was to seek relief from the judgment in the circuit court under Rule 60.

Specially-Sitting Circuit Judges

***Lawler Mfg. Co. v. Lawler*, No. 1180889 (Ala. March 27, 2020)**

Presiding circuit judge on recusal assigned action to a district judge for handling as a specially-sitting circuit judge. Held: orders entered by the district judge were without jurisdiction, and thus orders would not support an appeal, for failure to follow the procedure on judicial recusals and reassignments in *Ex parte Jim Walter Homes, Inc.*, 776 So. 2d 76 (Ala. 2000).

Shareholder Derivative Actions; Mandamus Review

***Ex parte 4tdd.com, Inc.*, No. 1180462 (Ala. March 27, 2020)**

Putative derivative action was to be dismissed under ARCP 23.1 for failure to allege with particularity the efforts plaintiff shareholder made to demand the requested relief before commencing suit. Shareholder demand is not an issue of standing but rather of adequacy of pleading. Mandamus review is, however, available to determine compliance with Rule 23.1, which requires a derivative complaint to allege that a director demand was made or was futile. Claims in this case were derivative in nature, in that they sought to set aside certain acts taken as *ultra vires* which inured to the detriment of the corporation. The relief requested was in part for damages to all shareholders, and non-monetary relief did not seek relief unique to the plaintiff shareholder. Director demand was therefore required, and no facts were pleaded to lead to the conclusion that it would be futile.

Juror Qualifications; General Verdicts

***Leftwich v. Brewster*, No. 1180796 (Ala. April 3, 2020)**

(1) Trial court properly denied strike for cause of one spouse based on claim that two spouses (husband and wife) were on the same venire. Nothing in Ala. Code § 12-16-150 disqualifies a venireperson for cause based on being married to another member of the venire. (2) Since the case was submitted on a general verdict, evidentiary issue concerning exclusion of testimony relating to real property damage could not be assigned as error because the jury could have determined there was no breach of duty, independent of any question of damage.

Res Ipsa Loquitur

***Nettles v. Pettway*, No. 1181015 (Ala. April 10, 2020)**

Negligence through res ipsa loquitur (RIL) requires plaintiff to demonstrate that alternative non-negligent potential causes of the accident did not occur or are implausible. In this case, the trial court properly granted summary judgment on an RIL claim based on allegedly negligent installation of aftermarket wheels, where plaintiff provided no evidence to foreclose the possibility that the detachment of the wheel could have occurred as a result of other causes. While a plaintiff is not required to exclude all other explanations, once a defendant offers evidence to support a potentially non-negligent alternative explanation, plaintiff is obligated to demonstrate that the plaintiff's theory is more probable.

Dram Shop Act

***Everheart v. Rucker Place, LLC*, No. 1190092 (Ala. April 24, 2020)**

ABC regulation on service of alcohol "applies when the on-premises licensee, either as an individual or through its agents, is acting in its capacity as an on-premises licensee." It does not apply to a caterer which is serving alcohol provided by the party's host at a venue which is not the subject of the on-premises license.

Direct Action Statute; Mandamus Review

***Ex parte State Farm Fire & Cas. Co.*, No. 1180451 (Ala. April 24, 2020)**

Carrier's contention that a direct-action statute claim could not be raised by amendment, but rather must be asserted in a different lawsuit, is not subject to mandamus review; review by appeal provided an adequate remedy.

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Relation Back of Amendments

***Ex parte Gray*, No. 1180999 (Ala. April 24, 2020)**

Under Ala. R. Civ. P. 15(c)(3), an amendment changing the name of a defendant relates back if three elements are satisfied: (1) the claims against the newly-added defendant are transactionally related to the claims as originally asserted; (2) within the later of the expiration of the statute of limitations or 120 days after commencement of the action, the new defendant receives notice of the action, and (3) the new defendant knows or should know that, but for a mistake in naming him, he would have originally been named. In this case, plaintiff mistakenly sued the law enforcement officer who worked the two-car accident instead of the party involved therein (suit was filed two days before the statute expired), but plaintiff corrected the error about 90 days after commencement of the action. There was no dispute that Gray knew or should have known that he was to have been sued. The amendment substituting Gray for the officer therefore related back.

Non-Compete Agreements and Intentional Interference; Causation

***Jostens, Inc. v. Herff Jones, Inc.*, No. 1180808 (Ala. April 24, 2020)**

HJ and Jostens are competitors in high-school scholastic recognition products, each of which sells its products through independent contractor businesses which are granted territories for the sales. At issue in this case was an alleged breach of a non-compete agreement involving a contractor's switch from HJ to Jostens, allegedly leading to the switch by 47 schools from HJ to Jostens products. After a two-week trial, the jury awarded compensatory and punitive damages to HJ and its contractor. The sole issue on appeal was the sufficiency of evidence that the wrongful conduct caused 47 high schools to switch their accounts from HJ to Jostens. Defendants contended that under *Corson v. Universal Door Systems, Inc.*, 596 So. 2d 565 (Ala. 1991), plaintiffs were required to produce evidence from each of the decision-makers in the 47 schools. Plaintiffs countered that under *Intergraph Corp. v. Bentley Systems, Inc.*, 58 So. 3d 63 (Ala. 2010), the jury was allowed to infer that all damages were caused by the wrongful conduct. The supreme court affirmed the judgment for plaintiffs, reasoning that plaintiffs were not required to present customer-specific evidence as to the reason each of the 47 schools switched. This is a unanimous full-court opinion by Justice Mendheim.

Declaratory Judgments; Justiciability

***City of Montgomery v. Hunter*, No. 1170959 (Ala. May 1, 2020)**

***Moore v. City of Center Point*, No. 1171151 (Ala. May 1, 2020)**

***Woodgett v. City of Midfield*, No. 1180051 (Ala. May 1, 2020)**

***Mills v. City of Opelika*, No. 1180268 (Ala. May 1, 2020)**

Trial courts lacked subject matter jurisdiction over these actions against municipalities by red-light camera citation recipients for lack of a justiciable controversy. In most of the cases, the plaintiff had paid the citation but not followed the challenge mechanism in the implementing legislation in the municipal or circuit court. (In at least one unpaid case, the plaintiff did not challenge the citation in the time period prescribed by the Local Act and Ordinance, but did not pay.) Any controversy involving the legality of the citations became moot once the time for challenge in the local act and ordinance passed without challenge, destroying justiciability.

Unjust Enrichment; Pleading

***Pentagon Fed. Credit Union v. McMahan*, No. 1180804 (Ala. May 8, 2020)**

In action for redemption of property, trial court erred in refusing to consider unjust enrichment argued by redemptionee for defendant's failure to plead it; unjust enrichment is not an affirmative defense under case law and because it was simply interposed as a defense rather than as an affirmative claim for relief.

CDs; Ownership

***Dupree v. PeoplesSouth Bank*, No. 1180095 (Ala. May 8, 2020)**

Where two parties' names appear on a CD and the funds used to purchase the CD belong to one party, unless there is evidence that the funding party intended to make a gift or create a trust, the funding party has the right to the funds as between the two named parties. Second party did not establish an inter vivos gift, and thus bank was entitled to summary judgment in action by second party arising from bank's payment of the CD to funding party.

Arbitration; Post-Arbitral Procedure

***Russell Construction of Alabama, Inc. v. Peat*, No. 1180979 (Ala. May 22, 2020)**

Challenges to the arbitrator's modified order were barred because challenger did not file a Rule 71B proceeding to vacate

the arbitral award within 30 days of the arbitral award. However, challenger's "answer" to prevailing party's Rule 71C proceeding could in substance be deemed a timely Rule 71B proceeding to vacate the arbitrator's "Final Order" regarding certain escrowed funds.

FELA

***Mohr v. CSX Transp., Inc.*, No. 1180338 (Ala. May 22, 2020)**

Rail worker was injured when his glove cuff (gloves were provided by employer) was caught in repairing a line without using a second "tag" line. Trial court granted summary judgment to employer. The supreme court affirmed. There was no evidence of any prior accidents caused by the standard-issue leather safety gloves involved nor any evidence CSX had notice of the tendency of the gloves to get caught. As to the use of only one tag line, no member of the undisputedly well-trained and experienced crew–including Mohr–thought a second tag line was needed or complained about the crew's failure to use one.

State-Agent Immunity

***Edwards v. Pearson*, No. 1180801 (Ala. May 22, 2020)**

Child died after being struck by motorist while crossing the road in an effort to board a school bus. Child's estate PR sued the bus driver. Trial court granted summary judgment based on *Cranman* immunity. The supreme court affirmed. Exercising judgment in supervising students extends to bus drivers performing official duties and exercising discretion in supervising students. Although the bus driver was stopping at an undesignated stop, she was undisputedly exercising judgment in responding to child's running across her yard and toward a busy highway.

From the Court of Civil Appeals

Default Judgment Procedure

***Living By Faith Christian Church v. Young Men's Christian Association of Birmingham*, No. 2180674 (Ala. Civ. App. March 20, 2020)**

Circuit court correctly denied Rule 60(b)(4) motion by church, seeking relief from a default judgment regarding possession of a building. Circuit court was not required to hold a hearing before entering default judgment; Rule 55(b)(2) provides a trial court "may" hold a hearing on application for default judgment, but it is not required.

Ejectment; Non-Final Judgments

***Delevie v. Carrington Mortgage Services, LLC*, No. 2180245 (Ala. Civ. App. March 20, 2020)**

***Underwood v. Planet Home Lending LLC*, No. 2180680 (Ala. Civ. App. March 20, 2020)**

The court dismissed these appeals as being from non-final judgments. Both were ejectment actions in which other non-ejectment claims were asserted, but the trial court's order disposed of only the ejectment claim. Appeals were thus from non-final orders and there was no jurisdiction.

Workers' Comp; Venue; Forum Non Conveniens

***Ex parte Wal-Mart Associates, Inc.*, No. 2190468 (Ala. Civ. App. April 24, 2020)**

Interests of justice mandated transfer from Mobile County (plaintiff's residence) to Baldwin County (plaintiff's work site and site of injury and treatment) in workers' comp action.

Condemnation; Rights of Way

***Forty Three Investments, LLC v. The Water Works Board of the City of Birmingham*, No. 2180799 (Ala. Civ. App. May 1, 2020)**

Under Ala. Code § 18-3-1, the owner of a landlocked parcel may obtain a right of way to reach a public road, "provided written approval is obtained from the municipal government and the planning board of such municipality." Here, applicant's property was located outside municipal limits, but the board's property was located inside the municipal limits of Birmingham. Held: where property staggers incorporated and unincorporated properties, municipal approval must by granted by the government and the planning board of the municipality in which the property that stands to be affected (i.e., to be condemned) is located.

Statute of Frauds

***McCall v. Lowndes County Commission*, No. 2180781 (Ala. Civ. App. May 15, 2020)**

Statute of Frauds, Ala. Code § 8-9-2, barred claims asserted by the commission that an entity (plaza) breached agreement with the commission, as part of a sales contract, to place $500,000 of funds into escrow for commission's use to service a bond debt. Tender of a $500,000 check from plaza to the commission did not satisfy the Statute of Frauds because it did not disclose the full terms of the contract, dates of closing, and payment of balance, and was not a final expression of the agreement.

Workers' Compensation

***Nucor Steel, Inc. v. Otwell*, No. 2180542 (Ala. Civ. App. May 22, 2020)**

Because plaintiff did not plead that his chronic lumbar pain was an occupational disease under section 25-5-110(1), the trial court's permanent total finding based on that determination could not be sustained. Although complaint did plead cumulative trauma or repetitive physical stress claim leading to disability, under the last-injurious-exposure rule,

(Continued from page 311)

employer is responsible for benefits only if the injury claimed by employee is either new injury or aggravation of prior injury, which trial court expressly did not find. Remand was thus necessary to resolve the inconsistency.

From the United States Supreme Court

Copyright

***Allen v. Cooper*, No. 18-877 (U.S. March 23, 2020)**

Congress lacked authority to abrogate the states' immunity from copyright infringement suits in the Copyright Remedy Clarification Act of 1990.

Section 1981; Causation

***Comcast Corp. v. National Assn. of African-American Owned Media*, No. 18-1171 (U.S. March 23, 2020)**

Section 1981 plaintiff is required to plead and prove that race was the but-for cause of the injury alleged to have been suffered, and that burden remains over the life of the lawsuit.

ADEA; Federal Employees

***Babb v. Wilkie*, No. 18-882 (U.S. April 6, 2020)**

Because most federal-sector "personnel actions" affecting individuals aged 40 and older must be made "free from any discrimination based on age," 29 U.S.C. § 633a(a), such a personnel action is unlawful if age is a factor in the challenged decision. The Court rejected a but-for causation standard, under which the employment decision would not have been made but for the discrimination; the plain language of the statute as to federal employees (not as to private employees) requires that there be no discrimination based on age in federal employment.

Environmental Law

***Atlantic Ritchfield Co. v. Christian*, No. 17-1498 (U.S. April 20, 2020)**

CERCLA does not prohibit actions against potentially responsible parties in state court under state law theories for remediation damages, even if the damages being sought are for remediation efforts beyond that required by the EPA under its CERCLA plan.

Environmental Law

***City of Maui v. Hawaii Wildlife Fund*, No. 18-260 (U.S. April 23, 2020)**

The Clean Water Act forbids "any addition" of any pollutant from "any point source" to "navigable waters" without an appropriate permit from the EPA. §§ 301(a), 502(12), 86 Stat. 844, 886. In this case, Maui's wastewater treatment system carried effluent a half-mile, through groundwater, and eventually into the Pacific. The district court and the Ninth Circuit held that this was a discharge into a navigable water. The Supreme Court reversed, holding that a permit was required only where there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent* of a direct discharge, which was not present in this case.

Lanham Act

***Romag Fasteners, Inc. v. Fossil Group, Inc.*, No. 18-1233 (U.S. April 23, 2020)**

Plaintiff in a trademark infringement suit is not required to show that a defendant willfully infringed the plaintiff's trademark as a pre-condition to a profits award.

Deportation

***Barton v. Barr*, No. 18-725 (U.S. April 23, 2020)**

When a lawful permanent resident commits certain serious crimes, the Government may initiate removal proceedings before an immigration judge. 8 U. S. C. § 1229a. If the lawful permanent resident is found removable, the immigration judge may cancel removal, but only if the lawful permanent resident meets strict statutory eligibility requirements. §§ 1229b(a), 1229b(d)(1)(B). Among the eligibility requirements, a lawful permanent resident must have "resided in the United States continuously for 7 years after having been admitted in any status." § 1229b(a)(2). Another provision, the so-called stop-time rule, provides that a continuous period of residence "shall be deemed to end" when the lawful permanent resident commits "an offense referred to in section 1182(a)(2) . . . that renders the alien inadmissible to the United States under section 1182(a)(2)." § 1229b(d)(1)(B). Held: For purposes of cancellation-of-removal eligibility, a § 1182(a)(2) offense committed during the initial seven years of residence does not need to be one of the offenses of removal.

Unfunded Mandates (ACA)

***Maine Community Health Options v. US*, No. 18-1023 (U.S. April 27, 2020)**

A now expired provision of the Affordable Care Act established a "Risk Corridors" program aimed to limit the plans' profits and losses and set out a formula for computing a plan's gains or losses at the end of each year, providing that eligible profitable plans "shall pay" the Secretary of HHS, while the Secretary "shall pay" eligible unprofitable plans. The ACA neither appropriated funds for payments nor limited the amounts that the Government might pay nor was the program required to be budget neutral. Held: the United States is required to pay the unprofitable-plan insurers under the Tucker Act.

Copyright

***Georgia v. Public.Resource.org, Inc.*, No. 18-1150 (U.S. April 27, 2020)**

Annotations in the Official Code of Georgia Annotated, which were produced by private authors under a work-for-hire agreement with the Georgia Code Commission, are not subject to copyright under the "government edicts" doctrine.

Issue Preclusion

***Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, No. 18-1086 (U.S. May 14, 2020)**

Because two suits here involved different marks and different conduct occurring at different times, they did not share a "common nucleus of operative facts." Thus, the doctrine of defensive preclusion within res judicata, under which the prior litigant would be precluded from asserting defenses not raised in the prior action, did not apply.

From the Eleventh Circuit Court of Appeals

CAFA; "Local Event" Exception

***Spencer v. Specialty Foundry Products, Inc.*, No. 19-14427 (11th Cir. March 17, 2020)**

"[A]n event or occurrence" in the CAFA local-event exception to federal jurisdiction, 28 U.S.C. § 1332(d)(11)(B)(ii)(I), "refers to a series of connected, harm-causing incidents that culminate in one event or occurrence giving rise to plaintiffs' claims." Allegations referring to exposures over many years and at different times for different plaintiffs did not meet that standard, and thus do not fall within the exception. The Court left open the question whether § 1332(d)(4)(A)'s local controversy exception applied, because the District Court did not address that ground for remand, and because the defendants' petition for interlocutory appeal did not present this issue.

Qualified Immunity

***Waldron v. Spicher*, No. 18-14536 (11th Cir. March 25, 2020)**

Decedent's mother sued responding deputy, contending deputy violated decedent son's due process rights by stopping bystanders from performing CPR on decedent. Bystanders detected a pulse when deputy ordered them to stop, whereupon deputy called for response indicating individual was deceased and responding personnel had no rush. When rescuers arrived, they detected a heartbeat and stabilized and transported decedent, but he died a week later. The district court denied summary judgment to deputy on qualified immunity. The Eleventh Circuit reversed. Assuming that deputy was acting within his discretionary authority, deputy's actions did not violate clearly established substantive due process rights, unless deputy could have acted with a level of culpability more than reckless interference with bystanders' rescue efforts. However, if jury could find that deputy acted for the purpose of causing harm to decedent, plaintiff would have proved a violation of clearly established substantive due process rights. The panel remanded for the district court to reconsider the facts under this standard.

Qualified Immunity

***Alston v. Swarbrick*, No. 18-10791 (11th Cir. March 26, 2020)**

The Court reversed the district court's grant of summary judgment to sheriff's deputy on grounds of qualified immunity, relating to claims of false arrest and excessive force in the use of pepper spray for three to five minutes. The Court affirmed summary judgment on all other excessive force claims against deputy, as well as on all claims against second officer for his failure to intervene, and on all claims against sheriff for having a policy allowing or condoning excessive force. Fact issue existed as to whether the facts even gave rise to probable cause to arrest without a warrant for disorderly conduct, and facts as construed in plaintiff's favor also established lack of arguable probable cause to arrest for resisting without violence under Florida law, thus precluding summary judgment on false arrest claim.

ERISA

***Williamson v. Travelport, LP*, No. 18-10449 (11th Cir. March 27, 2020)**

Because complete administrative record is a prerequisite to judicial review of any ERISA benefits claim, the district court erred in granting a Rule 12 dismissal of a suit for benefits concerning calculation of a pension. Because 29 U.S.C § 1132(c) imposes penalties for an administrator's failure to provide documents, it must be strictly and narrowly construed; penalties cannot be imposed for failure to provide documents other than those specifically enumerated in § 1024(b)(4).

(Continued from page 313)

Employment; Retaliatory Discharge

***Monaghan v. WorldPay US*, No. 17-14333 (11th Cir. April 2, 2020)**

Abrogating *Gowski v. Peake*, 682 F. 3d 1299, 1312 (11th Cir. 2012), retaliatory discharge plaintiff can survive summary judgment by proving "material" retaliation, which "well might have dissuade[d] a reasonable worker from making or supporting a charge of discrimination."

Higher Education; Student Loans; Preemption

***Lawson-Ross v. Great Lakes Higher Educ. Corp.*, No. 18-14490 (11th Cir. Apr. 10, 2020)**

Higher Education Act of 1965, 20 U.S.C. §§ 1001 et seq. ("HEA"), does not preempt state law claims alleging that student loan servicers made affirmative misrepresentations to borrowers regarding their eligibility for a federal program that forgives student loan balances.

Standing

***In Re Bay Circle Properties, LLC*, No. 18-12536 (11th Cir. Apr. 8, 2020)**

Non-debtor and non-mortgagee lacked standing to pursue claims based on allegedly wrongful foreclosure even though he personally guaranteed the loans at issue and even though the property could satisfy or decrease his personal liability stemming from judgments that two creditors have against him individually.

Victims' Rights

***In re Wild*, No. 19-13843 (11th Cir. April 14, 2020)**

Wild, one of 30+ victims of Jeffrey Epstein, sued under the Crime Victims' Rights Act of 2004, claiming that when federal prosecutors secretly negotiated and entered into a non-prosecution agreement with Epstein in 2007, they violated her rights under the CVRA to confer with the Government's lawyers and to be treated fairly by them. The Eleventh Circuit held that, as the CVRA is currently written, rights under the CVRA do not attach until criminal proceedings have been initiated against a defendant, either by complaint, information, or indictment. Because the Government never filed charges or otherwise commenced criminal proceedings against Epstein, CVRA was never triggered.

Monell Liability

***Barnett v. MacArthur*, No. 18-12238 (11th Cir. April 15, 2020)**

MacArthur arrested Barnett on suspicion of DUI and transported her to the county jail. Barnett twice took a breathalyzer test, and both times the results were a blood alcohol level of 0.000. Without evidence of any impairment, she was detained for eight hours, even after she posted bond, pursuant to the DUI eight-hour "hold policy" of the Seminole County Sheriff's Office. Barrett sued MacArthur and the sheriff under section 1983. The district court granted summary judgment to the sheriff, and the case proceeded to trial against MacArthur. The jury returned a verdict for defendants, and judgment was entered thereon. On appeal, the Court summarily affirmed the judgment for MacArthur, but reversed the grant of summary judgment to the sheriff on *Monell* liability. Claim against the sheriff was that plaintiff was unlawfully detained pursuant to the sheriff's hold policy, under which continued detention occurred without probable cause.

Maritime Law

***Carroll v. Carnival Corp.*, No. 17-13602 (11th Cir. April 15, 2020)**

After Carroll tripped over the leg of a lounge chair while walking through a narrow pathway on a Carnival cruise ship, she sued Carnival, claiming it negligently failed to maintain a safe walkway and failed to warn her of that dangerous condition. The district court granted summary judgment for Carnival, concluding the condition was open and obvious and that Carnival lacked notice of the hazard. The Eleventh Circuit reversed, holding that the district court's conclusion did not construe the facts for plaintiff, and that even if the allegedly dangerous condition were open and obvious, that would only defeat the failure to warn claim, not the claim for negligent failure to maintain safe walkway.

Copyright; Statute of Limitations

***Webster v. Dean Guitars, Inc.*, No. 19-10013 (11th Cir. April 16, 2020)**

Unlike an ordinary copyright infringement claim, which accrues for each infringing act, a claim concerning ownership accrues only once.

Labor and Employment (PDA)

***Durham v. Rural/Metro Corp.*, No. 18-14687 (11th Cir. April 17, 2020)**

Durham's EMT job required her to lift 100+ pounds regularly. When physician recommended she not lift more than 50 pounds due to pregnancy, Durham asked for a light-duty assignment for the duration of her pregnancy. Rural had provided those light-lifting accommodations (10- to 20-lb. restrictions) for EMTs who were injured on the job, but had a policy of not providing such accommodations for EMTs whose injuries were not job-related. Rural's policy did allow for accommodation decisions on a case-by-case basis. Rural declined the request for accommodation, and Durham sued. The district court granted summary judgment to Rural. The Eleventh Circuit reversed, reasoning that "[n]either a non-pregnant EMT who is limited to lifting 10 or 20 pounds nor a pregnant EMT who is restricted to lifting 50 pounds or less can lift the required 100 pounds to serve as an EMT. Since neither can meet the lifting requirement, they are the same in their 'inability to work' as an EMT, which satisfies the plaintiff's prima facie requirement to establish she was similar to other employees in her ability or inability to work."

Rule 59; New Evidence

***Grange Mut. Cas. Co. v. Slaughter*, No. 18-13555 (11th Cir. May 1, 2020)**

District court did not abuse its discretion in refusing to consider evidence available at summary judgment but not offered, and instead offered only on a Rule 59 motion.

TCPA

***Medley v. DISH Network, Inc.*, No. 18-13841 (11th Cir. May 1, 2020)**

TCPA does not allow unilateral revocation of consent given in a bargained-for contract.

Employment Discrimination

***Knox v. Roper Pump Co.*, No. 18-11756 (11th Cir. April 30, 2020)**

Knox and his adult daughter worked for sister companies. They got into a domestic altercation at home, after which daughter complained to the HR department of Roper (Knox's employer). Roper suspended Knox based on its workplace violence policy, after which Knox complained of race discrimination because other similar instances had been handled while allowing employees to continue working. Roper then told him he could keep his job if completing anger management classes while on unpaid leave. Roper sent Knox a written agreement to document the process, which included a release of all claims. After he refused to sign the release, he was fired. He sued; the district court granted summary judgment on both Title VII discrimination and retaliation claims. The Eleventh Circuit affirmed as to the discrimination claim, reasoning that the proffered comparators were not material in all respects. The Court reversed as to the retaliation claim, reasoning that employer may not respond to a claim of race discrimination by conditioning continued employment on a release of claims and firing the employee for refusing.

Election Law; Standing

***Jacobson v. Fla. Sec. of State*, No. 19-14552 (11th Cir. April 29, 2020)**

Voters and organizations lacked standing to challenge Florida law governing order in which candidates appear on the ballot in Florida's general elections for lack of injury in fact.

COVID; Conditions of Confinement

***Swain v. Junior*, No. 20-11622 (11th Cir. May 5, 2020)**

District court, in putative class action brought by inmates, entered a preliminary injunction requiring the defendants to employ numerous safety measures to prevent the spread of COVID-19 and imposing extensive reporting requirements. Pursuant to FRAP 8, the panel stayed the injunction pending appeal and expedite the appeal. The Court concluded that the defendants are likely to prevail on appeal because the district court likely committed errors of law in granting the preliminary injunction, specifically by incorrectly collapsing the subjective and objective components of an Eighth Amendment claim based on conditions of confinement. The subjective component requires a demonstration by the state actors of deliberate indifference to safety of the detainees; no such showing was made.

FMLA; Title VII

***Martin v. Financial Asset Mgmt. Systems, Inc.*, No. 17-14488 (11th Cir. May 14, 2020)**

District court properly granted summary judgment to employer on FMLA, Title VII race and gender claims, and a section 1981 claim. As to the FMLA claim, a "serious health condition" under the statute requires being treated by a "health care provider"; employee's being treated by a licensed professional counselor was not qualifying. As to Title VII retaliation, although employee testified that she complained to the HR director about maltreatment based on race and sex, HR director denied the complaints were based on race and sex, and company president (who fired employee two days later) denied any knowledge of the complaint, so even crediting employee's testimony, there was no evidence that the HR director had informed the president of the complaint, and thus no evidence the president had that knowledge at the time he fired employee. Although employee's termination within days of protected activity can be circumstantial evidence of a causal connection, unrebutted evidence that the decision-maker did not have knowledge of the employee's protected conduct means that temporal proximity alone is insufficient to create a genuine issue of fact as to causal connection.

(Continued from page 315)

Trademark

***Engineered Tax Services, Inc. v. Scarpello Consulting, Inc.*, No. 18-13690 (11th Cir. May 14, 2020)**

District court erred in concluding on summary judgment that mark was not inherently distinctive; the question is for the jury.

Admiralty

***Troutman v. Seaboard Atlantic Ltd.*, No. 19-10533 (11th Cir. May 13, 2020)**

Issue: when, if ever, a negligence claim for breach of the shipowner's duty to turn over a vessel in safe condition properly lies where the plaintiff was injured by an open and obvious hazard. Held: generally, a shipowner does not breach this duty when the injurious hazard was open and obvious and could have been avoided by a reasonably competent stevedore.

Taxation

***Champions Retreat Golf Founders LLC v. Commissioner*, No. 18-14817 (11th Cir. May 13, 2020)**

Taxpayer was entitled to deduction for conservation easement over property which included a private golf course; the relevant statutory provisions do not except property because it lies within a golf course.

Social Security

***Samuels v. Commissioner*, No. 18-14562 (11th Cir. May 13, 2020)**

ALJ erred by failing to give disability applicant's treating physician's opinion the proper weight and by discounting her own testimony. ALJ's hypothetical to vocational expert did not sufficiently communicate her limitations from bipolar disorder.

Insurance

***Robinson v. Liberty Mutual Ins. Co.*, No. 19-10940 (11th Cir. May 11, 2020)**

Brown recluse spiders are "insects and vermin" within a property damage exclusion in a homeowner's policy construed under Alabama law.

FOIA

***Statton v. Florida Federal Judicial Nominating Commission*, No. 19-11927 (11th Cir. May 21, 2020)**

Advisory commission appointed by U.S. senators for federal judge nomination recommendations is not an "agency" within the meaning of FOIA.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Insanity Defense

***Kahler v. Kansas*, No. 18-6135 (U.S. March 23, 2020)**

Due process clause does not require state to adopt insanity test to exculpate criminal liability which turns on a defendant's ability to recognize that his crime was morally wrong. The insanity defense is a project for state governance, not constitutional law.

Terry Stop

***Kansas v. Glover*, No. 18-556 (U.S. April 6, 2020)**

As long as an officer lacks information which would suggest that the owner is not driving the vehicle, an investigative traffic stop made after running a vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.

Plain Error

***Davis v. U.S.*, No. 19-5421 (U.S. March 23, 2020)**

The Court overruled the Fifth Circuit's outlier rule under which factual errors not preserved in the district court are not subject to "plain error" review.

Jury Unanimity

***Ramos v. Louisiana*, No. 18-5924 (U.S. April 20, 2020)**

Sixth Amendment right to a jury trial, as incorporated against the states by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense. The case drew significant press coverage regarding separate writings from various justices, especially Justice Kavanaugh, regarding the circumstances in which stare decisis does not compel continued adherence to precedent.

"Honest Services" and Property Fraud

***Kelly v. U.S.*, No. 18-1059 (U.S. May 7, 2020)**

Actions of (NJ) Governor Christie's aides to close traffic lanes on the George Washington Bridge between Ft. Lee, NJ and NYC, to retaliate politically against the mayor of Ft. Lee

for refusing to support Gov. Christie's re-election campaign, was not a scheme to obtain money or property, and thus could not be the subject of prosecution under federal wire fraud statutes.

From the Alabama Supreme Court

Ethics Act

***Ex parte Hubbard*, No. 1180047 (Ala. Apr. 10, 2020)**

The court affirmed six convictions of violations of the Alabama Code of Ethics by the former Speaker of the Alabama House of Representatives, while reversing five convictions due to insufficient evidence or incorrect interpretations of the Code. It rejected the defendant's assertions of hypothetical scenarios wherein the Code would punish otherwise innocent conduct, noting that the Code was designed to thwart corruption with prophylactic measures.

Mistrial

***Ex parte State (v. R.E.D.)*, No. 1180639 (Ala. Mar. 13, 2020)**

Defendant was not entitled to jury trial on whether the state intentionally engaged in misconduct to provoke him to move for a mistrial, without a showing of "substantial evidence" that the state committed such misconduct.

From the Court of Criminal Appeals

Municipal Court Appeal

***Ex parte City of Andalusia*, CR-19-0238 (Ala. Crim. App. Apr. 17, 2020)**

Defendant seeking to appeal to circuit court from his municipal court convictions perfected his appeal by timely filing a notice of appeal and requesting a waiver of an appeal bond within the 14-day time period required under Ala. R. Crim. P. 30.3 and Ala. Code § 12-14-70, even though waiver was granted outside of the time period.

Rule 32; Ineffective Assistance

***Walker v. State*, CR-18-0098 (Ala. Crim. App. Mar. 13, 2020)**

Defendant did not sufficiently plead facts to show that his trial counsel rendered ineffective assistance in failing to investigate and prepare for trial. Defendant's assertion that counsel "interviewed less than two potential witnesses for the defense" and did not "consult and retain expert witnesses to assist the defense[,]" without more, was insufficient to warrant further proceedings.

Probation Revocation

***Hooks v. State*, CR-18-0908 (Ala. Crim. App. Mar. 13, 2020)**

Trial court could not revoke probation based solely on finding that probationer committed technical violations. Because no evidence was presented regarding the probationer's alleged commission of two new offenses, he was subject only to a 45-day "dunk" under Ala. Code § 15-22-54(e)(1) for technical violations. ▲

ABOUT MEMBERS, AMONG FIRMS

Please email announcements to *margaret.murphy@alabar.org*.

About Members

C. Richard Wilkins announces the opening of **C. Richard Wilkins Attorney At Law PLLC** at 7070 Bruns Dr., Mobile 36695. Phone (251) 287-6087.

Among Firms

Amari & Gray of Birmingham announces that **Orion Parrish** joined as an associate.

U.S. Attorney General William Barr announces that **Philip A. Barr** (no relation) is a U.S. Immigration Judge in the Atlanta Immigration Court.

Baker Donelson announces that **Scott S. Frederick** is a shareholder in the Birmingham office.

Bradley Arant Boult Cummings LLP announces that **Rich Sharff** rejoined the Birmingham office as counsel and that **Jessica Sparhawk** joined the Montgomery office as an associate.

Cabaniss, Johnston, Gardner, Dumas & O'Neal LLP announces that **George Morris** and **Hal West** are the firm's managing partners.

The Cole Law Firm LLC of Decatur announces that **Zachary H. Starnes** joined the firm.

The Finley Firm PC announces that **Kirkland E. Reid** joined its Columbus, Georgia office as a partner.

G. Bartley Loftin III and **David W. Holt** announce the formation of **Loftin Holt LLP** at 200 Clinton Ave. W, Ste. 315, Huntsville 35801. Phone (256) 929-7997.

Mann & Potter PC of Birmingham announces that **Corbin Potter** joined as an associate.

Maynard Cooper & Gale announces that **La Keisha Wright Butler** joined as of counsel in the Huntsville office.

Timothy B. McCool and **John Morgan Owens** announce the opening of **McCool & Owens Attorneys at Law** at 100 Phoenix Ave., Carrollton 35447. Phone (205) 367-8125.

Pepper & Odom PC announces that **Andrew Seth Fishbein** and **Kristin M. Kizziah** joined as associates in the Birmingham office.

Scarborough & Griggs LLC of Tallassee announces that the firm name is now **The Griggs Law Firm LLC.** ▲

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