



2022-2023 ASB President C. Gibson Vance and Kate Vance



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### On The Cover

Alabama State Bar President  
Gibson Vance of Montgomery  
and his wife, Kate Vance

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Photography

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# ATTORNEY WELL-BEING: My Commitment to Prioritizing Better Health and Service

It's been nearly 30 years since I took the oath to become a member of the Alabama State Bar, and during those three decades, I have watched and learned from some of the best what it takes to be a successful attorney. Passion for the job, compassion, communication skills, a willingness to listen, good time management, a commitment to life-long learning, perseverance, good judgement – those are just some of the necessary traits. However, there is one that often gets left off the list – prioritizing health.

While we often hear about the importance of eating well and staying physically active in a career that involves many hours at a desk, it's the emotional and mental side of our health that sometimes feels neglected or even stigmatized in our conversations.

In short, we are good at taking care of our clients, but we aren't always so good at taking care of ourselves. Lawyers have significantly higher rates of problematic drinking and mental health problems than the general population. The statistics speak for themselves.



Suicide is the third leading cause of death among attorneys – *three to six times higher than other professions.*

A recent study found that as many as 36 percent of licensed, employed attorneys consume alcohol at levels consistent with problem drinking, compared with 12 percent of other professionals.

Around 28 percent of attorneys are struggling with some level of depression, and 19 percent show symptoms of anxiety. Younger attorneys in the first 10 years of practice have the highest incidence of these problems. In fact, 40 percent of law students report severe depression upon graduation.

Substance-use percentages were also alarming, with 36 percent of attorneys diagnosable versus 10 percent of the population.

What makes this even worse is that lawyers don't seek help for behavioral health problems because they fear someone will find out, and it will discredit them or possibly affect their license. The lack of awareness for available resources was also a barrier in getting the help they needed.

These numbers are incompatible with a sustainable professional culture. Too many individuals are struggling and suffering, and the impact is too great for us to ignore.

Doing more to address that issue will be the focus of my term as president.

In addition to promoting our first-class Alabama Lawyer Assistance Program led by Jeremy Rakes, which has, no doubt, saved the lives of countless attorneys in their darkest moments for many years, we have launched a

brand-new initiative. Modeling successful programs in Georgia and South Carolina, we launched **the ASB Lawyers Helpline** this past July.

Just by calling **1-800-605-8678**, lawyers, judges, and law students in Alabama can be connected with resources that quickly and professionally assist in handling problems affecting their personal or work life. Whether attorneys need help with parenting problems, family problems, work difficulties, marital concerns, emotional upsets, stress, depression, alcohol/drug misuse, or other personal concerns, the line is open 24/7. Counselors answer the phone around the clock to provide immediate support and assistance. What's more, we will provide all ASB members with five free hours of counseling each year.

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(Continued from page 281)

The counseling sessions are done anonymously. The bar will not know the identity of those utilizing the service, and the cost to our members is free. We hope this removes any financial obstacles or fear from getting help.

The Drive for Five, as I am calling my presidential mission this year, also includes a statewide tour. I plan to visit, spend time with, and listen to members in all 41 judicial circuits in Alabama. Every member who attends one of our events, whether it's a luncheon, breakfast, or social activity, receives 1.0 CLE credit.



*President Vance's initiative, the Drive for Five, is two-fold. He will travel to each of the 41 judicial circuits in Alabama to promote a brand-new program offering all ASB members five free hours of counseling per year.*

Not only are we going to highlight those five free hours of counseling as we drive across the state this year, but we also hope to drive home the message that to be a *good* lawyer, one must be a *healthy* lawyer.

This mission is also about making sure Alabama lawyers know about and use the free resources available to them while also taking away the stigma from talking about and reaching out for help.


The Lawyers Helpline is just one of the many free benefits and discounts available to members, and I hope our statewide visits illustrate just how much the bar does for Alabama attorneys.

I am excited about what we will do together over the next year for the Alabama State Bar. This year is not about me – it is simply my opportunity to provide the best service possible for all 19,000+ members.

To me, there is no greater feeling than giving back and knowing your words and actions have made a difference in the lives of others.

My early years gave me a heart for the underdog. Raised by a single mother, I got my first job at 12, and I was lucky enough to have the opportunity to attend college at Troy University thanks to a Pell grant and work-study programs. My passion for the law led me to Jones School of Law, where I attended classes at night so I could work during the day. I vividly remember my first job out of law school – my first case was a dog-bite. My second was a slip-and-fall.

As you'd imagine, Troy University has a special place in my heart, and I am honored to serve as president pro tempore of the school's board of trustees. It

  
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*President Vance talks with scholars from Valiant Cross Academy. Vance's alma mater and where he serves as president pro temp for the board of directors, Troy University, lends a portion of its Montgomery campus to the academy and supports its mission. The two schools are an integral part of President Vance's heart for service, in addition to his commitment to service and leadership at the state bar.*

is humbling to represent my alma mater and to support its work in preparing the next generation of leaders. Through that role, I was able to work closely with another organization nurturing exceptional leaders – Valiant Cross Academy in Montgomery. The all-male school was founded to address some of the challenges plaguing our city and nation. The vision is to increase the literacy rate, attendance rate, and ultimately the graduation rate of each scholar. The long-term goal is to teach each scholar the skills necessary to become lifelong learners and productive citizens.

I am proud of the partnership between Troy and Valiant Cross that provides Troy classrooms and other instructional spaces for Valiant Cross to house high school classes and other activities. They are truly changing lives, and I thank you for allowing me the space to highlight these remarkable

organizations that have taught me so much about service.

I tell you all of this to give you a glimpse into why giving back and helping those who are struggling is something I care about deeply. It's what energizes me most about the year ahead and the lives we can impact for the better. (Although I have promised my wife, Kate, that my role as ASB president is the last time I'll take on a volunteer role this large!)

I believe we have a moral obligation to our fellow members of the bar. This obligation cannot be found in a code or in a statute, but in the common bonds that bind us as professionals.

But we can and must do more to help our brothers and sisters of the bar and change the direction of the staggering statistics of our profession. With your help, this starts today. ▲

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## EXECUTIVE DIRECTOR'S REPORT

*Terri Lovell*  
*terri.lovell@alabar.org*

# Know Your Bar

First, I thank you for the opportunity – both in this column and during speaking opportunities – to share some of the Alabama State Bar programs that are crucial to supporting you. One of my many goals is to educate bar members about the numerous services that our organization provides for members and the public.



*Laneaux*



*Vinson*



*Douglas*

It all begins in the Admissions Office where Director Karen Laneaux, Coordinator LaDonna Vinson, and Administrative Assistant Sonia Douglas are responsible for processing law student registration applications and all applications for admission to the Alabama State Bar, providing administrative support to the Board of Bar Examiners and the Committee on Character and Fitness, and administering the Alabama Bar Exam. Our state bar continues to build strong relationships with law schools and law students as they administer and enforce the Rules Governing Admission to the Alabama State Bar.



The office is always bustling, but the weeks surrounding the February and July bar exams bring an additional level of anticipation. The buzz of the never-ending emails and phone calls is enough to bring back a flood of anxiety and emotion that all of us most likely felt at the time of the bar exam. The two-person grading system was implemented in February, and I will share more about it in a future article. As we continue to improve the process, take time to visit <https://www.alabar.org/admissions/> for the latest statistics, rules, and admissions information.

Next, I am highlighting our Licensing and Regulatory Office. Under the direction of Coordinator Cathy Sue McCurry and assisted by Angie Fuqua, our staff gives personal attention to each member through licensure processing, application of MCLE credits, attorney specialization, pro hac vice, addressing exemptions, and transfer of licensure status. Dues notices are sent to members each September. The board of bar commissioners recently voted to maintain dues at the reduced rate for another year. Along with answering many emails and calls during the year, the staff certifies over 15,000 MCLE courses each calendar year and works closely with the MCLE Commission. If you have a membership question, please contact us at [ms@alabar.org](mailto:ms@alabar.org).



McCurry



Fuqua

No program of the Alabama State Bar would be successful without the many volunteer lawyers. More than 9,000 lawyers belong to voluntary state bar sections. Over 1,200 lawyers serve the state bar through committees and task forces, 75 lawyers have been elected by your membership to represent you as the governing body, and many others serve in leadership and appointed positions like the MCLE Commission and the Committee on Character and Fitness mentioned before. If you are one of these volunteers, I say thank you. If you would like to be more involved, please reach out, and I will share more opportunities for you to help your fellow lawyers. The Alabama State Bar is all of us, and this system only works when we work together. ▲

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**W. Gregory Ward**  
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We have become known for our themed issues, and the lawyers I've spoken with seem quite taken with the concept. However, from time to time we step aside from that convention, and this edition is one of those times.

We have three unrelated articles for you. I was impressed with all three, and rather than wait to append them to themed issues we decided to display them all at once.

Marc James Ayers is a member of the editorial board of *The Alabama Lawyer* and his input and advice are always valued. He stepped out of that role and he decided to jump into the writing fray with his own article. We've been discussing this and he's been writing it for quite some time. I think you will enjoy "Who Do We Think We Are?" (page 290), which begins with the movie "A Few

Good Men" and deftly melds into a mention of Assize of Clarendon in 1166. What's it all about, Alfie? I think I'll leave it with that tease and let you discover it for yourself. With this spoiler alert: I found this to be a fun read.

The most patient people that I know are named Vince Schilleci, Brian Williams and Alex Priester. They've been patiently waiting while I found an edition to include their insightful article "Alabama Qualified Dispositions in Trust Act." The wait is over, and it is on page 300. Good stuff, this article. And well worth the wait.

We end – not because it is the least important article, but because it is the longest article – with "Are There Constitutional Issues with Alabama's gubernatorial and Legislative Responses to the COVID-19 Pandemic?" (page 310). I've



been waiting for someone to step up to the plate to take a look at these issues, and Dave Wirtes – also a member of the editorial board of *The Alabama Lawyer* – called and asked to take it on. He'd put together a team that researched the topic. If this article is not cited to circuit court judges across the state, and then, likely to our appellate courts, I'll munch my chapeau. By the by, we welcome Dave's son, Joey Wirtes, as a new contributor to our magazine, along with his co-authors Joe Steadman and Aaron Maples.

Just a quick reminder, this is not the first COVID-19-related article *The Alabama Lawyer* has published. Pull your November 2020 education law issue and read Anne Yuengert and Anne Knox Averitt's take on the Families First Coronavirus Response Act in "Navigating Employee Leave, Accommodations, and Preventative Health Measures in Schools."

So there you have it. We hope you have as much fun reading this issue as we had putting it together.

Enjoy the articles. Email me at [wguard@mindspring.com](mailto:wguard@mindspring.com) if you have questions or comments or want to write. Come join the fun. We are always looking for our next group of excellent writers.

And just wait till you see what we have for you in our November issue. ▲

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# Who Do We Think We Are?

*By Marc James Ayers*

## Introduction: Lawyers as Stewards of a Noble Profession

In the final scenes of the movie “A Few Good Men” – one of the great classics of legal cinema – under dramatic, but extremely risky cross-examination by Lt. Daniel Kaffee (played by Tom Cruise), Col. Nathan Jessup (played by Jack Nicholson) admitted to directing the kind of “Code Red” discipline which led to the unintentional death of a Marine stationed at Guantanamo Bay, Cuba. Although contrary to military law, Col. Jessup explains that he did it for what he personally determined to be the

greater good. When he is being arrested following this in-court admission, he is outraged, and he and Lt. Kaffee – who has up until this trial spent his career simply processing cases, looking for the easy way out and using his status for his own comfort, but is now finally embracing his true calling as a lawyer – have the following exchange:

Col. Jessup: ... You have no idea how to defend a nation. All you did was weaken a country today, Kaffee. That’s all you did. You put people’s lives in danger. Sweet dreams, son.

Lt. Kaffee: Don’t call me son. I’m a lawyer and an officer in the United States Navy. And you’re under arrest....

While the status of military officer is generally held in high esteem, one wonders about how the public views the status of the typical modern lawyer. We certainly do ourselves no favors with overly-aggressive and uncharitable litigation antics, unprofessional and sometimes simply humiliating television commercials, and the like (as well-known and long-circulating lawyer jokes demonstrate). Of course, there are some perceptions that may linger regardless of how we hold ourselves out.

Regardless, we should do whatever we can to help our profession regain and maintain its dignity. In that regard, perhaps a better starting question is: Who do we think we are? What do we think our profession is, and what should it be? Are we true professionals who care deeply about the law and its role in preserving society, or are we, as some have asserted, mere claims processors or technicians?

Such an inquiry should drive us to recall the great historic legal tradition into which we entered when we became members of the bar – a tradition that is one of the core pillars of Western civilization. We often call it the legal “industry,” which in many ways is unfortunate. Historically, the legal profession was seen as a true profession, as a calling. Indeed, in the past – meaning in *our* past as a body of lawyers – entry into the profession followed one’s being literally “called to the bar.”<sup>1</sup> Remember that even terms like *bar* connect us to our history, and show that the profession was intended to have a particular dignity. The bar refers to a wooden rail or partition in a court room which separated the public area from those qualified to address the court on the law. To be called to the bar



is to be recognized and received into this body of professionals.<sup>2</sup>

How does such an ancient and noble profession lose its perspective and lose the sense of dignity that should follow? It is actually quite easy, especially given the hectic schedules that many of us follow, to allow what we do to become a mere technical, plug-and-chug industry. We either never learned, or have long forgotten, the roots of our noble profession. So many things that we do day to day without much thought are actually tools that have been handed down as a part of the great and ancient English law tradition.

We are not mere technicians or claims processors, loudmouth braggards or bullies who manipulate the law. Rather, we need to think of ourselves as stewards entrusted with a sacred duty to the public and society, a notion aptly summarized by the Florida Supreme Court in a 1942 decision:

The administration of justice is a composite rather than an individual concept. It is a derivative of Christian ethics and with us has attained a significance that

it has nowhere else on earth. It contemplates the righteous settlement of every controversy that arises affecting the life, liberty, or property of the individual. *Lawyers and judges are stewards of the law provided for this purpose. ...*

Since the practice of the law deals with the most abiding and the most vital relations of life, we speak of it as a great and honored profession. Mr. Justice Brandeis characterized a profession as “an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning as distinguished from mere skill, an occupation which is pursued largely for others and not merely for one’s self, an occupation in which the amount of financial return is not the accepted measure of success.” In fact, the practitioner who makes financial return his main objective will experience little of the real joy that come to those whose interest in the law rises above the economic.



The administration of justice is the business of the public. *Members of the bar are stewards commissioned to perform that business.* Their stewardship will be successful in proportion to the manner in which they take the public into their confidence and perform it with a fidelity alike to the state, to client, and to the profession....

...

Whatever truth there is to the charge that the public no longer trusts the bar is not due to the fact that a majority have become ethically obtuse. It is due to the fact that an unscrupulous minority are unfaithful stewards, who insist on placing the emphasis in the wrong place; too much concern about fees and winning cases and too little concern about administering justice in the way to inspire public confidence. Making a fee is important but it is incidental to doing justice and is not the “accepted measure of success” at the bar...<sup>3</sup>

And as stated by a California federal district court:

... We live in a nation governed by the rule of law. We’ve constructed a powerful government to administer that law – a government that can deprive a person of property, liberty, and even life. But unlike governments of men, which depend on might, our government of law ultimately depends on the consent of the governed for its continued existence. The public must trust that the government and the legal system that undergirds it are fair and just. *Lawyers serve as both stewards and servants of that trust.* Since

well before the law was an industry, our society looked to the profession to safeguard a complex system that keeps our country going....<sup>4</sup>

The goal of this article is to briefly examine just a few of the many aspects of our day-to-day practice of quite ancient and distinguished lineage which should generate deeper appreciation. As will be necessary for an article of this length, the discussion is highly generalized, and each subject is certainly worthy of more detailed consideration. The hope is, however, that by even taking a quick look at the historical development and weight of many of the tools entrusted to us, we will be given pause to consider and reevaluate the true dignity of our profession.

## A Short History Of Some of The Tools of Our Profession

### The Common Law

Alabama has always been, of course, a common law state.<sup>5</sup> This principle is expressly stated in the Alabama code, which provides that “[t]he common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature.”<sup>6</sup> As Alabama practitioners, we frequently call upon and utilize the tools of the common law – ele-

ments of common law causes of action, common law remedies and defenses, etc. – as we have been trained to do, but without much thought to the fact that those tools are the end product of an ancient development which has been entrusted to us to maintain for the good of society.

What we know as the common law – often referred to as judge-made law or case law, as it evolved through the application of general maxims, logic, and reason to individual cases – began to come into existence almost 1,000 years ago from a need to bring a sense of uniformity and consistency to what was a patchwork of differing local legal systems. Many historians trace the beginnings of the English common law system to the Norman Conquest

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by William the Conqueror in 1066. Prior to the Conquest, law in Anglo-Saxon England was controlled by various local practices and customs:

There were three distinct systems in place: the law of Wessex, the law of Mercia, and the Danelaw. But there were differences of detail, particularly in procedure, in each of the 32 counties. Oath [and] ordeal ... were universal modes of proof; but their detailed operation varied from place to place and according to the status of the parties. Since all proceedings were oral, legal tradition was unstable. Litigation ... was as uncertain as a game of dice.<sup>7</sup>

Following the Conquest, however, now-King William I recognized that any effective lordship

over the great island required a much more organized administration of justice and a uniform system of law. One of the major components of William's efforts in this regard was his establishment of the *Curia Regis* ("King's Court"). The *Curia Regis* was a royal household of advisors and counsellors – something which was not unusual and existed in some form even under the Anglo-Saxon kings<sup>8</sup> – but which also became, under William, an actual body which would, along with the king, hear petitions and administer the king's justice.<sup>9</sup> As noted above, the king and his advisors would sit on a literal bench against a wall, a practice which eventually provided the name of one of the most important of the king's courts: the Court of King's Bench.

However, the king did not administer his justice in this way solely from London. Along with his *Curia*, King William would actually travel throughout the realm to hear and resolve various matters and petitions. In this way, the king could actually begin to create some level of uniformity in the legal principles that would bind the whole of the country as the law of the land.

Development of the common law was somewhat interrupted during the turbulent times following William's death – in particular stemming from the civil war between King Stephen and Empress Matilda<sup>10</sup> – but took major steps forward during the reign of Henry II (1154-89).<sup>11</sup> Like William, Henry II also had a strong desire to centralize his authority and to have a uniform system of law. One of the innovations implemented by Henry was to create *justices in eyre* – *eyre* meaning *circuit*.<sup>12</sup> Also known as itinerant justices, these judges would ride circuit through the country and hear


matters in the name of the king.<sup>13</sup> In Henry's time there were only 18 judges in the country, and, of these, five remained in London and comprised the Court of King's Bench in Westminster.<sup>14</sup> Under this system, the itinerant justices, who were versed in the laws and legal principles established at Westminster in London, would take and apply those same laws and principles in the various areas of the realm.

While this system of itinerant justices applying a growing, more consistent corpus of English law accomplished much in the creation of the common law, that process was greatly aided with the advent of the written decision. In the mid-13<sup>th</sup> century, court decisions and judgments, which until then were oral, began to be recorded, thus giving rise to a more concrete application of precedent. Indeed, the earliest system of law reporting was known as The Year Books, which were written in either Latin or French and contain decisions issued during the reign of Edward I (1272-1307).<sup>15</sup> From this point forward, the decisions handed down in English law courts could now be read and applied as precedent in similar cases in other locales.

It is from these beginnings that the law in England could become truly common, and that resultant common law – with all of its reasoned intricacies and underlying policies developed over a millennium – continues on as one of the great treasures of our society. When we become members of the bar, we, like so many before us, are entrusted to serve as stewards of that treasure.

## Equity and Equitable Remedies

Today, few of us would consider the seeking of equitable remedies such as injunctions, decrees of



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specific performance, rescission, and reformation, etc. as particularly noteworthy. Such litigation tools are so familiar and frequently invoked today that it would be easy to forget that the only reason we are able to seek such remedies is due to exceptional developments in England which occurred many hundreds of years ago and have since been handed down to us by our predecessors at the bar – a body into which we have now been called.

Although the gradual establishment of the English common law provided uniformity and consistency, the procedures and remedies developed by the common law courts also began to be criticized at times as being overly rigid, overly technical, and slow. Bringing an action before the justices could be expensive and often required one to fit their particular cause of action within a tightly-defined set of authorized writs in order to be permitted to have a case heard.<sup>16</sup> And the common law courts had limited remedies. The primary remedy – often the sole available remedy – was money damages, even when such damages did not actually provide effective relief under the circumstances.

These and other difficulties left many searching for other avenues to seek redress for their grievances. One historically-available avenue for those who could not achieve an effective remedy in the law courts was to petition the king directly, as the king was always considered to be the Fount of Justice.<sup>17</sup> Such petitions began to increase in frequency, and the resolution of such petitions was eventually given over to the king's chancellor. The chancellor was one of the king's chief advisors and was considered to be "the keeper of the King's conscience."<sup>18</sup>



Although the gradual establishment of the English common law provided uniformity and consistency, the procedures and remedies developed by the common law courts also began to be criticized at times as being overly rigid, overly technical, and slow.

Perhaps not surprisingly, therefore, in earlier years the chancellor was often a cleric (with some exceptions such as Sir Thomas More, called to the bar in 1502, who served under King Henry VIII and who was "the first chancellor since the fourteenth century to have been educated in the common law").<sup>19</sup>

In resolving petitions directed to the king, the chancellor was therefore not limited by the strict rules developed under the common law and was not limited to awarding money damages. Rather, the

chancellor's focus was on achieving a just and fair result in the name of the king – an equitable result – under the particular circumstances of the case. As Lord Chancellor Ellesmere explained in 1615, this power existed because men's actions are so diverse and infinite that it is impossible to make a general law which may aptly meet with every particular and not fail in some circumstances. The office of the chancellor is to correct men's consciences for frauds, breaches of trust, wrongs, and oppressions of what nature soever they be, and to soften and mollify the extremity of the law.<sup>20</sup>

In the 15<sup>th</sup> century, these petitions began to be sent directly to the chancellor, and the chancellor worked through a specialized court to hear these petitions, the Court of Chancery.<sup>21</sup>

Early on, the availability of equitable remedies was criticized for being too arbitrary, too varied from case to case (as opposed to the common law courts, which, by that point, maintained uniformity and consistency through established procedures, defined causes of action and written precedent). Indeed, jurist John Selden, called to the bar in 1612, famously quipped that equity varied like the length of the chancellor's foot.<sup>22</sup> However, the application of equity still followed certain recognized equitable maxims, and eventually written precedent for equitable decisions was available as well. Accordingly, as with common law actions and remedies, the availability of equitable remedies likewise became subject to recognized rules, elements and precedent, providing a level of consistency which we in the bar utilize and benefit from even today, centuries later.<sup>23</sup>

## Trial by Jury

Another concept that is frequently mentioned in our profession, and appropriately so, is the right to trial by jury. Alabama has always enshrined this as a constitutional right,<sup>24</sup> currently found in Article I, § 11 of the Alabama Constitution of 1901, which states “[t]hat the right of trial by jury shall remain inviolate” as an essential component of “the great, general, and essential principles of liberty and free government may be recognized and established.”<sup>25</sup>

As lawyers, we know this to be a bedrock, sacred principle. But, again, we often forget the ancient roots of this right which our profession is entrusted to protect.

It is difficult to pinpoint precisely when the jury system first took form in England, but there are many indications that the seeds were growing at a very early stage, even prior to the Norman Conquest. One oft-cited pre-Conquest example hails from the time of King Aethelred II (978-1016). From Anglo-Saxon times, England was divided into shires (counties) and further divided into hundreds (referred to as *wapentakes* in the Danish areas).<sup>26</sup> Each area was presided over by an official: the reeve for the shires/counties – from which we get the office of shire-reeve or sheriff – and the bailiff or hundredman for the hundreds.<sup>27</sup> In 997, Aethelred decreed that, in the Danish districts, 12 men should serve as a sort of presenting grand jury: “A court is to be held in each wapentake [*i.e.*, shire/county], and the twelve leading thegns [*i.e.*, nobles], and with them the reeve, are to come forward and swear on the relics that are put into their hands that they shall accuse no guiltless man nor conceal any guilty one.”<sup>28</sup>



It is difficult to pinpoint precisely when the jury system first took form in England, but there are many indications that the seeds were growing at a very early stage, even prior to the Norman Conquest.

However, different components of what would become the jury system as we now know it – both the grand jury and the petit jury – would become much more concrete following the Conquest. Indeed, there is some evidence that a form of jury established in France in the early ninth century may have traveled with William I to England during the Conquest. For example, in 829, Emperor Louis the Pious, the son of Charlemagne, ordered that royal rights would not be determined by witness testimony but by “the sworn statement of the best and most credible people of the district.”<sup>29</sup>

Continuing and expanding upon a Norman process occasionally

used by William I, Henry II established by assize<sup>30</sup> various forms of trial by inquisition (also known as inquest).<sup>31</sup> Originally, inquisitions were administrative devices used in England following the Conquest to obtain information useful to the government, such as general census information; particulars concerning land, land ownership and valuation information; etc.<sup>32</sup> This information would be collected by directing, often with the assistance of the local sheriff, the presence of a group of local people to answer questions. Such information formed the basis for official records some as the famous *Domesday Book* compiled under William I.<sup>33</sup>

Through his Assize of Clarendon in 1166, Henry II established the inquisition – one involving 12 persons – as a core aspect of criminal procedure that ultimately would form the basis for the grand jury.<sup>34</sup> Under the Assize, Henry II directed:

... that inquiry shall be made in every county and in every hundred by the twelve most lawful men of the hundred ... upon oath that they shall speak the truth, whether in the hundred or vill there be any man who is accused or believed to be a robber, murderer, thief, or a receiver of robbers, murderers or thieves since the King’s accession. And this the justices and sheriffs shall enquire before themselves.<sup>35</sup>

Once such an accused was captured, they were to be brought before the justices where the accused must make their law before the justices.<sup>36</sup> Making one’s law was one of the accepted modes of trial, in addition to trial by ordeal (where the accused would hold a hot iron or a stone from boiling water and would be proclaimed innocent if the burn would begin to heal in three



days – a method later abolished following its condemnation by the Catholic Church in the Fourth Lateran Council of 1215<sup>37</sup>), and trial by battle.<sup>38</sup> To make one’s law the accused needed to find a certain number of people (often 12) who would swear by oath that the accused was a credible person; they did not swear as to the facts of the case.<sup>39</sup>

The abolition of the trial by ordeal and the fundamental limitations inherent in the process of making one’s law eventually led many justices in the mid-13<sup>th</sup> century to begin to select a petit jury to hear and decide cases on the merits (at times from the members of the presenting jury, which raised obvious fairness concerns), and trial by jury in criminal actions was effectively imposed by statute in 1275.<sup>40</sup> By the 15<sup>th</sup> century, the use of the jury – and many of its particulars, such as the separation of issues of fact from issues of law – effectively reflected the modern use.

The use of the jury to determine rights and find facts has certainly evolved over more than a millennium. However, the key characteristic remains: that judgments will be rendered not by royal or government fiat but upon the consideration of one’s peers. As one scholar put it, “[a]n administrative device became in the fullness of time a part of the judicial system, and, adding to this its old representative character, finally grew into a cherished safeguard of liberty.”<sup>41</sup> Accordingly, as members of the profession empowered and entrusted to engage this system, we should strive to maintain its historic meaning, dignity, and importance.

## Due Process

Attorneys often invoke the concept of “due process” in any number of contexts. The right to due

process is of course guaranteed in both the Alabama and the United States Constitutions.<sup>42</sup> But when we invoke this important notion we are tapping into a central concept of free society – namely that law and legal process is over and binds even royal authority – which flowered in the Magna Carta itself.

Most are likely familiar with the origins of the Great Charter. In 1215, King John (1199-1216), who came to the throne following the death of his much-more-popular brother Richard I (“the Lionheart”), was facing open rebellion by many of his barons. This rebellion stemmed from many abuses of royal power by John including, among other things, oppressive taxation, misuses of the courts, and illegal imprisonment. In return for their continued loyalty, John met with his barons at Runnymede on June 15, 1215 and agreed to be bound by certain written guarantees that purported to limit royal power in various ways. Among these was Section 39, which guaranteed that the king could not unilaterally sanction or punish any free man and that such power – meaning the reach of the king himself – was limited by and must be in conformity with the law of the land:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will [the King] proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.<sup>43</sup>

This notion – that even the king is subject to the law of the realm – is obviously one of the most important and enduring aspects of

Magna Carta. Also, the possibility of enforcing such a concept was strengthened by the fact that, as discussed above, England now had, in growing form, a law of the realm that was truly common and identifiable.<sup>44</sup> As scholars have noted, “[i]ndeed, the idea of the ‘the law of the land’ was itself a fairly new one, as England could only be said to have a ‘common law,’ a law in use in all the English king’s domain, from the reign of Henry II....”<sup>45</sup>

Later, in a statute confirming Magna Carta enacted during the reign of Edward III (1327-1377), the king slightly revised this language, “ordain[ing] that ‘the Great Charter . . . be kept and maintained . . . and that no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken or imprisoned nor disinherited, nor put to death, without being brought in Answer *by due Process of Law.*’”<sup>46</sup> This phrasing – and the novel use of the phrase due process of law – is almost an exact parallel to the guarantees found in the Fifth Amendment to the United States Constitution (“No person shall be . . . deprived of life, liberty, or property, without due process of law”<sup>47</sup>), the Fourteenth Amendment to the United States Constitution (“nor shall any State deprive any person of life, liberty, or property, without due process of law”<sup>48</sup>), and Article I, Section 6 of the Alabama Constitution (“in all criminal prosecutions, the accused . . . shall not . . . be deprived of life, liberty, or property, except by due process of law”<sup>49</sup>). Writing for the Court in *Kerry v. Din*, 576 U.S. 86 (2015), Justice Scalia noted that “at the time of the Fifth Amendment’s ratification, the words ‘due process of law’ were understood

‘to convey the same meaning as the words “by the law of the land” in Magna Carta.’”<sup>50</sup>

It goes without saying that the notion of due process – the idea that an accused is entitled to notice and a fair hearing *before* his life, liberty, or property can be put in jeopardy, regardless of the political or social status of the accuser – is a notion that bears tremendous historic weight. In protecting and defending the right of due process, “we stand in the long line of fellow lawyers who worked to create, develop and protect this ancient right. As one modern jurist put it, “if we, as lawyers and judges ... want to preserve and protect the 800-year-old legacy of Magna Carta, we must be ever vigilant in the performance of our duties *as stewards and ‘guardians of the law.’*”<sup>51</sup>

## Conclusion

As noted above, many more examples of the historic jewels of (what should be) our noble profession could be given, and we would benefit from reviewing that – our – history.<sup>52</sup> As stewards of the law, we are called to protect its dignity for the sake and protection of the citizenry, whom we also serve. In this way, we help ensure that we are a “government of laws, not of men,”<sup>53</sup> and that persons – all persons – will be judged not by power, bullying, or fiat, but by a uniform law. By doing so, our profession helps maintain peace, stability, and consistency in society, as those who act in accord with the “law of the land” can rest safe in their person or property.

A good example of this sense of safety by law is seen in Robert Bolt’s famous play concerning Sir Thomas More, mentioned above: “A Man for All Seasons” – itself a



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legal classic, the film version of which won the Academy Award for Best Picture in 1966 – which dramatizes the events leading up to More’s execution by Henry VIII for his refusal to swear an oath to Henry’s radical claim to be the head of the English Church. More was an extraordinary lawyer and is in fact recognized by the Catholic Church as the patron saint of lawyers. Bolt sets forth More’s solid legal defense, in which More simply refused to speak on the matter of the king under the English common law maxim *qui tacet consentire* (“silence gives consent”). Under this maxim, one could not be convicted of high treason without making an actual treasonous statement, and if one was to presume anything from More’s silence they must, *under the law*, presume his consent.

It is only through corruption of the law (perjury) – and by the failure of other lawyers to properly act as stewards of the law – that

More was ultimately executed. But, as Bolt reflects in a powerful scene in Act Two, More knew that, properly and consistently followed and applied, the law provided him protection from even the most powerful people in the realm:

MORE: For myself, I have no doubt.

THOMAS CROMWELL: No doubt of what?

MORE: No doubt of my grounds for refusing this oath. Grounds I will tell to the King alone, and which you, Master Secretary, will not trick out of me.

...

CROMWELL: You don’t seem to appreciate the seriousness of your position.

MORE: I defy anyone to live in that cell for a year and not appreciate the seriousness of his position.

CROMWELL: Yet the State has harsher punishments.

MORE: You threaten like a dockside bully.

CROMWELL: How should I threaten?

MORE: Like a Minister of State, with justice!

CROMWELL: Oh, justice is what you’re threatened with.

MORE: Then I’m not threatened.

May we strive to be good stewards of the law and of the great legal traditions handed down by those in our profession who went before us, that the law and our profession will be seen and recognized by others as a source of dignity, stability, and protection, and not of embarrassment, ridicule, or threat. ▲



## Endnotes

1. See generally Sir John Baker, *An Introduction to English Legal History* 165-71 (Oxford Univ. Press 2019) (discussing the origins of the law as a profession).
2. Likewise, as referenced below, speaking of judges as the “bench” is a reference to the ancient practice of judges sitting on a literal bench to hear and decide cases, sometimes with the king present (as in the English Court of King’s Bench discussed below).
3. *Lambdin v. State*, 9 So. 2d 192, 193–94 (Fla. 1942) (emphasis added).
4. *State Comp. Ins. Fund v. Drobot*, 192 F. Supp. 3d 1080, 1083–84 (C.D. Cal. 2016) (emphasis added).
5. *Hollis v. Crittenden*, 251 Ala. 320, 323, 37 So. 2d 193, 195 (1948) (noting that “Alabama is a common law state”) (citing Ala. Code 1940, Title 1, § 3).
6. Ala. Code 1975, § 1-3-1.
7. Sir John Baker, *An Introduction to English Legal History* 16 (Oxford Univ. Press 2019) (discussing the *Leges Henrici Primi* (c. 1118), which, as Baker points out, was not actually a law code of Henry I). Baker’s quoted discussion of the *Leges Henrici Primi* actually describes the situation during the first 50 years after 1066, but it is a fairly apt description of the pre-Conquest legal systems in England. The original quote includes a reference to trial by battle, which did not appear until after the Conquest. See John Hudson, *The Formation of the English Common Law: Law and Society in England From King Alfred to Magna Carta* 114 (Routledge, 2d ed. 2018)). For an excellent summary and discussion of the development of the laws of England, and on the study of those laws, one should certainly read the Introduction to Sir William Blackstone’s masterpiece, his *Commentaries on the Laws of England*.
8. See Brockelbank, W.J., *Beginners’ Notes on the History of the English Courts*, 4:4 Ala. L.J. 249, 252-55 (May 1929).
9. *Id.*; Baker, *supra* n.7 at 20-21.
10. See Hudson, *supra* n.7 at 119-22.
11. Baker, *supra* n.7 at 16 (“The foundation of the common law is usually traced to the reign of Henry II....”).
12. See *id.* at 19; Hudson *supra* n. 7 at 122-24.
13. See Baker, *supra* n.7 at 19; Hudson, *supra* n.7 at 122-24.
14. Baker, *supra* n.7 at 21; Hudson, *supra* n.7 at 130; Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 163 (Cambridge University Press, 2d ed. 1898) (republished by permission by Liberty Fund, Inc.).
15. Baker, *supra* n.7 at 189-90; Pollock & Maitland, *supra* n.14, Vol. 1 at 229-30.
16. See Baker, *supra* n.7 at 60-77.
17. See 1 Lord Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England* 3 (Soule, Thomas & Wentworth 1874) (“With us the King has ever been considered the fountain of justice.”).
18. *Id.* at 4.
19. Baker, *supra* n.7 at 115.
20. *Id.*
21. Theodore F.T. Plucknett, *A Concise History of the Common Law* 161-62 (The Lawyers Co-operative Publishing Co., 2d ed. 1936).
22. See Baker, *supra* n.7 at 118-19.
23. *Id.*
24. This right has been expressly recognized in Alabama from the beginning of its statehood. See ALA. CONST. 1819, Art. I, § 28 (“The right of trial by jury shall remain inviolate.”).
25. ALA. CONST. 1901, Art. I, § 11.
26. Baker, *supra* n.7 at 9; Pollock & Maitland, *supra* n.14, Vol. 1 at 561-89.
27. See Baker, *supra* n.7 at 9, 12; Pollock & Maitland, *supra* n.14, Vol. 1 at 587; Brockelbank, W.J., *Beginners’ Notes on the History of the English Courts*, 4:4 Ala. L.J. 249, 250-53 (May 1929).
28. Hudson, *supra* n.7 at 59; Pollock & Maitland, *supra* n.14, Vol. 1 at 151-52; Baker, *supra* n.7 at 79-80.
29. Plucknett, *supra* n.21 at 104.
30. An “assize,” while initially meaning a type of convening council, eventually came to mean an enactment made at such a gathering. See *id.* at 106.
31. Plucknett, *supra* n.21 at 105-06; Pollock & Maitland, *supra* n.14, Vol. 1 at 152-54.
32. See Plucknett, *supra* n.21 at 106-07; Baker, *supra* n.7 at 79-80, 242-43.
33. Plucknett, *supra* n.21 at 107; Baker, *supra* n.7 at 242-43.
34. Plucknett, *supra* n.21 at 107-08.
35. *Id.* at 107.
36. *Id.* at 108.
37. *Id.* at 112.
38. *Id.* at 108-09.
39. *Id.* at 109.
40. *Id.* at 118-19.
41. Plucknett, *supra* n.21 at 127.
42. See John Hudson, *The Formation of the English Common Law: Law and Society in England From King Alfred to Magna Carta* 24-26 (Routledge, 2d ed. 2018).
43. *Magna Carta*, § 39 (1215) (reprinted in *Contexts of the Constitution* 662 (Neil H. Cogan ed., Foundation Press 1999)). The reader may note the phrase “except by the lawful judgment of his peers,” but, as Baker notes, this phrase did not refer to a jury trial. See Baker, *supra* n.7 at 548 & n.52.
44. Of course, historians may point out that John repudiated Magna Carta not long after it was signed. However, Magna Carta set a precedent that was re-adopted by English sovereigns at various times in later years and has become a fundamental aspect of the English Constitution.
45. Douglas W. Kmiec & Stephen B. Presser, *The History, Philosophy and Structure of the American Constitution* 26 (Anderson Publishing Co. 1998).
46. Brockelbank, W.J., *The Role of Due Process in American Constitutional Law*, 39:4 Cornell L.Q. 561-62 (summer 1954) (quoting 1 Statutes of the Realm 345. Stat. 28 Edw. III cc. 1 and 2 (1335)) (emphasis added). See also *Petition of Right* (1628) (authored by Sir Edward Coke, noting the enactment under Edward III as following from Magna Carta) (reprinted in Kmiec & Presser, *supra* n.45 at 49).
47. U.S. CONST. amend. V.
48. U.S. CONST. amend. XIV.
49. ALA. CONST. 1901, Art. I, § 6.
50. *Kerry v. Din*, 576 U.S. 86, 91 (2015) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276, 15 L. Ed. 372 (1856)).
51. *Benge v. Williams*, 472 S.W. 3d 684, 739 (Tex. App. – Houston [1st Dist.] 2014) (Jennings, J., dissenting from denial of en banc reconsideration), *aff’d*, 548 S.W. 3d 466 (Tex. 2018) (emphasis added).
52. As indicated above, there are numerous other aspects of our day-to-day practice worthy of analysis for its historic lineage. One example would be the commonly-used tool of petitioning for extraordinary “prerogative” writs, such as the writ of mandamus. Under the Alabama Constitution and the legislative enactments flowing from those constitutional provisions, Alabama’s appellate and circuit courts are expressly empowered to issue such writs. See ALA. CONST. Art. VI, §§ 140-142 (noting the writ powers of Alabama’s appellate and circuit courts); Ala. Code 1975, §§ 12-2-7 (2&3) (Supreme Court), 12-3-11 (Courts of Appeals). Seeking these writs is a common and familiar process to attorneys in Alabama, as they are in virtually every jurisdiction. One could consider just the numerous petitions for writs of mandamus routinely sought from Alabama’s appellate courts every year on everything from discovery fights to venue decisions to jurisdictional issues and so forth. See *Ex parte U.S. Bank Nat’l Ass’n*, 148 So. 3d 1060, 1064 (Ala. 2014) (listing several types of decisions concerning which review by mandamus has been deemed appropriate). In so doing, we are, again, engaging legal remedies of an ancient and honorable lineage. See, e.g., Geoffrey C. Hazard, Jr., *The Early Evolution of the Common Law Writs: A Sketch*, 6 Am. J. Legal Hist. 114 (1962); Baker, *supra* n.7 at 153-60; Robert H. Howell, *An Historical Account of the Rise and Fall of Mandamus*, 15 Victoria U. Wellington L. Rev. 127 (1985); see generally Baker & Milsom, *Sources of English Legal History* (Sir John Baker ed., 2d ed. 2010) (discussing various forms of historic writs from original sources).

Also, while this article focuses on the English historical roots relating to our profession, our laws and legal system were no doubt greatly influenced by other sources – for example, biblical sources, canon law, Roman law, etc. There is certainly no attempt to diminish the impact of such other sources, but they are simply beyond the scope of this article.

53. John Adams, “Letters of Novanglus No. 7,” *Boston Gazette* (1774). See ALA. CONST. 1901, Art. III, § 42 (providing that “the government of the State of Alabama may be a government of laws and not of individuals”).

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# Alabama Qualified Dispositions In Trust Act

*By Vincent J. Schilleci, III, Brian T. Williams, and Alexandra O. Priester*

## Introduction

Historically, grantors of trusts have had little asset protection afforded them where they name themselves as a beneficiary of a trust, even an irrevocable trust. Section 505(a)(2) of the Uniform Trust Code and its Alabama counterpart, § 19-3B-505(a)(2), Code of Alabama (1975), provide that “[w]ith respect to an irrevocable trust, a creditor or assignee of the grantor may reach the maximum amount that can be distributed to or for the grantor’s benefit.” For years, individuals seeking the benefits of asset protection using trusts were forced to seek this protection in foreign jurisdictions.<sup>1</sup> In recent years, however, many states have

enacted laws that allow a form of self-settled irrevocable trust that serves as a vehicle for asset protection for the grantor’s assets.<sup>2</sup>

On April 18, 2021, the Alabama Qualified Dispositions in Trust Act (the “Act”) was signed into law by Governor Kay Ivey. With the enactment of the Act, Alabama became the 20<sup>th</sup> state to allow for the creation of domestic asset protection trusts (“DAPTs”). Although similar in purpose, the requirements for, and level of asset protection granted by, DAPTs vary widely among the states. This article will provide a brief overview of the most important details of the Act and answer some of the more practical questions concerning the use and benefits of an Alabama Qualified Disposition in Trust (“QDIT”).<sup>3</sup>

# Exemption from § 19-3B-505

The Act provides a special exemption from the general rule that a trust grantor's creditors or assignees may reach the maximum amount that can be distributed to or for the grantor's benefit under § 19-3B-505(a)(2), Code of Alabama (1975). The Act provides:

Except as otherwise provided in this act, the interest of a beneficiary in a trust or portion of a trust that is a qualified disposition is not subject to a process of attachment issued against the beneficiary and may not be taken in execution under any form of legal process directed against the beneficiary, trustee, trust estate, or any part of the income of the trust estate. The whole of the trust estate and the income of the trust estate shall go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged of all obligations of the beneficiary.<sup>4</sup>

The Act also provides:

If any provision of this act conflicts with any provision of the Alabama Uniform Trust Code, Sections 19-3B-101 to 19-3B-1305, inclusive, Code of Alabama 1975, or the Alabama Uniform Voidable Transactions Act, Sections 8-9B-1 to 8-9B-17, inclusive, Code of Alabama 1975, the provision of this act prevails.<sup>5</sup>

In addition, the Act provides that “[a] trust beneficiary does not have the power or capacity to transfer any of the income from property of a trust or portion of a trust which is the subject of a qualified disposition by his or her order, voluntary or involuntary, or by an order or direction of a court.”<sup>6</sup> The Act requires that a trustee of a QDIT “...disregard and oppose an assignment or other act, voluntary or involuntary, that is attempted contrary to [§ 19-3E-9, Code of Alabama (1975)].”<sup>7</sup> It is important to remember that these special rules apply only in the event there is a Qualified Disposition to a QDIT.

# Qualified Disposition

The Act defines a Disposition as:

A transfer of property that either creates a new fiduciary relationship between at least one trustee and a trust beneficiary or subjects property to a preexisting fiduciary relationship between at least one trustee and a trust beneficiary. The term includes a transfer by conveyance or assignment; by exercise of a power of appointment, including a power to substitute a trustee for another or to add one or more new trustees; by exercise of a power of revocation or amendment; or, except as provided in this subdivision, by disclaimer, release, or relinquishment.<sup>8</sup>

The Act specifically excludes from the definition of disposition “...a disclaimer, release, or relinquishment of property that was previously the subject of a qualified disposition.”<sup>9</sup> The Act defines a Qualified Disposition as:

A disposition of property to one or more trustees, at least one of whom is a qualified trustee, which is governed by a trust instrument, including, but not limited to, a trust instrument as modified by an irrevocable written election described in [§ 19-3E-5(f), Code of Alabama (1975)],

under which the transferor<sup>10</sup> has no more rights, powers, or interests than those permitted by [§ 19-3E-4, Code of Alabama (1975)].<sup>11</sup>

The Act specifically excludes from the definition of qualified disposition any “...disposition to the extent that, at the time of the disposition, the transferor is in arrears on a child support obligation by more than 30 days.”<sup>12</sup> The intent of this exclusion is to ensure that a grantor is prohibited from utilizing a QDIT to avoid child support claims. The Act defines a Fiduciary Qualified Disposition as any “...qualified disposition made by a trustee acting in a fiduciary capacity.”<sup>13</sup> As discussed below, this important definition makes clear that a trustee may be able to use the Alabama Uniform Trust Decanting Act to make a Fiduciary Qualified Disposition of assets from a normal trust to a QDIT.

The Act defines a Fiduciary Qualified Disposition as any “...qualified disposition made by a trustee acting in a fiduciary capacity.”<sup>13</sup>



# Qualified Affidavit

The Act requires that before a Qualified Disposition is made, the transferor must sign a Qualified Affidavit.<sup>14</sup> The Act defines a Qualified Affidavit as an affidavit in which the transferor states that at the time of the transfer of the property to the trust, all the following apply:

- (1) The transferor has full right, title, and authority to transfer the property to the trust;
- (2) The transfer of the property to the trust will not render the transferor insolvent;
- (3) The transferor does not intend to defraud a creditor by transferring the property to the trust;
- (4) The transferor does not know of or have reason to know of any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit;
- (5) The transferor is not involved in any administrative proceedings, except for those

administrative proceedings identified on an attachment to the affidavit;

- (6) The transferor is not currently in arrears on a child support obligation by more than 30 days;
- (7) The transferor does not contemplate filing for relief under the Bankruptcy Code, 11 U.S.C. §§ 101 to 1532, inclusive;
- (8) The property being transferred to the trust was not derived from unlawful activities.<sup>15</sup>

Though not required in all states with asset protection trust statutes, the Qualified Affidavit can be an important tool for practitioners and grantors to be sure that the grantor is eligible to make a Qualified Distribution.

# Qualified Trustee

As noted above, a Disposition is not a Qualified Disposition unless at least one of the trustees of the QDIT is a Qualified Trustee.<sup>16</sup> The Act defines a Qualified Trustee as a person, other than the transferor, who meets all of the following requirements:

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1. Is an individual who is a resident of Alabama or is an organization that is authorized by the laws of Alabama to act as a trustee and whose activities are subject to supervision by the Alabama State Banking Department, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision;<sup>17</sup>
2. Maintains or arranges for custody in Alabama of some or all of the property that is the subject of the qualified disposition and administers all or part of the trust in Alabama;<sup>18</sup>
3. Whose usual place of business, where some of the records pertaining to the trust are kept, is located in Alabama or if the person does not have such a place of business, who is a resident of Alabama.<sup>19</sup>

The Act specifically excludes a transferor from the definition of Qualified Trustee.<sup>20</sup> In determining who should serve as a Qualified Trustee, the practitioner and grantor should first determine the main intent of the QDIT. As discussed below, if the main intent of the QDIT is estate and gift tax planning, the grantor may be limited in who he or she can appoint as the Qualified Trustee.

In the event a Qualified Trustee ceases to meet the Acts requirements of a Qualified Trustee and there is no Qualified Trustee remaining, such Qualified Trustee is deemed to have resigned, and the successor named in the QDIT becomes the Qualified Trustee upon such successor's acceptance of trusteeship.<sup>21</sup> Section 19-3E-8(a)(2), Code of Alabama (1975), provides that in the event a QDIT does not name a successor Qualified Trustee, a court of jurisdiction shall appoint a successor upon the petition of a Qualified Beneficiary.<sup>22</sup> The Act makes clear that a vacancy in the position of Qualified Trustee will not disqualify a disposition as a qualified disposition if a successor Qualified Trustee is appointed pursuant to the terms of the QDIT or a proceeding for the appointment of a successor Qualified Trustee is commenced in accordance with the Act within a reasonable time.<sup>23</sup>

In determining who should serve as a Qualified Trustee, the practitioner and grantor should first determine the main intent of the QDIT.

## Permitted Powers of Transferor

Though the Act does not allow a transferor to act as a Qualified Trustee of a QDIT, the Act does allow the transferor to retain a number of rights, powers, and interests over the QDIT without subjecting such assets of the QDIT to the transferor's creditors. In general, the

Act provides that a transferor does not have any power or right with respect to property (or income therefrom) that is the subject of a qualified disposition and any agreement or understanding that purports to grant or permit the retention of any greater powers or rights is void.<sup>24</sup> However, the Act does permit a QDIT to provide one or more of the following rights, powers, or interests to the transferor:

1. the power to direct investment decisions of the QDIT;<sup>25</sup>
2. the power to veto a distribution from the QDIT;<sup>26</sup>
3. a special power of appointment exercisable by will or other written instrument of the transferor effective only on the death of the transferor;<sup>27</sup>
4. the right to income of the QDIT;<sup>28</sup>
5. the right to income or principal from a charitable remainder unitrust or charitable remainder annuity trust and the right, at any time by written instrument delivered to the trustee, to release the transferor's interest in the QDIT in favor of a charitable organization that has a succeeding beneficial interest in the trust;<sup>29</sup>
6. the right to income or principal from a grantor-retained annuity trust or grantor-retained unitrust, or the receipt each year of a percentage of the value of the trust property, as provided in the trust instrument;<sup>30</sup>
7. the receipt or use of principal if such receipt or use of principal would be the result of a trustee acting under a discretionary trust provision, a



support provision, or the direction of an advisor acting under a discretionary trust provision or support provision;<sup>31</sup>

8. the right to remove and replace a trustee or advisor;<sup>32</sup>
9. the right to use of real property held under a qualified personal residence trust or the possession and enjoyment of a qualified annuity interest;<sup>33</sup>
10. the right to income or principal to pay income taxes due on income of the QDIT;<sup>34</sup>
11. a qualified trustee's authority to pay a deceased transferor's debts, the expenses of administering the deceased transferor's estate, and any estate or inheritance tax imposed on the deceased transferor's estate;<sup>35</sup>
12. the right to minimum required distributions with respect to a retirement benefit.<sup>36</sup>

Though the Act permits the above-referenced powers and rights to transferor, the Act makes clear that a transferor only has such powers and rights actually conferred by the terms of the QDIT.<sup>37</sup>

## Fiduciary Qualified Disposition

It is possible that the trustee of trust may use the Alabama Uniform Trust Decanting Act to make a Fiduciary Qualified Disposition of trust assets to a QDIT. In general, the Act deems a Fiduciary Qualified Disposition as made at the time of the original Disposition to the trustee (or any predecessor of that trustee in an unbroken succession of fiduciary ownership of the property) making the Fiduciary Qualified Distribution; provided, however, if the original distribution was transferred to the trustee prior to the effective date of the Act, the Fiduciary Qualified Distribution is deemed to have been made as of the effective date of the Act.<sup>38</sup> In addition, a trustee of a domestic asset protection trust under the laws of another state can use the Alabama Uniform Trust Decanting Act to make a Fiduciary Qualified Disposition of trust assets to a QDIT, provided that (i) the transferor has no more rights, powers, or interests than those permitted under § 19-3E-4, and (ii) at the time of disposition, the transferor was not more than 30 days in arrears on

child support.<sup>39</sup> Note that the Act defines “Transferor” with respect to a Fiduciary Qualified Disposition as “...the person or persons who, as of the time of the fiduciary disposition, most recently fit the description in paragraph a. with respect to the property subject to the fiduciary disposition.”<sup>40</sup>

If a trustee proposes to make a disposition that would not be a Qualified Disposition due to a nonconforming power of appointment of the transferor, the trustee may make an irrevocable written election to modify the nonconforming power of appointment to conform to the requirements of either § 19-3E-4(3) or § 19-3E-4(11).<sup>41</sup> Such irrevocable written election by the trustee must include (i) a description of the modified power of appointment and (ii) the transferor's written consent to the modification.<sup>42</sup> The Act makes clear that a transferor's consent to the modification is not a Disposition under the Act.<sup>43</sup>

## Creditor's Rights

Although the main purpose of a QDIT is to provide asset protection to a grantor that is also a beneficiary under the QDIT, the Act does provide certain rights and remedies to creditors of the grantor found in §§ 19-3E-5 and 19-3E-7, Code of Alabama (1975). A creditor seeking to bring an action for an attachment or other remedy against property that is the subject of a Qualified Disposition or for avoidance of a Qualified Disposition must bring the action under sections five and six of the Alabama Voidable Transactions Act.<sup>44</sup> To the extent the creditor's claim arose after the Qualified Disposition was made, the action is limited to Qualified Dispositions made with “actual intent to hinder, delay or defraud the creditor.”<sup>45</sup> The Act makes clear that the creditor must prove its allegations by a preponderance of the evidence.<sup>46</sup>

The running of the statute of limitation for claims related to a Qualified Disposition under § 19-3E-5, Code of Alabama (1975), depends on when the claim arises in relation to the Qualified Distribution. A claim related to a Qualified Disposition that arises concurrently with or after a Qualified Disposition is made must be brought within two years after the Qualified Disposition was made.<sup>47</sup> A claim related to a Qualified Disposition that arose prior to a Qualified Disposition must be brought within the latter of (i) two years after the Qualified Disposition or (ii) if the claim is fraudulently concealed, the earlier of one year after the qualified disposition was or could reasonably have been discovered by the claimant, and

the time allowed under the application statute of limitations under § 8-9B-10, Code of Alabama (1975).<sup>48</sup> Where more than one Qualified Distribution is made under the same QDIT, the subsequent Qualified Disposition is disregarded in determining whether a creditor's claim is timely filed with respect to any prior Qualified Dispositions under the appropriate statute of limitation.<sup>49</sup> It is important to note that the Act explicitly states that a creditor does not have a claim against any trustee, advisor, or person involved in the "...counseling, drafting, preparation, or funding..." of a trust that is the subject of a Qualified Disposition.<sup>50</sup> In addition, a creditor does not have a right against the interest of a trust beneficiary solely because the trust beneficiary has the right to authorize or direct the trustee to pay all or part of the QDIT property in satisfaction of the trust beneficiary's estate or inheritance taxes, debts, or administration expenses, unless the trust beneficiary actually directs the payment of such taxes, debts, or expenses, and then only to the extent of the direction.<sup>51</sup>

Special rules apply where a beneficiary of a QDIT is a party to an action for annulment of a marriage, divorce, or separate maintenance. Where the beneficiary of the QDIT is also the transferor of the Qualified Disposition, the Act provides that the interest in the Qualified Disposition or the property subject to the Qualified Disposition is not considered the real or personal property of the beneficiary, is not the beneficiary's marital asset, and may not be awarded to the beneficiary's spouse in a judgment if (a) the beneficiary made the Qualified Disposition more than 30 days before the marriage, (b) the beneficiary and spouse agree that the subdivision of the Act applies to the Qualified Disposition, or (c) the beneficiary and spouse agree that the property is not considered marital property, is not considered, directly or indirectly, part of the trust beneficiary's real or personal estate, and may not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.<sup>52</sup> Where more than one Qualified Distribution is made under the same QDIT, the subsequent Qualified Disposition is disregarded in determining whether the QDIT property with respect to a prior Qualified Disposition is a marital asset of the beneficiary, is the beneficiary's real or personal property, or whether the QDIT property may be awarded to the beneficiary's spouse in a divorce proceeding.<sup>53</sup> Where the beneficiary of the QDIT is not the transferor of the Qualified Disposition, the Act provides that the Qualified Disposition is not a marital asset of the beneficiary and may not be awarded to the beneficiary's spouse.<sup>54</sup>

The Act is clear that a valid lien attaching to property before a Qualified Disposition survives the disposition and that a trustee takes title to the property subject to the valid lien to any agreements that created or perfected the valid lien.<sup>55</sup> A transferor and a creditor may enter into a written agreement that requires: (1) the transferor to disclose to the creditor any Qualified Dispositions; (2) the prior written approval of the creditor of a Qualified Disposition; or (3) any other obligation as the creditor may require with respect to a Qualified Disposition.<sup>56</sup> In addition, the Act provides that:

In the event the transferor made an express or implied representation regarding an asset in order to create a debt to a creditor prior to December 31, 2021, the transferor is deemed to have entered into an agreement with the creditor, which as to the debt, a disposition of the asset would not be a qualified disposition as to the creditor, unless the disposition had the written approval of the creditor as to the disposition.<sup>57</sup>

If a transfer that would otherwise be a Qualified Disposition violates a written agreement described above, then such transfer shall not be considered a Qualified Disposition only as to that creditor.<sup>58</sup>

## Trustees' and Beneficiaries' Rights As to Avoided Qualified Dispositions

Where a creditor is successful in avoiding a Qualified Disposition, such Disposition may be avoided only to the extent necessary to satisfy the present value of the debt.<sup>59</sup> In determining present value, the court may take "...into consideration any uncertainty of the transferor's debt to the creditor..."<sup>60</sup> Generally, the sole remedy available to a creditor on the avoidance of a Qualified Disposition is "...an order directing the trustee to transfer to the transferor the amount necessary to satisfy the transferor's debt to the creditor at whose instance the Disposition has been avoided."<sup>61</sup>

Where a court avoids a Qualified Disposition, the trustee and beneficiary have special rights if the court finds such trustee or beneficiary acted in good faith.<sup>62</sup> The Act places the burden on the creditor to prove "by a preponderance of evidence" that the trustee or



beneficiary failed to act in good faith.”<sup>63</sup> The Act provides that “...the mere acceptance of property with or without a qualified affidavit, or the making of any distribution under the terms of the trust, shall not be considered as evidence that a trustee failed to act in good faith.”<sup>64</sup> Moreover, the Act provides that, “The mere creation of the trust or acceptance of a distribution made under the terms of the trust by the trust beneficiary, including a trust beneficiary who is also a transferor of the trust, shall not be considered as evidence that the trust beneficiary failed to act in good faith.”<sup>65</sup> Where the court finds the trustee has acted in good faith in accepting or administering the QDIT property, such trustee has a lien against the QDIT property in an amount equal to the entire cost of defending against the action against the Qualified Disposition (including attorney fees) and such has priority over all other liens against the QDIT property regardless of whether other liens accrued or were recorded prior to accrual of the lien to the trustee.<sup>66</sup> Where the court finds a trust beneficiary acted in good faith, the avoidance of the qualified disposition is subject to the right of the trust beneficiary to retain any distribution received before the creditor’s commencement of an action to avoid the qualified disposition.<sup>67</sup> In addition, any avoidance of the Qualified Disposition “...is subject to the fees, costs, preexisting rights, claims, and interests of the trustee who has acted in good faith...”<sup>68</sup>

## Jurisdiction, Venue, And Relation to Other Law

The Act grants exclusive jurisdiction to the circuit court over actions addressing QDITs.<sup>69</sup> However, the Act grants concurrent jurisdiction over actions addressing

QDITs to any “...probate court granted statutory equitable jurisdiction...”<sup>70</sup> The Act lists the following venue for actions addressing QDITs in the following order of priority:

1. In any county where venue is proper for civil actions generally;
2. In a county in this state in which the current qualified trustee has its usual place of business or residence;
3. In a county in this state in which the immediately preceding qualified trustee had its usual place of business or residence;
4. In a county in this state in which any trust property subject to the qualified disposition is located; or
5. In a county in this state in which a trust beneficiary resides.<sup>71</sup>

Where the provisions of the Act conflict with the Alabama Uniform Trust Code or the Alabama Uniform Voidable Transaction Act, the provisions of the Act prevail.<sup>72</sup>

## Benefits and Uses of QDITs

The QDIT provides practitioners another arrow in their asset protection quiver. As noted above, an individual can now make a Qualified Disposition to a QDIT and name himself or herself as a beneficiary, yet still have the asset protection for the property that is the subject of the Qualified Disposition. Though the Act is not as aggressive as other state domestic asset protection laws, the asset protection afforded by a QDIT is superior to the asset protection afforded under a limited liability company or other similar entity.

For those Alabama residents seeking to create asset protection trusts in states with more aggressive state domestic asset protection laws, the Act should help

...an individual can now make a Qualified Disposition to a QDIT and name himself or herself as a beneficiary, yet still have the asset protection for the property that is the subject of the Qualified Disposition.

overcome public policy/choice of law arguments used to defeat asset protection trusts established under another state's laws. For example, in *In re Huber*, 493 B.R. 798 (Bankr. WD. Wash. 2013), a Washington real estate developer created an Alaska domestic asset protection trust, transferring nearly all of his assets (mainly interests in numerous LLCs owning Washington real estate) into said trust under which he was also a beneficiary. Eventually, the grantor filed for bankruptcy, and his creditors filed suit to enforce their judgement against the Alaska trust's assets.<sup>73</sup> In holding that Washington law should apply rather than Alaska law in determining the validity of the trust, the Bankruptcy Court noted that Washington did not have a domestic asset protection trust law and that the state had strong public policy "...that a debtor should not be able to escape the claims of his creditors by utilizing a spendthrift trust."<sup>74</sup>

In addition to asset protection, the Act provides estate and gift tax planning opportunities to Alabama residents who have not otherwise been available. Using a QDIT, it may be possible for an Alabama grantor to make a completed gift of assets to a trust that is excluded from the grantor's gross estate for estate tax purposes, but allowing the grantor access to the income and principal as a beneficiary of the trust. While a complete discussion of transfer tax treatment of self-settled asset protection trusts is beyond the scope of this article, Private Letter Ruling 200944002, P.L.R. 2009-44-002 (October 30, 2009), is an example of how a QDIT can be used for estate and gift tax planning. In Private Letter Ruling 200944002, an Alaska resident proposed to create an Alaska asset protection trust (the "AAPT") and sought guidance from the Internal Revenue Service on a host of estate and gift tax issues.<sup>75</sup> Under the terms of the AAPT, the independent trustee<sup>76</sup> had sole discretion to pay out so much of the income or principal to the grantor, the grantor's spouse, or the grantor's descendants.<sup>77</sup> At the death of the grantor and the grantor's spouse, the trust

principal was divided among the then living descendants.<sup>78</sup> The Internal Revenue Service ruled that the gift of assets to the AAPT was a completed gift and that the independent trustee's "...discretionary authority to distribute income/or principal to Grantor, does not, by itself, cause the [AAPT] corpus to be includible in Grantor's gross estate under § 2036."<sup>79</sup>

In addition, many grantors may find the QDIT to be a more appealing estate and gift tax planning tool over a spousal lifetime access trust ("SLAT"). A SLAT is a trust where a donor-spouse gifts assets to a trust for the benefit of the non-donor spouse. During the donor-spouse's and non-donor spouse's lifetime, the donor spouse may indirectly benefit from the SLAT property due to his or her relationship with the non-donor spouse. However, in the event of a divorce or if the non-donor spouse predeceases, the donor-spouse loses that "indirect" benefit from the non-donor spouse. A QDIT solves this problem due to the fact that the grantor may have "direct" access to QDIT assets as a beneficiary as opposed to only "indirect" access to a SLAT through his or her spouse if grantor's spouse predeceases the grantor.<sup>80</sup>

Though the Act provides many benefits, it is imperative that a practitioner pay close attention to the many requirements of the Act as a mistake could be very costly to the grantor.

## Conclusion

The Act is a significant development in the evolution of Alabama asset protection law and estate and gift tax planning for Alabama residents. When designed correctly, a QDIT provides Alabama grantors the ability to protect their assets through the use of a trust while accomplishing beneficial estate and gift tax planning strategies. The Act should also allow Alabama residents to use other jurisdictions' more aggressive asset protection trust laws without the risk transfers under such other laws being avoided under a choice of law/public policy argument. Though the Act provides many benefits, it is imperative that a practitioner pay close attention to the many requirements of the Act as a mistake could be very costly to the grantor. ▲

## Endnotes

1. While offshore asset protection is still a viable option, it may be too costly and overly complicated for many individuals. Foreign asset protection trusts utilize foreign trustees and trust laws of other foreign nations. Many individuals do not feel comfortable expending the time, effort, and expense in setting up foreign asset protection trusts.
2. Alaska was the first state to enact a domestic asset protection trust statute. Other states to pass similar statutes include Connecticut, Delaware, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.
3. For purposes of this article, the authors will refer to any trust that is the subject of a qualified disposition as a QDIT.
4. Ala. Code § 19-3E-9(b) (1975).
5. *Id.* at § 19-3E-10(b).
6. *Id.* at § 19-3E-9(a).
7. *Id.* at § 19-3E-9(c).
8. *Id.* at § 19-3E-2(7).
9. *Id.*
10. The Act defines transferor as (a) A person or, for more than one owner of undivided interests, each of several persons who, as a beneficial owner of certain property or as the holder of a general power of appointment over certain property, directly or indirectly makes a disposition of the property or causes a disposition to be made; or (b) For a fiduciary disposition, the person or persons who, as of the time of the fiduciary disposition, most recently fit the description in paragraph a. with respect to the property subject to the fiduciary disposition. Section 19-3E-2(26), Code of Alabama (1975).
11. Section 19-3E-2(18), Code of Alabama (1975).
12. *Id.*
13. *Id.* at § 19-3E-2(10).
14. *Id.* at § 19-3E-6(b).
15. *Id.* at § 19-3E-6(a). Note that pursuant to § 19-3E-6(c), Code of Alabama (1975), "A qualified affidavit is defective if it materially fails to meet the criteria provided in subsection (a), except that a qualified affidavit is not defective because of any of the following: (1) Non-substantive variances from the language provided in [§ 19-3E-6(a)]; (2) Statements or representations in addition to those provided in subsection (a) if the statements or representations do not contradict those required by [§ 19-3E-6(a)]; (3) Technical errors in administering an oath if the errors were not the fault of the transferor and the transferor reasonably relied on another person to prepare or administer the oath.
16. See § 19-3E-2(18).
17. *Id.* at § 19-3E-2(19)(a).
18. *Id.* at § 19-3E-2(19)(b).
19. *Id.* at § 19-3E-2(19)(c).
20. *See id.*
21. *Id.* at § 19-3E-8(a)(1).
22. Section 19-3E-2(7) defines Qualified Beneficiary as, "A living trust beneficiary to whom any of the following apply on the date of the beneficiary's qualification: (a) the beneficiary is a distributee or permissible distributee of trust income or principal; (b) the beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date, but the termination of those interests would not cause the trust to terminate; (c) the beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date."
23. *Id.* at § 19-3E-8(b).
24. *Id.* at § 19-3E-4(a).
25. *Id.* at § 19-3E-4(b)(1).
26. *Id.* at § 19-3E-4(b)(2).
27. *Id.* at § 19-3E-4(b)(3).
28. *Id.* at § 19-3E-4(b)(4).
29. *Id.* at § 19-3E-4(b)(5).
30. *Id.* at § 19-3E-4(b)(6). The amount may be described as a percentage, a fixed amount, or an amount determined from time to time under the governing instrument and may not exceed five percent of the value of the trust.
31. *Id.* at § 19-3E-4(b)(7).
32. *Id.* at § 19-3E-4(b)(8).
33. *Id.* at § 19-3E-4(b)(9).
34. *Id.* at § 19-3E-4(b)(10). Note that the QDIT must expressly provide for the payment of taxes, and the receipt of income or principal is the result of a qualified trustee acting in the trustee's discretion or under a mandatory direction in the trust instrument or at the direction of an advisor who is acting in the advisor's discretion.
35. *Id.* at § 19-3E-4(b)(11).
36. *Id.* at § 19-3E-4(b)(12).
37. *Id.* at § 19-3E-4(a).
38. *Id.* at § 19-3E-5(e)(1).
39. *Id.* at § 19-3E-5(e)(2).
40. *Id.* at § 19-3E-2(26)(b).
41. *Id.* at § 19-3E-5(f)(2).
42. *Id.*
43. *Id.*
44. *Id.* at § 19-3E-5(b)(1).
45. *Id.* at § 19-3E-5(b)(2).
46. *Id.* at § 19-3E-5(b)(3).
47. *Id.* at § 19-3E-5(c)(2).
48. *Id.* at § 19-3E-5(c)(1).
49. *Id.* at § 19-3E-5(h)(1)(a).
50. *Id.* at § 19-3E-5(g).
51. *Id.* at § 19-3E-7(e).
52. *Id.* at § 19-3E-5(d)(2).
53. *Id.* at § 19-3E-5(h)(1)(b).
54. *Id.* at § 19-3E-5(d)(1).
55. *Id.* at § 19-3E-5(j).
56. *Id.* at § 19-3E-5(k).
57. *Id.* at § 19-3E-5(k)(4).
58. *Id.* at § 19-3E-5(l).
59. *Id.* at § 19-3E-7(a).
60. *Id.*
61. *Id.* at § 19-3E-7(g).
62. Note § 19-3E-11, which provides that "[u]nless otherwise displaced by the provisions of this act, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, and other validating or invalidating clauses, supplement its provisions."
63. *Id.* at § 19-3E-7(c).
64. *Id.* at § 19-3E-7(b)(3).
65. *Id.* at § 19-3E-7(b)(2).
66. *Id.* at § 19-3E-7(b)(1)(a).
67. *Id.* at § 19-3E-7(b)(2).
68. *Id.* at § 19-3E-7(b)(1)(b).
69. *Id.* at § 19-3E-3(a).
70. *Id.* at § 19-3E-3(b).
71. *Id.* at § 19-3E-3(c).
72. *Id.* at § 19-3E-10(b).
73. *See Huber.*
74. *Id.* at 809.
75. P.L.R. 2009-44-002 (October 30, 2009).
76. *See id.* Pursuant to the terms of the AAPT, the following persons could not serve as trustee of the AAPT: (i) grantor, (ii) grantor's spouse or former spouse, (iii) any beneficiary of the AAPT, (iv) any spouse or former spouse of any beneficiary of the AAPT, or (v) anyone who is related or subordinate to grantor pursuant to IRC § 672(c). In addition, the AAPT provided that grantor could not remove any trustee of the AAPT.
77. *See id.*
78. *See id.*
79. *See id.* Note that the IRS cautioned that, "We are specifically not ruling whether Trustee's discretion to distribute income and principal of Trust to Grantor combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion) may cause inclusion of Trust's assets in Grantor's gross estate for federal estate tax purposes under § 2036."
80. With the uncertainty surrounding the long-term availability of historically high estate and gift tax exemption amounts under the 2017 Tax Cuts and Jobs Act, many donor spouses use SLATs to use up their entire exemption amount (currently \$11.8 million) while excluding such assets from their gross estate at their death. One drawback of an SLAT is that if the non-donor spouse predeceases, the donor spouse loses the indirect benefit of the SLAT property.

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COVID-19



*insure domestic Tranquility, do ordain and establish this Constitution for the common defence and our Posterity, do ordain and establish this Constitution...*

# Are There Constitutional Issues With Alabama’s Gubernatorial and Legislative Responses to the COVID-19 Pandemic?

By David G. Wirtes, Jr., Joseph D. Steadman, Aaron N. Maples, and Joseph D. Wirtes

## The coronavirus known as COVID-19 reportedly infected

the first American on January 21, 2020.<sup>1</sup> According to the Alabama Department of Health, Alabama has to date suffered 19,890 deaths<sup>2</sup> and 45,976<sup>3</sup> hospitalizations from the virus. In this same time period, 1,053,969 Americans have died,<sup>4</sup> while 92,761,865 Americans have been confirmed as infected.<sup>5</sup>

In response, every state declared states of emergency at one point or another.<sup>6</sup> For example, on March 10, 2020, Michigan Governor Gretchen Whitmer issued an executive order declaring a state of emergency.<sup>7</sup> Alabama’s Governor Kay Ivey followed suit three days later when she issued Alabama’s first COVID-19 Emergency Proclamation on March 13, 2020.<sup>8</sup> While responses varied from state to state, most enacted stay-at-home orders, required closures of specific businesses, limited public

gatherings, and mandated the wearing of masks in public.<sup>9</sup>

To be sure, the COVID-19 pandemic presented challenges warranting creative and aggressive governmental responses. But any such responses are required to be tailored to fit within settled limits upon the exercise of governmental power imposed by our state constitution.

However, Governor Ivey’s use of COVID-19 emergency proclamations to abolish causes of action, change the standard of care, and confer immunity pursuant to Alabama’s Emergency Management Act of 1955 (the “AEMA”), Ala. Code §§ 31-9-1 to -24 (1975), raises serious constitutional questions because it may not fit within those settled limits.

The Alabama Legislature’s subsequent promulgation in 2021 of the COVID-19 Immunity Act (“ACIA”), §§ 6-5-790 to -799 likewise raises constitutional questions because it purports to *retroactively* abolish accrued causes of action, change the standard of care, and confer immunity.



In this article we first discuss pertinent Alabama constitutional provisions and the cases interpreting them that discuss the limits of the legislature's ability to delegate legislative power to the executive branch. We next catalogue Governor Ivey's emergency proclamations which purport to change Alabama negligence law and confer immunity upon COVID responders and businesses and explain how such proclamations may not withstand constitutional scrutiny. We move from there to demonstrating how retroactive application of the ACIA to deprive victims of vested negligence causes of action likewise may not withstand constitutional scrutiny. Finally, we examine the Michigan Supreme Court's decision in *Midwest Institute of Health, PLLC v. Whitmer*, an analogue to Alabama's unfolding situation, where the Supreme Court of Michigan held similar governmental responses to the COVID-19 pandemic unconstitutional under Michigan law.

In doing so, our article aims to assist Alabama lawyers contemplating or confronted with defenses to COVID-related injury and death claims premised upon gubernatorial proclamations, the AEMA, and/or the AICA.

## Pertinent State Constitutional Provisions

- Article I, § 13 of the *Alabama Constitution of 1901*: “[T]hat all courts shall be open, and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law, and right and justice shall be administered without sale, denial, or delay.”
- Article I, § 21 of the *Alabama Constitution of 1901*: “That no power of suspending laws shall be exercised except by the legislature.”
- Article I, § 35 of the *Alabama Constitution of 1901*: That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assume other functions it is usurpation and oppression.
- Article III, § 42 of the *Alabama Constitution of 1901*: (a) The powers of the government of the State of Alabama are legislative, executive, and judicial. (b) The government of the State of Alabama shall be divided into three distinct branches:

legislative, executive, and judicial. (c) To the end that the government of the State of Alabama may be a government of laws and not of individuals, and except as expressly directed or permitted in this constitution, the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.

## Pertinent Overarching Rules of Construction

- “But it is insisted that this law was enacted by the Legislature to meet an emergency. That emergencies do not authorize the suspension of the Constitution and its guaranties was settled nearly three quarters of a century ago...” *City of Mobile v. Rouse*, 233 Ala. 622, 625, 173 So. 266, 268 (1937), citing *Ex parte Milligan*, 4 Wall.2, 120-121, 18 L.Ed. 281(1866).
- ““Public policy considerations cannot override constitutional mandates.”” *Ex parte Bentley*, 116 So. 3d 201, 203 (Ala. 2012), quoting *Camp v. Kenney*, 673 So. 2d 436, 438 (Ala. Civ. App. 1995).
- “[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. \_\_\_, \_\_\_, 141 S.Ct. 63, 68, 208 L.Ed. 2d 206, 210 (U.S. 2020).

## Governor Ivey's Emergency Proclamations

On March 13, 2020, Governor Ivey declared a state of emergency in response to the COVID-19 pandemic and issued her first Emergency Proclamation.<sup>10</sup> In her initial proclamation, Governor Ivey stated that any “alternative standards of care” adopted by health care facilities were declared to be “state-approved” and that the “degree of care” owed to patients by health care professionals under §§ 6-5-540 to -552 (the Alabama Medical Liability Act (“AMLA”)) would be *suspended* as a result of her proclamation.





Governor Ivey issued 27 supplemental proclamations, each addressing miscellaneous topics impacting Alabama citizens.<sup>11</sup> Of those, the Fifth and Eighth Supplemental proclamations purport to make substantive changes to Alabama civil tort and damages law. While these provisions of Governor Ivey’s COVID-19 emergency proclamations expired by their own terms on October 31, 2021, they purport to impact all causes of action for personal injuries and wrongful deaths accruing while Alabama remained within a state of emergency.<sup>12</sup>

The Fifth Supplemental Proclamation was issued on April 2, 2020.<sup>13</sup> It authorizes certain health care officials, such as certified registered nurse practitioners and nurse anesthetists, to have an expanded scope of practice during the state of emergency. It also requires state health agencies to allow expedited licensures or temporary permits for medical professionals from out of state to practice in Alabama and further calls for the expedited reinstatement of medical licenses for those who have maintained good standing in Alabama, who have no disciplinary history in Alabama or elsewhere, and are deemed competent by the Alabama Board of Medical Examiners and Medical Licensure Commission.

The Eighth Supplemental Proclamation was issued on May 8, 2020.<sup>14</sup> This proclamation aims to confer broad immunity to health care providers who provide care arguably impacted by COVID. It also purports to confer on businesses broad immunity for liability from “death or injury to persons or for damage to property in any way arising from any act or omission related to, or in connection with, COVID-19 transmission....” The proclamation purports to immunize businesses even from claims arising from alleged failure to abide by public health guidance aimed at stopping or slowing the spread of COVID-19.

The proclamation consists of three key sections: “Findings,” “Definitions,” and “Emergency Protections.” The Findings section contains a series of declarations in which Governor Ivey explains her reasoning for granting immunity to health care providers. For example, the governor references the poor economy, the closure of many businesses, and that mortality rates increase significantly during periods of high employment.

The Definitions section specifies the actions and inactions by health care providers deemed exempt from liability. The essential term is labeled as a “Covered COVID-19 response activity.” This term is said to cover “any performance or provision of health care services or

treatment... that resulted from, was negatively affected [or]... impacted by a lack of resources caused by, or... in response to the COVID-19 pandemic...” The pertinent excerpts from this proclamation are as follows:

1. **“Covered COVID-19 response activity”** means any or all of the following activities by a business, health care provider or other covered entity:
  - a. Any testing, distribution of testing materials, monitoring, collecting, reporting, tracking, tracing, investigating, or disclosing exposures or other information in connection with COVID-19 during the ongoing state of emergency;
  - b. Any performance or provision of health care services or treatment by a health care provider that resulted from, was negatively affected by, was negatively impacted by a lack of resources caused by, or was done in response to the COVID-19 pandemic or the State’s response thereto;
  - c. Any design, manufacture, distribution, allowance, use, or non-use of precautionary equipment or supplies such as PPE in connection with COVID-19 during the ongoing state of emergency;
  - d. Any design or manufacture of testing materials done under the direction of ADPH and in accordance with ADPH’s specifications.

May 8, 2020 Eighth Supplemental Emergency Proclamation, ¶I(B)(4)(a-d).

The Emergency Protections section purports to amend the standard of care owed by health care providers under Alabama law, the standard of proof to prove a breach of the standard of care and imposes limitations on recoverable damages for claims which meet the heightened burden of proof. First, Governor Ivey proclaims that health care providers are not liable for the death or injury of persons arising from a “covered COVID-19 response activity” except for those resulting from a provider’s “wanton, reckless, willful, or intentional misconduct.”<sup>15</sup> Second, rather than requiring plaintiffs to prove by substantial evidence that a health care provider breached the standard of care,<sup>16</sup> Governor Ivey proclaims that plaintiffs must now establish a breach by “clear and convincing evidence.” Third, while Alabama plaintiffs are traditionally able to recover the full spectrum of

compensatory damages and punitive damages against health care providers (except in certain circumstances),<sup>17</sup> the Eighth Supplemental Proclamation prescribes that victims may no longer recover any noneconomic or punitive damages.<sup>18</sup>

The full text of the Emergency Protections section of the Eighth Supplemental Emergency Proclamation states:

### C. Emergency protections.

1. Liability protections. A business, health care provider, or other covered entity shall not be liable for the death or injury to persons or for damage to property in any way arising from any act or omission related to, or in connection with, COVID-19 transmission or a covered COVID-19 response activity, unless a claimant shows by clear and convincing evidence that the claimant's alleged death, injury, or damage was caused by the business, health care provider, or other covered entity's wanton, reckless, willful, or intentional misconduct.

2. Limitations on damages. In those instances where liability is established under Section I.C.1 and the acts or omissions do not result in serious physical injury, a business, health care provider, or other covered entity's liability shall be limited to actual economic compensatory damages, and in no event shall the business, health care provider, or other covered entity be liable for non-economic or punitive damages. A party asserting a wrongful death claim under Section I.C.1 is only entitled to an award of punitive damages.

3. Accrued causes of action. For any cause of action relating to COVID-19 transmission or a covered COVID-19 response activity where the cause of action accrued before the issuance of this proclamation and for which a court holds that the provisions of Section I.C.1 and I.C.2 do not apply, the following shall apply:

a. Standard of Care. As a matter of law, a business, health care provider, or other covered

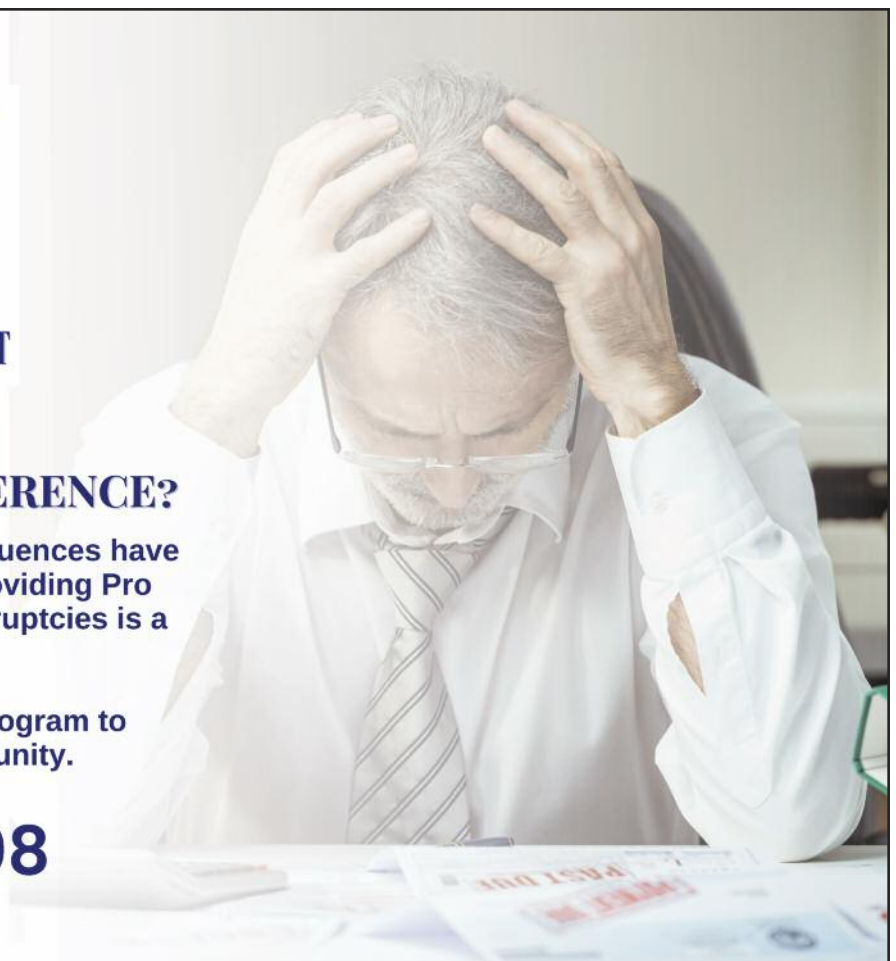


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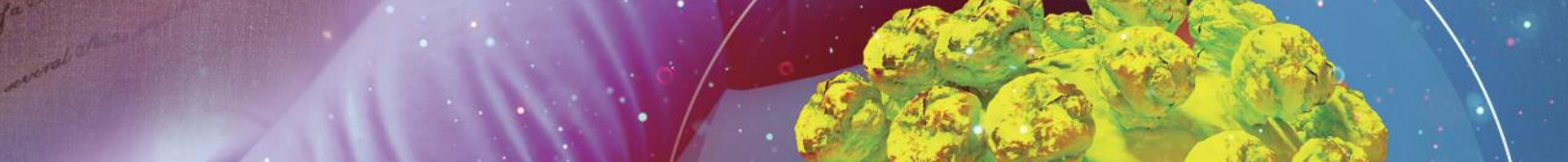
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entity shall not be liable for negligence, premises liability, or for any non-wanton, non-willful, or nonintentional civil cause of action with respect to any individual or entity relating to or in connection with COVID-19 transmission or any covered COVID-19 response activity unless the claimant proves by clear and convincing evidence that the business, health care provider, or other covered entity did not reasonably attempt to comply with the then applicable public health guidance.

- b. Adjustment of remedies. Notwithstanding any other provision of law, a business, health care provider, or other covered entity shall not be liable for damages from mental anguish or emotional distress or for punitive damages but could be liable for economic compensatory damages in a cause of action that does not involve serious physical injury. This subsection shall not prohibit the awarding of punitive damages for wrongful death claims, but no other damages shall be allowed for such claims.

May 8, 2020 Eighth Supplemental Emergency Proclamation, ¶ C(1-3).

The fundamental question to be confronted is whether under Alabama’s constitutional system of governance, does Governor Ivey have legal authority to issue such proclamations and make any such substantive changes to Alabama law?

## Alabama Emergency Management Act of 1955

Governor Ivey’s claimed authority for issuing such proclamations derives from operative provisions of the Alabama Emergency Management Act (“AEMA”), especially §§ 31-9-6 and 31-9-8, which enumerate emergency powers conferred upon Alabama governors once a state of emergency has been declared and filed with the Alabama Secretary of State. These statutes state:

### **Alabama Code 31-9-6. Powers and duties of Governor with respect to emergency management.**

In performing his or her duties under this article, the Governor is authorized and empowered:

- (1) To make, amend, and rescind the necessary orders, rules and regulations to carry out the provisions

of this article within the limits of the authority conferred upon him or her in this article, with due consideration of the plans of the federal government.

- (2) To prepare a comprehensive plan and program for the emergency management of this state, such plan and program to be integrated and coordinated with the emergency management plans of the federal government and of other states to the fullest possible extent, and to coordinate the preparation of plans and programs for emergency management by the political subdivisions of this state, such plans to be integrated into and coordinated with the emergency management plans and programs of this state to the fullest possible extent.

- (3) In accordance with such plan and program for the emergency management of this state, to ascertain the requirements of the state, or the political subdivisions thereof, for food or clothing or other necessities of life in the event of disaster or emergency and to plan for and procure supplies, medicines, materials, and equipment for the purposes set forth in this article; to make surveys of the industries, resources and facilities within the state as are necessary to carry out the purposes of this article; to institute training programs and public information programs; and to take all other preparatory steps, including the partial or full mobilization of emergency management organizations in advance of actual disaster, to insure the furnishing of adequately trained and equipped forces of emergency management personnel in time of need.

- (4) To make, amend, and rescind the necessary orders, rules, and regulations looking to the direction or control of practice blackouts, air raid drills, mobilization of emergency management forces, and other tests and exercises, warnings, and signals for drills or attacks, the mechanical devices to be used in connection therewith, the effective screening or extinguishing of all lights and lighting devices and appliances, the conduct of civilians and the movement or cessation of movement of pedestrians and vehicular traffic, public meetings or gatherings, the evacuation and reception of civilian population, and shutting off water mains, gas mains, electric power connections, and the suspension of all other public utilities, during, prior and subsequent to drills or attacks.



(5) To create and establish mobile support units and to provide for their compensation.

(6) To cooperate with the President and the heads of the Armed Forces, with the Emergency Management Agency of the United States and with the officers and agencies of other states in matters pertaining to the emergency management of the state and nation and the incidents thereof.

(7) With due consideration to the recommendation of the local authorities, to appoint full-time state and regional area directors.

(8) To utilize the services and facilities of existing officers and agencies of the state and the political subdivisions thereof.

(9) On behalf of this state, to enter into reciprocal aid agreements or compacts with other states and the federal government, including federally recognized Indian tribes. Such mutual aid agreements shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; national or state guards while under the control of the state; health, medical and related services; fire fighting, rescue, transportation, and construction services and equipment; personnel necessary to provide or conduct these services; such other supplies, equipment, facilities, personnel, and services as may be needed; and the reimbursement of costs and expenses for equipment, supplies, personnel, and similar items for mobile support units, fire fighting and police units, and health units. Such agreements shall be on such terms and conditions as are deemed necessary.

(10) To sponsor and develop mutual aid plans and agreements between the political subdivisions of the state, similar to the mutual aid agreements with other states referred to in subdivision (1) of this section.

(11) To delegate any administrative authority vested in him or her under this article, and to provide for the subdelegation of any such authority.

(12) To take such action and give such directions to state and local law-enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this article and with the orders, rules, and regulations made pursuant thereto.

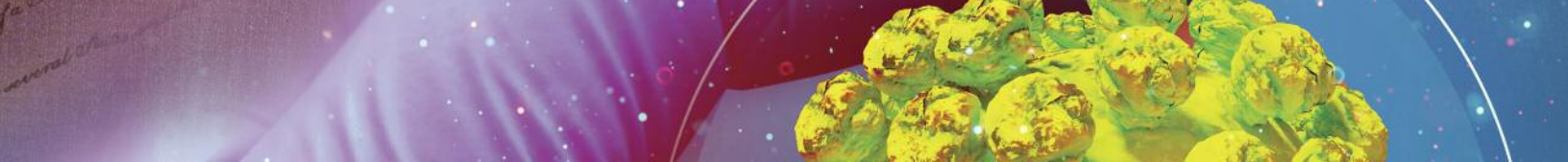
### Alabama Code 31-9-8. Emergency powers Of Governor.

(a) The provisions of this section shall be operative only during the existence of a state of emergency, referred to hereinafter as one of the states of emergency defined in Section 31-9-3. The existence of a state of emergency may be proclaimed by the Governor as provided in this subsection or by joint resolution of the Legislature if the Governor in the proclamation or the Legislature in the resolution finds that an attack upon the United States has occurred or is anticipated in the immediate future, or that a natural disaster of major proportions or a public health emergency has occurred or is reasonably anticipated in the immediate future within this state and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section. If the state of emergency affects less than the entire state, the Governor or the Legislature shall designate in the proclamation or resolution those counties to which the state of emergency applies. The emergency, whether proclaimed by the Governor or by the Legislature, shall terminate 60 days after the date on which it was proclaimed unless the Governor extends the emergency by proclamation or the Legislature extends the emergency by a joint resolution. Upon proclamation by the Governor of a state of emergency, the Governor may call the Legislature into special session. Additionally, the Lieutenant Governor or the Speaker of the House may request in writing that the Governor call the Legislature into special session. During the period that the proclaimed emergency exists or continues, the Governor shall have and may exercise the following additional emergency powers:

(1) To enforce all laws, rules, and regulations relating to emergency management and to assume direct operational control of all emergency management forces and helpers in the state.

(2) To sell, lend, lease, give, transfer, or deliver materials or perform services for emergency management purposes on such terms and conditions as the Governor shall prescribe and without regard to the limitations of any existing law, and to account to the State Treasurer for any funds received for such property.

(3) To procure, by purchase, condemnation, seizure, or other means, construct, lease, transport,



store, maintain, renovate, or distribute materials and facilities for emergency management without regard to the limitations of any existing law; provided, that this authority shall not be exercised with regard to newspapers, wire facilities leased or owned by news services, and other news publications, and provided further, that he or she shall make compensation for the property so seized, taken, or condemned, on the following basis:

\* \* \*

(4) To provide for and compel the evacuation of all or part of the population from any stricken or threatened area or areas within the state and to take such steps as are necessary for the receipt and care of such evacuees.

(5) To perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.

(6) To employ such measures and give such directions to the state or local boards of health as may be reasonably necessary for the purpose of securing compliance with the provisions of this article or with the findings or recommendations of such boards of health by reason of conditions arising from enemy attack or the threat of enemy attack or otherwise.

(7) To utilize the services and facilities of existing officers and agencies of the state and of the political subdivisions thereof. All such officers and agencies shall cooperate with and extend their services and facilities to the Governor as he or she may request.

(8) With due consideration to the recommendations of local authorities, the Governor may formulate and execute plans and regulations for the control of traffic in order to provide for the rapid and safe movement of evacuation over public highways and streets of people, troops, or vehicles and materials for national defense or for use in any defense industry, and may coordinate the activities of the departments or agencies of the state and of the political subdivisions thereof concerned directly or indirectly with public highways and streets, in a manner which will best effectuate such plans.

(9) To establish agencies and offices and to appoint temporary executive, technical, clerical, and other personnel as may be necessary to carry out the provisions of this article without regard to the Merit System Act.

The AEMA authorizes the governor to “enforce all laws, rules, and regulations relating to emergency management ... and to perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.”<sup>19</sup> Governor Ivey expressly relied upon such authority in issuing her COVID-19 emergency proclamations. For example, her Eighth Supplemental Proclamation states: “Whereas, in accordance with Ala. Code § 31-9-6 and § 31-9-8, I have concluded that it is necessary to promote and secure the safety and protection of the civilian population by ensuring that Alabama’s health care providers have adequate protections and our health care system has adequate capacity to provide health care for the people of this State... ”<sup>20</sup>

The AEMA’s other pertinent provisions specify that once issued a governor’s emergency order has the full force and effect of law when filed with the secretary of state.<sup>21</sup> Furthermore, it provides that “[a]ll existing laws, ordinances, rules, and regulations or parts thereof inconsistent with the provisions of this article or of any order, rule, or regulation issued under ... the article, shall be suspended during the period of time and to the extent that such inconsistency exists.”<sup>22</sup> Finally, § 31-9-23 prescribes that the AEMA is to be liberally construed in order to effectuate its purpose by providing Alabama governors with significant authority to direct the state’s response to emergency situations.

While on its face the AEMA appears noble in its intentions, if interpreted to grant Alabama’s governors such unbridled authority to change statutory law, it is arguably unconstitutional in many ways. The following sections show why.

## History Behind Governor Ivey’s May 8, 2020 Eighth Supplemental Emergency COVID-19 Proclamation

The Alabama Legislature convened in regular session the first week of May 2020. Senator Orr offered



Senate Bill 330 which, among other things, provided for a change in the standard of care for claims arising from or related to COVID-19 transmissions such that negligence claims against health care providers were abolished and damages could be recovered only “if the claimant proved by clear and convincing evidence that the covered entity caused the damages, injury, and death by acting with wanton, reckless, willful, or intentional misconduct.”<sup>23</sup> Senate Bill 330 failed to pass during the 2020 legislative session.

According to one of the drafters of SB 330, Mobile attorney Matthew McDonald, who appeared as an attorney for amicus curiae Alabama Civil Justice Reform Committee in *Joseph R. Dear v. Comfort Care Coastal Hospice, LLC*, Mobile County, Alabama Circuit Court Civil Action No. CV-2021-900780, SB 330 failed to pass in the 2020 legislative session because the legislature adjourned early out of health concerns. McDonald reported this legislative history during a hearing before Mobile Circuit Judge Ben H. Brooks:

“...I and others worked on a statute that got introduced in April of 2020. ...I think it was Senate Bill 30 by Senator Orr.<sup>24</sup> We, hurriedly, in March and April – as you know, you write these things by committee as you’ve done with me before many times.”<sup>25</sup>

\* \* \*

“...We introduced the bill in April, Senate Bill 30 [sic], Senator Orr introduced it. ...but the Legislature adjourned early, again because of health concerns. We could never, literally, get the bill through.”<sup>26</sup>

Upon ascertaining SB 330 would not garner enough votes to pass, Governor Ivey purported to accomplish the same results through executive proclamation under a claim of authority conferred by the AEMA. Side-by-side comparison of the then-proposed SB 330 with what ultimately became the text of Governor Ivey’s May 8, 2020 Eighth Supplemental COVID-19 Emergency Proclamation shows they are in all material respects *identical*. McDonald conceded before Judge Brooks that “Senate Bill 30 then morphed into the [Governor’s] proclamation.”<sup>27</sup>

## History Behind the Legislature’s Promulgation Of the COVID Immunity Act

Nothing contained within the AEMA authorizes the legislature to confer power upon a governor to change substantive law or confer immunity in times of emergencies. On the contrary, § 21 of the Alabama Constitution of 1901 forbids the legislature from delegating law-making authority just as § 42 (separation of powers provision) forbids the executive branch from exercising legislative power. In apparent recognition of the constitutional vulnerability of the declarations contained within Governor Ivey’s Eighth Supplemental Emergency Proclamation, the legislature reconvened in 2021 and considered a successor to SB 330 which was a mirror image of that same bill and a mirror image of Governor Ivey’s Eighth Supplemental Emergency Proclamation. The new 2021 bill was assigned Senate Bill number 30. Senate Bill 30 passed through the legislature, was signed into law, and was eventually codified as the Alabama COVID Immunity Act (“ACIA”), which, again, mirrors *both* SB 330 and Governor Ivey’s Eighth Supplemental COVID-19 Emergency Proclamation.

In addition, however, the ACIA includes § 6-5-792 which purports to abrogate all negligence causes of action related to COVID-19 transmission including those accruing before February 12, 2021, when the ACIA became law. Section 6-5-793 applies to negligence claims related to COVID-19 transmission “for which a court holds that neither Section 3 [codified at § 6-5-792] nor the liability limiting provisions of any gubernatorial emergency order appl[y].” Section 11 of the Act, which does not appear in the Alabama Code, provides “[t]he provisions of this act shall be retroactive and apply to causes of action filed on or after March 13, 2020.”

As shown below, the purported retroactivity of § 6-5-792’s language runs afoul of Art. I, § 13’s “right-to-remedy” provision, as construed in *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120, 126 (1857) (“[i]t is not within the power of the legislature to take away vested rights.”), *Pickett v. Matthews*, 238 Ala. 542, 545, 192 So. 261, 264 (1939) (“undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and the right of action vested, regardless of the source of the duty which





was breached, provided it remained in existence when the breach occurred”).

## Constitutional Issues with Governor Ivey’s Fifth and Eighth Supplemental COVID-19 Emergency Proclamations

### The Executive Proclamations Exceed the Delegation of Authority in the AEMA

The relevant section of the AEMA which purports to grant the governor authority to issue emergency proclamations is set out in § 31-9-6(1):

In performing his or her duties under this chapter, the Governor is authorized and empowered: (1) To make, amend, and rescind the necessary orders, rules, and regulations to carry out the provisions of this chapter within the limits of the authority conferred upon him or her in this chapter, with due consideration of the plans of the federal government.

None of the specific powers conferred by the various subsections of §§ 31-9-6 or 31-9-8 authorize the governor to change substantive tort law. On the contrary, “[t]he provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation.” *Ex Parte Jones Mfg. Co.*, 589 So. 2d 208, 210 (Ala. 1991). Just like an administrative agency, the governor cannot usurp legislative powers by “enlarg[ing] upon statutory authority.” *Id.*

Moreover, the AEMA does not purport to delegate to the governor any authority to create new law such as conferring immunity from liability for negligence upon private businesses and individuals. “It is axiomatic that administrative rules and regulations must be consistent with the constitutional or statutory authority by which their promulgation is authorized.” *Ex parte Florence*, 417 So. 2d 191, 193 (Ala. 1982); see also *Jefferson Cty. v. Ala. Criminal Justice Info. Ctr. Comm’n*, 620 So. 2d 651, 658 (Ala. 1993) (an agency “cannot claim implied powers that exceed and/or conflict with those express powers contained in its enabling legislation.”).

The only specific provision of the AEMA addressing tort liability concerns emergency workers:

Neither the state nor any political subdivision thereof nor other agencies of the state or political subdivisions thereof, nor, except in cases of willful misconduct, gross negligence, or bad faith, any emergency management worker, individual, partnership, association, or corporation complying with or reasonably attempting to comply with this article or any order, rule, or regulation promulgated pursuant to the provisions of this article or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state, shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity.

Section 31-9-16(a). In no way can this specific legislative grant of immunity to certain state actors be deemed some delegation of authority to the governor to extend such immunity to non-state actors. And even under the most liberal reading of the AEMA, health care providers remain liable for gross negligence. Under long-settled law, there is no meaningful distinction between “negligence and gross negligence.”<sup>28</sup> Consequently, under the AEMA health care providers and state actors reasonably attempting to comply with emergency orders remain liable for their negligence/gross negligence. Therefore, any reliance by anyone upon any part of Governor Ivey’s Fifth or Eighth Supplemental proclamations in support of any claim of immunity from civil liability exceeds the authority delegated to the governor by the AEMA because it conflicts with § 31-9-16(a).

Moreover, as shown below, construing the AEMA’s delegation of authority to the governor as allowing the governor to change burdens of proof in civil actions and to confer immunity for negligence liability raises serious constitutional questions in light of Article 1, § 21 and Article III, § 42 of the constitution.

### Any Grant of Immunity From Civil Liability by Executive Order Likely Violates Article I, § 21

Article I § 21 of the Alabama Constitution unequivocally provides: “That no power of suspending laws shall be exercised *except by the legislature*.” Emphasis supplied. As such, the section’s plain text prohibits a construction of § 31-9-13 of the AEMA as delegating a broad suspension power to the governor. Through her emergency proclamations, Governor

Ivey has exercised a broad suspension power pursuant to the AEMA by issuing emergency orders purporting to change substantive tort law. As a result, Governor Ivey's actions are arguably unconstitutional.

The Alabama Supreme Court has previously construed Art. I § 21 to prohibit the legislature from delegating the suspension power to the governor and precluding Alabama's governor from exercising that power.

In *Opinion of the Justices*, 345 So. 2d 1354 (Ala. 1977), Governor George Wallace requested that the court give an opinion on the constitutionality of a bill that would vest him with the power to freeze certain utility rates under an executive order that was established by a state agency, the Alabama Public Service Commission ("PSC").<sup>29</sup> The court was presented with three specific questions asking whether the bill violated certain Alabama constitutional provisions.<sup>30</sup>

One of the questions presented asked whether the bill conflicted with Section 21.<sup>31</sup> The court held that it did. The court reasoned that the power to freeze a utility rate was equivalent to the power to suspend law.<sup>32</sup> Although the court recognized that the state legislature could itself freeze the utility rate, the court declared that the legislature was unable to, consistent with Section 21, authorize its suspension by another agency or, as proposed by the bill, by Governor Wallace. The court reasoned "[t]he power to suspend having been vested exclusively in the legislature by the constitution, *a fortiori* it could not be delegated to the governor in view of [former] Section 43 of our constitution."<sup>33</sup>

Here, Governor Ivey's emergency proclamations purport to suspend numerous laws enacted by the Alabama Legislature.<sup>34</sup> Her initial proclamation on March 13, 2020 explicitly declared that the degree of care owed to patients by health care professionals under Alabama law was to be suspended as a result of her proclamation.<sup>35</sup> In light of the Alabama Constitution and Alabama Supreme Court precedent, Governor Ivey's purported suspension of laws is arguably unconstitutional as a matter of law.

Additionally, Governor Ivey's exercise of the law-making power via emergency proclamation pursuant to the AEMA may also run afoul of the separation of powers mandate of Article III, § 42.

### Any Grant of Civil Immunity by Executive Order Also Implicates Article III, § 42

Article III, § 42 provides that:

(a) The powers of the government of the State of Alabama are legislative, executive, and judicial.

(b) The government of the State of Alabama shall be divided into three distinct branches: legislative, executive, and judicial.

(c) To the end that the government of the State of Alabama may be a government of laws and not of individuals, and except as expressly directed or permitted in this constitution, the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.<sup>36</sup>

In addition to suspending current Alabama laws, Governor Ivey's emergency proclamation purports to amend existing laws and enact new laws, all without legislative approval. As discussed above, the Eighth Supplemental Proclamation, for example, declares an amendment to the statutory standard of care owed to patients by health care providers and immunizes all businesses from liability as to claims arising from COVID-19 transmission throughout the duration of the state of emergency.

The Alabama Supreme Court's decision in *Hawkins v. James*<sup>37</sup> confronted a similar situation. Governor Fob James issued an executive order that instructed Alabama agencies to deny waiver requests by state employees to work beyond the 70-year-old mandatory-retirement age, except in very limited circumstances.<sup>38</sup> The plaintiff, who was 74 years of age, previously met conditions allowing her to work beyond the mandatory retirement age.<sup>39</sup> However, Governor James's executive order subsequently forced her to retire against her will because she was unable to meet the amended requirements to obtain a waiver.<sup>40</sup> As a result, she alleged that but for Governor James's unconstitutional exercise of the legislative power she would have remained a paid state employee.<sup>41</sup> The court held that the governor's executive order violated the separation of powers clause of the Alabama Constitution.<sup>42</sup>

In reaching its decision, the court first noted: "It is commonly held that the executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his conduct is tantamount to a repeal, enactment, variance, or enlargement of legislation."<sup>43</sup> The court then found that the executive order was an unconstitutional exercise of the legislative power because it had the "direct practical effect" of removing





the consideration previously given to state department heads under law in deciding whether an employee should be entitled to a waiver.<sup>44</sup> Therefore, since the application of the order had the “effect of an exercise of legislative power,” the court concluded it violated the separation of powers.<sup>45</sup>

Alabama’s Court of Civil Appeals dealt with a similar case in *Jetton v. Sanders*.<sup>46</sup> There, lawyers appointed to represent indigent criminal defendants filed suit against the state comptroller in seeking to compel payment for services rendered.<sup>47</sup> The attorneys had been denied payment because Governor Wallace issued an executive order that reduced and limited payments owed to them under Alabama law.<sup>48</sup> Like *Hawkins*, the *Jetton* court held that Governor Wallace lacked the authority to alter or amend the law at issue and that his executive order was an unconstitutional exercise of the legislative power.<sup>49</sup>

In its opinion, the court first described the separation of powers under the Alabama Constitution.<sup>50</sup> Then, it looked to the state legislature’s role.<sup>51</sup> As with the suspension power, the court made clear that the legislature could not delegate its authority to Governor Wallace to modify the power to appropriate funds or otherwise amend law because that “would be in effect delegating the legislature’s power to make law.”<sup>52</sup> The court concluded that by reducing the amount to be paid to the attorneys, Governor Wallace’s Executive Order No. 36 constituted an unconstitutional intrusion into the legislative branch and was therefore void.<sup>53</sup>

Under the AEMA, gubernatorial emergency proclamations have the full force and effect of law and correspondingly cause the suspension of all existing laws inconsistent with those orders throughout the duration of a declared emergency.<sup>54</sup> Thus, the Act, in effect, delegates to governors the authority to enact certain laws during a state of emergency. This delegation of the legislative power is arguably unconstitutional. Broad construction of the AEMA as authorizing enactment of new laws and regulations constitutes an unlawful intrusion in the legislature’s exclusive power to make or change statutory laws.

Likewise, Governor Ivey’s emergency orders are tantamount to the “repeal, enactment, variance, or enlargement of legislation.”<sup>55</sup> As noted above, the governor has effected a change under Alabama law in modifying the standard of care from a “reasonable care” standard<sup>56</sup> to a “reckless and wanton conduct”

standard.<sup>57</sup> The governor has also arguably enlarged the purpose of the AEMA through the use of subsection (a)(5)<sup>58</sup> as a justification for promulgating all manner of laws and regulations via emergency proclamations during the declared state of emergency. By comparison, Governor James was not enacting major pieces of legislation in the issuance of his executive order in *Hawkins*. To be sure, the order likely affected thousands of Alabama state employees at the time. But at issue here are the fundamental rights and liberties guaranteed to all Alabamians by the constitution.<sup>59</sup>

Alabama citizens who are harmed by negligent health care providers are guaranteed a remedy by § 13 the same as state employees unconstitutionally forced to retire early. The Alabama Supreme Court recognized in *Hawkins* that they are entitled to that right, and Governor Ivey’s proclamations appear therefore to be an unconstitutional exercise of legislative power to the extent they deprive victims of their right to a remedy for their injuries.

Governor Ivey’s exercise of the legislative power mirrors a historic example from earlier in our nation’s history. In reviewing former Birmingham Mayor Richard Arrington’s actions (similar to Governor Ivey’s),<sup>60</sup> the Alabama Supreme Court recognized and cited with approval the U.S. Supreme Court’s landmark ruling in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>61</sup> where the Supreme Court of the United States declared that President Truman’s seizure of certain steel mills by executive order was unconstitutional.<sup>62</sup> Although President Truman claimed to be acting in the national interest, the Supreme Court found President Truman’s actions to be an unconstitutional usurpation of legislative authority since he failed to seek congressional approval prior to issuing the order.<sup>63</sup>

Defendants may argue that *Youngstown* stands for the proposition that the executive’s authority is at its greatest when acting pursuant to an express legislative grant of such authority. However, reported opinions from the United States Supreme Court, the Alabama Supreme Court, and elsewhere, including as will be shown below in Michigan under analogous circumstances, require that any such emergency extension of executive power can be sustained only when the legislature precisely defines what those powers consist of, how they may be exercised, and when they end.<sup>64</sup>

In its opinion, *Federation of City Employees v. Richard Arrington*, the Alabama Supreme Court



quoted Justice Black's majority opinion in *Youngstown Sheet & Tube* stating, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law maker."<sup>65</sup>

In numerous respects, Governor Ivey's actions are similar to those taken by President Truman in *Youngstown*. For example, she exercised the role of the legislature by enacting various laws during the pandemic via emergency proclamations. In doing so, she, like President Truman, claimed to be acting in the public's interest. The Eighth Supplemental Order, for instance, includes multiple statements that can be read to mean exactly that.<sup>66</sup> However, the Supreme Court explained in *Youngstown* that "[t]he President's power, if any, to issue the [executive] order must stem from either an act of Congress or from the Constitution itself,"<sup>67</sup> and as shown previously, it has been settled since 1866 that emergencies will not permit the disregard of constitutional commands. Our state constitution controls as the supreme law of the land through the best and worst of times.<sup>68</sup>

## Constitutional Issues With the Alabama COVID Immunity Act

Any retroactive application of § 6-5-792 to abrogate accrued negligence causes of action will also likely be deemed unconstitutional. The right-to-remedy provision (Art. I, § 13) of the Alabama Constitution of 1901 as applied in *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939) and other cases decided both before and long after *Pickett v. Matthews* prevent the legislature from eliminating a remedy after accrual of a cause of action.

The Alabama Supreme Court held more than 160 years ago that "[i]t is not within the power of the legislature to take away vested rights." *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120, 126 (1857). More recently, in considering the constitutionality of the Guest Statute's abolition of a negligence cause of action, the supreme court held in 1939:

Undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and right of action vested, regardless of the source of the

duty which was breached, provided it remained in existence when the breach occurred. 16 Corpus Juris Secundum, Constitutional Law, p. 1499, § 710. This includes such items of damages as were legally subject to recovery at the time of the breach. *Comer v. Advertiser Co.*, 172 Ala. 613, 55 So. 195; *Marion v. Davis*, 217 Ala. 16, 114 So. 357, 55 A.L.R. 171.

But section 13, *supra*, does not in language, nor intent, prevent the legislature from changing a rule of duty to apply to transactions which may occur thereafter.

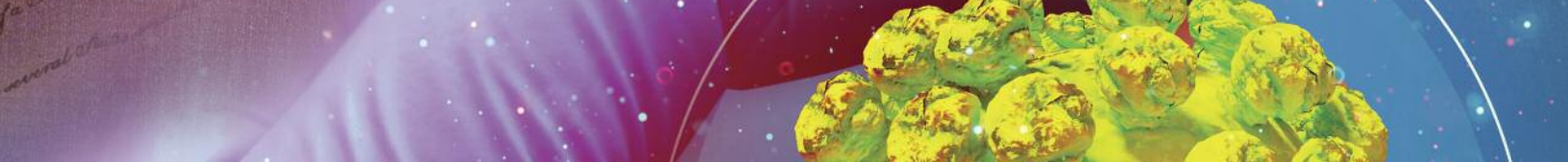
*Pickett v. Matthews*, 238 Ala. at 545, 192 So. at 264. The court relatedly held that "there can be no right to have an existing statute continue in effect without repeal or modification, except as to a cause which has accrued and vested." *Id.* at 548, 192 So. 261, 266.

Forty years after *Pickett v. Matthews*, in *Mayo v. Rouselle Corp.*, 375 So. 2d 449, 451 (Ala. 1979), the court recognized that § 13 "preserves to all persons a remedy for accrued or vested causes of action." Fifty years after *Pickett*, the court held in *Reed v. Brunson*, 527 So. 2d 102, 114 n. 5 (Ala. 1988), that "[s]ection 13 protects the injured party's right to a remedy from the time the civil action accrues until suit is filed."<sup>69</sup>

In 2014, the Eleventh Circuit Court of Appeals considered whether jailers were immune from negligence causes of action which accrued before the legislature amended § 14-6-1 to extend the immunity of the sheriff to jailers "acting within the line and scope of their duties ...." In *Johnson v. Conner*, 754 F. 3d 918, 919 (11<sup>th</sup> Cir. 2014), citing both *Pickett v. Matthews* and *Reed v. Brunson*, the court held that the amendment to § 14-6-1 could not be applied retroactively to confer immunity and destroy a cause of action against jailers that accrued before the statute was amended:

But retroactive application of the amendment would take away Appellee's substantive, vested right to sue in violation of Alabama's Constitution. Alabama's Constitution provides "that every person, for an injury done to him ... shall have a remedy by due process of law." Ala. Const. § 13.

That means that when a duty has been breached producing a legal claim for damages, such claimant cannot be denied the benefit of his claim for the absence of a remedy. But this provision does not undertake to preserve existing



duties against legislative change made before the breach occurs.... Undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and right of action vested, regardless of the source of the duty which was breached, provided it remained in existence when the breach occurred.

*Pickett v. Matthews*, 238 Ala. 542, 192 So. 261, 263-264 (1939) (citing 16 Corpus Juris Secundum, Constitutional Law, p. 1499, § 710). In other words, a litigant has “a vested interest in a particular cause of action” once the injury occurs. *Reed v. Brunson*, 527 So. 2d 102, 114 (Ala. 1988). Section 13 of Alabama’s Constitution protects litigants from legislative change made after the breach of duty occurs.

*Johnson v. Conner*, 754 F. 3d at 922. It therefore seems clear that retroactive application of § 6-5-792 to destroy a plaintiff’s cause(s) of action for negligence which accrued before the statute was passed will be deemed unconstitutional.

Defendants may argue that COVID-related negligence causes of action did not accrue because Governor Ivey’s May 2020 executive proclamation changed the standard of care for causes of action relating to COVID-19 transmission and thereby prevented such causes of action from ever arising. This circular argument begs the question of the validity of changing the standard of care or conferring immunity from negligence liability by executive proclamation. As shown, the portion of Governor Ivey’s executive proclamation changing the standard of care and conferring immunity from liability for claims related to COVID-19 transmission likely exceeds the scope of authority delegated by the AEMA and is, in any event, arguably unconstitutional under §§ 21 (no suspension of laws except by legislature) and 42 (separation of powers) of the Alabama Constitution.

Defendants may also argue that the COVID Immunity Act merely ratifies what Governor Ivey’s proclamation had already done. However, § 13 and Alabama’s settled vested-rights jurisprudence must also render invalid any retroactive legislative ratification of Governor Ivey’s May 8, 2020 unconstitutional executive proclamation purporting to abrogate all negligence causes of action related to COVID-19 transmission.

The legislature recognized in the ACIA that given § 13 and the vested rights doctrine and other limitations

on usurpation of legislative power, courts would decline to retroactively apply § 6-5-792’s change in the standard of care, so the new Act provides at § 6-5-793:

that for “[a] health emergency claim for which a court holds that neither Section 6-5-792 nor the liability limiting provisions of any gubernatorial emergency order applies... a covered entity shall not be liable for negligence, premises liability, or for any non-wanton, non-willful, or non-intentional civil cause of action to which this section applies, unless the claimant shows by clear and convincing evidence that the covered entity did not reasonably attempt to comply with the then applicable public health guidance.”

Time will tell whether this change in an injury or death victim’s burden of proof is rationally related to any legitimate governmental purpose and whether this will pass constitutional muster under Article I, § 35, which provides:

### Sec. 35. Objective of government

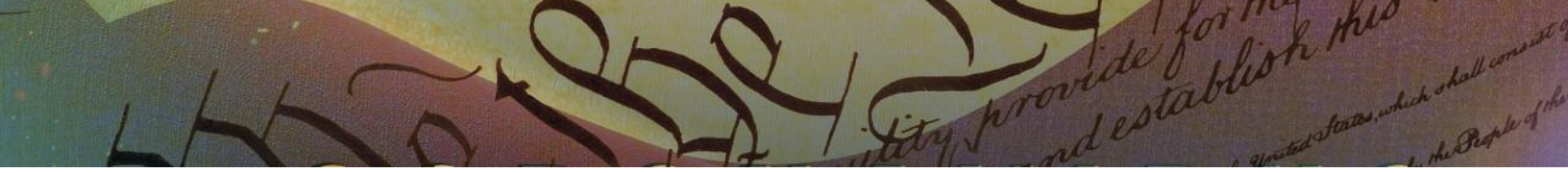
That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.

By its terms the AICA provides that “[t]he immunity and other provisions provided in this article shall terminate December 31, 2021, or one year after a declared health emergency relating to coronavirus expires, whichever is later, except that any civil liability arising out of acts or omissions related to health emergency claims or claims under Section 6-5-794 where the act or omission occurred during the operation of this article shall be subject to the provisions of this article in perpetuity.” § 6-5-799.

## Michigan’s Experience: *Midwest Institute of Health, PLLC v. Whitmer*

In a case that garnered national attention,<sup>70</sup> the Michigan Supreme Court ruled against Governor Gretchen Whitmer’s invocation of emergency powers to address that state’s COVID-19 pandemic.<sup>71</sup> In *In re Certified Questions from the United States Dist. Court*, 958 N.W.





2d 1, 24 (Mich. 2020), the court held that “the delegation of power to the Governor to ‘promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property,’ MCL 10.31(1), constituted an unlawful delegation of legislative power to the executive and was therefore unconstitutional under Michigan’s Const. 1963, art. 3, § 2, which prohibits exercise of the legislative power by the executive branch.” In so holding, the court revoked all of Governor Whitmer’s executive orders issued pursuant to the state’s Emergency Powers of the Governor Act of 1945 (the “EPGA”) as an unconstitutional exercise of legislative power in violation of the Michigan Constitution.<sup>72</sup>

The court began its analysis by reference to Michigan’s separation-of-powers principle embodied in the state’s constitution.<sup>73</sup> The court next described Michigan’s nondelegation doctrine, observing “the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.”<sup>74</sup> The court identified three relevant factors in adjudicating challenges alleging an unconstitutional delegation of legislative power: the scope, duration, and standards of the delegated power.<sup>75</sup>

The Michigan Supreme Court considered the EPGA’s scope of delegated power to be “remarkably broad.”<sup>76</sup> The EPGA authorized a governor “to protect life and property or to bring the emergency situation within the affected area under control.”<sup>77</sup> The court likened this power to the police power vested exclusively in the legislature.<sup>78</sup> In describing the statute’s scope, the court identified myriad orders issued by Governor Whitmer and their “sweeping” effects.<sup>79</sup> The court took issue with the fact that “[e]ach of these policies [had been] putatively ordered ‘to protect life and property’ and/or to ‘bring the emergency situation within the affected area under control.’”<sup>80</sup>

Alabama’s Emergency Management Act upon which Governor Ivey similarly relied in claiming authority to issue her emergency proclamations essentially mirrors the language found in the Michigan statute. In addition to those powers that are specifically enumerated, Alabama governors may “perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.”<sup>81</sup> Governor Ivey’s “Safer-at-Home” proclamation regulates all types of conduct from limitations on non-work regulated gatherings to requirements that all retail stores enforce social distancing measures and

take reasonable steps to comply with sanitation guidelines.<sup>82</sup> While these regulations are not nearly as broad in scope as some of those asserted by Governor Whitmer,<sup>83</sup> they derive from a statutory provision that similarly bears little to no checks on such an exercise of authority.<sup>84</sup> Overall, the AEMA’s expansive scope of delegated power – upon which Governor Ivey expressly relied – is virtually identical to that found *unconstitutional* in *Whitmer* and thus must reasonably be deemed constitutionally suspect under Alabama’s separation of powers and nondelegation constitutional provisions.

Under the AEMA, the duration factor is also roughly equivalent to Michigan’s EPGA. The AEMA provides that a state of emergency exists for 60 days upon a declaration by the governor, unless she or the legislature extends it.<sup>85</sup> For the same reason, an Alabama governor may proclaim that an emergency exists for an unlimited period of time; she need only extend it by an additional declaration, without having to seek legislative approval.<sup>86</sup> Since her initial order, Governor Ivey did exactly that. To avoid its termination, she issued 27 supplemental orders extending the duration of the state of emergency that she originally declared on *March 13, 2020*. Therein lies the problem: an argument can be made that no reasonable observer can argue that the COVID-19 pandemic has ended; empirical evidence shows this is not the case.<sup>87</sup> But a law that authorizes perpetual intrusions into the legislative sphere, without any actual temporal restraint, must be strictly scrutinized. Under *Whitmer*’s reasoning, the AEMA also fails to pass constitutional muster for this additional reason.

Lastly, the Michigan Supreme Court addressed the standards directing exercise of the delegated power. According to the court, the essential question presented was:

[w]hat standards or legislative direction are sufficient to transform a delegation of power in which what is being delegated consists of pure legislative policymaking power into a delegation in which what is being delegated has been made an essentially executive “carrying-out of policy” by virtue of the accompanying direction given by the Legislature to the executive in the delegation?<sup>88</sup>

The court stated that “[w]hen the scope of the power delegated ‘increases to immense proportions... the standards must be correspondingly more precise.’”<sup>89</sup>



The court found that the only standards restraining the governor’s executive powers under the EPGA were the words “reasonable” and “necessary.”<sup>90</sup> After identifying that neither term carried with it any “genuine guidance,” the court determined that the power delegated to the governor was not limited in any meaningful way.<sup>91</sup> Accordingly, the court held that the EPGA could not be sustained by those terms and therefore constituted an unlawful delegation of legislative power.<sup>92</sup>

The Supreme Court of Alabama approached this inquiry in a similar manner in *Monroe v. Harco, Inc.*<sup>93</sup> There the court set forth that in reviewing the constitutionality of a statute, there must initially be a strong presumption in favor of its validity.<sup>94</sup> Where there are two possible interpretations, one which would render the statute unconstitutional and the other valid, courts should adopt the construction upholding the law.<sup>95</sup> The court then recognized that “the doctrine of separation of powers does not prohibit the legislature’s delegating the power to execute and administer the laws, *so long as the delegation carries reasonably clear standards governing the execution and administration.*”<sup>96</sup>

Although many of the AEMA’s provisions are specific as to how the governor may act during an emergency,<sup>97</sup> the operative seminal phrase relied upon by Governor Ivey is not unlike that found unconstitutional in *Whitmer*.<sup>98</sup> As previously discussed, the subsection provides the governor with the “powers and duties as are *necessary* to promote and secure the safety and protection of the civilian population.”<sup>99</sup> Only the word “necessary” constrains how Governor Ivey may, consistent with the AEMA, exercise emergency powers.

The Michigan Supreme Court also examined use of the word “necessary” in this context.<sup>100</sup> There the court defined it as “absolutely needed” or “required.”<sup>101</sup> After examining the inherent problems with the term, the court explained how “necessary,” like “reasonable,” carries with it next to no constraint.<sup>102</sup> In doing so, the court looked to a 1942 Massachusetts’s wartime statute that allowed the state governor to “have and... [to] exercise any and all authority over persons and property, necessary or expedient from meeting the supreme emergency of... a state of war.”<sup>103</sup> The court cited the Supreme Judicial Court of Massachusetts which declared that it “did not believe that the state constitution allowed the legislature to confer upon the governor [via the wartime statute] ‘a roving commission to repeal or amend by

executive order unspecified provisions included anywhere in the entire body of’ of state law.”<sup>104</sup>

Plainly speaking, construing the AEMA as delegating to the governor an unbridled legislative power offends separation of powers principles. Under Alabama law (and the Michigan Supreme Court’s decision in *Whitmer*), the AEMA’s § 31-9-8(a)(5) does not have “reasonably clear standards governing [its] execution and administration and therefore is unconstitutional.”<sup>105</sup>

## Conclusion

Although emergency situations, such as an ongoing global pandemic, call for immediate and thoughtful governmental action, our constitutional mandates must be observed and revered. The Alabama Constitution provides that only the state legislature can exercise the suspension power; moreover, it requires that the executive branch abstain from usurping the law-making function reserved to the legislative branch. In *Whitmer*, the Supreme Court of Michigan concluded that the EPGA unconstitutionally delegated such powers to the governor. In Alabama, lawyers contemplating or confronted with immunity defenses premised upon Governor Ivey’s emergency proclamations, the AICA, or the AEMA must be aware of Alabama’s constitutional limitations upon exercises of power during emergencies. ▲

## Endnotes

1. Derrick B. Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. Times (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html>. The United States declared a National State of Emergency about the virus on March 13, 2020.
2. <https://alpublichealth.maps.arcgis.com/apps/dashboards/6d2771faa9da4a2786a509d82c8cf0f7> (last visited Jul. 27, 2022).
3. <https://alpublichealth.maps.arcgis.com/apps/dashboards/6d2771faa9da4a2786a509d82c8cf0f7> (last visited Jul. 27, 2022).
4. <https://www.worldometers.info/coronavirus/country/us/> (last visited Jul. 28, 2022).
5. <https://www.worldometers.info/coronavirus/country/us/> (last visited Jul. 28, 2022).
6. <https://www.ncsbn.org/14582.htm> (last visited Jul. 27, 2022).
7. See note, “Give Me Liberty or Give Me Death? A Comparative Analysis of Public Health Responses to the COVID-19 Pandemic, Their Efficacy, and Their Legal Implications,” 38 *Ariz. J. Int’l & Comp. L.* 319, 320 (2022) (citing Mich. Exec. Order No. 20-4 (Mar. 10, 2020)).
8. <https://governor.alabama.gov/newsroom/covid-19> (last visited July 25, 2022) (compiling Gov. Ivey’s COVID-19 Emergency Proclamations).
9. <https://www.webmd.com/lung/news/20200401/32-states-have-issued-stay-at-home-orders#> (last visited Jul. 27, 2022).
10. <https://governor.alabama.gov/newsroom/covid-19> (last visited July 25, 2022) (compiling Gov. Ivey’s Emergency Proclamations issued). See attached Exhibit A.
11. *Id.*





12. Paragraph E.4 of Governor Ivey's May 8, 2020 Eighth Supplemental Emergency Proclamation states:

**Effectiveness.**

"The provisions of this proclamation shall become effective upon my signature and its filing with the Secretary of State and shall be retroactive and effective for acts or omissions occurring from March 13, 2020, until the State COVID-19 public health emergency is terminated."

On October 8, 2021, Governor Ivey extended the state public health emergency until 11:59 p.m. on Sunday, October 31, 2021, "unless otherwise terminated or extended in writing." Governor Ivey did not otherwise terminate or extend in writing that October 31, 2021 ending date.

13. Attached, Exhibit B.

14. Attached, Exhibit C.

15. By contrast, Ala. Code 1975 § 6-5-548 requires that a health care provider "exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case."

16. *Cf.*, Ala. Code 1975 § 6-5-549.

17. See generally Ally Windsor Howell, 2 Ala. Pers. Inj. & Torts § 14:11 (2020 ed.).

18. One subsection of this proclamation offers two possible exceptions. First, it provides that a health care provider may be liable for economic compensatory damages for a cause of action that does not involve serious physical injury. And, wrongful death claimants may be entitled to a punitive damages award, but in those cases, no other damages may be recoverable.

19. Ala. Code 1975 § 31-9-8(1), (5).

20. Exhibit C, p. 1.

21. Ala. Code 1975 § 31-9-13.

22. *Id.*

23. The full text of SB 330 is attached as Exhibit D.

24. In fact, the 2020 bill was assigned number SB 330. When that same bill was again proposed in the senate in 2021, it was assigned number 30.

25. *Joseph R. Dear v. Comfort Care Coastal Hospice, LLC*, Mobile County, Alabama Circuit Court Civil Action No. CV-2021-900780, March 10, 2022 hearing transcript, p. 68:8-10; 17-21.

26. *Id.*, 69:9-14.

27. *Id.*, 69:20-22.

28. See *Miller v. Bailey*, 60 So. 3d 857, 867 (Ala. 2010) ("Gross negligence" is negligence, not wantonness"); *Ridgely Operating Co. v. White*, 150 So. 693, 695 (Ala. 1933) ("Ordinarily, 'gross negligence' imports nothing more than simple negligence or want of due care."); *Fid.-Phoenix Fire Ins. Co. v. Lawler*, 81 So. 2d 908, 912 (Ala. Ct. App. 1955) ("[T]he word 'gross' when used in connection with negligence, implies nothing more than negligence.")

29. 345 So. 2d at 1355.

30. *Id.* at 1355-57.

31. *Id.* at 1356-57.

32. *Id.* at 1357.

33. *Id.* The opinion cites former Art. III, § 43, which, before its repeal and substitution by Amendment 905, provided along with § 42 Alabama's separation of powers principles. Those same principles are now found in Art. III, § 42.

34. See *e.g.*, *supra*.

35. See *supra*.

36. See *Ex parte Jenkins*, 723 So. 2d 649, 654 (Ala. 1998) ("The political maxim posited by Montesquieu and embodied in the United States and Alabama Constitutions as a fundamental legal principle mandates that no branch of government be allowed to exercise any power vested in another branch and not vested in it.")

37. 411 So. 2d 115 (Ala. 1982).

38. *Id.* at 116.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 118.

43. *Id.* at 117. (internal citation omitted).

44. *Id.*

45. *Id.*

46. 275 So. 2d 349 (Ala. Ct. Civ. App. 1973).

47. *Id.* at 350-51.

48. *Id.* at 352 ("Executive Order No. 36 reduced the amounts that could be paid to a lawyer in all non-capital criminal cases in any court except recorder's courts from a maximum of \$500.00 per case as provided in Act No. 2420, to a maximum of \$75.00 per case.")

49. *Id.* at 352-54.

50. *Id.* at 352 ("State government is divided into three coordinate branches and each has a sphere in which each is supreme. Powers confided in one cannot be exercised by the other.")

51. *Id.*

52. *Id.* at 353. (internal citation omitted).

53. *Id.*

54. See *supra*.

55. *Id.* at 117.

56. See Ala. Code 1975, § 6-5-548.

57. Exhibit \_\_\_\_, p. \_\_\_\_.

58. Ala. Code 1975, § 31-9-8 ("To perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population."); *supra* note 4 (contains link to online compilation of emergency orders).

59. See *e.g.*, ALA. CONST. ART. I § 13 ("That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.") (emphasis added).

60. *Federation of City Employees v. Arrington*, 432 So. 2d 1285 (Ala. 1983).

61. 343 U.S. 579 (1952).

62. *Arrington*, 432 So. 2d at 1288; see also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 338-43 (3d ed. 2006).

63. 432 So. 2d at 1288.

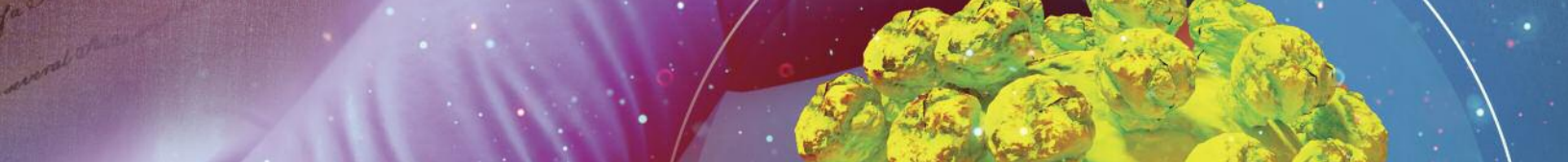
64. See, for example, *Mistretta v. U.S.*, 488 U.S. 361, 372, 109 S. Ct. 647, 655, 102 L. Ed. 2d 714 (1989) ("so long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.") (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 352, 72 L. Ed. 624 (1928)); *Opinion of the Justices, supra*, 345 So. 2d at 1356 "...the legislature cannot confer upon any person or authority the right, in its discretion to be exercised without regard to fixed standards set up by the Act, to declare when an enactment shall become effective..." (quoting *Mead v. Eagerton*, 255 Ala. 66, 50 So. 2d 253 (1951)).

65. *Id.* (citing *Youngstown*, 343 U.S. at 587).

66. For example, "That reasonable protections from the risk and expense of lawsuits, be provided to businesses and health care providers that comply with or reasonably attempt to comply with applicable public health guidance will encourage businesses to re-open and repair the damage to the economy of the State and the tax revenues of the State and of local governments."

67. *Youngstown*, 343 U.S. at 585.

68. *City of Mobile v. Rouse*, 173 So. 266 (Ala. 1937) ("But it is insisted that this law was enacted by the Legislature to meet an emergency. That emergencies do not authorize the suspension of the Constitution and its guaranties was settled nearly three quarters of a century ago...") (internal citation omitted) (emphasis added); *Ex parte Bentley*, 116 So. 3d 201 (Ala. 2012)



- (“Public policy considerations cannot override constitutional mandates.”) (internal citation omitted); *Horne v. Department of Agriculture*, 576 U.S. 350, 362, 135 S. Ct. 2419, 2428, 192 L. Ed. 2d 388 (2015) (“[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way.”) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922)).
69. In *Reed v. Brunson*, the supreme court also pointed out that § 95 of the Alabama Constitution protects vested rights after suit is filed – “[a]fter suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.” *Id.* at 114 n.5. The court explained further, “the need for the last sentence of § 95 may be questionable under any interpretation of § 13 as to common-law causes of action or defenses heretofore advanced by the Court; however, it is referred to herein to show that there is a need for § 13’s inclusion in the Constitution under the vested rights approach.” *Ibid.*
70. See generally Jason Slotkin, *Michigan Supreme Court Rules Against Governor’s Emergency Powers*, NPR (Oct. 3, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/03/919891538/michigan-supreme-court-rules-against-governors-emergency-powers> (last visited Jul 29, 2022).
71. In re Certified Questions (*Midwest Institute of Health, PLLC v. Whitmer*), 506 Mich. 332, 958 N.W. 2d (2020).
72. *Id.*, 506 Mich. at 385, 958 N.W. 2d at 31.
73. *Id.*, 506 Mich. at 357, 958 N.W. 2d at 16-17.
74. *Id.* (citing The Federalist No. 47 (Madison), Montesquieu’s *The Spirit of the Laws*, and John Locke’s *Two Treatises of Government*, among others).
75. *Id.*, 506 Mich. at 362-363, 958 N.W. 2d at 20-24.
76. *Id.*, (citing Mich. Comp. Laws § 10.21 (2006)).
77. *Id.*
78. *Id.*
79. *Id.* (listing dozens of orders codifying gubernatorial mandates such as business closings and hours of operation).
80. *Id.*
81. Ala. Code 1975, § 31-9-8(a)(5).
82. See *supra*.
83. *Whitmer* (e.g., “prohibiting the sale of carpet, flooring, furniture, plants, and paint. . . boating, golfing, and public and private gatherings of persons not part of a single household. . .”).
84. See Ala. Code 1975, § 31-9-16.
85. Ala. Code 1975, § 31-9-8.
86. See *supra*.
87. See e.g., CBS News, *COVID-19 Hospitalizations Back to March Levels* (Jul. 18, 2022) <https://www.cbs7.com/2022/07/18/covid-19-hospitalizations-back-march-levels/>.
88. *Whitmer*, 506 Mich. at \_\_\_, 958 N.W. 2d at \_\_\_ (emphasis added).
89. *Id.* (citation omitted) (emphasis added).
90. *Id.*
91. *Id.* at \*16-18 (“There is, in other words, nothing within either the “necessary” or “reasonable” standards that serves in any realistic way to transform an otherwise impermissible delegation of legislative power into a permissible delegation of executive power.”).
92. *Id.* at \*18.
93. 762 So. 2d 828 (Ala. 2000).
94. *Id.* at 831.
95. *Id.*
96. *Id.* (internal quotation marks and citations omitted) (emphasis added).
97. See generally Ala. Code 1975, § 31-9-8.
98. See *supra*, n. 70.
99. *Id.* (emphasis added).

100. *Whitmer*, 2020 WL 5877599 at \*17.
101. *Id.* (alteration in original).
102. *Id.* at \*18.
103. *Id.* at \*17.
104. *Id.* (citation omitted).
105. *Monroe*, 762 So. 2d at 831.

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 Charles Clark Collier  
 Gary Steven Cooley  
 Dudley Frank Davis  
 Rosa Hamlett Davis  
 Irene Whittle Deneau  
 Timothy Lee Dillard  
 William Howard Donovan, III  
 Bruce Johnson Downey, III  
 Godfrey David Dudley  
 Rufus Edward Elliott, III  
 Clausen Ely, Jr.  
 John Emerson Enslin

Joseph Cleodus Espy, III  
 Isaac Pugh Espy  
 Carolyn Burgess Featheringill  
 George Pass Ford  
 Samuel Holley Franklin  
 Albert Danner Frazer, Jr.  
 Sydney Fletcher Frazier, Jr.  
 Sarah Stewart Frierson  
 James Doyle Fuller  
 Thomas Travis Gallion, III  
 James Southerland Garrett  
 Richard Bartlett Garrett  
 Philip Stephen Gidiere, Jr.  
 Harold Henderson Goings  
 Otis James Goodwyn, Jr.  
 Patrick Howard Graves, Jr.  
 Paul Nicholas Greenwood  
 William Henry Halbrooks  
 William Dallas Hasty, Jr.  
 Jack Grisham Heffington  
 William Banks Herndon, Jr.  
 William Kenneth Hewlett  
 Ronald Nelson Hudson  
 William Henry Jackson  
 Roy Marvin Johnson, III  
 Albert Watkins Key  
 Roger Glen Killian  
 John Thomas Kirk  
 Thomas Low Krebs  
 John Malcolm Laney, Jr.

Ina Branham Leonard  
 Charles Stanley Lichtman  
 William V. Linne  
 Loyd Hinton Little, Jr.  
 Edwin Key Livingston  
 James Allen Main, Sr.  
 Alphonse Richard Maples, Jr.  
 Ralph Edward Massey, Jr.  
 Shirley Irene McCarty  
 Edward Drexel Meadors  
 John Thomas Mooresmith  
 Hugh Percy Nicholson  
 Charles Wayne Owen  
 Charles Tom Payne  
 Albert Matthews Pearson, III  
 Lewis Fredrick Pickard  
 John Jerrel Pilgrim  
 William Larkin Radney, III  
 James Folmar Reddoch, Jr.  
 Kenneth Michael Reese  
 Thomas William Repass  
 William Chapman Roedder, Jr.  
 Harvey Harold Rollings  
 Benjamin Thomas Rowe  
 Stanley Dagnal Rowe  
 George Washington Royer, Jr.  
 Robert Lee Rumsey, III  
 Michael Francis Scheuermann  
 John Anderson Screws  
 Charles Winston Sheehan, Jr.

Don Eugene Siegelman  
 Edward Simmons Sledge, III  
 Sydney S. Smith  
 William Ashley Smith  
 Thomas Wayne Sorrells  
 Shelby Lamar Starling, Jr.  
 William Stancil Starnes  
 Ronald Lee Stichweh  
 David Lee Thomas  
 James Claud Thomason, III  
 William C. Tidwell, III  
 Faya Rose Toure'  
 William James Trussell  
 George Martin Van Tassel, Jr.  
 James H. Weatherford, Jr.  
 David Lee Weathers  
 Meade Whitaker, Jr.  
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 William Robert Wilson, Jr.  
 James Eldon Wilson  
 John King Wright  
 William Terrell Youngblood  
 Alfred Fournoy Zachry



# Volunteer Lawyers Program Pro Bono Awards

The Alabama State Bar Pro Bono Awards are presented to an attorney (Albert Vreeland Award), mediator, law firm, law student, and public interest attorney who demonstrate outstanding pro bono efforts, through the active donation of time to the civil representation of those who cannot otherwise afford legal counsel and by encouraging greater legal representation and acceptance of pro bono cases.



Pro Bono awards recipients John Craft, Katarina Essenmacher (ABAP), Tim Gallagher, Brian Hayes, and Lucas Lopez.

## ALBERT VREELAND PRO BONO AWARD

Tim Gallagher

## LAW FIRM/ GROUP AWARD

Alabama Bankruptcy Assistance Project  
Advisory Council

## MEDIATOR AWARD

Brian Hayes

## LAW STUDENT AWARD

Lucas Lopez

## PUBLIC INTEREST ATTORNEY AWARD

John Craft



# Women's Section Awards



Women's Section awards recipients Justice Sue Bell Cobb (left) and Judge Carole Smitherman (second from right)

## MAUD MCLURE KELLY AWARD

Maud McLure Kelly was the first woman to be admitted to the practice of law in Alabama. In 1907, Kelly's performance on the entrance exam at the University of Alabama Law Department merited her admission as a senior, the second woman ever to have been admitted to the school.

**Judge Carole Smitherman**

## SUSAN B. LIVINGSTON AWARD

This award was named in honor of Susan Bevill Livingston, who practiced with Balch & Bingham. The recipient must demonstrate a continual commitment to those around her as a mentor, a sustained level of leadership throughout her career, and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service, and/or activities which benefit women in the legal field.

**Justice Sue Bell Cobb**

## JUSTICE JANIE L. SHORES SCHOLARSHIP

To encourage the next generation of women lawyers, the Women's Section of the Alabama State Bar established the Justice Janie L. Shores Scholarship Fund. Named in honor of the first woman to sit on the Supreme Court of Alabama, the scholarship is awarded to an outstanding woman who is an Alabama resident attending law school in Alabama.

**Chotsani Holifield**



Chotsani Holifield

# Alabama Lawyer Assistance Program Award



Jeremy Rakes and Judge Billy Ogletree

## JEANNE MARIE LESLIE SERVICE AWARD

This award recognizes exemplary service to lawyers in need in the areas of substance abuse and mental health and is presented by the Alabama Lawyer Assistance Program Committee.

**Hon. William B. Ogletree**



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Comprehensive Investigative Group  
Fresh Managed IT  
Gilsbar  
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# Wednesday



*Katherine Robertson and Prof. William Andreen share a laugh with attendees during their CLE presentation.*



*The annual meeting is great time to hang out with good friends!*



*Relaxing at the Opening Night Reception and Family Pool Party*



*Younger attendees create “Encanto” crafts poolside, courtesy of ISI, Alabama.*



*The Family Pool Party gets started with the sounds of Outside the Inside.*



# Thursday



*After a year at the helm, Executive Director Terri Lovell shares a laugh and tips on maximizing your state bar membership.*



*Andy Andrews and President Taze Shepard share ideas on Living a Life That Counts.*



*Dr. Kristen Powell addresses how to build a respectful and inclusive workplace.*



*Tom Perry, President Taze Shepard, and President-elect Gibson Vance reflect over the past bar year.*



*See what you missed at the Volunteer Lawyers Program Reception!*



*Coming together for a great cause—ACJF Executive Director Nikki Davis, Alabama Supreme Court Chief Justice Tom Parker, and ASB Executive Director Terri Lovell at the VLP reception.*



# Friday



*Jan Hargrave is back for a repeat performance, expounding on nonverbal intelligence in the legal setting.*



*Supreme Court Justice Kelli Wise explains a point during All Rise: Supreme Court Panel.*



*Jan and two fans!*



*The past presidents always have the biggest smiles.*



*All ages enjoyed the annual Friends of Tony McLain Golf Tournament.*



*Law student Chotsani Holifield and Circuit Judge Carole Smitherman visit after the Maud McLure Kelly Award Luncheon. Both were recognized during the event.*



# Friday

(Continued)



Tony Hoffman and Neal Buchman prove that you only need one thing to get plenty of visitors during the Legal Expo.



Paul Finebaum entertains and educates attendees on college sports.



Pam and Taze Shepard have the floor all to themselves during the President's Closing Night Reception.



2<sup>nd</sup> Coming Band welcomes extra vocals from a fellow musician!



Attendees got a dance lesson from 2<sup>nd</sup> Coming Band.



The Women's Section works year-round to ensure the success of its Silent Auction.



The variety of items at the Silent Auction Fundraiser gets better each year!



Pam Shepard and her grandson enjoy dancing to 2<sup>nd</sup> Coming Band.



# Saturday



*Bill Bass and Grand Prize winner  
Michael Henderson*



*Announcing the results of the golf tournament always produces the biggest laughs!*



*With his wife, Kate, holding the Bible, Gibson Vance is sworn in by  
Chief Justice Tom Parker as the 147<sup>th</sup> Alabama State Bar president.*



*President Gibson Vance, 147<sup>th</sup> president  
of the Alabama State Bar*



# Put a Natural Mediator to Work for Your Clients



As a young judicial law clerk in the early 1970s, George McMillan often wondered why so many disputes ended up in the marble courtrooms of the U.S. Federal District Court, when a skilled mediator could produce an equitable settlement more efficiently.

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As the decades passed, George McMillan helped assemble the coalition that elected Birmingham's first African American mayor and created non-profit organizations that transformed the cultural life of his city.

For his efforts, Birmingham named George McMillan Citizen of the Year in 1990.

In 2002, McMillan helped bring together two dynamic groups of citizens to form The Black Belt Community Foundation, later serving it as a director and chairperson for more than a decade.

Today, working with his associate, William Hall, George McMillan is putting to work his fifty years of legal experience and his natural talent for bringing disparate parties together with a broadly-based mediation practice.

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*No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.*



NOTICE

## DISCIPLINARY NOTICES

### ▲ Transfers to Inactive Status

### ▲ Disbarment

### ▲ Suspensions

## Transfers to Inactive Status

- Dadeville attorney **Jackson Brett Harrison** was transferred to inactive status, effective December 6, 2021. The Supreme Court of Alabama entered a notation on the Supreme Court of Alabama's roll of attorneys based upon the December 6, 2021 order of the Disciplinary Board of the Alabama State Bar, in response to Harrison's petition filed with the Office of General Counsel requesting he be transferred to inactive status. [Rule 27(c), Pet. No. 2021-1113]
- Boaz attorney **Alan Lavon Jackson** was transferred to inactive status, effective April 7, 2022, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the April 7, 2022 order of panel II of the Disciplinary Board of the Alabama State Bar in response to Jackson's petition filed with the Office of General Counsel requesting he be transferred to inactive status. [Rule 27(c), Pet. No. 2022-401]

## Disbarment

- Pelham attorney **Harry Whitehead Gamble, III** was disbarred from the practice of law in Alabama by order of the Alabama Supreme Court, effective May 2, 2022. The Alabama Supreme Court entered its order based on the March 28, 2022 order of panel II of the Disciplinary Board of the Alabama State Bar accepting Gamble's consent to disbarment, wherein Gamble was convicted for unlawful distribution of a controlled substance. [Rule 23(a), Pet. No. 2022-363; ASB No. 2022-228]

## Suspensions

- The lawyers listed below were suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective March 14, 2022. A notation was entered on the Supreme Court of Alabama roll of attorneys based upon the Disciplinary Commission's order that they be suspended for failing to comply with the 2020 Mandatory Continuing Legal Education requirements of the Alabama State Bar.



(Continued from page 341)

- **Cassidy Lee Anderson**, Gulfport, Mississippi CLE No: 2021-412; **Steven Douglas Andrews**, Capshaw, Alabama CLE No. 2021-415; **Stephen Andrew Brown**, Vestavia, Alabama CLE No. 2021-419; **Antonina Marie Carleton**, Portland, Oregon CLE No. 2021-421; **Lanier John Edwards**, Atlanta, Georgia CLE No. 2021-428; **Bryan Daniel Judah**, Jacksonville, Florida CLE No. 2021-446; **Carolyn Ngoc Lam**, Dallas, Texas CLE No. 2021-448; **Mark Oliver Loftin**, Mobile, Alabama CLE No. 2021-451; **Eric David Logan**, Duluth, Georgia CLE No. 2021-452; **Jason Michael Osborn**, Mobile, Alabama CLE No. 2021-466; **Harry Bartlett Still, III**, Daphne, Alabama CLE No. 2021-485; **Todd Stephen Strohmeyer**, Birmingham, Alabama CLE No. 2021-487; and **Teri Christine Tenorio**, Woodbridge, Virginia CLE No. 2021-489.
- Birmingham attorney **Cedric Demond Coleman** was summarily suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar, pursuant to Rules 20(a)(2)(i) and 8(e), Ala. R. Disc. P., effective April 8, 2022. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing that Coleman violated Rule 8.1(b), Ala. R. Prof C., by failing to respond to requests for information during the course of a disciplinary investigation. [Rule 20(a), Pet. No. 2022-416]
- Birmingham attorney **Trenton Rogers Garmon** was summarily suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective April 19, 2022, pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure. The Supreme Court of Alabama noted the interim suspension based upon the Disciplinary Commission's order that Garmon be interimsly suspended for engaging in continued conduct that is causing, or is likely to cause, immediate and serious injury to a client or the public. [Rule 20(a), Pet. No. 2022-461]
- New Orleans, Louisiana attorney **Larue Haigler, III**, also licensed in Alabama, was summarily suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective April 7, 2022, pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure. The Supreme Court of Alabama noted the summary suspension based upon the Disciplinary Commission's order that Haigler be summarily suspended for failing to respond to formal requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2022-376] ▲



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- ▲ James Curtiss Bernard
- ▲ William Maynard Heard, Jr.
- ▲ Ellis Leon Sanders

## James Curtiss Bernard

Curtiss Bernard was a friend of mine and was a member of the Alabama State Bar from 1977 until his recent passing. Before becoming a member of the bar, he served as a captain in the United States Air Force where he worked as a ballistic missile crew staff, on the missile launch officer crew, on the space system operation officer crew, and on the surveillance officer crew.

He held a bachelor's degree from Tuskegee Institute, a master's degree from the University of Southern California, and a law degree from Samford University.

Curtiss was a quiet man, who, rather than speaking about his accomplishments, spoke about his family and, as an ordained minister, his religion. He left behind his wife, two children, and four grandchildren.

—W. Gregory Ward, Lanett

## William Maynard Heard, Jr.

Bill Heard passed away on July 19, 2022 in Fairhope. He was 96 years old. Bill is survived by his loving family, including his wife, Barbara Jean Heard; his daughter, Marilyn Kay Heard Evans; and his son, W. Kenneth Heard, who practices law in Fairhope.

Bill was a lifelong resident of Mobile and a graduate of Murphy High School. He was a graduate of the University of Alabama and the University of Alabama School of Law in 1951. Prior to attending the University of Alabama, he served in the U.S. Army during WWII. He later served as a 1<sup>st</sup> Lt. in the JAG Corps in the U.S. Air Force during the Korean Conflict.

After earning his law degree, Bill began private practice in Mobile and soon found his interest in real



Heard



(Continued from page 343)

estate law. He was a member of the Alabama State Bar and the Mobile Bar Association for over 50 years. He went to work for Title Insurance Company of Mobile serving as general counsel for many years and later became president of the company. He was the leading real estate lawyer in Mobile and was regularly consulted by Alabama lawyers seeking advice on complex real estate law issues. He was a mentor to many young lawyers.

Bill was a faithful member of Dauphin Way Baptist church in Mobile, serving as deacon, Sunday school teacher, and member of the church legal committee. He served with various civic organizations, including the Mobile Jaycees. He was a model train enthusiast. He liked to fix things and was handy building and restoring furniture and renovating homes. Bill was a wonderful storyteller and had a great sense of humor.

—Sam W. Irby, *Irby & Heard PC, Fairhope*

## Ellis Leon Sanders

Leon Sanders was born at the dawn of the Great Depression in Warrior, Alabama. He was raised by a single father, who was devoted to his work running a hardware and appliance store as well as rental properties. His childhood was largely unsupervised, but he had many fun-loving friends and worked hard helping his dad.

During his adolescence he enjoyed fast cars, cigars, and his motorcycle, and was more prone to spend time in the pool hall rather than study hall. He recalled the day he decided he was done helping milk cows and proudly stated that he stopped and never milked one again. He played first base on the baseball team, point guard on the basketball team, and running back on the football team, of which he was captain one year. His mentor at Mortimer Jordan High School, Coach Bartow Hughes, taught Leon leadership skills and responsibility and even recruited him to drive the team bus.



*Sanders*

He met and fell in love with Bobbe Henry of Bessemer, a very polished and ambitious head cheerleader, who decided she would try to tame Leon. They were married August 26, 1949 and moved to Birmingham where Leon enrolled at Samford University. They soon had their children, Teresa, Karen, and Rance.

After graduating, Leon's professional career began with Lawyers Title Insurance Co. in Birmingham, where he decided he was truly a "title man." He began taking night classes at Birmingham School of Law while working full-time during the day. He found a way to juggle classes, study, work, and family. He graduated in 1966, passed the Alabama bar exam, and founded a new company, Jefferson Title Corporation, along with investment partner Mississippi Valley Title Insurance Company.

While serving as president and CEO, Leon gained real fulfillment in his work at Jefferson Title Company, which he started with just two or three employees and grew into an entire building. He ran the company with tenacity, long hours, service dedication, and good judgment for hiring excellent people. He was an innovator and had a talent at helping people grow and push beyond their perceived limitations. He was passionate about providing excellent service and he experienced genuine joy from working with outstanding men and women. In 1985 Leon was honored as Dixie Land Title Association Title Person of the Year, having served as its president in 1980. Jefferson Title prospered for over half a century. Beyond his business accomplishments, he was also known as, "a wonderful mentor to all who worked for him," as the family was recently told by one of his long-time employees.

While being a hard-working businessman, he was also a devoted family man. He took his family on many vacations, including lake camping trips, where he would prepare the boat, set up the heavy tent and bunkbeds, teach the children to water ski, and tell ghost stories around the campfire. He never missed his children's sporting events, he taught them to golf, made time for eating breakfast and dinner with his family, and was always available to talk.

Some of his favorite pastimes were hunting, fishing, University of Alabama football, golf (shot his age at 83), traveling in his van with his wife and friends all over the country to golf, grilling steaks while listening to Braves games, gardening flowers and vegetables, and shooting pool with his young son while listening to Jimmy Buffett and Jim Croce, even though he preferred George Jones, Willie Nelson, and Merle Haggard.

He had an affinity for Birmingham School of Law students, whom he taught as a professor there. In recent years, he was known for taking his beloved English retriever, Winston, on car rides twice a day through Oneonta in their van.

He was a member of Lester Memorial Methodist Church, The Club, Alpha Kappa Psi Fraternity, Limestone Springs Golf Club, the Alabama State Bar, and the Birmingham Bar Association. Leon was a board member and advisor to The Sanders Trust, a national medical real estate company.

Leon was preceded in death by his father, Collier Sanders; stepmom, Mozelle Sanders; daughter, Teresa Sanders; and grandson, Brooks Sanders. He is survived by his wife of 72 years, Bobbe Sanders; daughter, Karen Sanders; son, Rance Sanders; daughter-in-law Angie Sanders; granddaughter Casey Sandkuhl (Simeon); and great-grandchildren Hanna and Tyler Brooks Sandkuhl. He told family that he had peace about death, as he is a child of God, and looked forward to

living an eternity with God in heaven. He will be remembered by colleagues, employees, friends, family, and even competitors as a gentle, kind soul with an authentic spirit. A friend recently remarked that he was a “gracious prince of a man.” ▲

—Rance M. Sanders, Vestavia, and Casey Sandkuhl

In the July issue of *The Alabama Lawyer*, incorrect information was published for Col. Earle Forrest Lasseter. The correct information is included below. The editors and editorial board apologize for this error.

**Allenstein, Myron Kay**

Gadsden  
Admitted: April 23, 1973  
Died: June 10, 2022

**Brutkiewicz, D.E.**

Mobile  
Admitted: September 28, 1979  
Died: June 16, 2022

**Casey, John Sears**

Heflin  
Admitted: January 1, 1957  
Died: June 16, 2022

**Drummond, Nancy Cooley**

Birmingham  
Admitted: September 27, 1985  
Died: June 2, 2022

**Hamlin, Donald Ray**

Ashland  
Admitted: September 22, 1977  
Died: June 4, 2022

**Ladores, Andrew Seth**

Birmingham  
Admitted: December 9, 2015  
Died: June 2, 2022

**Lasseter, Col. Earle Forrest (ret.)**

Columbus, GA  
Admitted: September 7, 1966  
Died: April 28, 2022

**Maag, Gordon Esler**

Cottdonale  
Admitted: September 29, 2006  
Died: May 16, 2022

**McGlaughn, Col. James William (ret.)**

Southside  
Admitted: September 25, 1992  
Died: November 2, 2021

**McLeod, Blanchard LeBaron, Jr.**

Selma  
Admitted: September 25, 1981  
Died: May 23, 2022

**McNamee, Jack Bernard**

Birmingham  
Admitted: August 6, 1971  
Died: May 2, 2022

**Nabors, Scott Jason**

Birmingham  
Admitted: September 26, 1997  
Died: May 31, 2022

**Prince, Maryanne Melko**

Augusta, ME  
Admitted: April 23, 1993  
Died: May 19, 2022

**Tyson, Fred White**

Montgomery  
Admitted: September 24, 1982  
Died: June 7, 2022





**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.*



**J. Thomas Richie**

*J. Thomas Richie is a partner at Bradley Arant Boulton Cummings LLP, where he co-chairs the class action team. He litigates procedurally-complex and high-stakes matters in Alabama and across the country. Richie is a 2007 summa cum laude graduate of the Cumberland School of Law and former law clerk to the Hon. R. David Proctor of the United States District Court for the Northern District of Alabama.*

## RECENT CIVIL DECISIONS From the Alabama Supreme Court

### Summary Judgment

#### **Robinson v. Harrigan Timberlands L.P., No. 1200563 (Ala. May 2, 2022) (plurality opinion)**

In a boundary line dispute, the plaintiff failed to produce evidence that a creek's path changed suddenly (*i.e.*, by avulsion) instead of gradually (*i.e.*, by accretion), so the court affirmed summary judgment for the defendant. The deed at issue used a creek to mark a boundary line, and the general rule provides that a watercourse that gradually changes carries the boundary line with it, adding to one parcel at the expense of the other. The plaintiff, who bore the burden of showing that the creek moved, failed to introduce evidence of avulsion. (Note: the only opinion had four votes, and the remaining five justices concurred in the result without separate writing.)

### Evidence, Sudden Loss of Consciousness Defense

#### **Pearce v. Estate of Day, No. 1200623 (Ala. May 27, 2022)**

Plaintiff appealed from a defense verdict in a car accident case, claiming that evidence tending to rebut the sudden loss of consciousness defense should not have been excluded and the verdict was against the great weight of the evidence. The court affirmed, concluding that, while the plaintiff's evidentiary objections generally addressed parts of a defendant's medical history tended to establish that he should have known that he was susceptible to suddenly losing consciousness, these matters were not sufficiently relevant to justify the substantial risk of prejudice that would have resulted from admitting them.



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## Arbitration

***The Terminix Int'l Co., L.P. v. Dauphin Surf Club Ass'n, Inc., No. 1200846 (Ala. May 13, 2022); The Terminix Int'l Co., L.P. v. Stonegate Condominium Owners' Ass'n, Inc., No. 1200854 (Ala. May 13, 2022)***

The associations filed separate lawsuits seeking to appoint a substitute arbitrator because the arbitral forum selected in the parties' arbitration agreement ceased administering consumer arbitrations, and the defendants opposed the petitions by arguing that the parties could not be compelled to litigate if the selected arbitral forum was not available. The trial court ruled for the plaintiffs and the Alabama Supreme Court affirmed. While the arbitration agreement selected an arbitral forum, the provisions concerning that selection were not so pervasive as to make the agreement unenforceable in a different forum.

***Key v. Warren Averett, LLC, No. 1210124 (Ala. May 20, 2022)***

The court determined that the threshold question of arbitrability should be decided by the arbitrator and reversed the trial court's order denying the defendant's arbitration. It reasoned that the question of arbitrability was given the arbitrator in both the arbitration agreement and the Commercial Arbitration Rules of the American Arbitration Association selected by the arbitration agreement.

## Competitive Bid Law

***Newman's Medical Servs., Inc. v. Mobile Cty., No. 1210001 (Ala. June 17, 2022)***

A challenge to a contract awarded through Alabama's Competitive Bid Law (Alabama Code § 41-16-50 *et seq.*) was not moot, even though the contract had already been executed and performance had begun. As long as a contract remains executory, its remaining performance can be enjoined under the Competitive Bid Law. On the merits, the contract for ambulance services at issue was not void for failure to comply with the Competitive Bid Law because the contract fit within the exception to that law for contracts "related to, or having an impact upon, ... the... safety of persons..." Ala. Code § 41-16-51(a)(15). The court determined that the language of the contract itself, the equipment contained in ambulances, and undisputed testimony regarding the services and training provided by the ambulance company all fit within the dictionary definition of "safety," and so the defendants were properly granted summary judgment.

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[youtube.com/TheAlabamaStateBar](https://youtube.com/TheAlabamaStateBar)



(Continued from page 347)

## Probate

### **Massey v. Rushing, No. 1210092 (Ala. June 24, 2022)**

The court affirmed an order setting aside and voiding two deeds for lack of capacity and undue influence, but it found that the trial court erred in finding the grantor lacked capacity. The evidence showed, at most, temporary and periodic incapacity, not permanent incapacity. A deed can be set aside for temporary incapacity only if the grantor executed the deeds during a period of incapacity, and no such evidence existed. Nevertheless, the court affirmed the finding of undue influence, finding that the complaint was properly amended to include that issue and that the evidence established that the wife occupied a confidential relationship with the grantor in which she was the dominant party.

### **Hoff v. Estate of Kidd, No. 1210096 (Ala. May 27, 2022);**

### **Hoff v. Estate of Kidd, No. 1210098 (Ala. May 27, 2022)**

An order purporting to deny a removal petition was reversed. Even though the removal petition was not sworn, it satisfied the requirements Alabama Code § 12-21-85. As a result, the supreme court concluded that the circuit had no discretion to deny the petition and was bound to enter an order removing administration of the estate at issue from the probate court to circuit court. All remaining issues were mooted.

### **Ledbetter v. Ledbetter, No. 1200860 (Ala. June 30, 2022);**

### **Ledbetter v. Ledbetter, No. 1210003 (Ala. June 30, 2022)**

The supreme court previously reversed summary judgment, and parties renewed their motion on the same record on remand. The trial court granted summary judgment, and the supreme court found that the same factual issues that precluded summary judgment previously still applied.

## Mandamus, Discovery Sanctions

### **Ex parte McKinney, No. 1200621 (Ala. May 20, 2022)**

The defendant doctor was entitled to a writ of mandamus directing the trial court to vacate a discovery order requiring the defendant to amend the cause of death listed on a death certificate. Even though the defendant agreed that the cause of death on the death certificate was not correct, Alabama Rule of Civil Procedure 37(a)(2) did not give the trial court the authority to require an amended certificate. Moreover, causes of death listed in death certificates are not determinative as to the ultimate cause of death. Relevant provisions of the Alabama Administrative Code give the medical certifier discretion as to whether to issue a corrected or supplemental

death certificate addressing the cause of death, but the regulations do not require the medical certifier to take action.

## Post-Judgment Motions

### **Rhodes v. Funk, No. 1200384 (May 20, 2022)**

A settlement agreement resolved a dispute regarding a trust and the circuit court entered an order retaining exclusive jurisdiction over the action and the parties provided in the settlement agreement. Many years later, a successor trustee filed a motion to enforce the agreement, and the respondent argued that the trial court lacked jurisdiction because the motion to enforce was broader than the retention of jurisdiction entered in connection with the settlement agreement. The court denied the motion to enforce without a hearing. The Alabama Supreme Court reversed, noting that a party requesting a hearing is entitled to be heard. The harmless error exception, which applies when the post-judgment motion has no probable merit, did not apply because the motion had probable merit.

## Bingo

### **Alabama v. Epic Tech, LLC, No. 1210012 (Ala. May 20, 2022)**

The supreme court held that the trial court had jurisdiction to entertain the State of Alabama's public nuisance claims seeking to abate allegedly illegal gambling activities in Greene County. It also ordered the case to be reassigned to a different circuit judge on remand, finding that it had supervisory authority to order reassignment on remand on a prudential basis based on the totality of the circumstances. The court endorsed a non-exclusive three-factor test looking to (1) whether the trial court would be reasonably expected to have difficulty setting aside previously expressed views or evidentiary findings on remand; (2) whether reassignment preserves the appearance of justice; and (3) whether the waste and duplication required by reassignment is out of proportion to the gain in preserving the appearance of fairness.

### **Alabama Dep't of Revenue v. Greenetrack, Inc., No. 1200841 (Ala. June 30, 2022)**

Electronic bingo operation was not exempt from taxation under Alabama 45-32-150.15. The court determined that this provision, which on its face applied to pari-mutuel wagering on dog racing, did not apply to the putative electronic bingo operations from otherwise-applicable taxes. The court also

found the three *McCullar* factors to be present, which justified making the tax ruling retroactive. Next, the court determined that the particular lease provisions used in connection with the electronic bingo operations at issue did not comply with local amendment authorizing nonprofit bingo operations, a decision that subjected the gross receipts of the games to sales tax. Lastly, the court determined that the gross receipts were equal to the total wagers, including credits that players won and re-bet without cashing out.

## Immunity

### ***Ex parte Mestas*, No. 1200362 (Ala. May 27, 2022)**

A chief nursing officer was entitled to state-agent immunity in her personal capacity for claims of medical negligence because she performed administrative functions governing how clinical staff care for patients. As a result, the court issued a writ of mandamus directing the trial court to grant summary judgment for the petitioner.

### ***Ex parte City of Vestavia Hills*, No. 1210113 (Ala. May 27, 2022)**

In the course of police responding to a domestic disturbance call, the plaintiff's dog attacked one officer and advanced toward a second officer. The second officer shot and killed the dog. The plaintiff brought claims against the second officer and the city under 42 U.S.C. § 1983 and under state law. The court determined that the officer was entitled to qualified immunity for the § 1983 claims because he was acting within the scope of his duties and his conduct was objectively reasonable. The city was not entitled to qualified immunity because that defense is categorically unavailable to municipalities – though the court left open the possibility of other defenses applying. The officer and city were both entitled to state-agent immunity on the state law claims: the officer because he acted within the scope of his duties and did not act willfully, maliciously, or in bad faith in killing the dog, and the city because the officer is immune.

### ***Ex parte Pinkard*, No. 1200658 (Ala. May 27, 2022)**

A deputy fire marshal was not entitled to absolute state immunity for claims against him in his personal capacity arising from claims that he falsely claimed that the plaintiff had admitted to maintaining a fire that burned a cabin and personal property owned by the plaintiff. The supreme court overruled *Barnhart v. Ingalls*, 275 So. 3d 1112 (Ala. 2018), concluding that the rule from *Barnhart* – namely, claims alleging breach of a duty by an officer that existed solely because of the officer's official position – effectively precludes individual liability to an extent beyond the text of Alabama

Constitution § 14. Neither was the deputy fire marshal entitled to state agent immunity because the false statements in the report triggered the malice exception necessary for the stage of the litigation.

## AMLA, Relation Back

### ***Ex parte Affinity Hospital*, No. 1210160 (Ala. May 27, 2022); *Ex parte Wade*, No. 1210191 (Ala. May 27, 2022)**

The Alabama Medical Liability Act requires heightened pleading requirements, but those requirements do not displace the relation back standard of Alabama Rule of Civil Procedure 15(c)(2). Even so, the Alabama Supreme Court concluded that plaintiff's fifth amended complaint did not relate back to the time of filing of the original complaint because it changed both the cause of the alleged initial injuries and the alleged wrongful conduct of the defendants. The Alabama Supreme Court issued writs of mandamus directing the trial court to grant motions to dismiss based on the wrongful death statute's two-year limitations period.

## Transfer of Venue

### ***Ex parte Alabama Power Co.*, No. 1210104 (Ala. June 30, 2022)**

When action was filed in an improper venue, the supreme court issued mandamus directing that the action be transferred to venue that would have been proper at the time of the filing of the original complaint. The court held that a subsequent amended complaint adding new parties did not affect the requirement that the original motion to transfer venue be granted.

# From the Alabama Court of Civil Appeals

## Divorce

### ***Burkett v. Burkett*, No. 2200720 (Ala. Civ. App. May 6, 2022)**

The court affirmed the divorce judgment awarding joint custody and dividing the parties' marital property but reversed the trial court's denial of the wife's post judgment motion regarding her engagement ring. The ring was a gift in contemplation of marriage and the wife fulfilled the condition of the gift by entering the marriage. It was therefore her personal property, and the court of civil appeals held that the



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trial court should either award her the ring or its value. As to the other matters raised by the wife on appeal, the trial court's failure to hold a hearing on her post-judgment motions was harmless because those motions lacked probable merit.

***Dubose v. Dubose*, No. 2200737 (Ala. Civ. App. May 6, 2022)**

The court found that the husband had notice of the trial and had a duty to keep apprised of the progress of the litigation, so a default judgment entered against him would not be disturbed on appeal. Because the court found that he did not provide evidence and argument on all three *Kirtland* factors, so the trial court had no duty to consider those factors. The court found that the record contained no evidence from which the court could overturn the division of property, and that arguments related to child support and visitation were not adequately briefed on appeal.

***Jones v. Jones*, No. 2200988 (Ala. Civ. App. June 30, 2022)**

A husband appealed a divorce decree requiring him to pay alimony in gross, and the court of civil appeals ruled in his favor after determining that the trial court's implied determination of equity in the marital estate was not supported in the record. The court declined to address rehabilitative alimony until the trial court had the chance to reconsider the issue in light of the ruling on alimony in gross. In light of conflicting evidence, the court affirmed the trial court's joint child custody ruling.

## Grandparent Visitation

***East v. Adkins*, No. 2201052 (Ala. Civ. App. May 6, 2022)**

The court reversed the trial court's order granting grandparent visitation because it found that the trial court's order lacked the factual findings required by Alabama Code § 30-3-4.2(f).

***Barkley v. Gullede*, No. 2210174 (Ala. Civ. App. June 30, 2022)**

A mother appealed from an order awarding grandparent visitation, and the court of civil appeals reversed. It held that the record contained evidence that the grandparent relationship was beneficial, but lacked evidence that the child would suffer harm (as defined in Alabama Code § 30-3-4.2(a)(2)) if grandparent visitation were limited – especially against the presumption that a fit parent's decision to limit visitation is in the best interest of the child is correct. The court reversed and also reversed the trial court's determination that the mother had to pay half of the guardian ad litem's fee.

## Appellate Jurisdiction

***S.J. v. Henry Cty. Dep't of Human Resources*, No. 2210203 (Ala. Civ. App. May 6, 2022); *J.B. v. Henry Cty. Dep't of Human Resources*, No. 2210207 (Ala. Civ. App. May 6, 2022)**

The trial court lacked jurisdiction to decide motions filed by parents under Alabama Rule of Civil Procedure 60(b) in the trial court during the pendency of appeals to the Alabama Court of Civil Appeals. Because the movants did not seek leave from the court of civil appeals to file their motions, the trial court did not have jurisdiction to decide the motions, and the orders were void. The appeal of the trial court's order denying those motions was therefore dismissed.

## Visitation, Evidence

***Cantrell v. Cantrell*, No. 2200590 (Ala. Civ. App. May 6, 2022)**

The trial court did not abuse its discretion by admitting videotaped testimonial evidence suppressed in a criminal proceeding against a father in a custody proceeding. The video had been suppressed because the father was not given proper *Miranda* warnings. The court of civil appeals further found that the trial court acted within its discretion in determining that the probative value of the video testimony was not substantially outweighed by the danger of unfair prejudice. Next, the court determined that the trial court properly determined that the father did not establish substantial evidence of material changed circumstances justifying allowing him unsupervised visitation. However, the court reversed the trial court's decision to terminate the father's visitation rights because it concluded that the mother failed to establish that termination of the father's rights protected the child's best interests. The court did not overturn the trial court's refusal to hold the mother in contempt or its decision to award attorneys' fees to the mother.

## Adoption

***K.S. v. K.P.*, No. 2210156 (Ala. Civ. App. May 13, 2022)**

Because a birth mother's parental rights had been terminated, she was not entitled to notice of an adoption proceeding and had no cognizable claim to assert in that proceeding. She had no standing to appeal the adoption judgment and no standing to assert the potential rights of any of her family members. The appeal was dismissed for lack of jurisdiction.



### Finality of Judgments

***Tompkins v. William Pendleton & David Leslie Family Dentistry, No. 2210288 (Ala. Civ. App. May 27, 2022)***

A district court trial that resulted in a ruling for the defendant on a counterclaim but no specification of the extent of damages to be awarded was not a final judgment that could be appealed to the circuit court. Therefore, the court of civil appeals held that it lacked jurisdiction over an appeal of the trial *de novo* in the circuit court and dismissed the appeal with instructions for the circuit court to vacate its judgment.

***Ethridge v. Houston Cty. Dep't of Human Resources, No. 2201042 (Ala. Civ. App. June 17, 2022)***

Because an order in a contempt proceeding did not set the amount of new arrearage owed by a father, it was not a final judgment from which an appeal could lie. The court of civil appeals dismissed the appeal for lack of jurisdiction.

### Dependency

***S.B.T. v. P.B., Nos. 2210208, 2210209, and 2210210 (Ala. Civ. App. June 3, 2022)***

Because five months passed from between the entry of dependency judgments in the trial court and the entry of dispositional judgments, and because evidence at the dispositional hearing showed changed circumstances over those five months, the court of civil appeals held that it lacked evidence from which to determine whether the children were dependent at the time of the dispositional judgments. The case was remanded to determine whether the children were dependent at the time of the judgments.

### Mandamus

***Ex parte A.L., CL-2022-0545, CL-2022-0546, CL-2022-0547, and CL-2022-0548 (Ala. Civ. App. June 3, 2022)***

The mother, seeking to avoid termination of parental rights, filed motions to stay those proceedings during the pendency of criminal proceedings against her. The trial court granted the stay in 2021 but then lifted it in February 2022. The mother filed motions to continue the final hearings in the termination actions. When those motions were denied, she petitions for writs of mandamus. The court of civil appeals denied the writs, finding that the mother should have sought mandamus for the February orders lifting the stay and could not reset the clock for filing her mandamus petitions by filing motions to continue based on the same grounds addressed in the earlier order.

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***Ex parte Cortez, Nos. 2210488 and 2210489 (Ala. Civ. App. June 17, 2022)***

The court determined that an appeal would be an adequate remedy to address evidentiary issues arising from denial of a motion in limine. The trial court's ruling on the motions in limine held that a privilege had been waived, but stated that the court would hold ruling on hearsay objections until trial.

### Termination of Parental Rights

***Randolph Cty. Dep't of Human Resources v. K.W., No. 2200968 (Ala. Civ. App. June 10, 2022)***

Because the father was, in the opinion of the Alabama Court of Criminal Appeals, in a position to regain custody of the child in the foreseeable future, the court of civil appeals upheld the judgment of the trial court not to terminate parental rights. The record demonstrated injuries to siblings that were not explained, but the evidence did not establish, in the court's view, that the parents caused the injuries so as to render them abuse of a sibling under Alabama Code § 12-15-391(a)(3). The court also determined that unexplained serious physical injuries to a sibling are not relevant under Alabama Code § 12-15-391(a)(6), which addresses unexplained serious physical injury to the child at issue.

***H.A.A. v. B.J.J., No. 2200928 (Ala. Civ. App. June 10, 2022)***

The court of civil appeals dismissed the appeal from a termination of parental rights proceeding because it found that the trial court acted outside its statutory authority by terminating the rights of a biological father who did not qualify as the legal father. The biological father's paternity petition remained pending with no judgment entered, and competing presumptions of paternity ran in favor of the biological father and a stepfather. The court of civil appeals held that the juvenile court was required to decide between the presumptions, and it failed to do so. The cause was remanded for further proceedings.

***V.G.J. v. Tuscaloosa Cty. Dep't of Human Resources, No. 2210176 (Ala. Civ. App. June 17, 2022); M.H.R. v. Tuscaloosa Cty. Dep't of Human Resources, Nos. 2210187 and 2210188 (Ala. Civ. App. June 17, 2022)***

The court concluded that the trial court abused its discretion in not providing an interpreter to facilitate communication between the Spanish-speaking father and his appointed

counsel. It also reversed the trial court's conclusion that the mother had abandoned her children. The evidence established that the mother visited her children after they had been removed from her custody and had electronic contact with them after she had been deported to Guatemala.

***M.W. v. Calhoun Cty. Dep't of Human Resources, Nos. 2210093, 2210094, and 2210095 (Ala. Civ. App. June 30, 2022)***

The court of civil appeals reversed the trial court's decision to terminate parental rights. The plaintiff relied on service by publication. Without proper service, the court of civil appeals held that the trial court lacked personal jurisdiction over the mother and the judgment against her was void.

***T.B. v. Jefferson Cty. Dep't of Human Resources, No. 2210177 (Ala. Civ. App. June 30, 2022)***

The court of civil appeals reversed the termination of a mother's parental rights because the record contained no evidence that DHR attempted to rehabilitate the mother by addressing the mother's substance abuse issues or lack of housing.

### Right of Redemption

***Anderson Realty Group, LLC v. King, No. 2201014 (Ala. Civ. App. June 10, 2022)***

The court determined that a person seeking to redeem property sold at a tax sale must pay for the value of improvements made to the property, not the cost of improvements. The court determined that the term "preservation improvements" in Alabama Code § 40-10-122(d) means the same as "permanent improvements" in other sources, such as Alabama Code § 6-5-253.

### Adverse Possession

***Lindsey v. Pollard, No. 2200751 (Ala. Civ. App. June 17, 2022)***

Because a landowner had exercised the requisite elements of hybrid adverse possession as a strip of disputed property, the court of civil appeals reversed the judgment in favor of the defendant. Restrictive covenants barring subdivision of lots did not compel a different result because adding the disputed land to the plaintiff's lot would not create an additional lot. The court found that the trial court's ruling was plainly and palpably wrong.

## Certificate of Need

### ***Infirmiry Health Sys., Inc. v. State Health Planning and Development Agency, No. 2200890 (Ala. Civ. App. June 17, 2022)***

The court affirmed the Certificate of Need Review Board's order regarding a certificate of need application relating to ambulatory surgery center. Intervenors challenged the board's decision to issue a certificate for the ambulatory surgery center, but the court determined that the board's decision was adequately supported.

# From the United States Supreme Court

## Abortion

### ***Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022)***

The Court held that the Constitution does not confer a right to abortion and overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*.

## Second Amendment

### ***New York State & Rifle Ass'n, Inc. v. Bruen, No. 20-843 (U.S. June 23, 2022)***

A state law requiring an applicant to show proper cause to obtain a license to carry firearms in public for self-defense violated the Second Amendment. The Court reasoned that the Second Amendment established an individual's right to carry a firearm for self-defense, and the burden is on the party limiting the right to show that a restriction on that right comports with the historical tradition of firearm restrictions.

## Medicare and Medicaid

### ***Am. Hosp. Ass'n v. Becerra, No. 20-1114 (U.S. June 15, 2022)***

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 does not prevent judicial review of the Department of Health and Human Services' reimbursement rates for certain drugs provided to Medicare patients. Because HHS did not survey hospitals' acquisition costs in 2018 and 2019, it could not vary reimbursement rates only for 340B hospitals in those years.

### ***Gallardo v. Marsteller, No. 20-1263 (U.S. June 6, 2022)***

A state Medicaid agency seeking reimbursement for medical

expenses it paid can take any portion of a tort settlement allocated for medical expenses, even the portion that is allocated for future medical payments that the agency has not paid and may never pay.

### ***Marietta Mem'l Hos. Employee Health Benefit Plan v. DaVita, Inc., No. 20-1641 (U.S. June 21, 2022)***

A plan that provided the same limited outpatient dialysis benefits to individuals with and without end-stage renal disease did not impermissibly differentiate between those groups. The Court rejected a disparate-impact theory as being inconsistent with the text of the statute and rejected any contention that it characterized as a duty to provide a minimum level of benefits for outpatient dialysis treatment on the same basis.

## Immigration

### ***Patel v. Garland, No. 20-979 (U.S. May 16, 2022)***

An applicant for permanent residency inadvertently stated that he was a U.S. citizen on a driver's license renewal application. An immigration judge concluded that the misrepresentation was intentional and rendered the applicant ineligible for permanent residency. The applicant sought review in federal court, but the Supreme Court determined that 8 U.S.C. § 1252(a)(2)(B)(i) categorically bars reviewing any facts found in a decision to grant or deny relief.

### ***Garland v. Gonzalez, No. 20-322 (U.S. June 13, 2022)***

The Court found that a part of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)(1), does not provide for class-wide injunctive relief. That provision strips lower courts of the authority to enjoin or restrain the operation of parts of the act generally, though such authority exists as to orders entered with respect to an individual alien against whom proceedings have been initiated.

### ***Biden v. Texas, No. 21-954 (U.S. June 30, 2022)***

The government's decision to rescind the Migrant Protection Protocols ("MPP"), under which certain non-Mexican nationals arriving from Mexico were returned to Mexico to await the conclusion of their removal proceedings, did not violate 8 U.S.C. § 1225. Because the government has the discretion, not the duty, to return asylum seekers to their country of origin, the Court reasoned that the government had the right to rescind the MPP. The Court also relied on foreign affairs consequences in allowing the termination of the MPP, noting that both the United States and Mexico did not wish to continue the plan.



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## First Amendment

### ***Shurtleff v. City of Boston*, No. 20-1800 (U.S. May 5, 2022)**

A city allowed groups to hold ceremonies near a flag pole and hoist a flag of their choosing on that pole, but denied a group's request to hoist what it styled the "Christian Flag." The Supreme Court found this decision was not protected government speech by the city because the city historically lacked meaningful involvement in selecting the flags selected by the groups. Because the city lacked involvement, the decision to refuse to fly the Christian Flag violated the First Amendment's Free Speech Clause – refusing to fly the flag because of its content was viewpoint discrimination.

### ***Federal Election Commission v. Ted Cruz for Senate*, No. 21-12 (May 16, 2022)**

The Court addressed provisions of the Bipartisan Campaign Reform Act, 52 U.S.C. § 30116(j) and associated regulations. The Court found that the plaintiffs had standing to challenge the law because they were threatened with enforcement of the provisions at issue. The Court also concluded that the law burdens core political speech without justification because limits on repayment of loans to campaigns deters candidates from running for office. Against this deterrent effect, the Court found that the government had demonstrated no evidence of a permissible goal.

### ***Carson v. Makin*, No. 20-1088 (U.S. June 21, 2022)**

A state statute allows parents of students in certain districts to designate a qualifying private school to receive state funds to provide education to those students, provided that the private school is nonsectarian. The Supreme Court struck down the requirement that the school be nonsectarian under the First Amendment's Free Exercise Clause. Under strict scrutiny, the Court concluded that the state could not permissibly discriminate in providing a public benefit and exclude an entire class of otherwise-eligible recipients solely because they are religious.

### ***Kennedy v. Bremerton School Dist.*, No. 21-418 (U.S. June 27, 2022)**

The Court found that the Free Exercise Clause of the First Amendment protected a football coach's right to engage in personal religious observance – in this instance, praying at midfield after a game – and he was protected from reprisal by his school board employer. The coach's prayer occurred after games, at a time when school employees and players were permitted to attend to brief personal matters.

## Gaming

### ***Ysleta del Sur Pueblo v. Texas*, No. 20-493 (U.S. June 15, 2022)**

A federal statute restoring a Native American tribe's trust status was held, as a matter of federal law, to ban on tribal grounds only those gaming activities also banned in Texas.

## Administrative Law

### ***West Virginia v. Environmental Protection Agency*, No. 20-1530 (U.S. June 30, 2022)**

The Court found that states and coal companies had standing to challenge certain EPA regulations even though those regulations were not in effect because the government indicated that it intended to pursue regulations raising the same issues challenged by the states and companies. On the merits, the Court found that EPA regulations violated the major-questions doctrine, which the Court found to require Congress to explicitly state its intention to give an administrative agency the power to make decisions with broad economic and political significance – in this case, greenhouse gas emissions. The Court did not find such a Congressional statement in 42 U.S.C. § 7411.

## Civil Rights

### ***Egbert v. Boule*, No. 21-147 (U.S. June 8, 2022)**

The Court held that *Bivens* does not create causes of action for excessive force claims under the Fourth Amendment or retaliation claims under the First Amendment. As to the excessive force claim, the national security interests generally foreclose a *Bivens* claim against Border Patrol agents, and Congress had already authorized an alternative remedy. As to the retaliation claim, the Court determined that Congress was in a better position to determine the public interest in providing a damages remedy.

### ***Vega v. Tekoh*, No. 21-499 (U.S. June 23, 2022)**

The Court ruled that *Miranda v. Arizona* establishes a prophylactic rule and that violation of that rule does not give rise to a claim under 42 U.S.C. § 1983. Because the failure to give a *Miranda* warning does not necessarily violate the Fifth Amendment, such a failure is not a deprivation of a constitutional right for purposes of § 1983. Lastly, the Court declined to find that *Miranda* constituted a federal "law" for § 1983 purposes.

### ***Nance v. Ward*, No. 21-439 (U.S. June 23, 2022)**

A state prisoner proposing an alternative method of execution not provided by the state's death-penalty statute can bring the method-of-execution claim under 42 U.S.C. § 1983.

## Arbitration

### ***Morgan v. Sundance*, No. 21-328 (U.S. May 23, 2022)**

Because the Federal Arbitration Act requires that arbitration agreements must be interpreted according to generally applicable contract principles, it was error to create a prejudice requirement applicable to waiver for arbitration agreements where such a requirement did not apply to contracts generally. The policy in favor of arbitration does not compel a different result.

### ***ZF Automotive U.S. v. Luxshare, Ltd.*, No. 21-401 (U.S. June 13, 2022)**

28 U.S.C. § 1782 allows district courts to order discovery for use in a “proceeding in a foreign or international tribunal.” Based on the text of the statute and the Federal Arbitration Act, the Court construed § 1782 to apply to governmental or intergovernmental bodies with adjudicative authority, but not to apply to arbitration. Therefore, § 1782 is not available to obtain discovery for use in commercial arbitration proceedings.

### ***Southwest Airlines Co. v. Saxon*, No. 21-309 (U.S. June 6, 2022)**

The Court ruled that ramp supervisors are airplane cargo loaders, a class of workers in foreign or interstate commerce whose contracts of employment are specifically exempted from the Federal Arbitration Act. The Court determined that workers who touch cargo qualify for this class and rejected both the broader (*i.e.*, every employee who performs the customary work of an airline) and narrower (*i.e.*, those employees who actually move cargo across state or national borders) interpretations presented in the case.

### ***Viking River Cruises v. Moriana*, No. 20-1573 (U.S. June 15, 2022)**

The Court held that the Federal Arbitration Act preempts California’s rule of *Iskanian* insofar as it precludes actions under the Private Attorneys General Act being divided into individual and non-individual claims through an agreement to arbitrate. The FAA permits a party to compel individual arbitration if provided by contract, and a statute purporting to forbid severing a claim subject to arbitration is preempted.

## Civil Procedure

### ***Berger v. North Carolina State Conference of the NAACP*, No. 21-248 (U.S. June 23, 2022)**

Legislators are entitled to intervene in litigation over their state’s election laws. Legislators have an interest in defending their state’s laws, and even if there is a presumption that would provide that a group generally adequately represents the interests of its members, that presumption did not bar intervention by a legislator to defend state law.

## Hague Convention

### ***Golan v. Saada*, No. 20-1034 (U.S. June 15, 2022)**

When a court has determined that returning a child to a foreign country would expose the child to a grave risk of harm, the court need not examine all possible ameliorative measures before denying a petition under the Hague Convention for the return of the child. The Second Circuit’s categorical requirement that a court consider all ameliorative measures was rejected.

## Armed Forces

### ***Torres v. Texas Dep’t of Pub. Safety*, No. 20-603 (U.S. June 29, 2022)**

By ratifying the federal Constitution, states agreed that their sovereignty would yield to the nation’s need to raise and support the armed forces. As a result, states cannot raise their sovereign immunity as a legal defense to a suit under the Uniformed Services Employment and Reemployment Rights Act of 1994.



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## Bankruptcy

### ***Siegel v. Fitzgerald, No. 21-441 (U.S. June 6, 2022)***

A 2017 act that increased the amounts that certain large Chapter 11 debtors had to pay to the United States Trustee System Fund violated the uniformity provision of the Bankruptcy Clause because the law required Chapter 11 debtors in districts participating in the trustee program to pay more than similarly situated debtors in districts participating in the administrator program.

## Workers' Compensation

### ***U.S. v. Washington, No. 21-404 (U.S. June 21, 2022)***

The Court held that a Washington workers' compensation statute that applied only at a single federal facility facially discriminated against the federal government and its contractors by making it easier for the workers (most of whom were federal contractors) to receive benefits and thus increase the federal government's workers' compensation liabilities. No congressional waiver of sovereign immunity applied under the facts of the case.

## Veteran Affairs

### ***George v. McDonough, No. 21-234 (U.S. June 15, 2022)***

A Veterans Administration benefits decision based on agency regulation that is later found to conflict with the statute providing the benefit does not give rise to a clear and unmistakable error, meaning that a veteran cannot reopen his benefits claim under a statute authorizing collateral review, 38 U.S.C. §§ 5109A, 7111.

# From the Eleventh Circuit Court of Appeals

## Bankruptcy

### ***United States Pipe & Foundry Co., LLC v. Holland, No. 20-13832 (11<sup>th</sup> Cir. May 3, 2022)***

The Eleventh Circuit reversed and remanded, finding that the bankruptcy court and district court erred in determining that the debtor companies' obligations to provide future healthcare benefits to retired employees were not "claims"

discharged by a 1995 plan of reorganization. The court reasoned that the companies' liability was fixed at that time, even though the amount due was contingent. Because of these conclusions, the court also held that claims for equitable relief were discharged. It declined to adopt the *Udell* test from the Seventh Circuit.

## Westfall Act

### ***Omnipol, A.S. v. Worrell, No. 19-14597 (11<sup>th</sup> Cir. May 3, 2022)***

The Eleventh Circuit held that the district court correctly substituted the United States as a defendant in place of three individual contracting officers in connection with claims arising from government purchases of firearms. The court also affirmed summary judgment on ground of sovereign immunity and on the merits of the remaining claims.

## Appellate Jurisdiction

### ***Jenkins v. Prime Ins. Co., No. 21-11104 (11<sup>th</sup> Cir. May 4, 2022)***

The Court held that an order dismissing two defendants and transferring the remaining claims against the remaining defendants to a different federal district under 28 U.S.C. § 1404(a) did not give rise to an appealable order. There was no § 1291 final decision and no certification under Federal Rule of Civil Procedure 54(b).

## Negligence

### ***Brady v. Carnival Corp., No. 21-10772 (11<sup>th</sup> Cir. May 5, 2022)***

The court reversed summary judgment against a plaintiff's negligence claim relating to a slip-and-fall accident occurring when the plaintiff slipped in a puddle on the deck of a cruise ship. The court determined that the proper question to determine whether the defendant owed a duty was not whether the defendant was aware of the particular puddle in which the plaintiff slipped, but rather whether the defendant had notice that the area where the plaintiff slipped – an area near a swimming pool – was prone to becoming wet and whether the deck became slippery under those conditions.

### ***Fuentes v. Classica Cruise Line Operator Ltd., Inc., No. 20-14639 (11<sup>th</sup> Cir. May 3, 2022)***

Under maritime law, the court determined that a cruise line has a duty to warn or protect its passengers from passenger-on-passenger violence when the cruise line reasonably

apprehends the danger that such an attack was foreseeable. The foreseeability determination must have some connection to the events giving rise to the claim. The court affirmed summary judgment for the defendant. It also affirmed the district court's exercise of discretion in declining to sanction the defendant for its corporate representative's testimony given under Federal Rule of Civil Procedure 30(b)(6).

## Rule 11 Sanctions

### ***Gulisano v. Burlington, Inc., No. 20-12660 (11<sup>th</sup> Cir. May 12, 2022)***

The court found no abuse of discretion in imposing Rule 11 sanctions on an attorney who obtained a default judgment against a non-existent entity and then sought to amend the judgment to name different defendants without, in the court's analysis, performing an adequate investigation.

## Foreign Sovereign Immunities Act

### ***Global Marine Exploration, Inc. v. Republic of France, No. 20-14728 (11<sup>th</sup> Cir. May 12, 2022)***

The court determined that the commercial activity exception to the FSIA, 28 U.S.C. §§ 1605(a)(2) and 1603(d), applied to claims against a foreign state because the foreign government's actions related to ship wrecks were commercial in nature when viewed from the perspective of whether the sovereign's actions were the type of actions by which a private party engages in trade and traffic or commerce. As a result, the court reversed the district court's dismissal for lack of subject matter jurisdiction and remanded for further proceedings.

## Declaratory Judgment

### ***James River Ins. Co. v. Rich Bon Corp., No. 20-11617 (11<sup>th</sup> Cir. May 23, 2022)***

The court reversed the district court's dismissal of a declaratory judgment claim. The court emphasized that a parallel proceeding is not a prerequisite to a district court's refusal to entertain a declaratory judgment action and that the district court erred in imposing that requirement. In applying the *Ameritas* factors, the court emphasized that courts should consider all claims and all pending proceedings.

## UCC

### ***Wadley Crushed Stone Co., LLC v. Positive Step, Inc., No. 21-11002 (11<sup>th</sup> Cir. May 24, 2022)***

In affirming summary judgment, the court determined that a contract for providing a granite plant was a contract for goods under the UCC's predominance test because 95 percent of the total amounts billed under the contract were for goods, and 25 of the 27 line items in the contract were

for movable goods. As a result, the UCC's four-year statute of limitations applied, and the plaintiff's claims were barred. The court also affirmed summary judgment for one of the defendants on its counterclaims, finding the setoff defense of the plaintiff to have been too narrow.

## Antitrust

### ***OJ Commerce, LLC v. KidKraft, Inc., No. 21-11521 (11<sup>th</sup> Cir. May 24, 2022)***

The court affirmed summary judgment for the defendants on antitrust claims. As to the § 1 claim, the court found that a conspiracy cannot exist between an owner and the company it owns and with which it does not compete. As to the § 2 claim, the court found a lack of substantial evidence of a theory of monopolization.

## FDCPA, FCCPA

### ***Daniels v. Select Portfolio Servicing, Inc., No. 19-10204 (11<sup>th</sup> Cir. May 24, 2022)***

The court determined that a required monthly mortgage statement that generally complies with the Truth in Lending Act and its regulations may (under certain circumstances) plausibly be a communication in connection with the collection of a debt under the FDCPA or in connection with collecting a debt under the FCCPA if the communication contains additional debt-collection language.

## Arbitration

### ***Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A., No. 20-13039 (11<sup>th</sup> Cir. May 27, 2022)***

A party sought to vacate an international arbitral award on an "exceeding powers" ground because that ground is not stated in Article V of the New York Convention. The panel criticized the rule it applied in that case, noting that it believes the Eleventh Circuit's decision in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11<sup>th</sup> Cir. 1998) and its progeny are wrongly decided. But the panel viewed itself as bound by those decisions and followed them.

### ***Attix v. Carrington Mortgage Servs., LLC, No. 20-13575 (11<sup>th</sup> Cir. May 26, 2022)***

The court reversed the denial of a motion to compel arbitration, finding that the arbitration agreement between the parties delegated the question of the arbitrability of all claims, including the plaintiff's Dodd-Frank Act claims, to the arbitrator. The court also found that the Dodd-Frank Act's bar on arbitration in § 1639c(e)(3) does not bar arbitrating the threshold question of arbitrability.



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## SLUSA

**Cochran v. The Penn Mutual Life Ins. Co. of Am., No. 20-13477 (11<sup>th</sup> Cir. May 31, 2022)**

The court affirmed dismissal of a securities suit, concluding that the plaintiff had failed to identify a single untrue statement or omission of material fact relating to variable annuities.

## Attorneys' Fees

**Caplan v. All American Auto Collision, Inc., No. 19-14099 (11<sup>th</sup> Cir. June 6, 2022)**

The court found that the district court did not abuse its discretion in reducing the attorneys' fees awarded to a successful ADA plaintiff. The court affirmed the determination that the hours were excessive, the plaintiff was unreasonably litigious, and the fee request included too much time for specific tasks. The court noted that *Love v. Deal*, 5 F.3d 1406 (11<sup>th</sup> Cir. 1993), which provides that a plaintiff need not request a hearing on a fee request to complain on appeal that a hearing should have been held, conflicts with earlier precedent. The court disregarded *Love*.

## Voting Rights Act

**Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cty. Bd. of Registration and Elections, No. 20-14540 (11<sup>th</sup> Cir. June 8, 2022)**

The case involved allegations that Spanish-language ballots should have been provided to English and Spanish speakers in a county in Georgia. The court vacated the district court's decision to dismiss claims under the Voting Rights Act, finding that a plaintiff had adequately alleged that it had to divert its resources to identify and counteract the defendant's alleged illegal practices. Nevertheless, the court affirmed dismissal under Federal Rule of Civil Procedure 12(b)(6). It held that the state secretary of state was not subject to suit under § 203(c) of the Voting Rights Act, that the county had no obligation to translate materials provided by the state secretary of state, and that the allegations against the county board of elections were not plausibly stated. The court similarly affirmed the dismissal of the claims under § 4(e).

## Stay Pending Appeal

**League of Women Voters of Florida Inc. v. Florida Secretary of State, No. 22-11143 (11<sup>th</sup> Cir. May 6, 2022)**

The court granted a stay pending appeal to a state when the district court had permanently enjoined three provisions

of state law governing elections in that state. The court applied the *Purcell* standard, which addresses concerns specific to election cases.

## Mortgages

**Samara v. Taylor, No. 20-14629 (11<sup>th</sup> Cir. June 14, 2022)**

A claim seeking reformation of a mortgage was timed barred, the court reasoned, because the 10-year limitations period from Alabama Code § 6-2-33 applied. The court also determined that the plain language of the mortgage would lead it to affirm judgment for the defendants on the merits.

## Article III Standing

**Banks v. Secretary, Dep't of Health & Human Servs., No. 22-10072 (11<sup>th</sup> Cir. June 21, 2022)**

A Medicare recipient did not have Article III standing to challenge Medicare's decision not to pay for cancer treatments because, the court reasoned, the recipient did not have to pay for the treatments Medicare had not reimbursed. It also found that the possibility that the recipient could be financially responsible under the "Medicare mulligan" provisions of 42 U.S.C. § 1395pp was too remote and contingent to be a concrete and imminent harm.

**Resnick v. KrunchCash, LLC, No. 20-14504 (11<sup>th</sup> Cir. May 20, 2022)**

The court reversed a dismissal for lack of subject matter jurisdiction, finding that the plaintiff's due process claims were not so insubstantial and frivolous as to deprive the district court of jurisdiction under *Bell v. Hood*. Specifically, the court found that using a state law garnishment proceeding to freeze accounts could give rise to a deprivation of a constitutional right in the frozen accounts and that the specific procedures surrounding such garnishment proceedings could give rise to a plausible allegation of state action. The court also analyzed the adequacy of the state garnishment procedure's process and found that the plaintiff's challenge to such adequacy was not squarely foreclosed.

**Ladies Memorial Ass'n, Inc. v. City of Pensacola, Nos. 20-14003, 21-11072 (11<sup>th</sup> Cir. May 16, 2022)**

Plaintiffs challenging the removal of a Confederate monument lacked standing because they claimed only reputational or abstract injuries relating to dissolving the district where the monument was housed or harm to the state's mission of historic preservation (among other things). Because the case had been removed and then dismissed under Rule

12(b)(6), the Eleventh Circuit reversed the dismissal and directed that the case be remanded to state court.

## OSHA

### ***U.S. Dep't of Labor v. Tampa Elec. Co., No. 21-11681 (11<sup>th</sup> Cir. June 22, 2022)***

Because the court determined that the release of ammonia at a power plant was not, as a factual matter, uncontrolled, it concluded that OSHA's Hazardous Waste Operations and Emergency Response standard did not apply. It therefore denied the petition for review.

## National Defense Authorization Act

### ***Fuerst v. The Housing Auth. of Atlanta, No. 21-10285 (11<sup>th</sup> Cir. June 22, 2022)***

The court disagreed with the district court and concluded that employees of federal grantees are covered by the plain language of 41 U.S.C. § 4712(a), a whistleblower provision of the National Defense Authorization Act. However, the court affirmed judgment for the defendant because it agreed with the district court that the plaintiff had failed to establish that she had a reasonable belief that the defendant had engaged in "gross mismanagement," "abuse of authority," or violation of "law, rule, or regulation."

## Civil Rights

### ***Brucker v. City of Doraville, No. 21-10122 (11<sup>th</sup> Cir. June 24, 2022)***

The court affirmed summary judgment for a city on claims that its municipal court judge, prosecutor, police, and code enforcement agents were biased regarding people receiving either traffic citations or property code violations because the city used the revenue from citations and violations to fund those offices.

### ***Wade v. Daniels, No. 18-12371 (11<sup>th</sup> Cir. June 13, 2022)***

The court reversed summary judgment on a 42 U.S.C. § 1983 claim that an arresting officer pistol-whipped the arrestee, but it affirmed summary judgment on shooting and deprivation-of-medical-care claims. It found that pistol-whipping an arrestee who had been shot in the head and was neither resisting arrest nor attempting to flee was an exercise of excessive force and violated a clearly established right. But the court found that shooting the suspect and waiting four minutes to seek medical care for the arrestee did not violate established law.

## Social Security

### ***Harner v. Social Security Admin., Commissioner, No. 21-12148 (11<sup>th</sup> Cir. June 27, 2022)***

The court held that 20 C.F.R. § 404.1520c abrogated the "treating-physician rule" – which directed administrative law judges to give more weight to the opinions of treating physicians – and directed administrative law judges to consider several factors instead. The court found that § 404.1520c to be within the express delegation of authority to the Commissioner and neither arbitrary nor capricious.

## FLSA

### ***Fowler v. OSP Prevention Group, Inc., No. 19-12277 (11<sup>th</sup> Cir. June 27, 2022)***

Investigators who worked for a company that provided services related to damage occurring to property of broadband service providers were not included within the administrative exception to the FLSA. The court concluded that these employees provided production work that, while important, did not satisfy the "management or general business operations" prong of the administrative exemption. As a result, the court vacated summary judgment for the defendant.

### ***McKay v. Miami-Dade Cty., No. 20-14044 (11<sup>th</sup> Cir. June 9, 2022)***

A divided panel of the Eleventh Circuit decided that a person working for a county in its autopsy forensic photography training program was not a volunteer under the FLSA because the person was not motivated at all by civic, charitable, or humanitarian reasons. But the person did qualify as an "intern" under the seven *Shumann* factors because, the court reasoned, she was the primary beneficiary of the work. The court thus affirmed summary judgment for the county on the plaintiff's FLSA claims.

## Receivership

### ***Perlman v. PNC Bank, N.A., No. 21-10432 (11<sup>th</sup> Cir. June 27, 2022)***

The court, having previously held that a corporation in receivership must have at least one honest director or stockholder to have standing to bring common law tort claims against third parties to recover damages for the fraud committed by the corporation's insiders, clarified that this rule applies to claims brought under Section 501.207(3) of the Florida Deceptive and Unfair Trade Practices Act.

## Trademark – Reverse Confusion

### ***Wreal, LLC v. Amazon.com, Inc., No. 19-13285 (11<sup>th</sup> Cir. June 28, 2022)***

In a reverse-confusion trademark infringement case, the court found that three of the seven *Forman* factors apply differently than in a normal confusion case. Specifically, the commercial strength of the mark must consider the defendant's



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mark and not just the plaintiff's mark. In addition, the court decided that the sixth factor, the defendant's intent, is to be measured by a wide variety of sources and that the seventh factor, actual confusion, can be measured by either forward or reverse confusion. Applying these factors, the Eleventh Circuit reversed summary judgment for the defendant.

## ERISA

### ***Gimeno v. NCHMD, Inc.*, No. 21-11833 (11<sup>th</sup> Cir. June 28, 2022)**

ERISA Section 1132(a)(3) creates a cause of action for an ERISA beneficiary to recover monetary benefits lost due to a fiduciary's breach of fiduciary duty in the plan enrollment process. A plan beneficiary can bring a claim under § 1132(a)(3) against a fiduciary to recover benefits that were lost due to the fiduciary's breach of its duties.

## Employment Discrimination

### ***Johnston v. Borders*, Nos. 18-14808, 19-13269 (11<sup>th</sup> Cir. June 9, 2022)**

The court affirmed jury verdicts in favor of a plaintiff on claims relating to (1) statements made by a defendant sheriff in terminating her employment and (2) other statements made by a coworker that the jury found to be defamatory. The court vacated the award of attorneys' fees because it found that the district court included fees related to the defamation claim (which are not subject to fee shifting) in its award.

## Insurance

### ***Public Risk Mgmt. of Florida v. Munich Reins. Am., Inc.*, No. 21-11774 (11<sup>th</sup> Cir. June 29, 2022)**

The court affirmed summary judgment for the reinsurer. It found that the reinsurance agreement did not contain a "follow-the-fortunes" clause that bound the reinsurer to the insured's decision to pay the claim and that prevented the reinsurer from second guessing the good faith decision to pay the claim. It also declined to imply that such a clause existed in the face of clear contractual language to the contrary.

### ***Brink v. Direct Gen'l Ins. Co.*, No. 21-11070 (11<sup>th</sup> Cir. June 28, 2022)**

The Eleventh Circuit found that the district court's bad faith jury instruction was inadequate because it failed to instruct the jury that it could find bad faith if the insurer failed to advise the insured of settlement opportunities, advise as

to the probable outcomes, warn of the risk of excess judgments, and advise the insured of steps that could be taken to avoid them, and that an insurer must investigate, consider settlement offers, and settle where a reasonably prudent person faced with the prospect of paying the total recovery would reasonably do so.

### ***Great Lakes Ins. Co. SE v. Wave Cruiser LLC*, No. 20-14517 (11<sup>th</sup> Cir. June 15, 2022)**

After affirming, as a matter of first impression, the enforcement of a choice-of-law provision under federal maritime law, the court affirmed summary judgment for the insurer because the insured failed to carry its burden of establishing that an exception to an exclusion applied. The court found that the trial court abused its discretion by considering the insurer's lay expert testimony when the witness had disclaimed having the specialized knowledge necessary for the opinion, however, the error was harmless because the insured failed to produce any evidence to carry its burden at summary judgment.

### ***Dukes Clothing, LLC v. The Cincinnati Ins. Co.*, No. 21-11974 (11<sup>th</sup> Cir. June 6, 2022)**

Claims relating to insurance benefits from the COVID-19 pandemic were dismissed. The Eleventh Circuit affirmed, finding that, under Alabama law, the plaintiff did not establish the pandemic caused physical damage to its property. It found that COVID did physically alter the plaintiff's property and that COVID virus particles can be removed with standard cleaning measures, making closures stemming from the pandemic outside of the coverage provisions of the relevant policy.

### ***Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 20-14156 (11<sup>th</sup> Cir. June 3, 2022)**

In line with its other opinions, the Eleventh Circuit, applying Georgia law, affirmed dismissal of a claim for insurance proceeds arising out of property damage from the COVID-19 pandemic. The court found no covered "physical loss of or damage to" the insured property as a result of intangible harm caused by COVID or the declaration of a public emergency accompanying the pandemic.

### ***SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, Nos. 20-14812, 21-10190, 21-10490, 21-10672 (11<sup>th</sup> Cir. May 5, 2022)**

The court determined that all-risk commercial insurance policies did not cover losses and expenses arising from the

COVID-19 pandemic because the losses did not involve direct physical loss of or damage to property under Florida law. Neither did policies covering business interruption or extra expense provide coverage because, in the court's judgment, those coverages required the need to repair, rebuild, replace, or expend time securing a new permanent property. Lastly, the court remanded so that a district court could determine in the first instance whether the different language in one policy's spoliage provision – which required “direct physical loss or damage to” property instead of direct physical loss of or damage to” property – would lead to a different result.

## Class Actions

### ***Arkin v. Smith Med. Partners, LLC, Nos. 21-11019, 21-11502 (11<sup>th</sup> Cir. June 30, 2022)***

The court found that counsel that did not serve as class counsel provided one substantial and independent benefit to the class, but was not entitled to receive any portion of the fees awarded in connection with the settlement of a TCPA case. The court found that the district court permissibly determined that the counsel seeking a fee prioritized its own interests above the class as evidenced by its conduct in previous attempts to settle related class actions.

## First Amendment

### ***Rodriguez v. Burnside, No. 20-11218 (11<sup>th</sup> Cir. June 30, 2022)***

The district court granted summary judgment for the defendants in a prisoner's First Amendment Free Exercise challenge to the bathing policies in his prison. The Eleventh Circuit affirmed, finding that while the prisoner's exercise of his Muslim faith was sometimes curtailed by the bathing regulations, those regulations were legitimate under *Turner v. Safley* – and, in any event, the prison officials were entitled to qualified immunity.

### ***LaCroix v. Town of Fort Myers Beach, No. 21-10931 (11<sup>th</sup> Cir. June 28, 2022)***

A plaintiff wanting to carry a portable sign with a religious message received a citation from a city that had a policy banning all portable signs. The plaintiff sued under the First Amendment, the Equal Protection Clause, and Florida's Religious Free Restoration Act and sought a preliminary injunction. The district court denied the injunction, but the Eleventh Circuit reversed, finding that the outright ban would likely fail intermediate scrutiny because portable signs are a venerable form of speech, even though the ban was content-neutral.

### ***Dorman v. Chaplains Office BSO, No. 20-10770 (11<sup>th</sup> Cir., June 10, 2022)***

The court affirmed dismissal of a prisoner's claims under the First Amendment and the Religious Land Use and Institutionalized Persons Act (among others) relating to a requirement that the prisoner register his preference to celebrate Passover. It found that the registration requirement did not impose a substantial burden on the exercise of the plaintiff's religion, and it also found that posting notice of the 45-day requirement in an electronic kiosk was sufficient to satisfy procedural due process.

### ***NetChoice, LLC v. Attorney Gen'l, State of Florida, No. 21-12355 (11<sup>th</sup> Cir. May 23, 2022)***

The court affirmed in part and vacated in part the grant of an injunction against Florida's S.B. 7072, a state law that restricted how social media platforms “deplatformed” candidates or journalistic enterprises and required the platforms to make certain disclosures. The court agreed that many of the law's provisions – such as the content moderation provisions and the “thorough explanation” disclosure requirement – likely violate the First Amendment. It found it not substantially likely that the remaining disclosure provisions were unconstitutional.

### ***Speech First, Inc. v. Cartwright, No. 21-12583 (11<sup>th</sup> Cir. May 2, 2022)***

The court found that the plaintiff had standing to challenge both discriminatory-harassment and bias-related-incident policies. It also concluded that the district court abused its discretion in denying the plaintiff's motion to preliminarily enjoin the discriminatory-harassment policy, reasoning that the plaintiff was likely to succeed on the merits because the policy was overly broad and likely involved viewpoint discrimination. It remanded so that the district court could determine in the first instance whether to enjoin the bias-related-incident policy.

## Fraud

### ***Brown v. Phillip Morris USA, Inc., No. 15-13160 (11<sup>th</sup> Cir. June 30, 2022)***

In light of a recent Florida Supreme Court ruling limiting fraudulent concealment and conspiracy to fraudulently conceal claims, the court set aside verdicts for the plaintiff on those claims. It affirmed the jury verdict on negligence and strict liability, but remanded with instructions to reduce damages by comparative fault as found by the jury.



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**Rubenstein v. Yehuba, No. 20-11189 (11<sup>th</sup> Cir. June 29, 2022)**

The court affirmed fraud and conversion claims for the plaintiff and, on cross appeal, reversed the trial court's ruling that the plaintiff failed to mitigate damages. It also found that a civil RICO claim predicated on mail fraud, though dismissed as inadequately pleaded, was still substantial enough to create federal jurisdiction, and it found that the defendants waived any challenge to the district court's exercise of supplemental jurisdiction.

## RECENT CRIMINAL DECISIONS From the United States Supreme Court

### Prosecutorial Jurisdiction in Indian Reservation

**Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022)**

While the federal government maintains jurisdiction to prosecute crimes committed by non-Indians against Indians on an Indian reservation, the state holds concurrent jurisdiction over those crimes and may also prosecute them. Because the federal and state jurisdictions are concurrent, a state prosecution would not preclude an earlier or later federal prosecution arising from the same facts.

### Double Jeopardy; Prosecution in Indian Reservation

**Denezpi v. United States, 142 S. Ct. 1838 (2022)**

The Double Jeopardy Clause does not prohibit a defendant's prosecution arising from the same act for offenses defined by both tribal and federal law. The tribal and federal laws under which the defendant was prosecuted were defined by separate sovereigns and were proscribed separate offenses. Even if the prosecutors in the tribal courts exercised federal authority, the Double Jeopardy Clause does not prohibit successive prosecutions by the same sovereign, but instead prohibits successive prosecutions for the same offense.

### Distribution of Controlled Substance

**Ruan v. United States, 142 S. Ct. 2370 (2022)**

Once a defendant meets the burden of producing evidence that his conduct was "authorized" by federal law, the government prosecuting him under 22 U.S.C. § 841 for unlawfully distributing a controlled substance must prove beyond a reasonable doubt that he knowingly or intentionally acted in an unauthorized manner.

### First Step Act

**Concepcion v. United States, 142 S. Ct. 2389 (2022)**

Following the enactment of the federal Fair Sentencing Act of 2010, Pub. L. No. 111-220, that altered the disparity between punishment for crack and powder cocaine offenses without retroactivity, Congress enacted the First Step Act of 2018, Pub. L. No. 115-391, to reduce prison sentences of inmates convicted of certain crack cocaine offenses. The Court held that the district court entertaining an inmate's First Step Act motion to reduce his sentence may consider other intervening changes in the law or fact in adjudicating the motion.

### Hobbs Act

**United States v. Taylor, 142 S. Ct. 2015 (2022)**

The Hobbs Act, 18 U.S.C. § 1951, defines the federal offense of the attempted commission, conspiracy to commit, or commission of a robbery with an interstate component. An attempted to commit an offense under the Hobbs Act does not qualify as a "crime of violence" for sentence enhancement under 18 U.S.C. § 924(c)(3)(A). No element of the offense requires the prosecution to prove that the defendant used, attempted to use, or threatened to use force.

## From the Eleventh Circuit Court of Appeals

### First Step Act

**United States v. Brown, a.k.a. Fat Boy, No. 21-12127 (11<sup>th</sup> Cir. July 26, 2022)**

The district court did not err in denying the defendant's request for "compassionate release" under the First Step Act. The district court was entitled to place great weight on the defendant's criminal history, status as an armed career criminal, and seriousness of his offense.

## Confrontation Clause

**United States v. Streeter, No. 21-12584 (11<sup>th</sup> Cir. July 25, 2022)**

A recorded conversation between the defendant and a confidential informant who did not testify at trial was admissible to place the defendant's statements into context and did not violate the Confrontation Clause.

## Capital Murder; Execution

**James v. Attorney General, No. 22-12345 (11<sup>th</sup> Cir. July 26, 2022)**

The Court affirmed the denial of the inmate's request to stay his execution stemming from his capital murder conviction. He failed to timely elect to receive execution by nitrogen-hypoxia, a method that would have delayed his execution, and the Alabama Supreme Court's order setting the execution date did not violate due process or Alabama law.

## Federal Habeas; Ineffective Assistance

**Ramos v. Attorney General, No. 21-10006 (11<sup>th</sup> Cir. June 2, 2022)**

The District Court correctly denied habeas relief under 28 U.S.C. § 2254. The petitioner failed to show that the state court unreasonably determined that his attorney did not render ineffective assistance by not calling the victim's mother to testify at trial or in his cross-examination of the victim.

# From the Alabama Supreme Court

## Detainers; COVID

**Ex parte Brown, No. 1210172 (Ala. June 17, 2022)**

The supreme court's statewide suspension of jury trials resulting from the COVID pandemic tolled the 180-day time limit for bringing an inmate to trial under the Uniform Mandatory Disposition of Detainers Act, Ala. Code § 15-9-80 et seq., the codification of the federal Interstate Agreement on Detainers.

# From the Alabama Court of Criminal Appeals

## Speedy Trial

**Dennis v. State, CR-18-1211 (Ala. Crim. App. July 8, 2022)**

After weighing each of the factors of *Barker v. Wingo*, 407 U.S. 514 (1973), the court vacated the defendant's capital murder conviction on the ground that the delay of approximately eight years and one month between indictment and trial on the defendant's 1981 offense violated his right to a speedy trial.

## Probation Revocation; Lack of Hearing

**G.A.F. v. State, CR-21-0320 (Ala. Crim. App. July 8, 2022)**

The revocation of the defendant's probation was reversed due to the lack of a revocation hearing.

## Brady; COVID

**Nelson v. State, CR-20-0645 (Ala. Crim. App. July 8, 2022)**

Among other holdings, the court rejected the capital murder defendant's claim that the state violated *Brady v. Maryland*, 373 U.S. 83 (1963) in not disclosing a witness's statement. Even if it was presumed that the statement was suppressed, the defendant was aware of its substance – that an apartment into which he shot was occupied – and additional details related to activities in the apartment were not material to the case. It also found that the trial court's COVID protocols, including the use of television monitors for viewing of witnesses and a limitation placed on family member attendance, did not deny the defendant a fair trial.

## Self-Defense

**Thornton v. State, CR-19-0506 (Ala. Crim. App. July 8, 2022)**

A person who acts intentionally, reasonably believes that an act of self-defense is necessary under the circumstances, and accidentally causes another person's death, is entitled to a self-defense jury instruction. The denial of the instruction was harmless here, however, because the defendant's self-defense theory was incompatible with the factual finding underlying the jury's verdict finding him guilty of murder – that he intentionally killed the victim and did not intend to merely kick him.

## Split Sentence Act

**Thrash v. State, CR-20-0992 (Ala. Crim. App. June 3, 2022)**

The Split Sentence Act, Ala. Code § 15-18-8, did not authorize the trial court to impose a split sentence to include confinement for less than three years on the defendant's electronic solicitation of a child conviction. The trial court's revocation of the defendant's probation was therefore void and required a new sentencing hearing. ▲





## OPINIONS OF THE GENERAL COUNSEL

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# MCLE Compliance Should Be a Priority

The Alabama State Bar annually spends an inordinate amount of time, money and resources enforcing compliance with the Mandatory Continuing Legal Education (“MCLE”) mandates required by the Supreme Court of Alabama.

Each year, the state bar’s Licensing and Regulatory Division begins sending courtesy reminders (via both email and U.S. mail) to attorneys around September and October concerning their current MCLE obligations. Attorneys typically receive one more courtesy reminder in December. After December 31, attorneys receive deficiency notices if

they have failed to show proof of compliance with the previous year’s MCLE obligations. Upon receiving a deficiency notice, an attorney has until February 15 to file a “deficiency plan” (and pay a fee), explaining how they propose to become compliant in their MCLE obligations. The attorney has until March 1 to complete that deficiency plan. On certain occasions, this plan may be extended to allow for completion up to April 1. After April 1, as required by rule, the Licensing and Regulatory Division certifies a list of delinquent attorneys to the Office of General Counsel for prosecution.

Upon receiving the list of delinquent attorneys, a show cause order is issued, requiring proof of compliance within 60 days, as well as the payment of additional fees. At the end of the 60 days, all delinquent attorneys are summarily suspended from the practice of law until such time as they can become compliant. If the suspension exceeds 91 days, the lawyer may have to appear before a panel of the Disciplinary Board and request readmission pursuant to Rule 28 of the Alabama Rules of Disciplinary Procedure. In this hearing, the lawyer will have to prove by clear and convincing evidence why they should be readmitted to the practice of law and that he or she “has the moral qualifications to practice law in this state and that his or her resumption of the practice of law within the state will not be detrimental to the integrity and standing of the Bar or the administration of justice, and will not be subversive to the public interest.” Rule 28(c) Ala. R. Disc. P. In the event the attorney carries his or her burden in this proceeding, additional administrative fees will be required. As a prerequisite to readmission, a panel may also require additional oversight and training for the attorney.

This burdensome and expensive process can be avoided if an attorney will make CLE a priority in his or her practice. In the current environment, absent extenuating circumstances, there is almost no reason an attorney should be delinquent in a calendar year given the number of free CLE hours available to our membership.<sup>1</sup> There are a number of additional ways to gain hours beyond simply attending seminars and viewing presentations. Examples include:

1. An attorney can gain multiple credits for teaching an approved CLE course. The course must contain “thorough, high quality, readable, and carefully prepared written materials.” The presenting attorney can obtain six hours of credit for every one hour of instruction. If a presentation is made by a panel, the credits will be divided equally among panelists unless the MCLE Commission is advised otherwise;
2. An attorney can gain multiple credits through teaching a course in an ABA- or AALS-approved law school or any other law school approved by the MCLE Commission. The MCLE Commission will award six hours of MCLE credit for each hour of academic credit awarded by the law school for that course;
3. An attorney can author a significant research article that is accepted for publication in a national law journal. The MCLE Commission will award 12 hours of MCLE credit upon publication of the article;
4. An attorney can serve as a bar examiner in Alabama or in another state. The MCLE Commission shall award 12 hours of MCLE credit annually for such service during a given year;
5. An attorney can enroll for postgraduate classes at an accredited law school. The MCLE Commission will award one credit for each credit hour so earned;
6. An attorney can attend the annual business meeting of the Alabama State Bar. The MCLE Commission shall award two hours of MCLE credit to attorneys who attend;
7. An attorney can perform pro bono work through an approved pro bono provider. The MCLE Commission shall award one hour of MCLE credit for every six hours of pro bono work completed, for a maximum of three MCLE credits.

If you have any questions about MCLE or this article, please contact us at (334) 269-1515 or [ethics@alabar.org](mailto:ethics@alabar.org). ▲

## Endnote

1. The Alabama State Bar has a free MCLE platform with over 35 hours of available.





## LEGISLATIVE WRAP-UP

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*Ceremonial bill-signing of Act 2022-111 which authorized the placement of the Proposed Constitution of Alabama of 2022 on the ballot for ratification*

# THE ALABAMA CONSTITUTION OF 2022: A (Not Too) Short History of How It Came to Be Proposed

On November 8, 2022, the people of Alabama will have an opportunity to vote on the ratification of the proposed Constitution of Alabama of 2022. While the substantive differences encompassed in the proposed constitution compared to our current state constitution are minimal, its adoption would be a significant step forward in having a governing document that better reflects the Alabama of the 21<sup>st</sup> Century and that is accessible to all her residents. This process was made possible by the ratification of Amendment 951 in 2020 and the unanimous adoption of the proposed constitution by the legislature during the 2022 Regular Legislative Session. The proposed draft compiles 121 years of amendments that reflect the will of the voters to change the constitution over time.

## Background

When it was adopted, the 1901 Constitution was Alabama's fifth constitution in an approximately 40-year period (and sixth overall). Many extensive works have been written over the years, and it would be impossible to do justice to any reasonable level of background on it in this space,<sup>1</sup> but one significant feature is that it was written to greatly restrict the actions of state and local government absent a constitutional

amendment which in each instance requires voter approval. This restrictiveness led to a process whereby issues both great and small were addressed through the proposing of constitutional amendments. To date, the 1901 Constitution has been amended 978 times with nearly 750 of those amendments applying to a single county or municipality, including to allow things as simple as using public funds to build roads.

Many efforts over the past 50 years have been made to try and reform, reorganize, or re-write all or part of the document with mixed success. In 1973, then-Chief Justice Howell Heflin was successful in passing and ratifying a much-needed rewrite to update the Judicial Article (Article VI). In the early 1980s, the legislature passed a new proposed constitution, championed by Governor Fob James, only to have the Alabama Supreme Court hold that such a method failed to comport with any procedure provided in the constitution.<sup>2</sup> After that ruling, most efforts centered on a less comprehensive, article-by-article approach to updating the constitution. This included the ratification of a new Suffrage and Elections Article (Article VIII) in 1996 and the Constitutional Revision Commission of 2011,<sup>3</sup> which successfully led to the updating of the Separation of Powers (Article III), Impeachment (Article VII), Corporations (Article XII), and Banking (Article XIII) articles, along with several other revisions being ratified by Alabama voters.

## 2004 Statutory Recompilation

Perhaps the most impactful of the previous efforts from the perspective of organizing the hundreds of approved amendments was the 2003 passage of a statute directing the recompilation that led to the 2004 "Official Recompilation of the Constitution of Alabama of 1901" that has for nearly 20 years appeared as Volumes 1 and 2 of the Code of Alabama 1975 on lawyers' bookshelves and in Westlaw and Lexis.<sup>4</sup> The 2004 statutory recompilation of the 1901 Constitution placed all previous amendments into the constitution itself (just as we do with the Alabama Code each year), and we have continued to do so with subsequently ratified amendments. In this way, readers who have access to this version of the constitution are able to know what the current law is. The statewide provisions were placed in Volume 1. The statutory recompilation placed all the "local amendments" into Volume 2 and organized them by county. However, the full utility of this effort was never realized as neither the process nor the resulting document were ever ratified collectively, courts do not necessarily recognize it as the "official" constitution, and most people outside the legal world do not have regular access to Code books or online research services.

## Amendment 951

During the 2019 Regular Legislative Session, Representative Merika Coleman introduced a proposed constitutional amendment that was ultimately passed as Act 2019-271 and ratified as Amendment 951. The amendment created a new, narrow pathway to propose for ratification a recompiled constitution in light of the supreme court's 1983 *State v. Manley* decision. Amendment 951 provides as follows:

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(Continued from page 367)

The Legislature, upon the recommendation of the Director of the Legislative Services Agency through a proposed draft, may arrange this constitution, as amended, in proper articles, parts, and sections removing all racist language, delete duplicative and repealed provisions, consolidate provisions regarding economic development, arrange all local amendments by county of application during the 2022 Regular Session of the Legislature, **and make no other changes**. The draft and arrangement, when approved by a three-fifths vote of each house of the Legislature, through joint resolution, shall be submitted to the voters pursuant to Amendment 714 of the Constitution of Alabama of 1901, now appearing as Section 286.01 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, except that the text of the proposed constitution shall be published on the website of the Secretary of State and shall be made available, without cost, to any agency of the state or a municipality or county in the state that operates a public access website for publication on the website. The Constitution of Alabama, with the amendments made thereto, in accordance with this amendment, once approved by the voters, shall be the supreme law of the state. (emphasis added).

The overwhelming ratification of this amendment in 2020 created a new path forward.

### The Advisory Committee

On the heels of ratification of Amendment 951, the legislature passed Act 2021-523 (HJR 211) to create an advisory committee to work with the Legislative Services Agency to propose a draft document for consideration. The committee that was formed was chaired by Representative Coleman, vice-chaired by Senator Arthur Orr, and consisted of Senators Sam Givhan and Rodger Smitherman, Representatives Danny Garrett and Ben Robbins, and Anita Archie, Greg Butrus, Stan Gregory, and Aldos Vance. The committee met over the summer and fall of 2021 holding five public meetings to solicit input, consider recommendations, and recommend a path forward. All of the documents associated with the committee's work are posted online and are available today on the LSA website.

At the end of this process the committee was able to unanimously recommend a final document for consideration by the full legislature. During the 2022 Regular Legislative Session, the full legislature considered the joint resolution called for by Amendment 951 and adopted it unanimously in Act 2022-111 (HJR88) with the governor signing it on March 9, 2022.

### The Final Product

The final proposal is broken into two volumes: Volume 1, Statewide Provisions and Volume 2, Local Provisions. The statewide provisions are drawn from the 2004 statutory recompile. For attorneys looking at the statutory recompile in their law books, it will look largely the same. The local provisions are organized first by county, then by municipality, and finally by a uniform numbering system tied to common issues that many local governments have historically sought local amendments for (e.g., local government structure or personnel issues). The common issue organization in Volume 2 will allow users to quickly determine whether any particular county or municipality has a constitutional amendment addressing a particular subject. Similar to the codification of local laws in Title 45 of the Code of Alabama, 1975, this approach will be easier for Alabamians to use than the current listing of amendments for each county currently found in Volume 2 of the Code.

The placement of previously ratified constitutional amendments and the removal of previously repealed provisions redresses numerous instances of racist language, including the removal of Section 102 (miscegenation laws, repealed by Amendment 667) and nearly the entirety of the Suffrage Article (Article VIII). The Proposed Constitution of 2022 addresses three additional instances of racist language: Sections 32, 256, and 259. The text of the proposed changes is set forth in full below in strikethrough and underline to the current constitutional provisions:

#### Section 32 (as amended by Amendment 111)

That no form of slavery shall exist in this state; and there shall not be any involuntary servitude, ~~otherwise than for the punishment of crime, of which the party shall have been duly convicted.~~

#### Section 256 (as amended by Amendment 111)

It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, ~~in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.~~

The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such

conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.

~~To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.~~

Section 259 (as amended by Amendment 111)

~~All poll taxes collected in this state shall be applied to the support and furtherance of education in the respective counties where collected.~~

The final charge of Amendment 951 was to consolidate provisions regarding economic development. In the committee's judgement no further work on that charge was necessary after the arranging and placement of amendments and removal of repealed provisions and duplicative language.

## Conclusion

When the voters of Alabama prepare for the 2022 general election, in addition to deciding how to cast their vote for a full slate of state constitutional officers, state legislative seats, and members of Congress, they will face for the first time in 121 years the ratification of an Alabama Constitution. While this proposed constitution is very similar in substance to the document that has governed us for the past century, it would for the first time be without a confusing array of hundreds of amendments or facially racist language and would include an organized approach to presenting local constitutional provisions. ▲

## Endnotes

1. An excellent resource available for a quick study on Alabama's six constitutions is *We the People: Alabama's Defining Documents* by Scotty E. Kirkland. This book was published by the Alabama Department of Archives and History as part of the exceptional display of those documents during the Alabama Bicentennial celebration.
2. *State v. Manley*, 441 So.2d 864 (Ala. 1983).
3. This commission was created pursuant to Act 2011-197 (SJR82) sponsored by Senator Del Marsh. The commission was chaired by former Governor Albert Brewer with then-former Representative Paul DeMarco serving as vice-chair. The commission was staffed by the Alabama Law Institute under the leadership of Bob McCurley, Professor Howard Walthall, and Mike Waters.
4. See, Act 2003-312. The 2004 statutorily authorized recompilation was done under the direction and supervision of Jerry Bassett who served as the Code Commissioner of Alabama from 1991 until 2016.

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