THE ALABAMA LAWYER

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On The Cover

The Easley Covered Bridge is one of the many reasons that Blount County is such a beautiful place. This bridge was built in 1927, and it is rightly on the National Register of Historic Places.

–Photo courtesy of Greg Ward, Lanett

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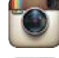
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PRESIDENT'S PAGE

C. Gibson Vance
gibson.vance@beasleyallen.com

Bar staff and leaders visiting with the 2nd Circuit

Reflections from the Road:
The Power of Lawyer Contributions

As I think back on the months since I was installed as the 147th president of the Alabama State Bar, there's a familiar Johnny Cash song lyric that keeps coming to mind.

> *"… [We've] been everywhere, man. [We've] been everywhere, man…"*

Since June, we have held Drive for Five events in about 25 circuits representing more than 40 of Alabama's 67 counties.

As we have driven down county roads, interstates, and through small downtown squares, I have realized how blessed we are in Alabama. The lawyers we meet and speak with have reminded me what dedicated and impressive professionals our members are.

In addition to growing their practices and careers, every attorney I know gives their time and talents in some way, either in an official pro bono clinic setting or just helping a neighbor in need. Right before I get up to speak at each event, I always look around the room and wonder how many baseball games or soccer matches have been coached by these men and women? How many local school boards, Chambers of Commerce boards, Lions Clubs, Kiwanis Clubs, or Junior Leagues do they lead?

I would argue that lawyers help their communities more than any other profession. Through the information our lawyers provide to us each year, we know that each member, on average, donates almost 50 hours a year to free legal service, and I have a feeling that number is much larger since not everyone reports or even keeps track of the good work they do for free. I can say with certainty that lawyers in every circuit are making an impact in their communities, both inside and outside the courtroom.

I was working on this very column when my predecessor, Taze Shepard, who served as the 146th president of the Alabama State Bar, passed away on October 10, after a courageous years-long battle with cancer.

Taze was the perfect example of a living a life dedicated to service to one's profession and community.

In a speech he gave as he was installed as president in July 2021, Taze said, "Serving in various leadership roles with the Alabama State Bar and my local bar, I have always found that I got a lot of satisfaction from helping people and being involved in something outside myself. "[In society], there is a lot of negativity, a lot of anger. And the truth is, we, as leaders of the bar, can inject more kindness and more love into what we do and how we treat people. If you want to be a better judge or a better lawyer, start by really working to be a better person."

If you had the good fortune of working with Taze during his long tenure of leadership in the Alabama State Bar, you know that you'd be hard-pressed to find anyone who had more passion for the bar and its members than Taze.

During his year as president, he never missed a beat, despite the debilitating side effects of his chemotherapy treatments and the other ways cancer attempted to keep him down.

He'd often tune into Zoom eating soup (out of necessity) and begin his meetings by praising his beloved wife, Pam, for her constant and loving care.

He never complained. He never lost hope. He never stopped working for the betterment of our profession.

He saw the world through a lens of positivity and gratefulness, often responding to those asking about his health with, "…but I have many wonderful friends and family, and I'm thankful for people like you who work hard and give me the opportunity to get up and get back to work today."

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(Continued from page 381)

He had a list of 41 goals and initiatives as president, and he didn't stop working until each one was accomplished. He called that list of goals his "Ideas from the Chemo Chair," and I think we all should be inspired by that. Rather than sit and feel defeated, or feel sorry for himself, he was dreaming about ways he could serve you better.

I encourage you to use that inspiration to energize you in whatever way you serve. Taze ran the race with endurance, as did so many attorneys who went before us. Now, we stand on their shoulders, and it is up to us to carry on their good work for the next leg of this journey.

We carry Taze's memory with us every day, especially as we serve members on our Drive for Five. If we haven't made it to your circuit yet, I look forward to the visits to come. I hope you'll join us and learn more about our mission to get lawyers the help they need. No matter what you're going through, the Alabama State Bar is here to help.

The 14th Circuit had a large turnout at the Drive For Five visit.

President Vance (left) and bar commissioner Tom Perry (standing) visiting with past President Shepard

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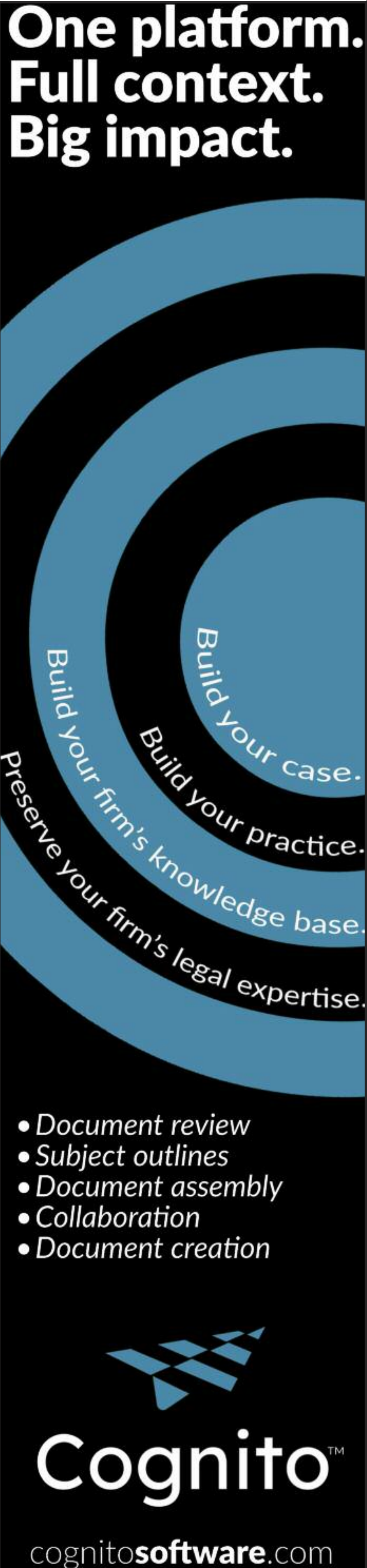

Terri Lovell
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Know Your Bar

Taze Shepard

October was filled with emotions at the Alabama State Bar. Our colleagues and friends who died during the past year were remembered at the Opening of Court ceremony. A few days later, we lost our friend and Past President Taze Shepard. His last year of life was devoted to his service of the Alabama State Bar. I am so grateful for each day that I was allowed to work with him and see many of his visions and ideas come to life. We ended the month celebrating the admission of new Alabama lawyers – no doubt, Taze was smiling down on these new lawyers entering this noble profession of service.

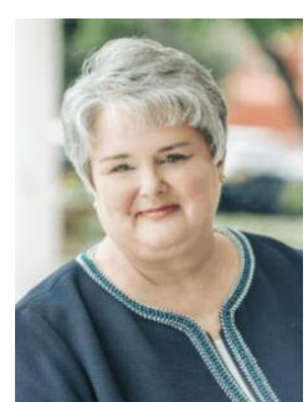
Taze Shepard and Terri Lovell not discussing bar business!

The Drive for Five visits across Alabama continue to be a source of inspiration to me. Not only have we shared the importance of being a healthy lawyer, but we also have connected with lawyers where they are. Many of you have been willing to share your thoughts on the challenges and opportunities facing your practices and the profession as a whole. I am encouraged by knowing that lawyers from all walks of life are joining together to find solutions and lead our profession in a positive direction.

The 29th Circuit joins President Vance on a recent Drive for Five.

Volunteer Lawyers Program/Alabama Bankruptcy Assistance Project (ABAP)

Continuing my quest to inform lawyers about the various services that your bar provides, in this issue I'm highlighting the work of the Alabama State Bar Volunteer Lawyers Program. Our longtime director, Linda Lund, leads the program by providing innovative ways for attorneys to serve their communities and low-income Alabamians who cannot afford civil legal services. Attorneys are asked to volunteer for two cases a year or 20 hours of service. Each day, attorneys Hilaire Armstrong (clinic coordinator) and Katarina Essenmacher (ABAP coordinator), along with our dedicated intake staff members, Debbie Harper and Carol Mott, aid those in need of a lawyer. Along with recruitment of volunteers, case development and management, clinic coordination, and oversight of local volunteer efforts and law student volunteers, our staff is providing hope to citizens across our state.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Mid-Year Meeting

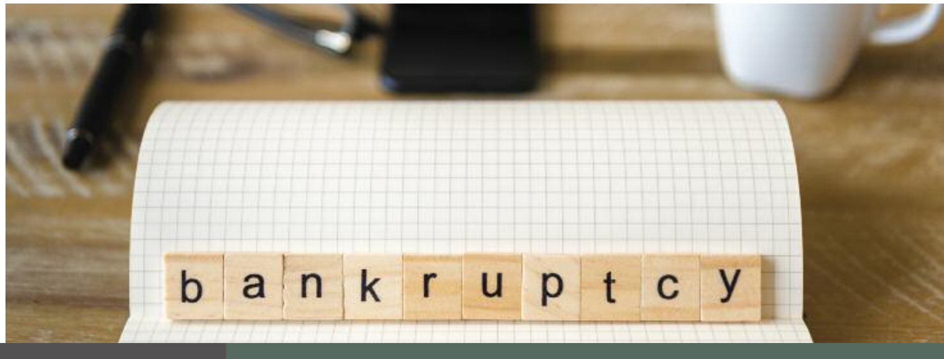
I look forward to seeing you at a Drive for Five visit in your local area and in Mobile for the Mid-Year Meeting at The Battle House Renaissance Mobile Hotel & Spa, January 18-20, 2023. The theme for this year's meeting is "Building Bridges to the New Normal." There will be outstanding speakers, programming, networking, Bench & Bar events, and even a little taste of Mardi Gras. ▲

Armstrong

Essenmacher

Harper

Mott



EDITOR'S CORNER

W. Gregory Ward
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Welcome to the November issue. We turn our attention this month to bankruptcy, a topic that we couldn't quite get to come together until Gary Sullivan agreed to help. And did he ever assemble a stellar cast of writers.

We begin with Eric Wilson's primer about the difference between chapter 7 and chapter 13. We hear those terms all the time, but do we really understand the difference? Eric, who has practiced bankruptcy law for many years, makes it simple and clear and understandable. See what you think *(page 390)*.

Our next article is by Bankruptcy Judge Clifton Jessup. Judge Jessup takes us through another term that is often heard but less often understood, the automatic stay. What is it? What impact does it have? And perhaps more importantly, how do I stay out of trouble when one is in place? He couldn't have done a better job at answering all these questions *(page 395)*.

We turn next to Judge Henry Callaway and Katarina Essenmacher. Judge Callaway and Kat teamed up to give us an overview of a program that too few know about – the Alabama Bankruptcy Assistance Project, or ABAP. ABAP, a joint project of the state's five VLP programs, finds, trains, and puts into place volunteer lawyers who agree to help people who need to file a chapter 7 bankruptcy but can't afford to. If you didn't know about this statewide program, read on *(page 400)*. I think you'll be impressed. And just maybe you'll want to sign up.

And just like in our September issue, we end not because our final article is the least important, but because it is the longest, with Tom Kendrick's excellent article, "Rebuttal: Alabama's Gubernatorial and Legislative Responses to the COVID-19 Pandemic Were Valid, Constitutional, and Appropriate" *(page 404)*.

As the title suggests, we were contacted about an article we published in September written by Dave Wirtes, Joe Steadman, Aaron Maples, and Joey Wirtes, "Are There Constitutional Issues with Alabama's Gubernatorial and Legislative Responses to the COVID-19 Pandemic?" 83 Ala. Law. 311 (Sept. 2022).

After we published that issue, Tom asked to file a rebuttal. The editorial board and I thought that was a great idea, and we were glad that Tom stepped up to the plate with such a well-written article. Between these two offerings we think you have a good idea about how these topics line up. We thought the last article might be cited to circuit and appellate judges, and I've no doubt that this will be, too. It couldn't have been better researched or better written.

Both sides of these issues have now been well-briefed, and we are happy that we could submit them to you. And, as you will remember from our comments in this column last time, we have now published several COVID-related articles.

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

Gary Sullivan – thanks again for helping put this together. To all our authors, we are in your debt.

Enjoy the articles. Email me at *wgward@mindspring.com* if you have questions or comments or want to join us as an author. We are always on the lookout for our next group of excellent writers.

And just wait until you see what we have planned for you in our January issue. ▲

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Notice of and Opportunity for Comment on Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. The public comment period is from Monday, December 5, 2022, to Wednesday, January 4, 2023.

A copy of the proposed amendments may be obtained on and after Monday, December 5, 2022, from the court's website at *http://www.ca11.uscourts.gov/rules/proposed-revisions*. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta, Georgia 30303. Phone (404) 335-6100.

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address, or electronically at *http://www.ca11.uscourts.gov/rules/proposed-revisions*, by 5:00 p.m. Eastern Time on Wednesday, January 4, 2023.

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Notice of Election and Electronic Balloting

Notice is given here pursuant to the Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners that the election of these officers will be held beginning Monday, May 15, 2023, and ending Friday, May 19, 2023.

On the third Monday in May (May 15, 2023), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 5, 2023) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 19, 2023) immediately following the opening of the election.

Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2023 and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. Such petitions must be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. on February 1, 2023.

Nomination and Election of Board of Bar Commissioners

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

8th Judicial Circuit
10th Judicial Circuit, Place 4
10th Judicial Circuit, Place 7
10th Judicial Circuit, Bessemer Cut-off
11th Judicial Circuit
13th Judicial Circuit, Place 1
13th Judicial Circuit, Place 5
15th Judicial Circuit, Place 5
17th Judicial Circuit
18th Judicial Circuit, Place 1
18th Judicial Circuit, Place 3
19th Judicial Circuit
21st Judicial Circuit
22nd Judicial Circuit
23rd Judicial Circuit, Place 1
23rd Judicial Circuit, Place 4
28th Judicial Circuit, Place 2
30th Judicial Circuit
31st Judicial Circuit
33rd Judicial Circuit
34th Judicial Circuit
35th Judicial Circuit
36th Judicial Circuit
40th Judicial Circuit
41st Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2023 and vacancies certified by the secretary no later than March 15, 2023. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 28, 2023).

Submission of Nominations

Nominating petitions or declarations of candidacy form, a high-resolution color photograph, and biographical and professional data of no more than one 8 ½ x 11 page and no smaller than 12-point type must be submitted by the appropriate deadline and addressed to Secretary, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 6 and 9. Petitions for these positions, which are elected by the board of bar commissioners, are due by March 31, 2023. All terms will be for three years.

Submission of Nominations

Nominee's application outlining, among other things, the nominee's bar service and other related activities must be submitted by the appropriate deadline and addressed to Executive Council, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

All submissions may also be sent by email to *elections@alabar.org*.

It is the candidate's responsibility to ensure that the executive council or the secretary receives the nomination form by the deadline.

Election rules and petitions for all positions are available at *https://www.alabar.org/about/board-of-bar-commissioners/election-information/*. ▲

Consumer Bankruptcy for the Non-Bankruptcy Lawyer:

The Nuts and Bolts of Chapter 13 and Chapter 7

By Eric M. Wilson

That dreaded word – "bankruptcy!"

No other area of practice quite strikes fear into the minds of state court practitioners and newbie attorneys than bankruptcy. The federal Bankruptcy Code[1] and the accompanying Federal Rules of Bankruptcy Procedure (that basically mirror their big brother – the Federal Rules of Civil Procedure) govern bankruptcy cases that are filed either on behalf of consumers or companies.

This article will try to demystify the basic components of consumer cases filed under chapter 7 or chapter 7. By explaining the basics of each, perhaps the state court practitioner will feel more at ease when one of their clients or cases intersects with a bankruptcy issue.

The General Chapters 1, 3, and 5

Chapters 1, 3, and 5 of the Bankruptcy Code contain provisions

that apply generally. Chapter 1[2] concerns general provisions – the most important provisions being section 105 which gives broad powers to the bankruptcy court and section 109 which outlines who may actually be a debtor. Chapter 3[3] concerns case administration focuses on the commencement of the case. Perhaps the most important and foundational aspect of any bankruptcy case – the automatic stay – is found at 11 U.S.C. § 362. The automatic stay is the immediate force field of protection that protects the debtor and the assets of the debtor from creditors. The automatic stay stops any and all actions against the debtor or asset of the bankruptcy estate in the collection of a PRE-petition debt. However, the automatic stay does have limits. The automatic stay does not apply to actions: to establish paternity; to establish or modify an order for domestic support; an action concerning child custody or visitation; an action to dissolve a marriage (unless it involves property division of the bankruptcy estate); actions regarding domestic violence; or criminal actions.[4] Chapter 5[5] deals with creditors, the debtor, and the estate. Important aspects in chapter 5 concern claims and claim status: secured vs. unsecured vs. priority claims.

Consumer Bankruptcy Option 1: Chapter 7 (Straight Bankruptcy)

Generally speaking, chapter 7 is what the layperson considers total bankruptcy or straight bankruptcy and is a liquidation of any non-exempt assets of the individual and a discharge of all debts that are dischargeable. In a chapter 7, the debtor will reaffirm or redeem (redemption is a very unlikely scenario in Alabama due to our limited exemptions) those secured debts that the debtor desires to keep and continue to pay directly to the current lien holder. Business entities cannot receive a discharge under chapter 7 – only individuals can.[6] Under Alabama law, each individual debtor is entitled to claim exemptions of $8,225 for personal property and $16,450 in homestead equity.[7] These amounts are doubled for a joint case where a husband and wife file together.

Reasons to File Chapter 7

What are some factors that determine whether someone should be directed toward filing a chapter 7? A debtor's amounts of non-exempt personal property and real property; amount of equity in home; amount of unsecured debt; monthly income and expenses; is the debtor current on the secured and exempt obligations that the debtor wishes to retain; the nature of the unsecured obligations (chapter 7 discharge vs. chapter 13 super-discharge); and does the debtor have any priority debts (such as child support or taxes). If the consumer is managing his secured debts (house and car) just fine, but is saddled with extraordinary credit cards, medical bills, or unsecured loans, he or she may want to file a chapter 7.

Attorneys' Fees for Chapter 7

Attorneys usually charge their attorney fee to be paid up front before the filing of the case. This can be a deterrent for some consumers that need a chapter 7 but are facing imminent garnishment and can't afford the up-front fee. In this instance, a debtor can file a chapter 13 for minimal up-front costs and then later convert their chapter 13 to chapter 7.

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Consumer Bankruptcy Option 2: Chapter 13

Chapter 13, often referred to as debtors' court, is simply a reorganization for individuals with regular income.[8] A chapter 13 bankruptcy gives the debtor the opportunity to adjust her financial affairs without having to give up or liquidate current assets. Rather than being designed to pay debts from liquidated assets, a chapter 13 case involves payments of debts from future income. The debtor is, for the most part, allowed to keep and use all assets, whether totally exempt or not, and to pay their secured debts and a percentage of unsecured debts over a plan lasting from 36 months to 60 months. After completion of the plan, the debtor receives a discharge similar to that of a chapter 7, yet broader in certain circumstances.[9] A benefit of chapter 13 is often lower payments on secured debts and no interest on unsecured and priority debts. These factors allow for the debtors, in theory, to reorganize their finances and regroup financially.

Chapter 13 is available to individuals (or married couples) with a regular source of income. Regular income can mean wages, alimony, and child support payments; governmental benefits; and, basically, any source of regular income. No creditor can take action against any of the debtor's property (i.e., repossession or foreclosure) without getting permission from the court to do so via a Motion for Relief from the Automatic Stay.

A chapter 13 bankruptcy gives the debtor the opportunity to adjust her financial affairs without having to give up or liquidate current assets.

Attorneys' Fees in Chapter 13

Attorneys get paid through the plan as a claim in the debtor's case. The current no-look fee for cases filed in the Northern District of Alabama, Western Division, is $3,500 for below-median-income debtors and $3,750 for above-median-income debtors.

Chapter 13 Current Monthly Income/ Means Test

One of the hurdles that may prevent a chapter 7 discharge or a less-than-100-percent chapter 13 discharge is the income of the debtor(s). The snap-shot test is the gross income for the six months preceding the filing of the bankruptcy.[10] If that number is below the state median for a comparably-sized family, then the debtor(s) qualifies. If that number is above the state median, then they must pass the multi-factor Means Test. Certain income does not have to be calculated in this number – such as Social Security disability.

Domestic Support and Bankruptcy

Child support and alimony are now considered together as a Domestic Support Obligation ("DSO"). DSO is defined in 11 U.S.C. § 101(14A) and is a debt in the nature of alimony, maintenance, and support. These debts are not dischargeable in either chapter 13 or chapter 7. Property settlements, incident to a divorce decree, are dischargeable in a chapter 13, but are not dischargeable in a chapter 7.[11] Thus, the distinction between a DSO and a non-DSO (i.e., a true property settlement) is an important distinction. The terms used or contained in the divorce decree do not necessarily govern the characterization of DSO versus property settlement. And the bankruptcy court and state courts have concurrent jurisdiction to determine this distinction. Factors include language used, parties' financial positions, amount of division, whether the obligation ends upon death or remarriage, frequency of payments, whether the agreement can be

modified, whether the agreement can be waived, and treatment for tax purposes. Thus, the treatment of the debt can have a huge impact on whether the debtor chooses chapter 13 or chapter 7.

Discharge Generally

While the automatic stay is the protecting provision, the discharge is the ultimate goal of almost any bankruptcy case – whether chapter 13 or chapter 7. The discharge provisions are § 1328 for chapter 13 and § 727 for chapter 7. The exceptions to discharge are found in § 523 and § 727. Common exceptions to discharge include domestic support obligations, certain tax debts, many student loan debts, and debts procured by fraud. It's a fascinating laundry list of what a debtor can't erase, and denying discharge typically takes an affirmative act on behalf of the objecting creditor in filing an adversary proceeding. An adversary proceeding is a trial in front of the judge and operates within the Rules of Bankruptcy Procedure and Federal Rules of Evidence.

Exemptions

A debtor can shield some or all of his unencumbered property by using exemptions available to him. A debtor's exemption situation is extremely important in advising a client which chapter he should file under. Section 522 of the Bankruptcy Code governs exemptions and gives the choice of state exemptions or federal exemptions. Alabama opted out of federal bankruptcy exemptions so property may only be claimed exempt under state law or federal law other than § 522(d). A brief overview of important exemptions is:

1. Homestead exemption of $16,450 per debtor[12]
2. Personal property exemption of $8,225 per debtor[13]
3. Total exemption for necessary wearing apparel (which has been construed to include a Rolex watch) and family portraits[14]
4. Total exemption for burial plots and church seats[15]
5. Total exemption for workers' compensation benefits[16]
6. Most all 401(k), IRAs, and ERISA pension funds *are* totally exempt.[17]

Under Alabama law, a debtor has a constitutional right to claim a homestead exemption.[18] Also, the Alabama Legislature codified the homestead exemption.[19] The property claimed as homestead must be the actual residence of the party claiming the exemption. The statutory homestead exemption establishes that a mobile home or similar dwelling that is the principal place of residence of the individual

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claiming the exemption may qualify as homestead. A similar dwelling has been construed to encompass house boats.[20]

Summary of Pros and Cons of Chapter 7 Versus Chapter 13

Financial Goals That Are Served by Filing a Chapter 7 Bankruptcy

- Receive discharge quickly (in about three months)
- Remove judgment liens from your home
- Reaffirm and keep good credit with your secured creditors
- Pay zero to unsecured creditors

Risks in a Chapter 7

- May lose to the trustee non-exempt property
- Lose control over lawsuits
- Stays on your credit for 10 years
- Likely can't get conventional financing on home for two years
- Income may be too high for Chapter 7
- Must be current on secured debts to keep and reaffirm

Financial Goals That Are Served by Filing a Chapter 13 bankruptcy

- Protect non-exempt property
- Lower monthly payments, reduce interest rates, extend repayment on secured debts
- May can remove junior mortgages on homestead
- May can value the vehicle and pay only what it is worth
- Reorganize and repay back child support or back taxes
- Stop foreclosure and allow 60-month plan to catch up

Risks in a Chapter 13

- If income changes, it could impact ability to pay the plan
- No discharge received until case is completed
- Stays on credit report for seven to 10 years

Conclusion

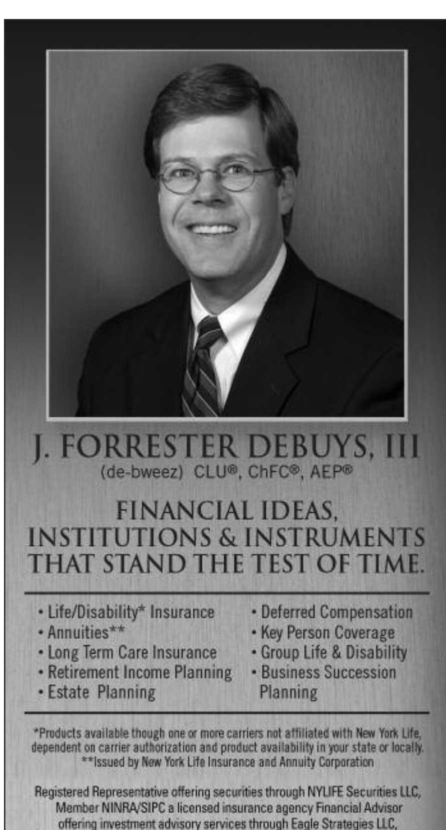
Bankruptcy is a unique and intricate legal field. However, bankruptcy should not intimidate state court practitioners. The goal of this short primer was to wash away some of the bankruptcy mystique. ▲

Endnotes

1. 11 U.S.C. § 101 - § 1532.
2. *Id. at* §§ 101-112.
3. *Id. at* §§ 301-366.
4. See 11 U.S.C. § 362(b)(2)(A).
5. *Id. at* §§ 501-562.
6. *Id. at* § 727(a)(1).
7. See Ala. Code § 6-10-2 and 6-10-3.
8. 11 U.S.C. §§ 1301-1330.
9. See *id. at* § 1328.
10. *Id. at* § 1325.
11. See *id. at* § 523(a)(15).
12. Ala. Code § 6-10-2.
13. *Id. at* § 6-10-6.
14. *Id. at* § 6-10-6, § 6-10-126.
15. *Id. at* § 6-10-5.
16. *Id. at* § 25-5-86.
17. *Id. at* § 19-3B-508.
18. See Ala. Const. of 1901, Art. X, § 205.
19. Ala. Code § 6-10-2 (1993).
20. *In re Scudder*, 97 B.R. 617 (Bankr. S.D. Ala. 1989); Travel Trailers (*In re Meola*, 158 B.R. 881 (Bankr. S.D. Fla. 1993); *In re Mangano*, 158 B.R. 532 (Bankr. S.D. Fla. 1993).

Eric M. Wilson

Eric Wilson is a solo practitioner and owner of Eric Wilson Law LLC in Tuscaloosa. He has represented consumer debtors in Chapter 7 and Chapter 13 since 1997. He graduated from Vanderbilt University and the University of Alabama School of Law, where he served as an editor for the *Alabama Law Review*.



The Automatic Stay: What Every Lawyer Should Know

By Judge Clifton R. Jessup, Jr.

The automatic stay of Section 362(a) of the Bankruptcy Code

gives a clear prohibition against collection activity after a bankruptcy case is filed. Because bankruptcy can intervene into many other areas of the law, every lawyer, even ones who never practice in the bankruptcy courts, should be aware of the general provisions outlined in this article so that they and their clients can avoid violating the automatic stay. Although this article contains a summary of key provisions of which every lawyer should be aware, it is not intended to provide an exhaustive treatment of the automatic stay, nor is it indicative of how the author may rule on any issue involving the automatic stay in a specific case.

The Automatic Stay Is a Federal Injunction Which Goes Into Effect Immediately Upon the Filing of Any Bankruptcy Petition

The bankruptcy injunction – called the *automatic stay* – has unique properties that differ

from court-ordered injunctions.[1] Court-ordered injunctions do not arise until a plaintiff files a motion and the issuing court determines that the relief sought is appropriate – they are not automatic. In contrast, because the automatic stay is a federal injunction imposed by congressional mandate, no judicial action is required for the stay to become effective.[2] The automatic stay arises by operation of law the moment any bankruptcy petition is filed.

The Automatic Stay Generally Prohibits the Commencement or Continuation of Any And All Actions to Collect a Prepetition Debt

Pursuant to the Bankruptcy Code, the filing of a bankruptcy petition has certain immediate consequences, including the imposition of the automatic stay which stays the commencement or continuation of virtually all judicial proceedings. Generally, pending state court litigation must be put on hold the moment the debtor files a bankruptcy petition. Certain litigation is exempted from this rule, as this article will address later.

Filing a bankruptcy petition also initiates the stay of any act to recover prepetition debts owed by the debtor. Essentially all collection activities must be immediately suspended when a bankruptcy petition is filed.[3] Accordingly, all creditor efforts to collect debts that were owed before the bankruptcy case was filed must stop. Fundamentally, the automatic stay is intended to maintain the status quo as it existed at the time the bankruptcy case was filed.

The Automatic Stay Benefits Not Only Debtors in Bankruptcy, But Also Creditors

In implementing the automatic stay, Congress sought to support the two core concepts in the Bankruptcy Code, which are: (i) to provide debtors with a fresh start, or the basic means of survival; and (ii) to ensure the equality of distribution among unsecured creditors. Congress was unequivocal in its stated intent that the stay must provide the debtor with breathing room from the financial distress that first drove the debtor to seek bankruptcy relief by immediately stopping "all collection efforts, all harassment, and all foreclosure actions."[4]

The commencement of a bankruptcy case also creates a bankruptcy estate, which is the basis for payment of creditors.[5] The bankruptcy estate includes essentially all the non-exempt property owned by the debtor as of the petition date and all of the debtor's rights to property.[6] Without the stay, creditors would be able to pursue their own remedies against the bankruptcy estate, and those who acted first would obtain payment in preference to and, to the detriment of, other creditors.[7] Thus, the stay both provides the debtor with an opportunity for a fresh start while facilitating the orderly distribution of assets to creditors by avoiding the race to the courthouse.

Thus, the stay both provides the debtor with an opportunity for a fresh start while facilitating the orderly distribution of assets to creditors by avoiding the race to the courthouse.

Any Action Taken in Violation of the Automatic Stay Is Void or Voidable

There is a split between the circuits concerning whether actions taken in violation of the stay are void or merely voidable.[8] An action that is void is without effect, whereas an action that is voidable takes effect unless objected to.[9] However, in the Eleventh Circuit, an action taken in violation of the automatic stay is void and without effect.[10] Because the automatic stay arises the moment a case is filed, and is effective, regardless of notice, any act that violates the stay is "void *ab initio*."[11] Thus, collection activity taken after the stay arises has no legal effect.

There are Specific Exceptions From the Operation of the Automatic Stay, Including Domestic Support Obligations, The Exercise of Police and Regulatory Powers, and Negotiable Instruments

All proceedings against a debtor are immediately stayed upon the commencement of a case, unless the action falls under one of the enumerated exceptions listed in 11 U.S.C. § 362(b) of the Bankruptcy Code. For example, various family law proceedings are excepted, including the commencement or continuation of an action: (i) to establish paternity; (ii) to establish or modify an order for domestic support; (iii) to establish child custody or visitation; (iv) to dissolve a marriage, except to the extent that the proceeding seeks to determine the division of estate property; and (v) to address domestic violence actions.[12]

Actions taken by a governmental unit or agency to enforce its police or regulatory powers are also excepted from the stay. For this exception to apply, the action taken by the governmental unit must generally effectuate some underlying public policy or protect public health and safety.

The commencement or continuation of criminal proceedings against a debtor are also excepted from the stay. It is important to distinguish between civil and criminal contempt actions, because a contempt action that is civil in nature *is* subject to the automatic stay. For example, the Eleventh Circuit affirmed an order finding that a debtor's former spouse willfully violated the stay by opposing his release from prison until he agreed to pay unpaid child support as a condition of release.[13] The contempt order at issue was found to be civil in nature, and not criminal.

Presenting a negotiable instrument, giving of notice, and protesting dishonor of such an instrument is also excepted from the stay.[14] Under this exception, courts have held that a payday loan lender may present a check for payment after the debtor files for bankruptcy without violating the stay.[15]

The Automatic Stay Can Be Lifted or Terminated by the Court for Cause

Because the distinction between what the stay covers and what is excepted under the Code is sometimes unclear, when in doubt a creditor should seek relief from the stay by filing a motion to lift the stay with the bankruptcy court. Under 11 U.S.C. § 362(d)(1), relief from the stay may be granted for cause. The term *cause* is not defined under the Bankruptcy Code and its application is determined by the bankruptcy court.

A secured creditor seeking stay relief to repossess collateral or to foreclose on real property generally must show that the debtor does not have any equity in the property, and that the property is not necessary for the debtor's effective reorganization. Cause may also exist if the debtor fails to maintain insurance for a lender's collateral or otherwise does not provide adequate protection to a secured creditor.

If the court determines that good cause exists to lift the stay, the prepetition state law rights of the parties are restored. The creditor is then entitled to enforce its rights outside of the bankruptcy court to the extent permitted by the order lifting the stay. For example, if the court determines that cause exists to lift the stay to allow a creditor to pursue the debtor's insurance policy, the order lifting the stay will generally limit any recovery to available insurance proceeds.

A Willful Violation of the Automatic Stay Involving an Individual Can Result in Compensatory Damages, Including Attorney Fees, and in Extreme Cases, Punitive Damages

A willful violation of the automatic stay can result in penalties on the violating party. The Eleventh Circuit has stated that the test for determining whether a willful violation of the stay exists is if the creditor "(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay."[16] Specific intent to violate the stay is not required.[17] If a creditor knows that a debtor has filed a bankruptcy petition or has reason to know and, thereafter, takes an action

that violates the stay, the action is willful under the Bankruptcy Code even if the creditor did not specifically act with the intention of violating the automatic stay. Formal notice from the bankruptcy court is not required. For instance, if the creditor calls the debtor and is informed that the debtor has filed bankruptcy, any further collection activity violates the stay.

If an individual is injured by a willful violation of the stay, an award of actual damages is mandatory, and punitive damages are possible in extreme cases.[18] Actual damages are compensatory in nature. For example, if a creditor violates the stay by repossessing the debtor's vehicle, the debtor will be entitled to compensation for any financial harm incurred due to the loss of transportation such as lost wages and costs incurred to obtain alternate transportation. In addition, under the Bankruptcy Code, actual damages include attorneys' fees and costs incurred in remedying the stay violation. Because attorneys' fees constitute actual damages for purposes of a willful violation of the stay, reasonable attorneys' fees and costs may be assessed.

The Automatic Stay Can Have Limited Duration in Certain Repeat Bankruptcy Cases

To prevent an abuse of the bankruptcy system by serial filers, the Bankruptcy Code limits the duration of the automatic stay if the debtor had one or more cases pending during the one-year period preceding the petition date. If the debtor had one case pending during the prior year, the stay terminates 30 days after the debtor commences the new case. The bankruptcy court may, however, extend the stay if the debtor demonstrates that the new case was filed in good faith.[19] A case is presumptively filed in bad faith if there has not been a substantial change in the debtor's financial or personal affairs since the dismissal of the prior case.[20] In a chapter 13 case, this means that the debtor must demonstrate that it has the ability to make payments under a confirmable plan because the debtor now has stable income resulting from some specific change in the debtor's financial or personal circumstances. A hearing to extend the stay must be completed within the 30-day period after the petition is filed.

In one of the only instances under the Bankruptcy Code, the stay does *not* go into effect if the debtor filed two or more petitions within the prior year.

In one of the only instances under the Bankruptcy Code, the stay does *not* go into effect if the debtor filed two or more petitions within the prior year. However, the bankruptcy court can still impose the automatic stay if the debtor files a motion within 30 days after the petition date and is able to rebut the presumption that the new case was filed in bad faith.

The Automatic Stay Terminates Automatically Upon the Closing or Dismissal of the Bankruptcy Case

Unless otherwise terminated by order of the bankruptcy court, the automatic stay remains in effect until the earliest of: (i) the time the bankruptcy case is closed; (ii) the time the bankruptcy case is dismissed; or (iii) the time the discharge is granted or denied.[21] The automatic stay which arises by operation of law, also can expire by operation of law when the bankruptcy case is closed or dismissed, or the debtor receives a discharge.[22]

The Automatic Stay, When Specifically Enforced, Can Only Be Ignored at Your Peril

The United States Supreme Court has stated that when a "statute's language is plain, 'the sole function of the courts' . . . 'is to enforce it according to its terms.'"[23] Because the stay is one of the fundamental protections provided by the Bankruptcy Code,

bankruptcy courts "will not hesitate to defend the integrity of the bankruptcy laws and the bankruptcy court, as well as the protections afforded to debtors who seek shelter under them," by enforcing the plain language of the statute.[24]

For example, the Eleventh Circuit affirmed an award of punitive damages in a case where a debtor informed a local creditor's manager that he had filed bankruptcy nine days after the creditor filed a small claims action and the creditor failed to dismiss the action until the debtor filed a bankruptcy complaint seeking damages. By using non-attorney staff to prosecute a small claims action for the admitted purpose of reducing legal fees and costs, the Eleventh Circuit found that the creditor acted with reckless disregard of the automatic stay.[25]

Dunning collection efforts are also not permitted. For example, in another state a creditor owed less than $1,000 was found to have violated the stay and was ordered to pay compensatory damages for emotional distress, $16,000 for attorneys' fees, and $3,000 in punitive damages for placing a sign in front of his business dunning the debtor in a small town where everyone knew the debtor.[26] In another case, *the bankruptcy court* awarded $50,000 in punitive damages, explaining that such amount was necessary to deter a debt collector from debiting a debtor's bank account and repeatedly calling the debtor, knowing she was in bankruptcy.[27] Finally, a bankruptcy court in another state recently awarded punitive damages of $500,000 as necessary to deter a mortgage servicer from committing further stay violations after evidence revealed the existence of unwritten and undisclosed policies, and express procedures adopted to narrow the sources of bankruptcy information that the servicer was willing to acknowledge, and resulted in the servicer's disregard for the debtor's bankruptcy status and the automatic stay.[28]

If there is any question regarding whether the automatic stay applies in a particular situation, a bankruptcy practitioner should be consulted immediately before taking any action to collect a debt owed by a debtor prior to the commencement of a case. ▲

Endnotes

1. *Jove Eng'g, Inc. v. I.R.S.* (*In re* Jove Eng'g), 92 F.3d 1539, 1546 (11th Cir. 1996).
2. *Bayview Loan Servicing LLC v. Fogarty* (*In re* Fogarty), 39 F.4th 62, 71 (2d Cir. 2022).
3. *Auriga Polymers Inc. v. PMCM2, LLC*, 40 F.4th 1273, at *2 (11th Cir. 2022).
4. H.R. Rep. No.95-595, at 6297 (1977).
5. *Auriga Polymers*, 40 F.4th, at *2.
6. *Id*.
7. H.R. Rep. No.95-595, at 6297.
8. *See Easley v. Pettibone Michigan Corp*., 990 F.2d 905, 911 (6th Cir. 1993) (joining the Fifth Circuit and adopting minority view that actions taken in violation of the stay are voidable).
9. 3 Collier on Bankruptcy ¶ 362.12 (Richard Levin & Henry J. Sommer eds., 16th ed. 2022).
10. *U.S. v. White* (*In re* White), 466 F.3d 1241, 1244 (11th Cir. 2006) (citing *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982)).
11. *Alley Cassetty Cos., Inc. v. Wren* (*In re* Wren), 502 B.R. 609, 612-13 (N.D. Ga. 2013) (quoting *In re* Peralta, 317 B.R. 381, 389 (9th Cir. BAP 2004)).
12. 11 U.S.C. § 362(b)(2)(A)-(B).
13. *Russell v. Caffey* (*In re* Caffey), 384 Fed. Appx. 882 (11th Cir. 2010).
14. 11 U.S.C. § 362(b)(11).
15. *Blasco v. Money Servs*. (*In re* Blasco), 352 B.R. 888 (Bankr. N.D. Ala. 2006).
16. *Jove Eng'g, Inc. v. I.R.S.* (*In re* Jove Eng'g), 92 F.3d 1539, 1555 (11th Cir. 1996).
17. *In re White*, 410 B.R. 322, 326 (Bankr. M.D. Fla. 2009).
18. 11 U.S.C. § 362(k).
19. *Id. at* § 362(c)(3)(B).
20. *Id. at* § 362(c)(3)(C)(i)(III).
21. *Id. at* § 362(c)(2)(A)-(C).
22. *Smith v. HSBC Bank USA, N.A.,* 775 Fed. Appx. 492 (11th Cir. 2019).
23. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6(2000) (quoting *U.S. v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989)).
24. *In re* White, 410 B.R. at 328.
25. *Parker v. Credit Cent. South, Inc.* (*In re* Parker), 634 Fed. Appx. 770 (11th Cir. 2015).
26. *Collier v. Hill* (*In re* Collier), 410 B.R. 464 (Bankr. E.D. Tex. 2009).
27. *Campbell v. Carruthers* (*In re* Campbell), 553 B.R. 448 (Bankr. M.D. Ala. 2016).
28. *In re Moon,* No. 13-12466, 2022 WL 2951490 (Bankr. D. Nev. June 13, 2022).

Judge Clifton R. Jessup, Jr.

Judge Clifton Jessup was appointed United States Bankruptcy Judge for the Northern District of Alabama, Northern Division, in 2015. Before that, he practiced with Greenburg Traurig LLP in Dallas, where he concentrated on business reorganization and bankruptcy. With 35-plus years of experience, Judge Jessup represented secured creditors, unsecured creditors, committees, equity holders, debtors, and trustees in federal bankruptcy cases in over 37 states and Puerto Rico. He also represented purchasers of assets in bankruptcy cases and served as examiner and mediator in many cases.

Too Broke to File Bankruptcy:

Why We Need the Alabama Bankruptcy Assistance Project

By Katarina A. Essenmacher and Judge Henry A. Callaway

It's a common scenario. Suzy[1] works hard at her low-paying job and is keeping her head above water. She rents an apartment or trailer; her car is a beater. She lives paycheck to paycheck, but she is keeping the lights on and her children fed.

But then something happens. Maybe Suzy didn't respond when she got sued by a debt buyer on an old written-off credit card debt, and the debt buyer is garnishing her wages. Or Suzy's hours at work got cut. Or one of her children got sick, running up medical bills and making Suzy miss work. Now Suzy can't afford a garnishment or take the relentless collection phone calls.

Suzy is an honest but unfortunate debtor who needs to file chapter 7 (liquidation) bankruptcy to stop the collections and make a fresh start. So that's obviously what she should do – right? Right? The problem is that Suzy is too broke to file a chapter 7 bankruptcy.

Upfront Attorney's Fees Create a Hurdle to Filing Chapter 7

Suzy can't afford the attorney's fees to file chapter 7. There is no provision in the Bankruptcy Code for paying chapter 7 attorney's fees through a bankruptcy. A chapter 7 bankruptcy usually results in the debtor being discharged (released) from most kinds of pre-bankruptcy debt. As a result, many courts hold that a debtor's agreement to pay her bankruptcy attorney is also discharged and thus unenforceable,[2] leaving an attorney with no recourse even if the attorney agrees to be paid later. Understandably, almost all attorneys thus want to be paid up front to handle a chapter 7 bankruptcy.

An informal survey of chapter 7 attorney's fees a few years ago in the Southern District of Alabama showed that fees generally ranged from $800 to $1,500, with an average of about $1,000. It's almost impossible for many low-income debtors – especially ones being garnished or who are under other creditor pressure – to save enough to pay an attorney to file chapter 7.

The Alternative – Filing a Chapter 13 Bankruptcy – Is Not For Everyone

Unlike chapter 7, in a chapter 13 (wage-earner reorganization), Suzy could pay her attorney's fees through the chapter 13 plan payments. However, chapter 13 has disadvantages that may outweigh its benefits. While chapter 13 can be a useful tool for saving an auto loan or home mortgage in default, chapter 13s are generally more expensive than chapter 7s and prone to being dismissed before the reorganization is complete. The debtor must either pay all debts in full or pay all of his net income into the plan for three to five years. And the attorney's fees are much higher in chapter 13s; the court-authorized "no-look" chapter 13 attorney's fees in Alabama are currently around $4,500.

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Phillip McCallum brings to every mediation a wealth of experience, creativity, and credibility and the ability to build rapport and relationships with people from all walks of life. Phillip's value as a mediator is enhanced by his experience in leading a successful trial firm, litigating disputes on behalf of businesses and individuals, and achieving settlements in a variety of areas. Phillip is a past president of the Alabama State Bar and is a member of the Alabama Academy of Attorney Mediators.

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About 70 percent of the bankruptcies filed in Alabama are chapter 13s, compared with about 30 percent nationwide.[3] About half of the chapter 13 cases in Alabama fail – mostly because the debtors cannot make their plan payments.[4] And the poorest counties have the highest percentage of chapter 13s – the opposite of what you would expect. As of this writing in the fall of 2022, Judge Callaway has 24 chapter 7 cases and 1,027 chapter 13 cases pending in the Southern District's Northern (Selma) division, which includes some of the poorest counties in the United States.

The result of this disparity is that the poorest debtors often can't file bankruptcy, or they get pushed into the more expensive, problematic chapter 13s. This is a national problem not limited to Alabama, but it is exacerbated here by the state's relatively low exemptions and high poverty rate.

That's where the Alabama Bankruptcy Assistance Project comes in.

What is the Alabama Bankruptcy Assistance Project (ABAP)?

ABAP is a statewide project created to help debtors who need a chapter 7 bankruptcy but can't afford the attorney's fees to file. All five volunteer lawyer programs in the state participate, enabling ABAP to serve each of Alabama's 67 counties.

ABAP serves clients whose income is below 125 percent of the federal poverty level (currently $1,416 a month for one person and $2,891 for a family of four). Through its roster of dedicated volunteer attorneys, ABAP provides representation in chapter 7 bankruptcy cases, almost all of which are no-asset cases in which the debtor doesn't have any non-exempt assets to distribute to creditors.

ABAP is a statewide project created to help debtors who need a chapter 7 bankruptcy but can't afford the attorney's fees to file.

ABAP also provides educational materials to help clients better understand their debts and options for addressing their situation – not just bankruptcy. ABAP hosts community education events about financial literacy and different types of debt relief. Attendees can talk with an attorney about how to proceed with managing their own debts and get legal assistance if they need it.

In addition, ABAP provides resources for attorneys who want to learn more about bankruptcy practice. These resources include free CLE trainings about bankruptcy basics and court-specific guidebooks with detailed information about the different bankruptcy courts in Alabama.

How does ABAP work?

The process is simple for both clients and volunteer attorneys. Prospective clients can contact either their local volunteer lawyers program or the ABAP coordinator directly. The VLP intake specialists collect information from the client and send it to ABAP.

The ABAP coordinator first determines whether the client is eligible for a chapter 7 bankruptcy. What is the source of the client's debts, and are they dischargeable? Is the client ineligible to receive a discharge because of previous bankruptcies? The coordinator then works with the client to decide whether a chapter 7 bankruptcy is in the client's best interest. What are the client's financial goals, and will a chapter 7 help him or her achieve them? Does the client have a home with equity that will be jeopardized by a chapter 7? Answering these questions helps determine the appropriate course of action.

If filing chapter 7 is not the best way to help the client, ABAP provides advice and refers the client

to other resources. For example, a client who needs debt relief but has too much equity in his home for a chapter 7 may be better served by a chapter 13 bankruptcy.

If the client decides to file chapter 7, the ABAP coordinator contacts a volunteer attorney to see if he or she can accept the client's case. If so, ABAP sends the client's documents and case information to the attorney. The ABAP coordinator will prepare a draft of the client's petition and schedules at the request of the volunteer attorney. The attorney will thus have a head start and normally be ready to file the chapter 7 with minimal additional front-end work.

ABAP volunteers are asked to take only one or two cases a year, although they can accept more. An attorney receives one hour of CLE credit for every six hours of pro bono work, up to three CLE hours a year. Volunteers specify the counties in which they are willing to accept cases, and they can include other limitations. ABAP volunteers are covered by the program's malpractice insurance and can use its BestCase software license to prepare and file documents with the bankruptcy court. By joining the list of volunteers, an attorney is not obligated to take a referred case. A volunteer who can't accept a client at the time of a referral can always decline, and ABAP will place the client with another attorney.

Why is ABAP important?

Bankruptcy is complicated, and it is difficult for a debtor to successfully file and receive a discharge without an attorney. As noted above, a client who can't afford the upfront attorney's fees for a chapter 7 often either does nothing (and continues to suffer from debt collection) or files a chapter 13, where the fees are paid through the chapter 13 plan. A chapter 13 bankruptcy can be a useful tool for a client with regular income trying to protect a car from repossession or house from foreclosure. But as discussed above, chapter 13s are generally more expensive for the debtor and much more prone to failure.

This problem isn't the fault of the debtors or the attorneys. It results from a gap in the bankruptcy system. With help from volunteer attorneys, ABAP can fill that gap. As Alabama attorneys, we can do better for our community and for the clients who rely on us. ABAP provides access to pro bono chapter 7 services by developing a roster of volunteer attorneys who are willing to take just two cases per year to ensure that low-income debtors in Alabama get the relief they need. If we all do a little, together we can do a lot.

How do I get involved?

Joining ABAP as a volunteer is easy. You can find out more and sign up to volunteer on ABAP's website, *https://www.alabar.org/abap/*. ABAP also hosts CLEs and provides support to help attorneys get involved in bankruptcy practice. If you want to learn more about ABAP or are new to bankruptcy practice and would like information for upcoming ABAP CLE trainings, contact the ABAP coordinator at (334) 517-2108. ▲

Endnotes

1. Suzy is a fictional character, constructed to represent anyone who might need this service.
2. *See, e.g.*, *Walton v. Clark & Washington, P.C.*, 454 B.R. 537 (Bankr. M.D. Fla. 2011); *In re Waldo*, 417 B.R. 854 (Bankr. E.D. Tenn. 2009).
3. U.S. Bankruptcy Caseload Explorer, *https://jnet.ao.dcn/resources/data-analysis/us-bankruptcy-caseload-explorer* (last visited August 23, 2022). For the four years ending March 31 in 2019-2022, the percentage of cases filed under chapter 13 for the Southern District ranged from 62.9 percent to 73.1 percent; for the Middle District, from 71.7 percent to 77.9 percent; and for the Northern District, from 42.8 percent to 53.8 percent. The percentage of cases filed under chapter 13 nationwide for the same periods ranged from 25.2 percent to 37.7 percent.
4. *Id.* For the four years ending March 31 in 2019-2022, the discharge rate in chapter 13 cases in the Southern District ranged from 43.1 percent to 59.1 percent; for the Middle District, from 49.6 percent to 63.5 percent; and for the Northern District, from 38.1 percent to 51.8 percent.

Katarina A. Essenmacher

Katarina Essenmacher is a graduate of the University of Alabama School of Law and was admitted to the Alabama State Bar in 2021. She serves as the coordinator for the Alabama Bankruptcy Assistance Project, which provides pro bono Chapter 7 bankruptcy services to low-income Alabamians.

Judge Henry A. Callaway

Judge Henry Callaway has been a U.S. Bankruptcy Judge for the Southern District of Alabama since 2015. Before that, he practiced bankruptcy and litigation in the Mobile office of Hand Arendall. Judge Callaway served as a bar commissioner, member of the state bar disciplinary commission, president of the Mobile Bar Association, chair of the South Alabama Volunteer Lawyers Program, and chair of the Alabama Access to Justice Commission. He graduated from Harvard University and Vanderbilt Law School.

IMMUNITY TO
CARE PROVIDERS
WHO
PROVIDE CARE
ARGUA
ED BY COV
EXPEDITED LICENSURES OR
TEMPORARY PERMITS FOR
MEDICAL PROFESSIONALS

REBUTTAL: Alabama's Gubernatorial and Legislative Responses to the COVID-19 Pandemic Were Valid, Constitutional, and Appropriate

By Thomas A. Kendrick

As a lawyer who defends healthcare providers that continued to care for patients during the COVID-19 pandemic, I take a different view from my opposing counsel who published an article in the September edition of *The Alabama Lawyer.*[1] *See* David Wirtes, Jr., Joseph D. Steadman, Aaron N. Maples, & Joseph D. Wirtes, *Are There Constitutional Issues with Alabama's Gubernatorial and Legislative Responses to the COVID-19 Pandemic?*, 83 Ala. Law. 311 (Sept. 2022) (the "September Article").

Executive Summary

While the September Article contends that Governor Ivey's May 8, 2020, emergency order (an executive order that provides certain protections to healthcare providers and businesses from COVID-19 lawsuits) violates the separation-of-powers test under *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952), it fails to state the test. Under *Youngstown* and the cases applying it, an executive order does not impinge on the legislative power when the legislature authorizes the executive to issue the order. After

Youngstown, the Alabama Legislature passed the Alabama Emergency Management Act [AEMA] that expressly authorizes the governor to issue orders to address emergency conditions, including a public health emergency and an epidemic – exactly what Governor Ivey's May 8, 2020, order did.

The September Article asserts that Governor Ivey's May 8, 2020, order violated § 21 of the Alabama Constitution by suspending existing law. But the article fails to recognize that it was not the governor who suspended laws, but the legislature that passed the AEMA that provides that laws inconsistent with an emergency order "shall be suspended" during the temporary period of the emergency. This was consistent with the case law and the constitution's provision "[t]hat no power of suspending laws shall be exercised <u>except by the legislature</u>." Ala. Const. § 21 (1901) (emphasis added).

And the September Article argues that AEMA violates the non-delegation doctrine by delegating to the governor powers that are too broad. This ignores that the AEMA limits the power delegated to the governor to issue emergency executive orders to the specific time when a specific emergency is declared and to measures that address only that emergency. Further, Governor Ivey's May 8, 2020, order provided limited protections only for a public health emergency (i.e., the COVID-19 pandemic), only during the COVID-19 state of emergency, and only from COVID-19 lawsuits that the governor found threatened the ability of healthcare providers and businesses to remain open and to re-open to serve patients and consumers.

In fact, in 2021, the legislature passed the Alabama COVID Immunity Act that specifically adopted into statutory law the specific protections granted by Governor Ivey's order. In addition to ignoring the effect of this ratification, the September Article ignores that the overwhelming number of appellate decisions addressing the non-delegation doctrine have rejected its application, including those decisions considering COVID-19 emergency orders.

Governor Ivey's May 8, 2020, order allowed the standard of care to meet what the hospital and nurses could actually do during the emergency, so they could continue treating patients without the threat of being sued.

* * *

Every time there is a hurricane, tornado, or other natural disaster, the president and Alabama's governor issue executive orders to address the emergency. Emergency orders issued under the AEMA can waive the licensing requirements for out-of-state nurse practitioners to come to Alabama to help in an emergency,[2] waive hours-of-service limitations for truck drivers delivering emergency supplies to disaster areas,[3] and get emergency supplies delivered to families who need it most.[4]

In Alabama, the legal authority for these orders is the Alabama Emergency Management Act of 1955 ("AEMA"), Ala. Code §§ 31-9-1 to -25. Through the AEMA, the legislature has authorized the governor to declare a state of emergency, § 31-9-8(a), and to issue emergency orders "necessary" to address the emergency, § 31-9-6(1) and -8. Under the AEMA, the governor's emergency orders have the "force and effect of law" and "suspend" inconsistent laws, § 31-9-13, but these orders only last as long as the emergency does. The AEMA makes particularly good sense given that we have a part-time legislature, and emergencies don't necessarily follow the legislative calendar.

Following the Trump administration's declaration of a state of emergency for the nation based on the COVID-19 pandemic,[5] Governor Ivey declared a state of emergency for Alabama based on COVID-19 on March 13, 2020. In that order, the governor approved the use of "alternative standards of care" by healthcare providers. For example, under existing Alabama law, in a non-emergency situation, a hospital may have enough nurses to check on patients once every hour. By contrast, in an emergency that triples the number of patients, the hospital could not live up to that non-emergency standard of care. Governor Ivey's May 8, 2020, order allowed the standard of care to meet what the hospital and nurses could actually do during the emergency, so they could continue treating patients without the threat of being sued.

Other orders that Governor Ivey issued during the COVID-19 emergency include:

- Modifying out-of-state licensing requirements to allow healthcare professionals from other states to work in Alabama.[6]
- Allowing governmental bodies to meet by video conference so long as certain open meeting requirements are satisfied (e.g., Zoom).[7]
- Postponing deadline for state tax filing.[8]
- Allowing witnesses to be sworn and documents to be notarized using video (e.g., nursing home patients executing a will).[9]
- Postponing the primary runoff date to prevent voters from standing in line next to each other at the beginning of the COVID-19 crisis.[10]

In March 2020, Secretary of State John Merrill requested an opinion from Attorney General Steve Marshall on the validity of an emergency order postponing the March 31, 2020, runoff election to July 14, 2020. Attorney General Marshall concluded:

> "The Governor, therefore, has the authority under the AEMA to declare a state of emergency as a result of the emergence of the COVID-19 virus, and she has the authority to postpone a primary runoff election to protect the public health and safety during the proclaimed emergency. Should the Governor exercise her authority to postpone the primary runoff election, any existing law setting a contrary date for the primary runoff election would be suspended by the AEMA."[11]

On May 8, 2020, Governor Ivey issued an emergency order under the AEMA that helped healthcare providers to continue to operate and businesses to reopen during the COVID-19 emergency. The order recognized that:

- "[T]he various practices put into place to slow the spread of COVID-19 have been helpful from a public health perspective, but they have also required the closure of numerous businesses and resulted in damage to the economy of the State and the Nation and caused economic hardship to working people and their families";
- "[S]tudies have shown that mortality rates increase significantly during periods of high unemployment";
- "[O]n April 28, 2020, the Alabama State Health Officer, with [the governor's] support, issued an order to begin the process of allowing businesses and the economy in Alabama to reopen consistent with preserving the public health";
- "[A]s a result of this continuing uncertainty, businesses have been reluctant to reopen–or, where partially open, to fully reopen–for fear of lawsuits and the risk of the associated expense and liability";
- "[The governor's] office has worked with representatives of business and industry to obtain information on concerns and challenges associated with re-starting the economy of this State."[12]

The May 8, 2020, order also found:

- "That COVID-19 cases have put, and will continue to put, a significant strain on the health care facilities, health care providers, and health care resources of this State and that COVID-19 cases have undermined, and will continue to undermine, the ability to deliver patient care or obtain certain equipment or materials in the traditional, normal, or customary manner"; and
- "That COVID-19 has affected, and will continue to affect, our health care system in unique and potentially devastating ways, and our health care facilities, health care professionals, and their supporting workers need protection to respond to this pandemic and to do what they can do to continue to provide treatment and services for the people of Alabama."[13]

The May 8, 2020, order recognized that healthcare providers and businesses were subject to Alabama Department of Public Health orders setting out COVID-19 protocols to protect patients, employees, and customers. The order provided healthcare providers and businesses with protections specifically designed to help them remain open and to reopen during the COVID-19 emergency so they could provide healthcare services and other needed goods and services. The three basic protections are:

- Protection for healthcare providers and businesses from COVID-19 negligence claims, but no protection for wantonness or recklessness claims;
- Requiring COVID-19 claims against a healthcare provider or business to be proven by "clear and

convincing" evidence, instead of the "more likely than not" standard of proof; and

- Allowing recovery of only economic damages. This means that punitive and non-economic damages are not available. For wrongful death claims, however, punitive damages are available.[14]

Further, in May 2020, Senator Arthur Orr offered Senate Bill 330 to provide the same protections that Governor Ivey's order did. Because of COVID-19, however, the senate adjourned without voting on that bill and many others. As soon as the legislature reconvened in 2021, Senator Orr and Representative David Faulkner introduced a bill providing the same protections as Governor Ivey's order and doing so retroactively. The bill passed the House by a vote of 87-4 and is now the Alabama COVID Immunity Act (the "ACIA"), Ala. Act 2021-4. The legislature authorized Governor Ivey's emergency order on the front end with the AEMA of 1955 and approved it on the backend with the ACIA in 2021.

* * *

But did the governor, the attorney general, and the legislature properly consider the Alabama Constitution with respect to the AEMA, the emergency orders, and the ACIA? Yes, it turns out they did.

I. Governor Ivey's Emergency Order Passes The *Youngstown* Separation-of-Powers Test Because the Order Was Authorized By the Legislature

A. Governor Ivey's May 8, 2020, Emergency Order Complied with the *Youngstown* Separation-of-Powers Test Because It Was Authorized by the Alabama Emergency Management Act

The September Article argues that Governor Ivey's emergency order violates the separation of powers principle, but the U.S. Supreme Court's seminal case says it does not. The case that established the constitutional separation-of-powers test for executive orders is *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952). President Truman issued an executive order to seize steel mills to prevent a strike that would have negatively affected the production of ammunition and other military supplies during the Korean Conflict. The Supreme Court concluded that the executive order was not authorized by the Taft-Hartley Act for which Congress had specifically considered and rejected an amendment that would have allowed presidential seizures. Thus, the executive order impinged on legislative power and violated the constitution.

The September Article states: "In numerous respects, Governor Ivey's actions are similar to those taken by President Truman in *Youngstown*." Sept. Art. at 322. Right case; wrong test. The *Youngstown* separation-of-powers three-part test for executive orders is as follows:

Executive Order	*Youngstown* Test for Validity of Executive Orders
Valid	"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . ."
Questionable	"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."
Invalid	"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ." *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

The three-part test set forth by Justice Robert Jackson has been recognized as the standard by federal and Alabama appellate courts.[15]

Unlike President Truman's 1952 order in Y*oungstown* that was not authorized by the Taft-Hartley Act (Congress had rejected giving the president the seizure power), Governor Ivey's 2020 order was expressly authorized by the AEMA. Indeed, the legislature even ratified the specifics of Governor Ivey's order after the fact.

Three years after the 1952 *Youngstown* decision, the Alabama Legislature took a cue from that decision and enacted the AEMA of 1955 to authorize Alabama governors to declare states of emergency and to issue executive orders to address those emergencies. Governor Ivey acted within the AEMA when she declared a state of emergency for the COVID-19 pandemic and issued temporary orders to address various aspects of that specific emergency.

B. The Alabama Cases Do Not Hold Otherwise

The September Article points out that in *Hawkins v. James*, 411 So. 2d 115 (Ala. 1982), the Alabama Supreme Court held unconstitutional an executive memorandum that directed state department heads not to recommend a waiver for employees who wanted to work past age 70 without approval of the state finance director. Sept Art. 320-21. But in *Hawkins*, there was no emergency. And the statute at issue in *Hawkins*, which allowed a waiver of the 70-year age limitation, did not authorize the governor to issue an executive order to affect the waiver process.

Unlike the statute in *Hawkins*, the AEMA **does authorize** the governor to issue orders to address emergencies: "The Governor is authorized and empowered: (1) *To make*, amend, and rescind the *necessary orders*, rules and regulations to carry out the provision of this article . . ."[16] "[T]he Governor shall have and may exercise the following additional emergency powers: . . . (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*."[17]

Suspended means that a law inconsistent with an emergency order is displaced and has no effect only for the temporary period of the emergency and comes back into force automatically when the emergency ends.

The September Article further relies on *Jetton v. Sanders*, 275 So. 2d 349 (Ala. Civ. App. 1973), in which the Alabama Court of Civil Appeals struck down a portion of an executive order that set the maximum amount for which a criminal defense attorney could be reimbursed at $75 per case. The executive order violated the separation-of-powers principle because the $75 cap conflicted with a statute that set the cap at $500 per case. Again, there was no emergency. Unlike the statute in *Jetton*, the AEMA expressly authorizes the governor to issue temporary emergency orders, even orders that conflict with previously existing law.[18] The AEMA provides that laws that conflict with the emergency order "shall be suspended" while the emergency lasts. Ala. Code § 31-9-13.

II. Governor Ivey's Order Does Not Violate § 21 of the Alabama Constitution Because The Governor Did Not Suspend the Laws, The Legislature Did in the AEMA

Suspended means that a law inconsistent with an emergency order is displaced and has no effect only for the temporary period of the emergency and comes back into force automatically when the emergency ends. The September Article argues that the governor's suspension of law violates § 21 of the Alabama Constitution that authorizes only the legislature to suspend laws. Sept. Art. 319-20. A close reading of the authorities at issue and the AEMA, however, shows the AEMA does not violate § 21 because the governor did not suspend the laws, the legislature did.

The September Article relies on *Opinion of the Justices No. 238*, 345 So. 2d 1354 (Ala. 1977), in which the justices opined that a proposed bill that would have authorized the *governor himself* to suspend utility rates, which had the force of law, would violate § 21. The proposed bill provided:

> *The Governor* of Alabama *shall*, at any time when in his considered opinion extraordinary action in the matter of utility rates is called for, by Executive Order *freeze a utility rate or rates*, established by the Alabama Public Service Commission, at the then existing level or *may roll said rate or rates back* . . . .

345 So. 2d at 1355 (emphases added).

Unlike the statute in *Opinion of the Justices No. 238*, the AEMA does not say the *governor* can suspend a law. Instead, the legislature itself in the AEMA suspended laws that are inconsistent with the governor's emergency order:

> "*All 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 authority of this article, *shall be suspended* during the period of time and to the extent that such inconsistency exists."

Ala. Code § 31-9-13 (emphases added).

That suspension by the legislature is consistent with § 21 of the constitution: "That no power of suspending laws shall be exercised *except by the legislature*." Ala. Const. § 21 (1901) (emphasis added.) Because the September Article's argument is wrong on the face of § 21, there is no need to wipe from the books almost 70 years' worth of emergency orders that temporarily suspend certain laws during an emergency (e.g., allowing out-of-state healthcare providers to come to practice in Alabama, authorizing video notarization of documents, allowing truck drivers to work overtime to deliver emergency supplies to hurricane victims).

In *Hand v. Stapleton*, 33 So. 689 (Ala. 1903), the Alabama Supreme Court concluded that the predecessor of § 21 was not violated by a statute that suspended the movement of a courthouse from Daphne to Bay Minette. The suspension lasted until the local board of commissioners determined that the move would not require a tax increase.

> "The **Legislature determined** for itself that the act should not take effect until it was ascertained by the board of commissioners that the amount to be paid by the county for building the courthouse and jail would not require an increase in the tax rate of the county–a limitation expressly declared in the act itself. . . . Whatever suspension there was of the act until the commissioners could determine the question of fact submitted to them, *it was* ***exercised by the Legislature****, and not by the commissioners*."

Id. at 692 (emphases added).

Similarly, the legislature determined for itself in the AEMA that existing laws could be suspended, § 31-9-13, if the governor finds that a "public health emergency" exists, § 31-9-8(a), and that the emergency order is "necessary to promote and secure the safety and protection of the civilian population," § 31-9-8(a)(5). Following the lead of the Trump Administration, Governor Ivey found that there was a public health emergency for COVID-19 in her March 13, 2020, proclamation. In her May 8, 2020, emergency order, Governor Ivey found that protecting healthcare providers and businesses from COVID-19 lawsuits was "necessary" to protect the civilian population. Whatever suspension there was, it was exercised by the legislature, and not by the governor. That followed § 21 of the Alabama Constitution to a T.

III. The AEMA Does Not Violate the Non-Delegation Doctrine

A. Governor Ivey's AEMA Orders Are Limited to a Specific Type of Emergency, Have a Specific Fit With That Emergency, and Lasted for a Specific, Limited Time

The September Article contends that the AEMA violated the non-delegation doctrine by delegating too much power to the governor. Sept. Art. 323-25. That argument fails when the AEMA is read with respect to the specific emergency at issue, the specific order at issue, and the legislature's enactment of the ACIA that effectively ratified the lawsuit protections granted by Governor Ivey's order.

The non-delegation doctrine provides that the legislature cannot delegate its power to make law to a non-legislative body or person (e.g., an administrative agency) unless it provides an "intelligible principle" that cabins what kind of rules that body can make. *See Touby v. United States*, 500 U.S. 160, 165 (1991) (rejecting non-delegation doctrine challenge). Three factors that aid in assessing whether a delegation is too broad are the scope of the power, the standards under which the power is limited and the fit of the order with the specific emergency, and the duration of the power.

1. The Scope of the Power Delegated by The AEMA Is Limited to a Specific Type of Emergency in This Case – COVID-19

The AEMA defines a state of emergency as "fire, flood, storm, *epidemic*, technological failure or accident, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, earthquake, explosion, terrorism, or man-made disaster, or other conditions." Ala. Code §§ 31-9-3(4) (emphasis added). Further, the AEMA defines a "public health emergency" as the "appearance of a novel or previously controlled or eradicated *infectious agent*"

that "[p]oses a high probability of . . . [a] *large number of deaths* in the affected population." Ala. Code § 31-9-3(5)a.2 & b.1 (emphases added). Because the COVID-19 pandemic is a bigger version of an epidemic, Governor Ivey acted under a specific grant of emergency powers by the legislature to declare a public health emergency.

The courts have long recognized the validity of legislative delegations of power to deal with public health emergencies. *See, e.g*., *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 27, (1905) (holding that the Massachusetts legislature was permitted to entrust to local boards of health decisions regarding health measures "*necessary* for the *public health or the public safety*," during a smallpox epidemic) (emphases added). And in *Parke v. Bradley*, 86 So. 28, 29 (Ala. 1920), the Alabama Supreme Court rejected a non-delegation challenge to the statute giving the Alabama State Board of Public Health (which had members appointed by an organization of healthcare providers) the power to order quarantines to fight infectious diseases:

> "The *prevention of disease and the conservation of health*, by all of the means known to modern science, is universally recognized as one of the *most important* and imperious *duties of government*, and in the construction of statutes enacted for such a purpose, under the police powers of the state, *courts are agreed* that *great latitude should be allowed to the Legislature* in determining the character of such laws, and how, when, and by whom, in their practical administration, they should be applied."

(Emphases added.)

In *Parke*, 86 So. at 32, the Alabama Supreme Court reasoned that the public board of health statute had been "*unchallenged for nearly 50 years*, and *acquiesced in by the people and by their representatives* in convention assembled," and thus "must, in the absence of any expressed inhibition, and of any clearly defined implication to the contrary, be given *very weighty consideration* by this court . . . . ." (Emphases added.) Likewise, the AEMA, unchallenged for nearly 70 years and acquiesced in by the legislature, which has made minor amendments but no major changes to the AEMA, must be given "very weighty consideration." *Id*.

2. The AEMA's Standard – That the Governor's Order Must Be "Necessary" to Address the Specific Emergency Declared – Passes Muster Under the Non-Delegation Doctrine

Section 31-9-8(a)(5) of the AEMA authorizes the governor "[t]o perform and exercise such other functions, powers and duties as are *necessary* to promote and secure the safety and protection of the civilian population." (Emphases added.) "[S]ecure the safety and protection" from what? The specifically declared emergency. *See* Ala. Code § 31-9-8(a).

So, a governor could not raise taxes, grant himself a law degree, or use public funds to buy himself a yacht during an epidemic emergency because those actions would have nothing to do with addressing the effects of that emergency. *Necessary* means an emergency order must fit the specifically declared emergency. In *Parke*, 86 So. at 30-31, the Alabama Supreme Court used the word *necessary* to show what delegations were proper:

> "[I]t is thoroughly well settled by the decisions of this, as well as other states, that the implied limitation against the delegation of the lawmaking power was never intended to prevent Legislatures from authorizing their own appointed agencies to make such minor rules and regulations as are *necessary* or appropriate for the administration and enforcement of the general laws of the state."

(Emphasis added.)

In *Jacobson*, 197 U.S. at 25, 27, the U.S. Supreme Court recounted approvingly that the Massachusetts Legislature was permitted to entrust to local boards of health decisions regarding health measures "*necessary* for the public health or the public safety," during a smallpox epidemic. (Emphases added.) Indeed, the standard provided by the statute at issue in *Parke* was a *proper* standard no more specific than necessary in the abstract.[19]

But the abstract must be given context by the actual. As applied to Governor Ivey's order, the "necessary" standard was quite narrow. Governor Ivey's May 8, 2020, order applied only during the COVID-19 emergency to only COVID-19 claims against healthcare

providers and businesses, and operated for the purpose of ameliorating the health and economic effects of the COVID-19 emergency. And only for negligence claims (not wantonness and recklessness) and limits, but does not preclude damages awards. That fits like a glove.

3. The Duration of the Governor's Emergency Powers Is Limited to the Duration of the Emergency

In Alabama, the governor or the legislature may declare a state of emergency that lasts 60 days. Ala. Code § 31-9-8(a). After that, the governor or the legislature can extend it. But to declare or extend the state of emergency, there must be a real emergency. The governor issued a series of orders that extended the state of emergency for COVID-19 until the emergency was terminated on October 31, 2021.

The AEMA's delegation of power to the governor to determine when emergency conditions no longer exist makes sense. In Alabama, the legislature is a body of part-time legislators while the governor's duties are full-time. In *Beshear v. Acree*, 615 S.W.3d 780, 812-13 (Ky. 2020), the Kentucky Supreme Court rejected a non-delegation challenge to COVID-19 emergency orders issued under that state's emergency statute, stating: "[O]ur legislature is not continuously in session, ready to accept the handoff of responsibility for providing the government's response to an emergency such as the current global pandemic." *Id*. at 812.

And the power of Alabama's governor to extend the duration of an emergency is limited by the existence of an emergency being subject to judicial challenge, the ability of the legislature with a veto-proof majority to amend the AEMA and terminate the emergency, and the ballot box where the voters can terminate a governor's holding of the office. *See Beshear*, 615 S.W.3d at 813 ("[J]udicial challenges to the existence of an emergency or to the content of a particular order or regulation; legislative amendment or revocation of the emergency powers granted the Governor; and finally the 'ultimate check' of citizens holding the Governor accountable at the ballot box" all check the duration of an emergency.").

In short, the AEMA provides an intelligible principle – emergency orders must be tailored to the specific, declared emergency and last only as long as the emergency does. There is no unconstitutional delegation of unlimited power.

B. The Outlier Michigan Case Does Not Create an Unconstitutional Delegation In Alabama

The September Article cites a Michigan case that held that Michigan Governor Gretchen Whitmer's COVID-19 emergency orders were invalid because the Michigan emergency statute violated the non-delegation doctrine. Sept. Art. 323-25 (citing *In re Certified Questions from the United States District Court*, 958 N.W. 2d 1 (Mich. 2020)). The September Article, however, does not mention all the other cases that reject non-delegation claims or the differences between the Michigan case and the Alabama statutory law and emergency order.

1. The Overwhelming Majority of Appellate Decisions Weigh Against Non-Delegation

In over 230 years, the U.S. Supreme Court has accepted non-delegation arguments twice, both times in 1935 before the large number of agencies that now exist were created. *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring); *Clinton v. City of New York*, 524 U.S. 417, 485–86 (1998) (Breyer, J. dissenting). The U.S. Supreme Court's non-delegation "jurisprudence has been driven by a practical understanding that in our increasingly complex society ... Congress simply cannot do its job absent an ability to delegate power ...." *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

Except for Michigan, the appellate decisions that this writer has found in jurisdictions that have squarely addressed non-delegation challenges to orders issued in response to the COVID-19 emergency have rejected those claims. In fact, four federal appellate cases and seven state appellate cases squarely rejected non-delegation challenges to emergency statutes and orders during COVID-19. *See Kentucky v. Biden*, 23 F.4th 585, 608 n.14 (6th Cir. 2022); *In re MCP NO. 165*, 21 F.4th 357, 386 (6th Cir. 2021), *rev'd on other grounds*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022); *Slidewaters LLC v. Washington State Dep't of Lab. & Indus.*, 4 F.4th 747, 756 (9th Cir. 2021) (applying Washington state law); *Alabama Ass'n of*

Realtors v. United States Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 2221646, at *3 (D.C. Cir. June 2, 2021); *Becker v. Dane Cnty*., 977 N.W.2d 390, 403 (Wis. 2022); *Newsom v. Superior Ct*., 63 Cal. App. 5th 1099, 1118, 278 Cal. Rptr. 3d 397, 410 (2021); *Kravitz v. Murphy*, 468 N.J. Super. 592, 624, 260 A.3d 880, 899 (App. Div. 2021); *Grisham v. Romero*, 483 P.3d 545, 557–58 (N.M. 2021); *Casey v. Lamont*, 258 A.3d 647, 672 (Conn. 2021); *Wolf v. Scarnati*, 233 A.3d 679, 707 (Pa. 2020) (applying different law, but rejecting non-delegation claim), *superseded by constitutional amendment*, *Corman v. Acting Sec'y of Pennsylvania Dep't of Health*, 266 A.3d 452, 457 (Pa. 2021); *Beshear v. Acree*, 615 S.W.3d 780, 812–13 (Ky. 2020).

So, the Michigan case is an outlier. And there are reasons for that.

2. The Michigan Statute and Experience Were Different from Alabama's Statute And Experience

The Michigan emergency statute provided only a general catch-all category for emergencies to be declared (i.e., "great public crisis, disaster"). *See In re Certified Questions*, 958 N.W.2d at 12. By contrast, the AEMA specifically authorizes the governor to declare an emergency when there is an "epidemic" (i.e., a smaller version of a pandemic) or other "public health emergency" that includes the "appearance of a novel or previously controlled or eradicated infectious agent" that "[p]oses a high probability of . . . [a] large number of deaths." Ala. Code § 31-9-3(5) & (4). Unlike Governor Whitmer, Governor Ivey acted under a very specific grant of power from the Alabama Legislature.

Further, in Michigan, there was a pitched political fight between Democratic Governor Whitmer and the majority Republican Michigan Legislature over, for example, the duration and scope of Governor Whitmer's executive orders.[20] In this context, the Michigan court held that the ability of the governor to extend a state of emergency was a factor weighing against delegation.

By contrast, in Alabama there was no fight between the legislature and Governor Ivey. These bodies worked together to protect Alabamians without shutting down this state's economy. And it worked. In January 2021, Alabama ranked sixth in the nation for how much its unemployment rate has bounced back since 2020.[21] In March 2021, Alabama ranked fifth among states in back-to-normal economic ratings,[22] and Alabama ranked eighth in the nation in economic momentum compared to Michigan's 35th.[23]

3. The Alabama Legislature Enacted the Exact Same Protections as Governor Ivey Provided in Her Order, Making the Delegation in This Case Narrow

The Alabama Legislature's agreement with Governor Ivey as to the need for COVID-19 lawsuit protections is demonstrated by the legislature's enactment of the ACIA. The ACIA provided the exact same COVID-19 lawsuit protections as Governor Ivey provided in her May 8, 2020, order. In fact, the ACIA provides that it should be interpreted *in pari materia* with Governor Ivey's order. *See* Act 2021-4, § 7. This confirms that Governor Ivey was acting with the authorization of the legislature just as *Youngstown* said she should.

Through the ACIA, the legislature effectively ratified the governor's order, including its specific COVID-19 lawsuit protections and the specific duration of those protections. *See Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301–02 (1937) ("[i]t is well settled that Congress may, by enactment not otherwise inappropriate, ratify ... acts which it might have authorized ... and give the force of law to official action unauthorized when taken") (citation omitted; internal quotation marks omitted); *Fay v. Merrill*, 256 A.3d 622, 640–41 (Conn. 2021) ("A separation of powers challenge to executive action is rendered moot by legislative ratification of the challenged executive action."); *Fletcher v. Commonwealth*, 163 S.W.3d 852, 859 (Ky. 2005) (challenge to governor's emergency budget action as violating legislature's appropriations power was rendered moot by legislature's enactment of bill ratifying governor's actions but reaching issue as capable of repetition, yet evading review).

The weight of authority and the specifics of the AEMA, Governor Ivey's May 8, 2020, order, and the ACIA establish a limited and constitutional delegation and exercise of authority.

IV. Act 2021-4 Does Not Retroactively Bar Vested Causes of Action Because Governor Ivey's Order Prevented Those Claims from Vesting

The September Article argues that the ACIA is unconstitutional because it retroactively bars causes of action that vested before the ACIA became effective (February 12, 2021). Sept. Article at 322 (citing Ala. Const. § 13 (1901) (due process clause), and *Pickett v. Matthews*, 192 So. 261 (Ala. 1939)). *Pickett*, 192 So. at 263, however, recognizes that a legal pronouncement issued before a claim accrues may prevent a claim from vesting: "But this provision [Ala. Const. § 13] does not undertake to preserve existing duties against legislative change made <u>before</u> the breach occurs." (Emphases added.) In short, if a claim never vests there is no substantive due process problem with extinguishing it. And because Governor Ivey's May 8, 2020, order was issued before most COVID-19 claims accrued, those claims never "vested" for purposes of Alabama Constitution § 13.

The retroactivity question might arise only for claims that accrued between the onset of COVID-19 and May 8, 2020, when Governor Ivey provided protections from COVID-19 claims. And the two-year statute of limitations on those claims expired on May 8, 2022. Ala. Code § 6-5-797.

Conclusion

For 70 years, the U.S. Supreme Court's *Youngstown* decision has provided that an executive order authorized by a statute should be valid. For 67 years, the Alabama Emergency Management Act has authorized governors to issue emergency orders in response to tornadoes, hurricanes, and disease outbreaks. Almost all courts that have addressed non-delegation doctrine challenges to emergency statutes and orders have rejected those challenges. Governor Ivey and the Alabama Legislature agreed that protections from COVID-19 lawsuits were necessary to support healthcare providers and businesses during that emergency. The emergency is over. The legal challenges should be too.

Endnotes

1. The authors of the September Article and this article serve as opposing counsel in a case where these issues came up.
2. Ala. Gov. Emerg. Procl. I (April. 2, 2020).
3. Ala. Gov. Emerg. Procl. III. (Hurricane Ida) (Aug. 28, 2021).
4. *Id*. at IV.
5. Presidential Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020).
6. Ala. Gov. Emerg. Procl. (April 2, 2020).
7. *Id.*
8. Ala. Gov. Emerg. Procl. (March 23, 2020).
9. Ala. Gov. Emerg. Procl. (March 26, 2020).
10. Ala. Gov. Emerg. Procl. (March 18, 2020).
11. Ala. Atty. Gen. Op. 2020-020 (March 17, 2020).
12. Ala. Gov. Emerg. Procl. Recitals (May 8, 2020); *see* Ala. Code § 31-9-6(3) (authorizing the governor "to make surveys of the industries, resources and facilities within the state as are necessary to carry out the purposes of this article").
13. Ala. Gov. Emerg. Procl. I.A. 2 & 3, Findings (May 8, 2020).
14. Punitive damages available for wrongful death claims. The damages limitations do not apply to a "serious physical injury" (i.e., "death or an injury that requires either in-patient hospitalization of at least 48 hours, permanent impairment of a bodily function, or permanent damage to a body structure). Ala. Gov. Emerg. Procl. I.C. 1 & 2, I. B.10. (May 8, 2020).
15. *See Zivotofsky ex rel. Zivotofsky v. Kerry,* 576 U.S. 1, 10, (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from Youngstown . . . ."); *Ex parte Jenkins*, 723 So. 2d 649, 654–55 (Ala. 1998) (citing *Youngstown* for the proposition that the executive may not usurp the legislative power).
16. Ala. Code § 31-9-6(1) (emphases added).
17. Ala. Code § 31-9-8(a)(5) (emphasis added).
18. Ala. Code §§ 31-9-6(1) & -8(a)(5).
19. *See* Ala. Code § 22-2-2 (delegating to the State Board of Public Health the power "[t]o adopt and promulgate rules and regulations providing <u>proper</u> methods and details for administering the health and quarantine laws of the state") (emphasis added).
20. *See* Jonathan Oosting, et al., *Michigan Supreme Court rules Whitmer lacks COVID-19 emergency powers*, Bridge (Oct. 2, 2020), *available at* https://www.bridgemi.com/michigan-government/michigan-supreme-court-rules-whitmer-lacks-covid-19-emergency-powers (last viewed Oct. 14, 2022).
21. *See* Micah Danney, *Study ranks Alabama in top 10 for unemployment recovery*, Alabama Political Reporter (Jan. 27, 2021).
22. *See* William Thornton, *Alabama recovering from COVID faster than other states, economy shows*, Al.com (March 11, 2021).
23. *See* State Policy Reports, *Index of Economic Momentum* (March 2021), *available at* https://governor.alabama.gov/assets/2021/04/FFIS-Index-of-State-Economic-Momentum.pdf (last viewed on Oct. 20, 2022).

Thomas A. Kendrick

Tom Kendrick was admitted to the Alabama State Bar in 1985. He practices with Norman, Wood, Kendrick & Turner in Birmingham, focusing on the defense of physicians, nurses and hospitals, dentists, physical therapists, nursing homes, home health providers, other healthcare providers, medical laboratories, and drug and medical device manufacturers.

MEMORIALS

▲ **William Inge Hill, Jr.**

▲ **Scott Jason Nabors**

▲ **Sydney R. Prince, III**

▲ **Tazewell T. Shepard, III**

▲ **Justin Lee Smith**

William Inge Hill, Jr.

Hill

Hill, Hill, Carter celebrates the life of longtime shareholder William Inge Hill, Jr. Inge was born on August 15, 1949 in Montgomery, a community that he cherished and called home his entire life. He died on August 7, 2022 with his beloved wife, Camilla, by his side.

Inge graduated high school from the Montgomery Academy and graduated college from Transylvania University with a BA in English as valedictorian of his class. He received the Hugo Black Scholarship to attend the University of Alabama School of Law where he was named the Outstanding Editorial Board Member of the *Alabama Law Review* and was admitted to the Order of the Coif and the Bench and Bar Legal Honor Society. He graduated in the top five percent of his law school class.

In 1975, after briefly serving as a Judge Advocate General in the United States Navy, Inge commenced private practice in Montgomery at Hill, Hill, Carter, founded by his late uncle, Thomas B. Hill, Jr., and his late father, W. Inge Hill, Sr., both of whom he revered. Inge practiced commercial real estate law at Hill, Hill, Carter for 45 years. As an attorney, he was a perfectionist, in every sense of the word. His capacity for work, intellect, and humor sustained the unparalleled legal services that he provided to his clients. Inge handled a variety of complex matters over his career, but he found most rewarding his work in service of education. He found especially fulfilling his work on LAMP High School's acquisition of the former Montgomery Mall for a new school campus.

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Inge gave freely and often, in a quiet and unassuming way, of his time, legal abilities, and resources, to many charitable causes and individuals from all walks of life. He saw no distinctions in the dignity of human life, and he valued people rather than status. Serving and engaging individuals, particularly those who were in misfortune or otherwise overlooked, brought Inge much satisfaction, although he was never very comfortable with recognition of his generosity and kindness.

For most of his life, Inge had an answer for everything, always with just the right "pinch of wit" emphasized with a huge, mischievous grin. His dry sense of humor allowed him to defuse most any contentious situation by leaving all parties either bewildered or grinning. He took particular delight in elaborate pranks and in making the lives of those around him more surreal.

Inge held closely an everlasting passion for life's wonderments and joys. He never stopped learning, and he cultivated new interests throughout his life. In addition to his law practice, he loved the arts, paleontology, archaeology, astronomy, physics, travels, gardening, and photography. In another life, he might have professionally pursued one of these interests.

Inge never lost a child's sense of adventure, and he was happiest when he was outside, often with his family at Lake Martin, working in his garden, hiking through the Sipsey Wilderness, or exploring ancient ruins in remote parts of the world. He received much pleasure in sharing his pursuits and adventures with his family, friends, and law partners.

Above all else, Inge would tell you that the best, happiest, and easiest decision he ever made in his life was to marry his wife of 49 years, Camilla. Inge and Camilla traveled the world together but always returned to Montgomery, where they raised their children, Cammie and Maxwell Inge, both of whom Inge was immensely proud. Their family was later blessed with a son-in-law, daughter-in-law, and grandchildren, all of whom brought much happiness into Inge's life.

Inge's generosity, kindness, excellence in law, respect for the dignity of mankind, pursuit of his passions, and devotion to his family inspired our firm throughout his lifetime. Such inspiration will endure for many years to come, and the remembrance of Inge will remain forever young.

–James E. Beck, III

Scott Jason Nabors

Nabors family

Jason Nabors was born November 25, 1971 and passed away May 31, 2022 at age 50.

Some lawyers are attorneys-at-law, some are trial lawyers, and others are corporate attorneys. A few identify as "counselors." Jason Nabors was a counselor, in every sense of the word. Clients valued his legal counsel. Family and friends cherished his personal counsel. To all who were blessed to know him as a lawyer or a friend, Jason listened and cared and counseled.

Humility, empathy, integrity, and wisdom are the traits of a trusted counselor, and Jason had them all. These qualities made Jason an exceptional husband, father, and friend as well. Like his clients, family and friends went to Jason with their cares and concerns. They sought his guidance, they cherished his kindness, and they valued his insight. Rarely did Jason have a superficial conversation. In a time when self-promotion has become the norm, Jason never uttered a boastful word. He made his mark by investing in others.

Jason excelled in relationships. Those who knew Jason well, and there were many, understood that he cared deeply. Jason's love for people was evident in how closely he listened and probed for deeper understanding, in how he took joy in the successes of others, and in how he imparted guidance without judgment.

For the last 12 years, Jason served as in-house counsel at Vulcan Materials Company. The memories of his colleagues, some of which are below, provide a glimpse into Jason's profoundly positive impact:

–Jason is the reason I'm at Vulcan. He impressed me from the moment I first met him, and since that time, I've looked up to him both figuratively and literally as a role model for the type of lawyer and father I want to become. He was brilliant, an incredible boss, and an even better person.

–I sought his advice almost every day for the past 12 years. He was a little older than I am and a whole lot wiser. He gave me advice on a range of topics: there was business, of course, and we did heaps of it. I sought his counsel on more important matters as well, namely on how to be a better husband and a better father, two areas where he excelled. He was generous to a fault. His guidance and his kindness have helped make me a better person.

–We had many deep talks about life, in which I always found wisdom. He was a great business partner who gave fantastic advice. He happily found solutions to problems and ensured we got things done the right way. I will miss him.

–Jason left the world with two wonderful sons, Jackson and Thomas. They knew their dad as an extraordinary father. It takes only a few minutes with them to see that he and his wife, Rhonda (also a member of our bar), have excelled as parents.

Jason lost his life to an aggressive mental illness. He was open about his struggles because he wanted to help others facing their own mental health challenges. And help he did. As one friend said, "Jason gave me the courage to ask for help in my own battle with depression and anxiety ... simply put, I think he saved my life." Even in his deepest struggle, Jason never stopped being a counselor.

–Brannon J. Buck, Jerry F. Perkins, Jr., and Anthony C. Portera

Sydney R. Prince, III

Sydney Prince died peacefully in his Battles Wharf, Alabama home surrounded by family on Wednesday, October 19.

Born in Washington, D.C. on November 25, 1933, Prince was the oldest of two sons born to the former Elizabeth Herndon and Sydney R. Prince, Jr.

Prince started his education at Landon, a preparatory school in Bethesda, Maryland. A natural athlete, he played varsity football and baseball. He earned his college degree at Princeton University in 1955, and three years later, graduated from the University of Virginia with a law degree.

Prince also served two years in the U.S. Army during the Korean conflict, stationed in Boston.

Because of family vacations in Point Clear as a child, Prince developed a deep affinity with life on Mobile Bay. As a teenager, he made it his goal to live on the Alabama Gulf Coast.

After graduating from law school, Prince moved to Mobile and joined the Inge Twitty firm, embarking on a 40-year practice, focusing primarily on litigation defense.

He married the former Anne Macpherson in October 1961, and the couple had three children: Sydney Rhodes Prince, IV; John Ritchie Macpherson Prince; and Beverly Anne Prince.

Prince loved fishing in the Gulf of Mexico and the game of golf, engaging in both regularly throughout his life. He served as president of the Country Club of Mobile, where he played a key role in renovating the entire facility. He was also president of the Order of Myths and was very involved and active in the organization.

A practicing Catholic throughout his adult years, Prince attended Mass at St. Ignatius in Mobile and St. Lawrence in Fairhope.

Prince is preceded in death by his parents, Mr. and Mrs. Sydney R. Prince, Jr., and his brother, Robin Prince. He is survived by his wife, three children, and four grandchildren, all of whom he loved dearly.

–Beverly Prince Bethay, J.R.M. Prince, and Sydney R. Prince, IV

Tazewell T. Shepard, III

Shepard

Taze Shepard of Huntsville passed away on October 10, 2022 at the age of 68. He was born January 8, 1954 in Washington, D.C. to Admiral Tazewell T. Shepard, Jr. and Julianne Sparkman Shepard. Taze was born into a family dedicated to serving this state and country with deep political roots. He spent much of his youth with his maternal grandparents, United States Senator John J. Sparkman and Ivo Sparkman.

After attending St. Albans School in Washington, D.C. and Eton College in Windsor, Great Britain, he graduated from Dartmouth College and received his law degree from the University of Alabama School of Law.

Taze was admitted to the Alabama State Bar in September 1979 and was in private practice in Huntsville for more than 40

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years. He was widely known as a great mind in the field of bankruptcy, most especially Chapter 13, and was the Bankruptcy Trustee for the Northern District of Alabama for many years.

His service to the Alabama State Bar included as president (2021-2022), president-elect, vice president, two-term bar commissioner, and chair of the Solo & Small Firm Section. Taze also was president of Legal Services of Alabama for the past two years, helping provide legal services to the disadvantaged, and as a board member and a Fellow of the Alabama Law Foundation.

He left a legacy with the many innovative initiatives he suggested for the benefit of our bar membership and his message of inspiration, that to be a better lawyer, start by striving to be kind and courteous in all interactions with others.

Taze was always in service to the Huntsville community. He was president of the Huntsville Bar Association and the Madison County Volunteer Lawyers Program. He served on the Huntsville Committee of 100, Huntsville Leadership Class 25, and Huntsville Rotary International. His dedication to education was apparent as he served the Athens State University Board of Trustees, the Alabama Space Science Commission, and the Alabama Supercomputer Authority. He was elected to the Alabama State Board of Education representing District Eight and was president of the board of directors for The Schools Foundation.

He always displayed a compassion which proved his love for other people. He was loving and kind. He was a friend to almost everyone and set an example on how to treat other people. He sought to help others and be of service to the less fortunate. Taze will be remembered and missed as a dedicated lawyer, an admirable professional worthy of emulation, a leader of the legal profession, and a dedicated husband, father, and grandfather. We will remember him as the finest example of the gentleman lawyer.

Taze is survived by his loving wife, Pam; sons Tazewell T. Shepard, IV (Sarah); John Sparkman Shepard; Hunt Chastain Shepard; and Riley Douglas Jacobs (Sarah); daughter Jana Jacobs Broughton (Thomas); and six grandchildren.

He was our leader but, more importantly, he was our friend. Taze was the definition of a friend. He made sure that you knew he cared about you. He provided a helping hand wherever and whenever he could. He took time to listen to his friends. He was comfortable with the most powerful among us and the less fortunate. We will never forget our friend, and we will miss him.

The family has requested that memorials be made to Lawyers Render Service, Inc., 415 Dexter Avenue, Montgomery, Alabama 36104, *https://www.alabar.org/news/memorialdonations/*. Your gift will help fund the Lawyers Helpline counseling initiative and other services benefiting members of the legal community who experience life-changing events.

–Deborah Bell Paseur and T. Thomas Perry, Jr.

Justin Lee Smith

Smith

Justin Smith was a devoted father, a loving husband, a leader in his church and community, and a respected attorney. He had a big personality, a sharp wit, and an infectious laugh. Justin was a friend to everyone he met. He was a man of God and lived his faith. He had a tremendous work ethic and always, always had a positive attitude. He was a man of integrity, strong character, and morals. He was an attorney who sincerely cared about his clients. If he saw a need, he devised a way to fill it. He made the world around him a better place.

Justin passed away on September 29, 2022 at age 45. A native of Sumter County, he graduated from Sumter Academy, the University of West Alabama, and the Mississippi College School of Law. While in law school, he was the Executive Editor for the *Mississippi College Law Review* and was a member of the Honor Court. A member of the Alabama State Bar since 2003, Justin was a partner in the Tuscaloosa firm of Cross & Smith. Justin exemplified professionalism and was well respected by the bench and both sides of the bar. He was a tireless advocate for his clients.

Justin believed in investing in others was the way to improve his community. First, he invested in his sons Henry and Harmon. He taught them to pay attention to detail and to be prepared. He taught them to always have a sharpened pencil before beginning their homework because a sharpened pencil showed

that they were ready and that they cared. He invested in the many youth baseball and football players that he coached in Tuscaloosa. He taught them grit and determination. He invested in his church. He was an elder at Trinity Presbyterian Church in Tuscaloosa and taught adult Sunday school classes.

He invested in his home county and the University of West Alabama, serving as the seventh congressional district representative to the University of West Alabama (UWA) Board of Trustees beginning in December 2015. During his tenure, he served in various capacities, including chair of the Student Affairs Committee and the Athletics Committee, and he was elected president pro tempore of the board in June 2019. He served admirably in this capacity until the end of his term in July 2022.

Justin's exemplary leadership will forever be commemorated in the history of UWA. He certainly made a positive and lasting impact on his fellow trustees and on many in the university community and beyond. During his tenure, the board experienced significant achievements that required dedication, wisdom, compassion, and the level of professionalism that Justin was always sure to exhibit. In particular, Justin's leadership contributed significantly to the establishment of the University Charter School, which has been undeniably transformative for Livingston and Sumter County. One of his primary goals was to help guide the vision and establishment of the school, and he was indeed proud of the achievements and growth the school has experienced since that vision was born.

Justin enjoyed turkey hunting and fishing at his farm in Sumter County. He enjoyed watching baseball and football with his sons and traveling with his family and friends.

He is survived by his wife, Amy, and his sons, Henry and Harmon. Justin was an extraordinary person and will be truly and deeply missed by all who were fortunate enough to know him. ▲

–Terri Olive Tompkins

Leopold Blum Babin
Selma
Admitted: 2014
Died: July 2, 2022

Hon. Alfred Bahakel
Birmingham
Admitted: 1979
Died: August 9, 2022

Hon. Patricia Cash Burns
Birmingham
Admitted: 1979
Died: September 16, 2022

John Robert Christian
Birmingham
Admitted: 1957
Died: September 4, 2022

Billy Earl Cook
Brewton
Admitted: 1977
Died: September 9, 2022

Joseph Herrin Hagood, III
Selma
Admitted: 1996
Died: July 7, 2022

Ralston Darnell Jarrett, Jr.
Columbus, Georgia
Admitted: 2019
Died: September 8, 2022

Eugene DeArmit Martenson
Birmingham
Admitted: 1971
Died: July 8, 2022

Martha Lynn McCain
Gadsden
Admitted: 1982
Died: August 22, 2022

Lynn Gourley McGuire
Olathe, Kansas
Admitted: 1966
Died: July 20, 2022

Harold Faulkner Miller, Jr.
Birmingham
Admitted: 1952
Died: July 21, 2022

Ralph Eugene Rozell
Bessemer
Admitted: 1985
Died: August 16, 2022

Mark Alan Segal
Mobile
Admitted: 1997
Died: May 4, 2022

David Fitzgerald Steele
Monroeville
Admitted: 1982
Died: September 18, 2022

James Edmond Taylor, Jr.
Montgomery
Admitted: 1997
Died: July 10, 2022

Jerry Laurance Thornton
Hayneville
Admitted: 1974
Died: September 23, 2022

Thomas Joseph Thornton
Birmingham
Admitted: 1975
Died: August 17, 2022

ALABAMA LAWYERS

HALL OF FAME

Today we are conducting our 18th Alabama Lawyers Hall of Fame (HOF) Induction Ceremony.

My involvement with the HOF actually predates its existence. Early in 2001, when I was president of the Alabama State Bar, I received a letter from Montgomery attorney Terry Brown. Terry, who is now deceased, was the immediate past president of the Montgomery County Bar Association. He also had a keen interest in Alabama history.

In his letter, Terry suggested that the Alabama State Bar should establish an Alabama Lawyers Academy of Honor to recognize Alabama attorneys who had achieved national or international renown. He also suggested that any inductee be deceased at least 10 years and that by their accomplishments they have brought honor to themselves, the state, and the legal profession. I liked this idea very much and wrote about it in my "President's Page" for the March 2001 issue of *The Alabama Lawyer*. Unfortunately, my term of office would end in four months, and the idea was not pursued at that time.

At approximately the same time, Tuskegee attorney Fred Gray qualified to become the state bar president-elect designate.

He had also served as president of the National Bar Association (NBA) from 1985-1986. In 1986, he appointed a committee to create the National Bar Association Hall of Fame Awards to honor those lawyers who had been licensed to practice law for 40 years or more, and who had made significant contributions to the cause of justice. To date, more than 400 lawyers have been so honored by the NBA. He desired to create a similar legacy for the Alabama State Bar.

In July 2002, President Gray appointed me to chair a task force to explore the possibility of establishing such a hall of fame. The task force took its job seriously, especially regarding the debate between "living" versus "posthumous" induction. We made our report in 2003, and it was approved by the board of bar commissioners. However, a Hall of Fame Selection Committee had to be appointed, nominations had to be solicited, and our first group of inductees was finally selected for a ceremony held in May 2005 for our 2004 honorees. Now we are conducting our 18th ceremony for our 2021 honorees. With these inductees, we have now honored 85 attorneys from among all the lawyers in the more than 200-year history of the state of Alabama.

Over the years, we have recognized men and women; black and white attorneys; judges, both appellate and trial, both federal and state; military heroes; public servants; law professors; a clerk of the Alabama Supreme Court and a reporter of decisions; Assistant U.S. Attorneys; governors; senators; members of congress; mayors; city councilors; an ambassador; a speaker of the house of representatives; and a vice president of the United States. But our largest single demographic is the group of lawyers, all outstanding individuals, who have labored in the field of private practice. All our lawyer-inductees are the true giants, the mentors, and, yes, the heroes of our

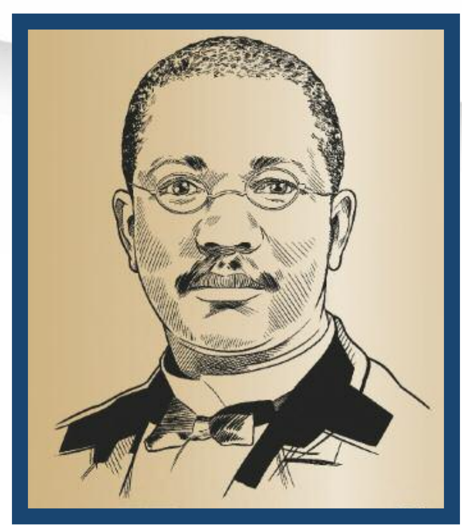
profession. Their plaques are in the lower rotunda of the Heflin-Torbert Judicial Building, and together they form a very impressive collection.

Inductees into the Alabama Lawyers Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement – leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each group of inductees, at least one honoree must have been deceased a minimum of 100 years in order to give due recognition to historic figures as well as the more recent lawyers of the state.

Our 12-member selection committee consists of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, a member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the board of bar commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the secretary of the Alabama State Bar. This committee considers the nominees and makes selections for induction.

Remember, great lawyers cannot be considered for induction if they have not been nominated.

We hope that all of the inductees' stories will serve to inspire the present and future citizens of Alabama.

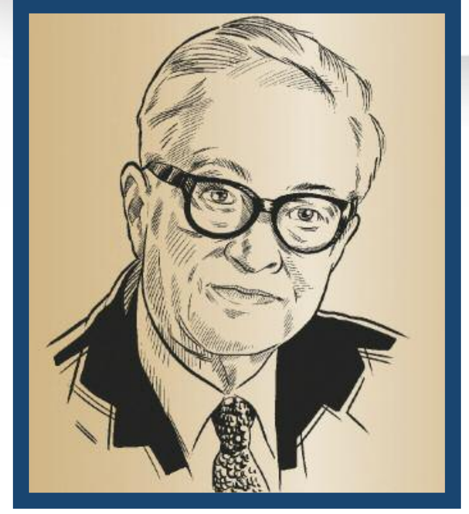


WILLIAM HOOPER COUNCILL (1849-1909)

Born in Fayetteville, North Carolina; enslaved until the Civil War when he escaped; teacher in the black public schools in Alabama; opened Lincoln Normal School in Huntsville; chief enrolling clerk of the Alabama House of Representatives; secretary of the National Civil Rights Convention (1873); appointed firs President of the State Colored Normal School (now Alabama A&M University); admitted to the Bar in 1883; founded the Huntsville Herald where he published until 1884; instrumental in founding the St. Johns AME church in Huntsville; filed a discrimination lawsuit against the Interstate Commerce Commission and won; honored with the first public African American High School in Huntsville named for him.

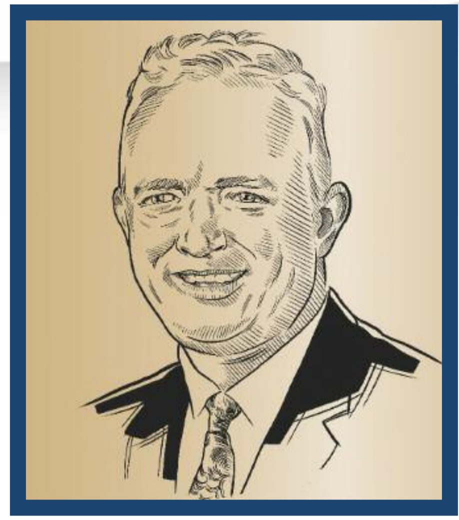
CHARLES BAKER ARENDALL, JR. (1915-1993)

Born in Portsmouth, Virginia; graduated from Harvard Law School in 1938; admitted to the Alabama State Bar in 1938; formed and led Hand Arendall; argued in Exxon Corporation v. Eagerton; President of Mobile Bar Association (1976); National Vice President of Harvard Law School Association; member of the City of New York Bar Association, American Bar Association, National Railroad Trial Counsel, International Association of Insurance Counsel, International Bar Association, InterAmerican Bar Association, American Counsel Association, and American Law Institute; fellow of American College of Trial Lawyers; Advisory Board of Cumberland School of Law, and founding member Board of Trustees of University of Mobile.



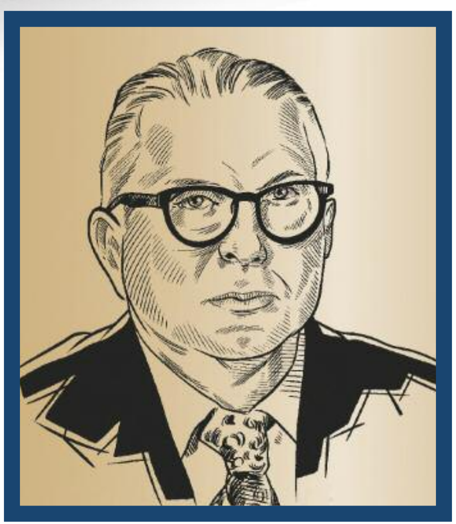
JEROME ALFRED COOPER (1913-2003)

Born in Brookwood, Alabama; graduated from Harvard Law; admitted to the Alabama State Bar in 1936; law clerk to Judge David Davis; first law clerk for U.S. Supreme Court Justice Hugo Black; Chief Attorney in Alabama Department of Labor (1940-1941); served 44 months in the Navy; began his law practice in Birmingham; tried the first successful federal racial discrimination employment case; assisted in the Reynolds v. Sims case; served Mental Health Association, Crisis Center, Ruffner Mountain Nature Preserve, WBHM's Advisory Board, Birmingham Symphony Association and Birmingham Jewish Community Center among others; National Conference of Christians and Jews Brotherhood Award recipient.



DOUGLAS PHILLIP CORRETTI (1921-2009)

Born in Jefferson County, Alabama; WWII veteran; graduate of University of Alabama School of Law in 1943; practiced law in Birmingham for over 60 years; authority in real estate, land use, and zoning law; taught classes in law at various colleges in Alabama; mentor to young lawyers; helped establish Vestavia Hills School System and served on its first Board of Education; President of the Birmingham Bar Association (1966); elected to serve six-year term on the Jefferson County Judicial Commission; received special recognition by the Birmingham Bar for meritorious service.



JAMES OSCAR SENTELL, JR. (1909-1985)

Born in Luverne, Alabama, graduated from University of Alabama Law School; admitted to Alabama State Bar in 1932; private practice with his father, J.O. Sentell, Sr.; attorney for the Office of Price Administration during WWII; Counsel of the Office of Price Stabilization; first Assistant U.S. Attorney for the Middle District of Alabama (1962); Clerk of the Supreme Court of Alabama (1968-1982); first clerk of the Court of Civil Appeals (1969-1975); Board of Bar Commissioners for 2nd Judicial Circuit; editor of The Alabama Lawyer; founder and first president of the National Conference of Appellate Court Clerks and received their first Distinguished Service Award which now bears his name.

ALABAMA LAWYERS HALL OF FAME

PAST INDUCTEES

2019
Henry W. Hilliard (1808-1892)
Clifford J. Durr (1899-1975)
Broox G. Garrett (1915-1991)
Richard T. Rives (1895-1982)
Ellene G. Winn (1911-1986)

2018
Jeremiah Clemens (1814-1865)
Carl Atwood Elliott, Sr. (1913-1999)
Robert A. Huffaker (1944-2010)
Henry Upson Sims (1873-1961)
George Peach Taylor (1925-2008)

2017
Bibb Allen (1921-2007)
Mahala Ashley Dickerson (1912-2007)
John Cooper Godbold (1920-2009)
Alto Velo Lee, III (1915-1987)
Charles Tait (1768-1835)

2016
William B. Bankhead (1874-1940)
Lister Hill (1894-1984)
John Thomas King (1923-2007)
J. Russell McElroy (1901-1994)
George Washington Stone (1811-1894)

2015
Abe Berkowitz (1907-1985)
Reuben Chapman (1799-1882)
Martin Leigh Harrison (1907-1997)
Holland McTyeire Smith (1882-1967)
Frank Edward Spain (1891-1986)

2014
Walter Lawrence Bragg (1835-1891)
George Washington Lovejoy (1859-1933)
Albert Leon Patterson (1894-1954)
Sam C. Pointer, Jr. (1934-2008)
Henry Bascom Steagall (1873-1943)

2013
Marion Augustus Baldwin (1813-1865)
T. Massey Bedsole (1917-2011)
William Dowdell Denson (1913-1998)
Maud McLure Kelly (1887-1973)
Seybourn Harris Lynne (1907-2000)

2012
John A. Caddell (1910-2006)
William Logan Martin, Jr. (1883-1959)
Edwin Cary Page, Jr. (1906-1999)
William James Samford (1844-1901)
David J. Vann (1928-2000)

2011
Roderick Beddow, Sr. (1889-1978)
John McKinley (1780-1852)
Nina Miglionico (1913-2009)
Charles Morgan, Jr. (1930-2009)
William D. Scruggs, Jr. (1943-2001)

2010
Edgar Thomas Albritton (1857-1925)
Henry Hitchcock (1792-1839)
James E. Horton (1878-1973)
Lawrence Drew Redden (1922-2007)
Harry Seale (1895-1989)

2009
Francis Hutcheson Hare, Sr. (1904-1983)
James G. Birney (1792-1857)
Michael A. Figures (1947-1996)
Clement C. Clay (1789-1866)
Samuel W. Pipes, III (1916-1982)

2008
John B. Scott (1906-1978)
Vernon Z. Crawford (1919-1985)
Edward M. Friend, Jr. (1912-1995)
Elisha Wolsey Peck (1799-1888)

2007
John Archibald Campbell (1811-1889)
Howell T. Heflin (1921-2005)
Thomas Goode Jones (1844-1914)
Patrick W. Richardson (1925-2004)

2006
William Rufus King (1776-1853)
Thomas Minott Peters (1810-1888)
John J. Sparkman (1899-1985)
Robert S. Vance (1931-1989)

2005
Oscar W. Adams (1925-1997)
William Douglas Arant (1897-1987)
Hugo L. Black (1886-1971)
Harry Toulmin (1766-1823)

2004
Albert John Farrah (1863-1944)
Frank M. Johnson, Jr. (1918-1999)
Annie Lola Price (1903-1972)
Arthur Davis Shores (1904-1996)

The Alabama Lawyers Hall of Fame is located on the ground floor of the Heflin-Torbert Judicial Building, 300 Dexter Avenue, Montgomery, Alabama

DISCIPLINARY NOTICES

- Reinstatement
- Disbarments
- Suspensions

Reinstatement

- McCalla, Alabama attorney **Cynthia Vines Butler**, who is licensed in Alabama, was reinstated with conditions to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective August 10, 2022. Butler was previously suspended from the active practice of law on July 20, 2020. [Rule 28, Pet. No. 2022-255]

ALABAMA BANKRUPTCY ASSISTANCE PROJECT

WANT TO MAKE A DIFFERENCE?

COVID-19 and its economic consequences have touched all of our communities. Providing Pro Bono assistance in Chapter 7 bankruptcies is a great way to help yours.

Call your local volunteer lawyers program to learn how you can help your community.

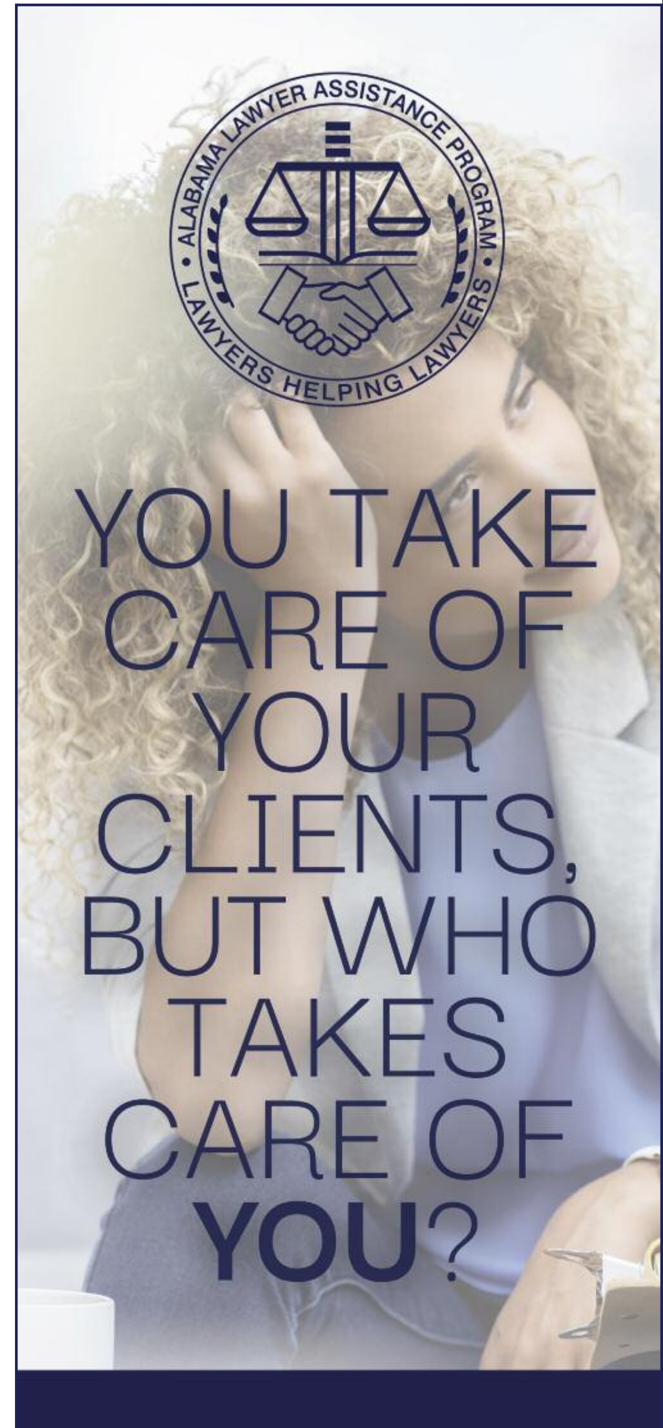
(334) 517-2108

Disbarments

- Birmingham attorney **Joel Iverson Gilbert** was disbarred from the practice of law in Alabama, effective July 27, 2022. The Supreme Court of Alabama entered its order based on the Disciplinary Board's order, wherein Gilbert consented to disbarment based on multiple felony convictions in federal court, including conspiracy, money laundering conspiracy, bribery (aiding and abetting), and honest services wire fraud (aiding and abetting). [Rule 23 (a), Pet. No. 2022-649; Rule 20(a), Pet. No. 2018-851]
- Santa Rosa Beach, Florida attorney **Michael Lee Weimorts**, also licensed in Alabama, was disbarred from the practice of law in Alabama, effective July 27, 2022. On June 15, 2021, the Office of General Counsel of the Alabama State Bar filed a certified copy of discipline imposed on Weimorts by the Supreme Court of Florida, wherein Weimorts was disbarred for failure to respond to a bar complaint and failing to refund unearned fees. The Disciplinary Board of the Alabama State Bar issued Weimorts a show cause order as to why reciprocal discipline should not be imposed upon him pursuant to Rule 25, Alabama Rules of Disciplinary Procedure. Weimorts failed to respond. The Alabama State Bar was unable to locate Weimorts, and as a result, the Disciplinary Board entered an order authorizing service by publication. Weimorts failed to respond. The Supreme Court of Alabama entered its order disbarring Weimorts as reciprocal discipline pursuant to Rule 25, Alabama Rules of Disciplinary Procedure, effective July 27, 2022. [Rule 25(a), Pet. No. 2021-714]

Suspensions

- Birmingham attorney **Nakita Blocton** was suspended from the practice of law for four years in Alabama by the Supreme Court of Alabama, effective February 12, 2021. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's acceptance of Blocton's conditional guilty plea, wherein Blocton pled guilty to violating Rule 8.4(g) [misconduct], Alabama Rules of Professional Conduct, by engaging in conduct that reflected adversely on her fitness to practice law. [ASB No. 2021-1242]
- Birmingham attorney **Mattie Neal Newell** was suspended from the practice of law in Alabama for 91 days with the suspension to be held in abeyance. Newell was placed on a two-year probationary period, effective June 1, 2022. The suspension was based upon the Disciplinary Board's acceptance of Newell's conditional guilty plea, wherein she pled guilty to violating Rules 8.4(b) and (c) [misconduct], Alabama Rules of Professional Conduct. [ASB No. 2017-739]



For information on the Alabama Lawyer Assistance Program's **FREE** and **CONFIDENTIAL** services, call **(334) 224-6920.**

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 Boult 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

Quo Warranto

***Burkes v. Franklin*, No. 1210044 (Ala. July 15, 2022)**

A plaintiff bringing a quo warranto action failed to give security for costs of the action, and the Alabama Supreme Court determined on appeal for the first time that this failure deprived the circuit court of jurisdiction over the action. It dismissed the appeal.

Section 230

***Ex parte The HuffintonPost.com, Inc.*, No. 1200871 (Ala. Aug 12, 2022)**

The court held that a news organization was immune under the Communications Decency Act, 47 U.S.C. § 230, for claims arising brought by an adoptive mother relating to publicity around the adoption. The court reversed the denial of summary judgment, finding that the author of the publicity at issue was not the news organization's agent and that the news organization did not qualify as an "information content provider" as to information appearing in the "Voices" section of its website.

Taxes

***Ex parte Mobile Cty. Bd. of Equalization*, No. 1210058 (Ala. July 8, 2022)**

The court issued a writ of mandamus directing that a taxpayer's appeal be dismissed, reasoning that the taxpayer had failed to demonstrate payment of the taxes due under Alabama Code § 40-3-25 – a defect held to divest the trial court of jurisdiction. The court determined that the taxpayer had failed to demonstrate payment when the payment was never received by the appropriate official and the certified mail through which the taxpayer claims to have sent payment did not have return receipt requested.

Medical Malpractice, Expert Testimony

***Nall v. Arabi*, No. 1210312 (Ala. Aug. 19, 2022)**

The circuit court barred a medical expert from granting testimony because he was no longer certified by the appropriate American board in his specialty as required by Alabama Code § 6-5-548(c)(3) and granted summary judgment for defendants. The Alabama Supreme Court affirmed, concluding that the plaintiffs were not entitled to a continuance of the case to allow the expert to obtain reinstatement. It also declined to find that the certifying board was equitably estopped from withholding certification from the expert for four reasons: (1) estoppel runs against parties only, and the certifying board was not a party; (2) estoppel has not been used to imbue a witness with certification under Section 548(c); (3) the expert could have learned of his certification's lapse with diligence; and (4) there was no evidence that the certifying board made any false or misleading communication. Lastly, the court affirmed the circuit court's decision not to modify the scheduling order so that the plaintiffs could retain a new expert. Even though the lack of certification could be characterized as an oversight or technicality, the court found that it could have been remedied with diligence.

State Agent Immunity

***Avendano v. Shaw*, No. 1210125 (Ala. Aug. 19, 2022)**

Claims against a DHR social worker in her official capacity were barred, but claims against her in her individual capacity were not barred, either by state-agent immunity or by Alabama Code § 26-14-9. The court reversed in part the circuit court's decision to dismiss claims under Alabama Rule of Civil Procedure 12(b).

***Harris v. Hicks*, No. 1200717 (Ala. Aug. 19, 2022)**

Claims against various employees of a nursing school were dismissed because the circuit court found them barred by state-agent immunity. On appeal, the Alabama Supreme Court determined that the finding of a previous federal lawsuit that certain defendants were entitled to federal qualified immunity barred the plaintiff from relitigating factual issues related to state-agent immunity. But the complaint was sufficient to survive an immunity challenge of the other defendants on motions to dismiss.

(Continued from page 427)

Appellate Procedure

***Womble v. Moore*, No. 1210222 (Ala. Aug 12, 2022)**

The court determined that a Rule 60(b) motion could not support an appeal because the trial court had not ruled upon that motion, and it further determined that any appeal of the judgment challenged in the Rule 60(b) motion was untimely. It dismissed the appeal.

***Lord Genesh, Inc. v. Valley Nat'l Bank*, No. 1210003 (Ala. Aug. 19, 2022)**

The court dismissed an appeal because it determined that a trial court's judgment that explicitly left open and undecided the issues of interest and other charges was not a final judgment that would support an appeal. Moreover, because the defendants took an appeal two days before a final judgment was entered, the court found that the trial court lacked jurisdiction to enter that order and it was a void order.

Civil Procedure

***Cartron v. Bd. of Governors of Valley Hill Country Club, Inc.*, No. 1210192 (Ala. Aug. 26, 2022)**

Even though both the plaintiff and defendants cross moved for summary judgment, the Alabama Supreme Court found that the trial court erred in entering summary judgment for the defendants and reversed. The court reasoned that Alabama Rule of Civil Procedure 56(c) requires a hearing in almost all circumstances and further relied on four factors to decide that a hearing should have been set: (1) no oral argument of any kind took place on the issues in the motion; (2) the order was entered long before trial; (3) the plaintiff had not yet filed an opposition brief to the defendants' motion; and (4) the plaintiff had filed a motion seeking additional discovery.

Concealed Carry Permit, Appellate Jurisdiction

***Treadway v. Abernathy*, SC-2022-0540 (Aug. 12, 2022)**

After an application for a concealed carry permit was denied, the applicant appealed to the district court and, next, to the circuit court. The circuit court dismissed the appeal on the theory that it lacked jurisdiction to consider it. The Alabama Supreme Court reversed, reasoning that Alabama Code § 12-11-30 gives the circuit could general supervisory jurisdiction over final judgments from district courts.

Landlord/Tenant Law

***Hiett v. Brady*, No. 1210065 (Ala. Aug. 26, 2022); *Brady v. Hiett*, No. 1210081 (Ala. Aug. 26, 2022)**

A lease agreement provided the tenants the option to purchase the property. The tenants contended that they exercised the purchase option. The landlord disagreed. The tenants thereafter stopped paying rent. A jury found that the tenants properly exercised the purchase option but that the tenants owed rent to the landlord. The court ordered specific performance of the purchase option. The Alabama Supreme Court affirmed the specific performance judgment and also rejected the tenants' argument that the award of rent to the landlord is inconsistent with the verdict for the tenants on their exercise of the purchase option. The court found that the damages awarded to the landlord for rent were inadequate and not supported by the evidence and therefore ordered that the trial court should hold a new trial on the landlord's breach claim unless the tenants consent to additur.

***City of Center Point v. Atlas Rental Property, LLC*, No. 1210316 (Ala. Aug. 26, 2022)**

The court affirmed a preliminary injunction against a city's ordinance that required an inspection of rental property and the payment of a fee for each time a rental property became vacant. The Alabama Supreme Court agreed with the trial court that the ordinance was preempted by the Alabama Uniform Residential Landlord and Tenant Act, specifically Alabama Code §§ 35-9A-121 and -102(b), which together provide that Alabama's act governs residential rentals and preempts any conflicting ordinance.

Limited Liability Companies

***Sadler v. Players Recreation Group, LLC*, No. 1210116 (Ala. Aug. 26, 2022)**

The court reversed a bench-trial judgment for the company against a member on claims of breach of the duties of loyalty, care, and good faith and fair dealing. The company lacked a written LLC agreement so the default provisions of Alabama Code § 10A-5A-4.08 governed the duties of loyalty and care. Under the ore tenus standard of review, the court found a lack of evidence supporting a breach of either duty and a lack of evidence that the member breached the duty of good faith and fair dealing.

Arbitration

***Ball Healthcare Servs., Inc. v. Flennory*, No. 1220843 (Ala. Aug. 19, 2022)**

The court reversed the trial court's decision not to compel arbitration. The arbitration agreement at issue was signed by the daughter of a person admitted to a skilled nursing facility, and the daughter's signature certified that she was the duly authorized representative of her mother. The trial court declined to compel arbitration because evidence before it showed that the mother had the ability to sign documents for herself when the daughter signed on her behalf. The Alabama Supreme Court reversed, reasoning that the facility satisfied its burden of producing a facially valid arbitration agreement and shifting the burden to the party challenging arbitration to show that the agreement was invalid or inapplicable. The court found that the party challenging arbitration failed to submit evidence to carry that burden, specifically as to whether the daughter had apparent authority to sign on her mother's behalf.

***Equity Trust Co. v. Morris*, No. 1200551 (Ala. Aug. 19, 2022); *ETC Brokerage Servs., LLC v. Fry*, No. 1200552 (Ala. Aug. 19, 2022)**

The Alabama Supreme Court reversed the trial court's denial of motions to compel arbitration, both as to the claims of a person who had signed arbitration agreements and as to the claims of people who did not sign the agreement. As to the signatory's claim of fraud in factum, the court ruled that the claim was actually for fraud in the inducement, which do not provide a basis for avoiding arbitration. As to the nonsignatory claimants, the court found them to be equitably estopped from avoiding the arbitration provisions because all of their claims (including tort claims) were based on their accounts created by the contracts that contained the arbitration provisions.

From the Alabama Court of Civil Appeals

Appellate Jurisdiction

***Ex parte D.M.,* Nos. 2210403, 2210404, 2210405, 2210406, 2210407 (Ala. Civ. App. Aug. 12, 2022); *D.M v. F.L.C.*, Nos. 2210424, 2210425, 2210426 (Ala. Civ. App. Aug. 12, 2022)**

Various appeals and mandamus petitions arose from five actions: a custody-modification action, a visitation-modification action, a contempt action, a dependency action, and a termination-of-parental-rights action. The court dismissed the appeals of the custody-modification, visitation-modification, and contempt actions insofar as they were brought by the children. Mandamus petitions arising from the dependency action and termination-of-parental rights actions were dismissed as moot because the trial court's dismissal rendered it impossible for the appellate court to grant relief. Other appeals were dismissed either because they were from non-final orders or were not deemed to be adverse to the appellant. The court likewise found that mandamus petitions were not the correct vehicle for challenging the denial of intervention, and, in any event, found them to be untimely if there were to be treated as notices of appeal.

Divorce

***Cate v. Cate*, No. 2210021 (Ala. Civ. App. Aug 12, 2022)**

The court reversed several aspects of the financial terms of the trial court's orders in connection with a divorce. It found the award of more than half of the parties' retirement benefits to the wife to be error because nothing in the record demonstrated that the parties agreed to such a division and Alabama Code § 30-2-51(b)(2) requires an agreement to award more than half of such benefits. Upon reversing the division of the retirement benefits, it also reversed the trial court's decision as property division in general because the issues of property division are interrelated. The court also reversed the child-support rulings because the court of civil appeals could not determine how the trial court determined the amount of child support to award, specifically as to the issue of imputed income from the wife's alleged underemployment.

***Frohock v. Frohock*, Nos. 2210040, 2210077 (Ala. Civ. App. July 29, 2022)**

The court reversed, finding that the trial court improperly admitted an unauthenticated exhibit that was critical in determining the property division of the divorcing couple. It also reversed the trial court's decision not to award the wife alimony, reasoning that the possibility of a new division of property might lead the trial court to change its decision about alimony.

***Myrick v. Myrick*, No. 2200951 (Ala. Civ. App. Aug. 5, 2022)**

The court held that the trial court had jurisdiction over the wife because she was domiciled in Alabama. Even though she lived in Georgia to work, she spent holidays in Alabama and testified that she intended to return to Alabama when she

(Continued from page 429)

retired in nine years. The court then reversed the decision to award alimony to the wife, concluding that the trial court relied on inadequate evidence in finding that the wife lack the means to maintain the economic status quo of the parties as it existed during the marriage. Given this decision, the court likewise reversed the trial court's requirement that the husband bear all of the responsibility to pay a debt to the IRS.

***Turney v. Turney*, No. 2201007 (Ala. Civ. App. Aug 19, 2022)**

The court affirmed the award of an attorney's fee to the wife, finding that the trial court did not exceed its discretion in awarding a fee in light of the extensive litigation involved in the divorce and the wife's limited ability to earn income. The amounts of periodic alimony and past-due child support. The court reversed the trial court's order requiring the husband to maintain a life insurance policy until his alimony obligations were fulfilled because it reasoned that the obligation to pay alimony does not survive the death of payor. Even though the court reversed the life-insurance provision in the trial court's order, it did not find that matter to be so substantial as to require the trial court to revisit the entire property division and alimony rulings. Lastly, the court awarded the wife a $4,000 attorney's fee on appeal.

Child Custody

***Grantham v. Grantham-Potts*, No. 2210139 (Ala. Civ. App. July 15, 2022)**

The court determined that a custody arrangement that awarded the father visitation with the child "one weekend a month, or three consecutive days, one week in the summer or 7 days and alternate holidays determined by even and odd years" amounted to sole physical custody subject to the father's visitation rights, so the trial court was correct in applying the *McLendon* standard of proof to the father's custody modification petition. The court affirmed the denial of the father's petition to modify custody but reversed the child-support modification awarded in favor of the mother because it found the record to lack the basis for the award. The case was remanded for child-support modification proceedings.

***Corbitt v. Corbitt*, No. 2200786 (Ala. Civ. App. July 22, 2022)**

The court affirmed the trial court's decision to hear testimony from the father's children in camera with counsel present (but not the parents) because the court determined that the father did not object to receiving testimony in that manner. It also found other of the father's evidentiary objections to have been waived. The trial court's custody decisions were affirmed. While the court affirmed the modification of the father's child support obligations, it reversed the calculation of child support in order to have the trial court develop a full Rule 32 record. The trial court's decision not to hold the wife in contempt was affirmed. While the mother's failure to require the child to engage in visitation with the father could be grounds for contempt, the court found that extraordinary circumstances – including the child's testimony about her own unwillingness to visit with the father and the physical symptoms that resulted from that unwillingness – were present and were sufficient to support the trial court's decision not to hold the wife in contempt.

***R.N.C. v. A.V.P.*, No. 2210189 (Ala. Civ. App. July 29, 2022)**

A visitation order that provided that a father's visitation rights would automatically change from supervised to unsupervised visitation after the passage of six months was reversed because it did not provide the trial court's rationale or explain the circumstances that could change over that time to justify a change in visitation rights.

***Shackleford v. Shackelford*, 2210201 (Ala. Civ. App. Aug. 5, 2022)**

The court rejected a father's appeal from an order refusing to modify his visitation rights. As an initial matter, it found that a father's failure to file a supplemental petition under Alabama Rule of Civil Procedure 15 precluded him from relying on post-petition conduct in attempting to hold the mother in contempt. It also found that the evidence was sufficient to support the trial court's decision to deny modification under the ore tenus standard of review. It also found that the father had, in its view, failed to properly challenge the trial court's decision not to hold the mother in contempt.

Termination of Parental Rights

***E.A.D. v. Randolph Cty. Dep't of Human Resources*, Nos. 2210148, 2210149 (Ala. Civ. App. July 22, 2022); *S.D. v. Randolph Cty. Dep't of Human Resources*, Nos. 2210165, 2210166 (Ala. Civ. App. July 22, 2022)**

Because a father had shown sobriety in the months leading up to trial, the trial court did not have clear and convincing evidence that the father was unable or unwilling to discharge his responsibilities, or that his conduct or condition rendered him unable to properly care for the children and that his conduct and condition were unlikely to change in the foreseeable future. The court therefore reversed the trial court's decision terminating the father's parental rights. The

court also reversed the termination of the mother's parental rights so that the trial court could consider whether placing the children with the father and granting the mother visitation might be a viable alternative to terminating her rights.

***J.C.L. v. J.B.L.*, No. 2200841 (Ala. Civ. App. Aug. 5, 2022)**

Appealing from an order terminating her parental rights based on a stipulation recognized by the trial court, a mother argued that the trial court erred in two ways. She asserted that the court did not find that there were no viable alternatives to terminating her rights, but the court of civil appeals disagreed and concluded both that the record supported a finding of abandonment and that a stipulation relieved the father of his evidentiary burden of proving the lack of viable alternatives. She also argued that the agreement enforced against her was procured by duress, but the appellate court found no evidence in the record supporting a finding of duress. The court also found that the mother had not made an adequate challenge to the termination of her parental rights based on the best interests of the child.

***S.C. v. Lauderdale Cty. Dep't of Human Resources*, Nos. 2210267 and 2210268 (Ala. Civ. App. Aug. 5, 2022)**

Because the court of civil appeals determined that a mother's postjudgment motions were denied by operation of law 14 days after they were filed, it found that the mother's notices of appeal were untimely and dismissed the appeals. The court found that the juvenile court lacked jurisdiction to extend the deadline for ruling on the mother's postjudgment motions because it did not enter such an order until after the 14-day period had expired, and it similarly concluded that the juvenile court could not make its extension orders relate back to a time within the 14-day period.

***A.B. v. Montgomery Cty. Dep't of Human Resources*, Nos. 220106 and 2210107 (Ala. Civ. App. Aug. 19, 2022)**

An order terminating a mother's parental rights was reversed because the evidence demonstrated that a child could stay with a foster mother who would permit contact between the mother and child. Because this alternative to termination existed, the court found that termination was not warranted.

***H.F. v. Elmore Cty. Dep't of Human Resources*, Nos. 2210190 and 2210191 (Ala. Civ. App. Aug. 19, 2022); *A.L. v. Elmore Cty. Dep't of Human Resources*, Nos. 2210192, 2210193, 2210194, and 2210195 (Ala. Civ. App. Aug. 19, 2022)**

Orders terminating a mother's parental rights were affirmed based on the credibility determinations based by the juvenile court and the finding that the mother's continued relationships with the children were not in the children's best interests. The father's appeals as to his child were found to lack

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merit in light of what the court determined to be his ongoing addictions and the court's rejection of his argument that maintaining his parental rights was a viable option. The child had been in foster care from birth. The father made no challenge to the finding that his child was dependent, so that order was affirmed and the father's appeals pertaining to another child were dismissed because he was not the legal father whose parental rights were terminated.

Dependency

***B.N.D. v. Barbour Cty. Dep't of Human Resources*, No. 2200998 (Ala. Civ. App. Aug. 5, 2022)**

An appeal relating to a 72-hour hearing was dismissed as moot because the order was supplanted by later orders. It affirmed the trial court's decision to find the child dependent and awarding custody to the paternal grandparents with supervised visitation for the mother.

From the Eleventh Circuit Court of Appeals

TILA

***Lamirand v. Fay Servicing, LLC,* No. 20-14286 (11th Cir. July 1, 2022)**

The Truth in Lending Act requires lenders to send periodic statements to clients about their loans. The court held that these periodic statements can still violate the Fair Debt and Collection Practices Act (FDCPA) when they make false or misleading statements in connection with debt collection. Although the lender argued that the periodic statements should not fall within the FDCPA's limitations because they are required by the Truth in Lending Act, the Eleventh Circuit found no conflict between the obligation to send period statements and the obligation to send consumers accurate information.

Title VII

***Patterson v. Georgia Pacific, LLC,* No. 20-12733 (11th Cir. July 5, 2022)**

An HR manager claimed that her current employer had fired her in retaliation for testifying against her former employer in violation of Title VII. The Eleventh Circuit first rejected the "manager exception" by holding that HR managers are protected by Title VII's anti-retaliation provision. It then held that the anti-retaliation provision prohibits retaliation against an employee who opposes unlawful employment practices of a former employer. In addition to these protections, the court held that the manager was protected by the Title VII participation clause.

Immigration

***Daye v. United States Attorney General,* No. 20-14340 (11th Cir. July 6, 2022)**

The petitioner, a lawful permanent resident of the United States, was convicted of three offenses involving the transportation and distribution of marijuana. The Eleventh Circuit affirmed the Board of Immigration Appeals' finding that the petitioner was removable under INA § 237(a)(2)(A)(i)-(ii) because the drug transportation and distribution charges constituted crimes involving moral turpitude.

Fee Shifting

***Royal Palm Properties, LLC v. Pink Palm Properties, LLC,* No. 21-10872 (11th Cir. July 7, 2022)**

The Eleventh Circuit affirmed the district court's ruling that there was no prevailing party, and therefore no party entitled to fees, when both parties lost their claims and counterclaims. The plaintiff alleged the defendant had infringed its registered service mark; the defendant responded by filing five counterclaims. The jury held that, while there was no infringement, the trademark was not invalid as argued by the defendant. The Eleventh Circuit considered whether there was a prevailing party in this unique situation and concluded that there is no prevailing party for purposes of awarding fees when the resolution of the parties' legal dispute does not result in a material change in their relationship.

Rule 11

***Huggins v. Lueder, Larkin, & Hunter, LLC,* No. 20-12957 (11th Cir. July 12, 2022)**

The Eleventh Circuit vacated the district court's ruling that a Rule 11 motion was untimely because it was filed after the court's final judgment. The Eleventh Circuit clarified that nothing in its case law or the text of the rule makes a Rule 11 filing untimely solely because the court has already issued a final judgment.

FIFRA

***Carson v. Monsanto Co.,* No. 21-10994 (11th Cir. July 12, 2022)**

The plaintiff alleged that his exposure to the chemical ingredient in Monsanto's Roundup product was linked to his malignant fibrous histiocytoma diagnosis. The district court held that the plaintiff's failure to warn claims were preempted under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The Eleventh Circuit reversed. It held that the EPA registration process for a pesticide label in compliance with FIFRA was not sufficiently formal to carry the force of law, and therefore could not preempt a state law claim. It also held that a failure to warn claim under Georgia law was not preempted by FIFRA because Georgia law imposes a lesser duty to warn than the FIFRA warning requirements.

Civil Procedure

***MSP Recovery Claims, Series LLC v. Metropolitan Gen'l Ins. Co.,* No. 21-11547 (11th Cir. July 18, 2022)**

The Eleventh Circuit reversed the district court's Rule 12(b)(6) dismissal of a claim for payment under the Medicare Secondary Payer Act. The district court dismissed the complaint in part because the plaintiffs had improperly pleaded their factual allegations in an exhibit and not in the complaint. The Eleventh Circuit held that the district court should have considered whether the allegations in the complaint and in the exhibit plausibly alleged a claim when taken together.

***Stansell v. Lopez Bello* (11th Cir. July 19, 2022)**

The plaintiffs obtained a default judgment under the Anti-Terrorism Act of $106 million in compensatory damages, which was then trebled under § 2333 to $318 million. The plaintiffs attached the award of compensatory damages to the assets of Lopez Bello. Lopez Bello filed a Rule 60(a) motion requesting the district court to categorize the $106 million as compensatory damages, rather than the fully trebled $318 million as compensatory. The district court denied the motion and he appealed. The Eleventh Circuit held that Lopez Bello was requesting a material alteration of the award, not a correction of a clerical error, and so the district court had properly denied his Rule 60(a) motion.

***Peden v. Stephens,* No. 21-10723 (11th Cir. Aug. 29, 2022)**

A district court's 54(b) certification was found to be in error because the only reason given for the finding that there was no just reason for delay was the potential length of the litigation being expanded due to the pandemic. The district court did not find that the delay cause by the pandemic could imperil the plaintiff's ultimate recovery. Because the pandemic is a common source of delay for many cases, the Eleventh Circuit found it insufficient to support a Rule 54(b) certification.

Abortion

***SisterSong Women of Color Reproductive Justice Collective v. Governor of the State of Georgia,* No. 20-13024 (11th Cir. July 20, 2022)**

The Eleventh Circuit considered the constitutionality of Georgia's ban on abortions after the detection of a fetal heartbeat and whether Georgia's definition of an unborn child as a human being was void for vagueness on its face. It held that Georgia's ban survived the rational basis review required after the recent *Dobbs* decision and that the definition of an unborn child as a human being was not unconstitutionally vague.

Preemption

***Jacob v. Mentor Worldwide, LLC,* No. 20-10132 (11th Cir. July 20, 2022)**

The Eleventh Circuit reversed the district court's dismissal of the complaint and held that the plaintiff's medical device manufacturing defect claims were not preempted by the Medical Device Act. The plaintiff alleged that the defendant had violated a duty under federal law, and a parallel duty under Florida law, to exercise reasonable care. Because she relied on a violation of federal requirements to prove a breach of state law, the court held that the plaintiff's claims were not preempted by the Medical Device Act.

Conflicts of Interest

***Tecnicas Reunidas De Talara S.A.C. v. SSK Ingenieria Y Construccion S.A.C.,* No. 21-13776 (11th Cir. July 22, 2022)**

Two of the appellant's attorneys withdrew and joined the opposing party's law firm during the course of an arbitration proceeding. A year after receiving notice of withdrawal and shortly after receiving an adverse award, the appellant argued that the side-switching violated public policy by creating a non-waivable conflict of interest. The Eleventh Circuit affirmed the district court's conclusion that the appellant had waived this argument by waiting a year and only raising it after receiving notice of the adverse award.

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Immunity

***Coleman v. Riccardo,* No. 20-14091 (11th Cir. July 22, 2022)**

A plaintiff sued a group of Florida police officers and the city for committing several state law torts. The district court denied the officers' motion for summary judgment on state-law sovereign immunity grounds because it was unclear whether they had arrested the plaintiff with probable cause. On appeal, the Eleventh Circuit concluded that Florida law grants officers sovereign immunity unless they acted with actual malice or wanton and willful disregard of human safety. Although the officers may not have had probable cause, the plaintiff had not shown that they acted with actual malice or wanton and willful disregard, and so the Eleventh Circuit reversed.

***Butler v. Gualtieri,* No. 21-12136 (11th Cir. July 25, 2022)**

A plaintiff sued a Florida police officer and the sheriff in his official capacity after the officer broke the plaintiff's arm during her arrest. The sheriff appealed the district court's denial of his motion for summary judgment on sovereign immunity grounds. The sheriff argued that because the officer's actions were undertaken in bad faith, with malicious purpose, and in a manner exhibiting wanton and willful disregard of human safety, Florida sovereign immunity law protected him from vicarious liability. The Eleventh Circuit affirmed the district court's ruling that there were unresolved issues of fact relevant to determining whether the officer's actions were sufficiently egregious to excuse the sheriff from liability.

***Richmond v. Badia,* No. 20-14337 (11th Cir. Aug. 22, 2022)**

The trial court ruled at summary judgment that a school resource officer had qualified immunity against a claim that he falsely arrested, used excessive force against, and battered a student. The Eleventh Circuit affirmed as to the false arrest claim but reversed as to excessive force and battery. The court reasoned that the officer's armbar technique amount to too much force against a 13-year-old child who was not actively committing a crime or posing a threat, and that the officer's conduct could be deemed malicious or in bad faith at the summary judgment phase.

Standing

***Drazen v. Godaddy.com, LLC,* No. 21-10199 (11th Cir. July 27, 2022)**

The Eleventh Circuit vacated the district court's approval of a class action settlement because it found that the plaintiff did not have Article III standing. Even though the court found that, at most, approximately seven percent of the plaintiffs in the class did not have standing to sue, the district court approved the settlement because those plaintiffs may have had standing to sue in the Fifth Circuit. The Eleventh Circuit held that in a class action, every member of the class must have standing at all phases of litigation, including the settlement stage. It also rejected the district court's interpretation of Fifth Circuit case law about standing to sue in a class action.

Antitrust

***Arrington v. Burger King Worldwide, Inc.,* No. 20-13561 (11th Cir. August 31, 2022)**

The court reversed the dismissal of an anti-trust complaint, finding that the plaintiffs had plausibly alleged that a "no-hire agreement" satisfied the concerted-action prong of a Sherman Act Section 1 violation.

Bail

***Shultz v. Alabama,* No. 18-13894 (11th Cir. July 29, 2022)**

The court reversed the entry of a preliminary injunction against the bail system in Cullman County, Alabama, finding that the district court erred in concluding that the plaintiffs were likely to succeed on the merits of their claims that the bail system discriminated against the indigent and denied pretrial detainees procedural due process. The court affirmed the district court's decision not to abstain under Younger and found that judges lacked standing to appeal the district court's injunction because the injunction applied to the sheriff, not the judicial officers. The court found that the district court properly determined that the sheriff was the proper defendant.

Lanham Act

***Edmonson v. Velvet Lifestyles, LLC,* No. 20-11315 (11th Cir. Aug. 4, 2022)**

The court reversed summary judgment for the plaintiffs against an individual and organization that were managers of a swingers' club. The district court entered summary judgment against the defendants on false endorsement claims under the Lanham Act. The court reversed that judgment as to the managers, finding that the record evidence did not support the conclusion that the managers were involved or a moving, conscious force in the Lanham Act violations.

Administrative Law

***S.S. v. Cobb Cty. School District,* No. 21-11048 (11th Cir. Aug. 5, 2022)**

The court held that a district court's order remanding a claim under the Individuals with Disabilities Education Act

claim to a state administrative agency was not a final order under 28 U.S.C. § 1291 and dismissed the appeal.

Bidi Vapor LLC v. U.S. Food & Drug Admin., **No. 21-13340 (11th Cir. Aug. 23, 2022)**

The Eleventh Circuit remanded five premarket tobacco product applications back to the FDA for reconsideration after determining that the agency acted arbitrarily and capriciously in denying the applications without considering the applicants' marketing and sales-access-restriction plans.

Medicare Secondary Payer Act

MSPA Claims 1, LLC v. Tower Hill Prime Ins. Co., **No. 21-11135 (11th Cir. Aug. 10, 2022)**

The four-year statute of limitations from 28 U.S.C. § 1658(a) was held to apply to claims arising under the Medicare Secondary Payer Act, and that statute began ran when the assignor paid medical bills and became entitled to reimbursement through the MSPA.

Copyright

Victor Elias Photography, LLC v. Ice Portal, Inc., **No. 21-11892 (11th Cir. Aug. 12, 2022)**

As a matter of first impression, the court held that 17 U.S.C. § 1202(b) includes a scienter requirement. In light of this requirement, the court found that summary judgment was properly granted for the defendant because the plaintiff did not demonstrate sufficient evidence of this scienter element.

Personal Jurisdiction

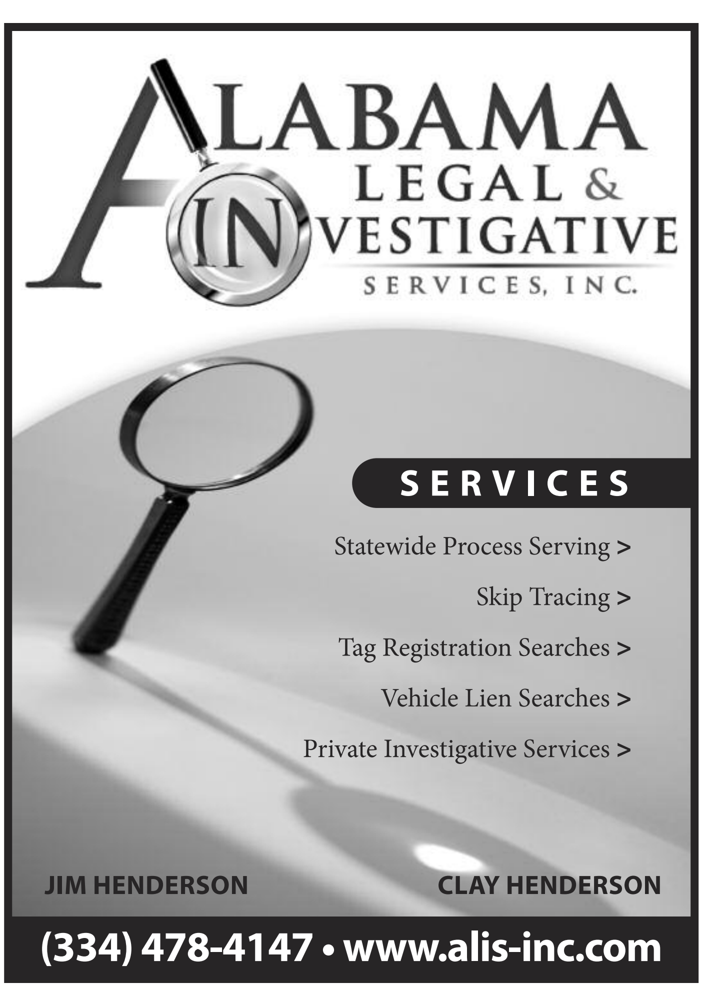
Herederos De Roberto Gomez Cabrera, LLC v. Teck Resources Ltd., **No. 21-12834 (11th Cir. Aug 12, 2022)**

The court held that the personal jurisdiction analysis of the Fifth and Fourteenth Amendment is the same, given the materially identical language of the two provisions and the history of similar treatment of the provisions in the Eleventh Circuit. Applying the minimum-contacts analysis, the court found that specific jurisdiction was lacking because the only alleged contact with the forum was the injury, not the defendant's conduct. It also found that general jurisdiction was lacking. The plaintiff alleged that the defendant was the alter ego of subsidiary companies within the United States, but the court determined that, under the totality of the circumstances, the plaintiff had not established that the parent company was the alter ego of the subsidiary companies.

COVID Vaccine Mandate

Georgia v. President of the United States, **No. 21-14269 (11th Cir. Aug. 26, 2022)**

Reviewing a preliminary injunction granted to several states and private parties suing agencies of the federal government to enjoin the contractor vaccine mandate imposed by an executive order, the Eleventh Circuit found that the district court properly enjoined the federal agencies from enforcing the mandate against the parties and to the extent the injunction barred the agencies from considering a bidder's compliance with the mandate in deciding whether to grant a contract to a party or non-party bidder. The court otherwise vacated the preliminary injunction, allowing the agencies to enforce the mandate in new contracts and in existing contracts between the federal government and non-parties and also allowing the agencies to consider compliance with the mandate in the bid-selection process when no plaintiff was a bidder.



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Fair Housing

***Sailboat Bend Sober Living, LLC v. Fort Lauderdale,* No. 20-13444 (11th Cir. Aug. 26, 2022)**

The Eleventh Circuit affirmed the district court's ruling that a zoning ordinance did not facially violate the Fair Housing Act or the Americans with Disabilities Act because the ordinance treated people with disabilities better than people without disabilities. Similarly, the court found insufficient evidence to carry the plaintiffs' burden of creating a fact issue on the issue of whether the city defendant was required to make a reasonable accommodation for the plaintiffs relating to the sprinkler requirement in a fire code. Lastly, the court held that the district court correctly granted summary judgment against the plaintiffs on their intentional discrimination claim, finding that the city's enforcement of the fire code was not motivated by discrimination against people with disabilities.

Bankruptcy

***In re: Forrest,* No. 21-12133 (11th Cir. Aug. 31, 2022)**

In a matter of first impression, the Eleventh Circuit held that Section 523(a)(4) does not except debts incurred by a buyer acting as a trustee under the Perishable Agricultural Commodities Act ("PACA") from discharge. The court adopted a three-part test to determine whether a person is acting in a fiduciary capacity in relation to a creditor. The first part has three sub-parts: (1) a trustee, who holds (2) an identifiable trust res, for the benefit of (3) an identifiable beneficiary or beneficiaries. Second, the relationship must impose sufficient trust-like duties on the trustee with respect to the res and beneficiaries to create a "technical trust" – with the important indicia of a technical trust being the duty to segregate assets and the duty to refrain from using those assets for non-trust purposes. Third, the debtor must be acting as a fiduciary before the act of fraud or defalcation creating the debt. Applying this test, the court found that PACA does identify a trustee, beneficiary, and res, it does not impose sufficient trust-like duties to satisfy the second element – the "technical trust" element. Therefore, the court affirmed the bankruptcy court's decision to dismiss the adversary proceeding relating to the non-dischargability of a debt.

Trade Secrets

***AcryliCon USA, LLC v. Silkal GmbH & Co.,* No. 21-12853 (11th Cir. Aug. 29, 2022)**

In a case up on an appeal for the third time, the court ruled that the district erred in entering a permanent injunction without making the findings of fact required by Federal Rules of Civil Procedure 60 and 65. In particular, it found that Rule 60(a), relating to correcting clerical errors, was not available to amend the prior final judgment entered in the case because Rule 60(a) does not apply to orders, such as new injunctions, that affect the substantive rights of the parties. The Eleventh Circuit also ruled that the district court erred in "re-entering" a permanent injunction when the Eleventh Circuit had already determined that no permanent injunction had previously been entered. The appellate court reversed the district court's fee awards. It reversed the fee award to the plaintiff because it determined that the district court did not make the requisite findings regarding work done on a successful claim verses an unsuccessful claim. It reversed the award to the defendant for a successful appeal because, under Georgia law, the defendant was not a prevailing party because some relief was still awarded against it after the appeal. Lastly, the court declined to reassign the case on remand. The defendant requested reassignment based on what the Eleventh Circuit characterized as "barbed" comments, but the court found that the comments were insufficient to rise to the level of undermining the appearance of justice – in part because they related to the merits of the case.

Recent Criminal Decisions From the Eleventh Circuit Court of Appeals

First Step Act; Compassionate Release

***United States v. Cilla*, No. 21-13248 (11th Cir. Sept. 2, 2022)**

The district court did not err in denying an inmate's request for "compassionate release" from his sentence on drug trafficking/illegal firearm charges. His asthma, heart condition, respiratory illness, need to care for his ill cousin, and

risk of COVID-19 infection were not "extraordinary and compelling" grounds for release required under the First Step Act, 18 U.S.C. § 3582(c), and, alternatively, his lengthy criminal history and disciplinary record also weighed against release.

Ineffective Assistance; Procedural Default Of Claims Under *Martinez*

***Palmer v. Cilla*, No. 20-12066 (11th Cir. Aug. 31, 2022)**

The doctrines of exhaustion and procedural default prevent a federal habeas petitioner from challenging a state court judgment on an issue that was not presented throughout the state courts. However, if a petitioner can show that he received ineffective assistance of counsel or lack of counsel during state court postconviction proceedings that caused him to not exhaust an ineffective assistance of trial counsel claim, he may still present the claim to federal courts under *Martinez v. Ryan*, 566 U.S. 1 (2012). Under *Martinez,* the petitioner must show that the claim is "substantial" and has merit. Here, each of the petitioner's claims, including claims that defense counsel was ineffective in his handling of prosecution witnesses at trial, were procedurally defaulted; he failed to show that the ineffective assistance claims were "substantial" under *Martinez*.

Ineffective Assistance; Conflict of Interest

***Ochoa v. United States*, No. 18-10755 (11th Cir. Aug. 18, 2022)**

The district court properly denied the defendant's motion to vacate his drug trafficking conspiracy conviction based on his attorney's conflict of interest. The attorney allegedly sought to convince the defendant to pay a bribe as part of a plea agreement that would benefit another client. However, the defendant was represented by other attorneys who were not conflicted or deficient in pursuing a legitimate plea agreement. While the Sixth Amendment guarantees the right to legal assistance without a conflict of interest, it does not "include the right to receive good advice from every lawyer a criminal defendant consults about his case[,]" and there was no allegation that the numerous other attorneys representing the defendant also had a conflict of interest.

Self-Representation

***United States v. Cobble*, No. 20-13166 (11th Cir. Aug. 17, 2022)**

The district court did not err in permitting the defendant, diagnosed with antisocial and narcissistic personality disorders, to represent himself at a trial in which he was convicted of mailing threats to kill judges in violation of 18 U.S.C. § 876. It correctly warned him of the dangers and disadvantages of self-representation, and the factors for considering voluntary waiver of counsel under *Fitzpatrick v. Wainwright*, 800 F. 2d 1057 (11th Cir. 1986) weighed in favor of upholding the waiver.

From the Alabama Supreme Court

Prior Bad Acts

***Ex parte State (v. Yeiter),* SC-2022-0417 (Ala. Sept. 2, 2022)**

The court of criminal appeals erred in reversing a capital murder conviction due to the admission of prior bad acts evidence under Ala. R. Evid. 404(b). The defendant's statements to police regarding his prior robbery and auto theft convictions, incarceration, driving while intoxicated, and other bad acts could not have affected the outcome of his trial because the evidence of his guilt "was virtually ironclad" and " overwhelming[.]"

Escape

***Ex parte Jones*, No. 1210194 (Ala. Sept. 16, 2022)**

The purpose of the Alabama Criminal Code's adoption was to "provide an entirely new criminal code for the State of Alabama," and the corresponding enactment of Ala. Code §§ 13A-10-31 through 13A-10-33 governing escape from custody superseded the "former 'helter-skelter' scheme for punishing escapes." Those statutes repealed Ala. Code §§ 14-8-42 and 14-8-3 to the extent they provided a separate punishment for escape from a county work-release program. Thus, the willful escape from a county work-release program is punishable under §§ 13A-10-31 through 13A-10-33.

Year-and-a-Day Rule

***State v. Grant*, No. 1210198 (Ala. Sept. 9, 2022)**

The common law year-and-a-day rule provided that a defendant could be prosecuted for homicide only if the victim died within one year and a day of the defendant's wrongful act. Holding that the adoption of the Alabama Criminal Code abrogated that rule by enacting statutes that contained no time limitation and accounted for concurrent causes of death, the Alabama Supreme Court overruled its prior decision in *Ex parte Key*, 890 So. 2d 1056 (Ala. 2003) to hold that no time limitation exists for homicide offenses.

(Continued from page 437)

From the Alabama Court of Criminal Appeals

Transfer for Trial as an Adult; Hearsay

***M.L.W. v. State*, CR-21-0468 (Ala. Crim. App. Sept. 2, 2022)**

The juvenile court erred in transferring a juvenile to circuit court for trial as an adult because its determination was based on hearsay alone. While the rules of evidence do not apply to juvenile transfer hearings and hearsay is admissible, the decision to transfer cannot be solely based on hearsay.

Transfer for Trial as an Adult; Confrontation Clause

***A.P.S. v. State*, CR-21-0024 (Ala. Crim. App. Aug. 5, 2022)**

The admission of a witness's out-of-court statement implicating the juvenile in a hearing on the state's motion to transfer him for prosecution as an adult violated the juvenile's Confrontation Clause rights and required reversal.

Criminal Surveillance

***Bailey v. City of Vestavia Hills*, CR-21-0080 (Ala. Crim. App. Sept. 2, 2022)**

The court upheld the defendant's municipal court conviction of criminal surveillance under Ala. Code § 13A-11-32 arising from a "Peeping Tom" incident at a private residence. It found no error in the municipal court's denial of his motions to dismiss the case due to an alleged defect in the complaint or to suppress evidence of his identification by the homeowner. However, it reversed the defendant's split sentence, holding that the language of the Split Sentence Act, Ala. § 15-18-8, in effect at the time did not allow the municipal court to split his six-month sentence.

Capital Murder; "Law of the Case"; Jury Composition; Mitigating Circumstances

***Smith v. State*, CR-17-1014 (Ala. Crim. App. Sept. 2, 2022)**

The court rejected the capital murder defendant's claim that the circuit court should have conducted another hearing to determine his eligibility for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibited capital punishment for intellectually disabled defendants. The Alabama Supreme Court had already upheld the circuit court's prior decision that the defendant was not intellectually disabled and was thus eligible for the death penalty, and whether more recent caselaw impacted that decision "is a question that only the Alabama Supreme Court can answer." The court also found no plain error in the denial of the defendant's challenges to the racial or gender makeup of his jury under *Batson v. Kentucky*, 479 U.S. 79 (1986) and *J.E.B. v. Alabama*, 511 U.S. 127 (1994) nor in the admission of prior bad acts evidence during the trial's penalty phase. The circuit court also committed no plain error when it did not list "horrific poverty" as a mitigating circumstance in its sentencing order.

Capital Murder; Intent

***Dearman v. State*, CR-18-0060 (Ala. Crim. App. Aug. 5, 2022)**

The jury could properly find from the evidence that the capital murder defendant possessed the intent to commit the offenses, regardless that he was intoxicated from drugs at the time he killed his six victims during a burglary. The defendant thoroughly described his offenses in statements to law enforcement, including the order in which he killed his victims, where they were located, and other details, and even diagramed the scene. Further, several witnesses stated that he did not appear intoxicated on the morning after the murders.

Hearsay; Ultimate Issue

***Bishop v. State*, CR-20-0976 (Ala. Crim. App. Sept. 2, 2022)**

The court rejected the defendant's arguments that portions of a body-camera recording and an interview with law enforcement constituted inadmissible hearsay. The statements on the body-camera recording were from police dispatch to the arresting officer regarding whether the defendant matched a description, and they were offered "to let [him] know why he was being detained," not to identify him as the robber, and thus were not offered to prove the truth of the matter asserted. The detective's statement during the interview, "Stop lying to me. I know what happened and you know what happened," was also not offered to

prove the truth of the matter asserted, but instead was an "interrogation tactic used to elicit a confession." The court also found no merit to the defendant's argument that the detective's statement embraced the ultimate issue to be determined by the jury.

Probation Revocation; Lack of Hearing

***Gosa v. State*, CR-21-0460 (Ala. Crim. App. Sept. 2, 2022)**

The court reversed a probation revocation judgment, finding that the circuit court did not conduct a proper hearing on the state's revocation motion. Although the probationer stated that he wished to forgo a formal revocation hearing and that the delinquency report's facts were correct, he "did not affirm that those facts constituted an admission that he had absconded" and thereby had violated the terms of his probation.

Probation Revocation; Sufficiency of Evidence

***Harper v. State*, CR-2022-0596 (Ala. Crim. App. Sept. 2, 2022)**

While a combination of hearsay and nonhearsay evidence may suffice to support a probation revocation, the state presented only hearsay testimony from a law enforcement officer who traveled to the probationer's registered address, did not see him at the address, and inquired of someone at the address whether he lived there. The court found this to be insufficient to support revocation on the ground that the probationer's failed to comply with sex offender registration requirements.

Expert Witness Funding; Involuntariness of Statement Due to Staleness of *Miranda* Warning, Intoxication

***Horn v. State*, CR-20-0790 (Ala. Crim. App. Aug. 5, 2022)**

The defendant, who was provided funding for independent DNA testing, failed to show that his trial was rendered fundamentally unfair by the circuit court's denial of funds to retain an expert to educate defense counsel regarding DNA evidence. The circuit court also did not err in denying his motion to exclude his statement to law enforcement as involuntary. The six-hour interval between when the defendant was issued warnings pursuant to *Miranda v. Arizona*, 4 U.S. 436 (1966) prior to his first statement and his second statement did not render the warnings stale or the second statement inadmissible. The defendant's claim that he was too intoxicated to voluntarily waive his *Miranda* rights was also meritless because there was nothing to indicate that he was "intoxicated to the extent of mania" as required for a finding of involuntariness.

Statement Given After Arrest in Home

***Downey v. State*, CR-20-0934 (Ala. Crim. App. Aug. 5, 2022)**

While an arrest of a person inside his home must be based on both probable cause and exigent circumstances under *Payton v. New York*, 445 U.S. 573 (1980), an arrest made in violation of *Payton* does not render a subsequent statement made outside of the home inadmissible. The defendant was arrested in his home but gave his statement at the sheriff's office, thus, even if the arrest was not based on exigent circumstances, the statement was not subject to the exclusionary rule.

Criminally Negligent Homicide; Suspended License

***Davis v. State*, CR-20-0787 (Ala. Crim. App. Aug. 5, 2022)**

Evidence that the defendant was driving with a suspended license at the time of a fatal accident was relevant to prove his mental culpability, along with his running of a stop sign, for the offense of criminally negligent homicide.

Post-Release Supervision for Sex Offenders

***L.M.L. v. State*, CR-20-0157 (Ala. Crim. App. Aug. 5, 2022)**

The court overruled the state's application for rehearing that sought to alter its opinion that affirmed the defendant's sex offense convictions but set aside certain sentences as they related to Ala. Code § 13A-5-6(c). The offenses were committed before § 13A-5-6(c), which provides for post-release supervision after release for incarceration for certain classes of sex offenders, was enacted in 2005.

Felony Murder; Double Jeopardy

***McGee v. State*, CR-20-0676 (Ala. Crim. App. Aug. 5, 2022)**

The defendant's two felony-murder convictions (murder committed during a robbery and murder committed during a burglary) arising from the death of one victim constituted double jeopardy, requiring a remand for the circuit court to enter a new order adjudging him guilty of a single offense and sentencing on that offense. ▲

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margaret.murphy@alabar.org.

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J. Ladd Davis announces the opening of **DLB Attorneys at Law LLC** and that **Amy Nelson** and **Theresa Friedman** joined the firm, with offices at 2100B SouthBridge Parkway, Ste. 240, Birmingham 35209. Phone (659) 200-9586.

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The **United States Social Security Administration** announces that **Brian Austin Oakes** has been appointed a federal administrative law judge for Division IV in Atlanta.

The **United States Bankruptcy Court, Northern District of Alabama,** announces the appointment of **Bankruptcy Judge Jennifer H. Henderson** as Chief Judge.

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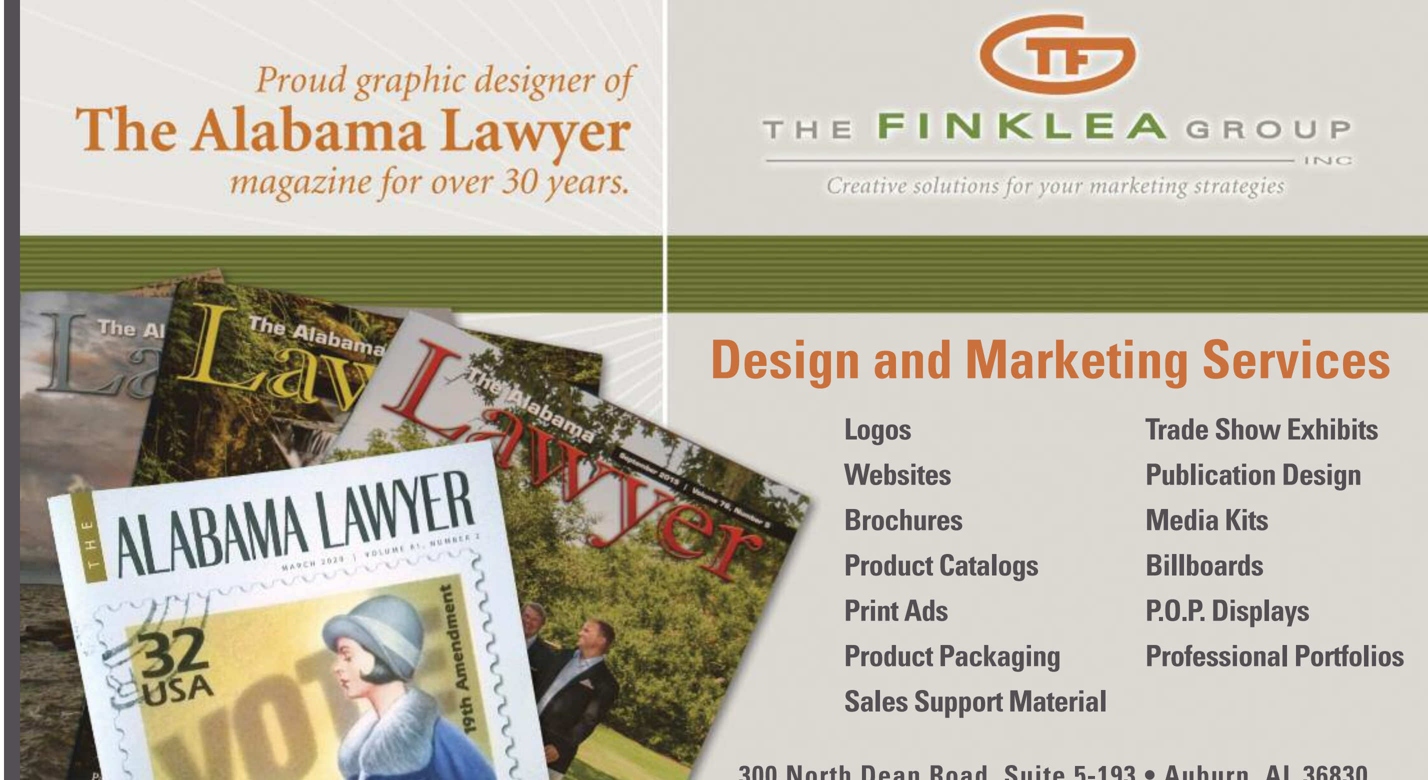

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Rulemaking Under the Alabama Administrative Procedure Act

What is the APA?

The Alabama Administrative Procedure Act (APA),[1] enacted in 1981, establishes the "minimum procedural code" by which an agency, board, or commission of state government may adopt administrative rules. Before the adoption of the APA, there was no uniform procedure by which agencies adopted rules; consequently, the procedure and timeline varied from agency to agency. The APA established a uniform process with the intent of providing notice to the public, promoting fairness in and access to rulemaking, and encouraging increased public participation in the process.[2]

The APA directs the Legislative Services Agency (LSA) to compile and maintain the official Alabama Administrative Code, a comprehensive publication containing the complete administrative rules of all agencies of the state, and to publish the Alabama Administrative Monthly (AAM), a monthly register of proposed rule additions, amendments, and repeals, as well as a list of certified final rules adopted by agencies during the preceding month. Both publications are available to the public free of charge on the website of the Alabama Legislature.[3] LSA also coordinates the filing process and provides administrative assistance to the Legislature in carrying out its oversight duties. All proposed rules must be submitted to LSA to begin the rulemaking process, and all final adopted rules must be certified to LSA in order to complete the process.

Legislative Oversight

From time to time, the Legislature delegates to an agency of the state the authority to adopt rules to better carry out the day-to-day operations of the agency without the necessity of going through the full Legislative process of enacting new legislation. All rulemaking under the APA is subject to the legislative oversight of the Joint Committee on Administrative Rule Review, a statutorily created legislative committee comprised of 10 members of the House of Representatives, 10 members of the Senate, and the Lieutenant Governor, as a nonvoting member.[4]

LSA assists the Joint Committee in its oversight function by examining each filing submitted to it for compliance with the format and timelines established in the APA. LSA summarizes each proposed submission for the Joint Committee and alerts the Joint Committee if, in its opinion, any submission clearly exceeds the agency's rulemaking authority. The APA, in and of itself, does not give an agency the power to adopt rules; the agency must have express statutory authority outside of the APA to adopt rules for a specific purpose. Generally, an agency's rulemaking authority appears in the statute specifying the duties and powers of the agency.

Who is subject to the APA?

Generally, every state agency having the authority to adopt rules is subject to the APA unless specifically exempt. Subdivision (1) of Section 41-22-3, Code of Alabama 1975, defines the term "agency" as every board, bureau, commission, department, officer, or other administrative office or unit of the state unless exempted. Those entities considered an agency for purposes of the APA include: The Legislature and its agencies, the Court System, units of local government (counties and municipalities), the State Port Authority, the Public Service Commission, the State Banking Department, Boards of Trustees of Postsecondary Institutions, Boards of Plans administered by public pension systems, and agencies whose rules or administrative decisions are subject to approval by the Supreme Court and the Department of Insurance.[5]

The Alabama Administrative Monthly

The Alabama Administrative Monthly (AAM) is a register of rule changes proposed by state agencies during a month. Each agency subject to the APA must file a notice of all rule changes with LSA for publication in the AAM. LSA publishes the AAM on the legislative website on the last business day of each month. The AAM contains a listing of notices of all rules submitted during the month that are proposed to be added, amended, or repealed. Each notice describes the substance of the proposed rule change, specifies a comment period, and provides the manner in which a member of the public may submit comments to the agency regarding the proposal.

The AAM also contains a listing of all final adopted rules certified by the agency during the preceding month and a list of final adopted rules certified to LSA during the preceding month. Final certifications are those rules entering the

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final phase of the rulemaking process. An agency may adopt a final rule and certify it to LSA only after completion of the comment period specified in its notice. A final certification becomes effective 45 days after publication of the certification in the AAM unless the Joint Committee disapproves it within the 45-day waiting period.[6]

The Proposal

The formal rulemaking process begins with a proposal. LSA requires the agency initiating the proposal to submit a transmittal sheet, notice, and a copy of the text of the proposal with the language proposed to be added or deleted highlighted. If the agency determines that the rule will have an economic impact, the agency must also attach an economic impact statement. As part of the required documentation, the agency proposing the new rule or amending or repealing an existing rule must specify a notice and comment period of 35 to 90 days following publication of the proposal in the AAM. The purpose of the notice is to give parties affected by the rule and other interested members of the public an opportunity to comment; therefore, the notice should provide a clear and reasonable method by which the agency will accept comments. Before adopting the final rule, the agency must "consider fully all written and oral submissions respecting a proposed rule."[7]

Economic Impact Statements

The APA requires the agency to submit a fiscal note with a proposal if the proposed new rule or rule change would have an economic impact on the public if adopted. The agency is responsible for preparing the fiscal note using the Economic Impact Statement Form created by LSA. The form generally tracks the information required by Section 41-22-23, Code of Alabama 1975. This section requires the fiscal note, at a minimum, to include the following information:

"(1) A determination of the need for the rule and the expected benefit of the rule.

(2) A determination of the costs and benefits associated with the rule and an explanation of why the rule is considered to be the most cost effective, efficient, and feasible means for allocating public and private resources and for achieving the stated purpose.

(3) The effect of the rule on competition.

(4) The effect of the rule on the cost of living and doing business in the geographical area in which the rule would be implemented.

(5) The effect of the rule on employment in the geographical area in which the rule would be implemented.

(6) The source of revenue to be used for implementing and enforcing the rule.

(7) A conclusion on the short-term and long-term economic impact upon all persons substantially affected by the rule, including an analysis containing a description of which persons will bear the costs of the rule and which persons will benefit directly and indirectly from the rule.

(8) The uncertainties associated with the estimation of particular benefits and burdens and the difficulties involved in the comparison of qualitatively and quantitatively dissimilar benefits and burdens. A determination of the need for the rule shall consider qualitative and quantitative benefits and burdens.

(9) The effect of the rule on the environment and public health.

(10) The detrimental effect on the environment and public health if the rule is not implemented."

The Joint Committee may request additional information from the agency or from other sources during its review of the proposed rule.[8]

Certification of the Final Adopted Rule

When the final date for comments and completion of notice published with the proposal arrives, the clock for certifying the final adopted rule to LSA begins to tick. Final certification to LSA must occur within 90 days of the final date for comment listed in the agency's proposal *and* within 15 days of transmission of the final adopted rule to the agency's administrative procedure secretary.[9] Certification may occur as soon as the day following completion of the notice, but if it does not occur within 90 days, the agency must start the process over by submitting a new proposal. After considering all comments it receives during the notice period, the board or governing authority of the agency will meet to adopt the final rule. The agency may adopt the final rule either with or without changes in response to comments. If the agency receives conflicting views during the comment period, the agency is required to issue a concise statement on the certification of the principal reasons for or against the adoption of the rule. The statement should specify the agency's reasons for overruling any consideration urged against the adoption of the rule.[10]

Once the agency adopts the final rule, it must transmit a copy of the final adopted rule to the person designated by the agency to serve as its administrative procedure secretary. The individual serves as a contact person to LSA for purposes of the rulemaking process. The administrative procedure secretary has 15 days to certify the final adopted rule by filing it with LSA. After LSA receives the final certification, LSA will publish the certification in the next issue of the AAM. Unless the agency specifies a later date, the rule will become effective 45 days following the publication of the certification in the AAM. At any time before the rule becomes effective, the Joint Committee may convene a hearing on the rule and disapprove it, send it back to the agency with suggested amendments, or take no action at all, thereby allowing the rule to become effective at the end of the 45-day waiting period.

Emergency Rules

The APA allows an agency to adopt an emergency rule if the rule is necessary due to an immediate danger to the public health, safety, or welfare, or if federal law or regulation requires immediate adoption.[11] There is no notice period required to adopt an emergency rule and the APA does not provide a process for review of an emergency rule by the Joint Committee. The emergency rule is effective on the date the agency files it with LSA, and it expires after 120 days. The agency may not adopt a new rule on the same or on a similar subject for nine months after the emergency rule expires unless the agency clearly establishes that it could not have foreseen during the initial 120-day period that the emergency would continue or would likely reoccur during the following nine months. The burden of proof is on the agency to establish that a continuing or reoccurring emergency was not foreseeable. Emergency rules are strictly construed and are not valid except to the extent necessary to prevent, mitigate, or resolve an immediate danger to the public health, safety, or welfare. When adopting an emergency rule, the agency must make reasonable efforts to apprise persons who may be affected.[12]

Anti-Trust Review

The APA requires LSA to review each rule certified to it by a state board or commission that regulates a profession if a controlling number of members of the board or commission are active market participants in the profession. The purpose of the review is to determine whether the rule may significantly lesson competition and, if it does, whether the rule was adopted pursuant to a clearly articulated state policy to displace competition. If LSA determines that the rule is anti-competitive, LSA must notify the Joint Committee of its

(Continued from page 445)

determination. The Joint Committee must review the substance of the rule and either approve the rule or notify the board or commission that it agrees with the determination of LSA, effectively disapproving the rule.[13] A new board or commission's initial rules are inherently anticompetitive, and, as such, the rules are not operative until the Joint Committee approves them. A board of commission may ask LSA to review an existing rule and issue an opinion. The Joint Committee must review any such opinion and either approve or disapprove LSA's determination.

Where to Find Us

More information regarding the administrative rulemaking process is available on the website of the Alabama Legislature (*https://alison.legislature.state.al.us/*) or by calling the Legislative Services Agency at (334) 261-0600. ▲

Endnotes

1. Act 81-855, 1981 Regular Session. The APA is codified as Chapter 22 of Title 41 of the Code of Alabama 1975.
2. Section 41-22-2, Code of Alabama 1975.
3. Alabama Legislature (*https://alison.legislature.state.al.us/*).
4. The membership of the Joint Committee is identical to that of the Legislative Council, created pursuant to §§ 29-6-1 and 29-6-2, Code of Alabama 1975.
5. Section 41-22-3(1), Code of Alabama 1975.
6. Sections 41-22-5.1(h) and 41-22-23(b)(1), Code of Alabama 1975.
7. Section 41-22-5, Code of Alabama 1975.
8. Section 41-22-23(f), Code of Alabama 1975.
9. Section 41-22-6(b), Code of Alabama 1975.
10. Section 41-22-5(a)(2), Code of Alabama 1975.
11. Section 41-22-5(b), Code of Alabama 1975.
12. *Id.*
13. Section 41-22-21.1, Code of Alabama 1975.

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