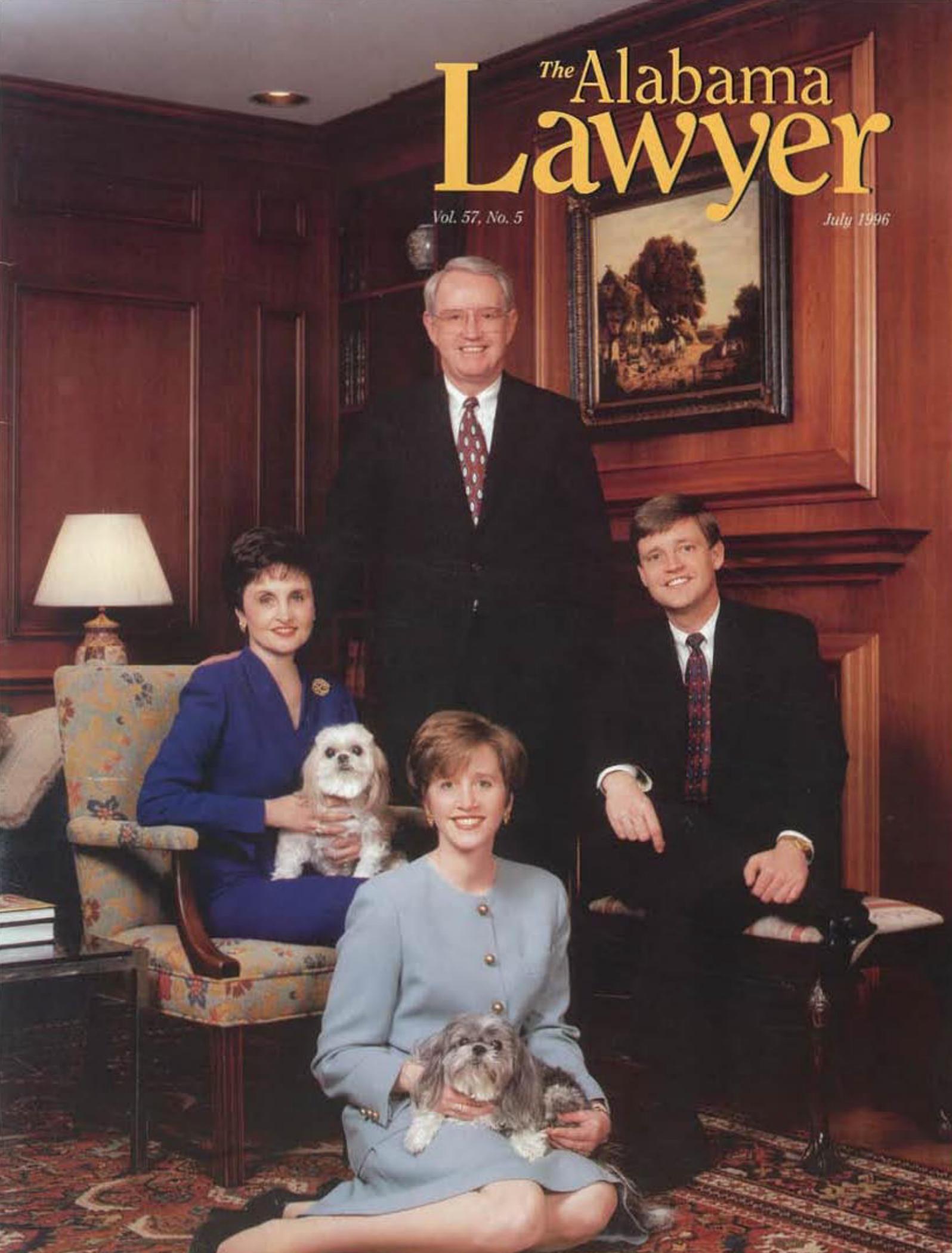


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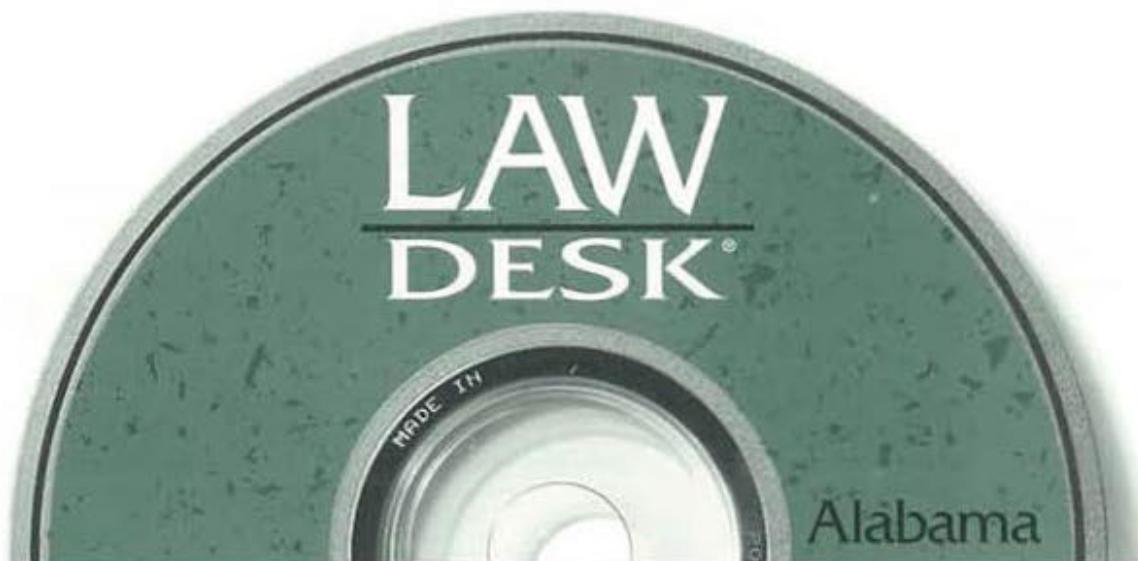
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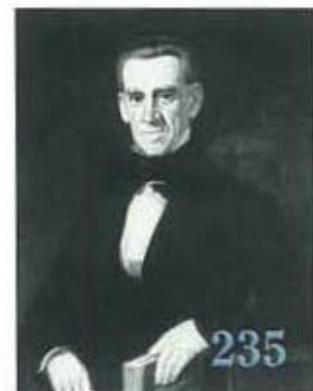
On the Cover

Pictured on the cover are Birmingham attorney N. Lee Cooper and his wife Joy, daughter Catherine and son Clark. Cooper, who practices with the firm of Maynard, Cooper & Gale, will assume office in August as president of the American Bar Association, the second Alabamian to do so. He is also the featured speaker for the Bench & Bar Luncheon at this year's Annual Meeting.

—Photo by Gittings of Atlanta.

IN THIS ISSUE

SPRING ADMITTEES	203
LAWYERS IN THE FAMILY	205
STATISTICS OF INTEREST	207
LETTER TO THE EDITOR	210
LAW DAY 1996	219
ALABAMIAN SET TO LEAD AMERICAN BAR ASSOCIATION By Susan Cullen Anderson	220
ROAD SHOW '96	240
PUNITIVE DAMAGES AND PRE-VERDICT PROCEDURES LIFE OF GEORGIA: A BOLD NEW FRONTIER By Davis Carr and Rachel Sanders Cochran	225
SUPREME COURT OF ALABAMA — FEAT OF CLAY By J. Gorman Houston, Jr.	236
BAD FAITH: DOES IT APPLY TO SURETIES IN ALABAMA? By R. Cooper Shattuck	241



(Continued on page 196)

DEPARTMENTS

President's Page
198

Executive Director's Report
200

About Members, Among Firms
208

Bar Briefs
213

Disciplinary Report
214

CLE Opportunities
222

Legislative Wrap-Up
224

Recent Decisions
249

Memorials
253

Classified Notices
255

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PRESIDENT'S PAGE

By John A. Owens

Spotlighting Committees and Task Forces



John A. Owens

One year no longer seems a significant length of time. Yet, by the time this last article goes to press that will be the approximate time I will have served as president of the Alabama State Bar. Although we have accomplished much this year, there are still many "loose ends" which I hope to tie together with the last two meetings of the board of bar commissioners. We have committee reports and proposals for the **Management Assistance Program** and a **Fee Dispute Resolution** mechanism, both of which I have written about and talked about considerably during this year. We are doing what we can to work with the **Judicial Inquiry Commission** to try to improve upon the tone of the upcoming judicial elections. We have worked hard all year to try to preserve Legal Services Corporation. We are hosting a conference May 30 at the Alabama State Bar to discuss this subject and access for the poor to legal services—generally. Bar leaders, community leaders, social services agencies and others are being invited as I write. There are always numerous issues and projects ongoing within the Alabama State Bar, as well as an opportunity for service, with an eye toward improving the legal profession, to assist you and your ability to serve your clients.

I had planned to devote several of these articles to the work of various committees. In the September 1995 issue, I wrote about the **Solo and Small Firm Practitioners Task Force**, now a standing committee, and the new **Task Force on Fee Dispute Resolution**. In the November issue, I spotlighted the **Client Security Fund Committee** and the **Citizenship Education Committee**. There was a separate article in the same issue about the **Unauthorized Practice of Law Committee**. Still, this barely touches on some of the work of five of our 39 committees and task forces. All of the committees with their members

were published in the September 1995 issue of *The Alabama Lawyer* and all of the task forces with their members were published in the November 1995 issue. Yet, this is still scant recognition for all of the work done by the 863 men and women who work on our committees and task forces. When I am asked, as I often am, what the Alabama State Bar does for the average lawyer, for the trial lawyer, for the sole practitioner, etc., I like to answer by pointing to the work of our 39 committees and task forces, the work of the board of bar commissioners, the work of the board of bar examiners, the work of the sections of the Alabama State Bar, and the work of our outstanding bar staff. I am using this final article to spotlight two more of these committees and task forces.

Lawyer Referral Service

The Lawyer Referral Service consists of 13 members chosen from 13 districts set out in the bylaws. They are each appointed for three-year terms. This year the committee is chaired by **Gregory A. Reeves** of Decatur, with **Daniel G. Ham** of Montgomery serving as vice-chair. Its members come from Cullman, Florence, Fairhope, Dothan, Enterprise, Demopolis, Prattville, Birmingham, Alexander City, Gadsden, Wetumpka, Huntsville, Tuscaloosa, Montgomery, Gulf Shores, Daleville, Greensboro, Auburn, and Anniston. **John C. Gullahorn** of Albertville is the board of bar commissioners liaison. Ed Patterson is the staff liaison and Katherine Creamer is its director. Katherine is the employee who makes the service work.

When I became president-elect, I studied the various functions of the bar more closely. I decided to become a participating member of the LRS, so I paid my \$50 and listed the areas in which I would accept cases. I have been amazed at the number of referrals. Most have

resulted only in telephone advice, but a couple led to a desirable business in which I was able to render service and was paid a reasonable fee. I asked Greg Reeves to write a summary of what he would like to communicate to the bar about the LRS. He writes:

"The Alabama Lawyer Referral Service was established in 1978 as a service to the public. The LRS operates to address the needs of a large segment of society who simply does not know how to find a lawyer. The participating attorneys, or 'panel members,' also benefit from the LRS by receiving referrals in their particular area of practice. An incidental benefit to our bar association, as a whole, is the potentially enhanced image gained by sponsoring the LRS as an organization dedicated to assisting the public locate the 'right' lawyer for their particular need."

The LRS makes referrals throughout the state, with the exception of Madison, Jefferson and Mobile counties, which have their own local referral service. However, attorneys practicing in those counties with a local referral service may belong to the state LRS if they desire to handle cases in surrounding counties.

Our LRS receives a great number of calls each day. The LRS referred 17,957 prospective clients to panel member attorneys between the months of June 1, 1994 and June 30, 1995. The majority of these calls are generated by Yellow Page advertising. As an added benefit, the LRS has a toll-free number for the public to use.

The LRS is not to be confused with a pro bono referral program. The panel member attorneys may negotiate their fees with the referred prospective clients. As such, the LRS generally caters to the middle class segment of our society, those individuals who can afford an attorney, but simply do not know who to call.

The monetary value of referral services is being recognized by bar associations nationwide, as many referral services now receive percentages of the fees generated by the referrals. In this way, the services are able to become self-supporting, and, in some instances, share funds generated with other bar committees, such as pro bono services. The state LRS is

presently considering the implementation of a fee percentage system in the near future.

Attorneys interested in joining the LRS as a participating panel member may write to the Lawyer Referral Service, P.O. Box 671, Montgomery, Alabama 36101, or contact Katherine Creamer at 1-800-354-6154 for an application and a copy of the LRS rules. The LRS requires a membership fee of \$50 and proof of malpractice insurance coverage in an amount not less than \$100,000/300,000.

In summary, the Alabama LRS is a "win-win" program, for the individual who locates an attorney through the service and for the participating attorneys who gain new clients.

Judicial Selection

Robert P. Denniston of Mobile, Alabama has chaired this task force for six years. **Carol Sue Nelson** of Birmingham is its vice-chair. **Rick Manley** of Demopolis is the board of bar commissioners liaison. The work which Bob and his task force have accomplished is astounding. Although unfortunately none of it has resulted in legislation, Bob Denniston has made himself perhaps the most knowledgeable person on the subject of judicial selection. The task force has presented many well-reasoned and well-considered proposals to the board of bar commissioners. Although none of them have yet made their way into law, Bob does not get discouraged and he and his task force go forward. They provided outstanding research and resource support for the Third Citizens Conference which did ultimately recommend non-partisan election of judges. The board of bar commissioners has again endorsed that proposal. I asked for some comments from Bob's committee members. Typical is the following from Carol Sue Nelson:

"First, I cannot tell you what an honor, pleasure and privilege it has been working with Bob Denniston during the past several years on the task force. He has worked tirelessly to bring about judicial reform in Alabama in the way we select our judges. Bob is a man who displays integrity, leadership, commitment and energy toward a goal that is not just important to him, but

to this entire state. His goal is to develop a better way of selecting judges to insure integrity, impartiality and confidence with a full and fair opportunity for minority representation on the Bench. Despite many frustrations and road blocks Bob has continued to challenge our task force to remain active and pursue reform. He has done this despite the fact that some of our members have been ready to disband."

I take this final opportunity to express my gratitude to Bob Denniston and to all of the other committee chairs, co-chairs and members, to the board of bar commissioners, the board of bar examiners, the bar staff, and all the many other people who make our 11,000-plus member association the best bar association in these United States.

I also thank the entire bar for the opportunity to serve as your president. It is a high honor. It is an experience that Dot and I will cherish forever. I leave the bar in the good and capable hands of Warren Lightfoot who is well supported by Keith Norman and an outstanding bar staff.

Thanks again. ■

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EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

Educational Debt— A Heavy Load for Law School Graduates



Keith B. Norman

One of my responsibilities is to review the applications of individuals seeking admission to the bar. Applicants must disclose all education loans. I have been monitoring the educational debt load of applicants for the last two years, and I am very concerned about the amount of debt law school graduates are accumulating. This level of debt is truly stunning!

There were 287 people who took the February 1996 bar examination for the first time. One hundred and forty-eight, or 51 percent, had borrowed money to finance their higher education. Their loan amounts ran from a few thousand dollars to more than \$90,000! The debt averaged approximately \$35,000 per applicant.

Typically, these educational loans accrue interest at an annual rate of 7.0 percent and have a repayment period of ten years. Monthly payments for \$35,000 would be \$400. By comparison, the monthly payment on \$90,000 financed for ten years at 7.0 percent is more than \$1,000!

This debt load is significant because graduates generally have rent to pay, a car payment, insurance and a host of other expenses. Associates just out of law school receive salaries in Alabama that range from \$21,000 to \$65,000. Most positions pay in the low \$30s. Needless to say, if a graduate is unable to find legal employment in the private or public sectors, the only remaining options are hanging out a shingle or seeking non-legal employment. These options may or may not prove to be very remunerative in the beginning.

As pointed out in an article that appeared in the January 1996 issue of *The Alabama Lawyer*, recent law school graduates in Alabama are facing a struggle finding legal employment. Law school graduates in other states are finding that legal employment is more difficult to come by now than in recent years. Although the number of students applying to law schools has

been down the last several years, there still appear to be more law school graduates than jobs. In spite of the tight job market for lawyers, we are experiencing record numbers of applicants sitting for the bar examination and being certified. In the five-year period of 1991 to 1995, the number of law school graduates taking the bar examination increased by 47 percent. The number of examinees who were certified was 30 percent higher in 1995 than in 1991.

With increasing competition and decreasing job prospects, the education debt load of so many is cause for concern. I am not alone in expressing this concern. I have seen articles dealing with this issue in two recent state bar magazines—*The Pennsylvania Lawyer* and the *Oregon State Bar Bulletin*. My concerns are primarily twofold. First, a high debt load compounds the other daily pressures of a law practice.

Moreover, this additional pressure comes at a time when the new lawyer possesses the least amount of knowledge about the practice of law. This is also the time when the new lawyer is probably the most vulnerable to these pressures. Second, high debt levels may force the new lawyer to consider job prospects based purely on financial reasons. For example, a new lawyer with high debt may prefer a lower paying public-interest job, but choose another job because it pays a higher salary. This is truly unfortunate. Whenever the independence of a lawyer's judgment is affected, regardless of the reason, the public and profession suffer.

Considering the statistics of the last few years, I believe that this problem will become more acute. While there is no quick and inexpensive fix, one thing we *can* do is counsel prospective law students about the problems of high

(Continued on page 202)

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AVIS

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harder.

Executive Director's Report

(Continued from page 200)

debt. We can encourage them to consider ways to lower debt, including delaying law school to earn money to pay for school or working part-time during law school to help defray law school expenses.

In several states a debt forgiveness program has worked well. These programs allow law school graduates to have a portion of their law school debt retired in return for their working in public-interest jobs. This may be an idea worth considering in Alabama.

Education debt is an issue that bears

close watching. Education costs no doubt will continue to rise as will debt levels. We must be concerned that new lawyers entering the ranks of the profession are not so burdened with debt that their ability to practice or to effectively represent their clients is impaired. ■

Position Offered

United States District Court, Middle District of Alabama

The United States District Court is now accepting applications for the position of staff attorney/pro se law clerk. JSP Grade: 9-12, annual starting salary: \$29,405 to \$42,641. Grade and salary may be higher depending upon qualifications.

Application deadline: July 15, 1996

Occupational information: The staff attorney is a professional staff position; the law clerk is hired by and reports to the court. A staff attorney examines all prisoner petitions and complaints, including state habeas petitions, motions to vacate federal sentence, and civil rights complaints, determining if they are proper for filing; performs substantive screening after filing of all petitions and motions; drafts appropriate recommendations and orders for the court; performs research as required to assist the court in preparing opinions; and performs similar work as assigned by the court.

Minimum Qualifications: The applicant must be a law school graduate (or have completed all law school studies and merely awaiting conferment of degree) to satisfy entry level requirements.

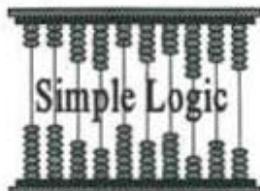
Desirable experience: This court is interested in an applicant who has at least two years of specialized experience in the practice of law, in legal research, legal administration, or equivalent experience received after graduation from law school.

Submit resume with writing sample and law school transcript to: **Hon. Charles S. Coody, United States Magistrate Judge, U.S. Courthouse, P.O. Box 158, Montgomery, AL 36101. Phone (334) 223-7316.** Names of persons applying will not be published and applications will be considered confidential.

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SMITH, Steven Paul
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Lawyers in the Family



Veronica J. Cherniak (1996) and I. David Cherniak (1965)
admittee and father



Eric B. Funderburk (1996) and Kenneth L. Funderburk (1965)
admittee and father



Lucius Shaw Gaines (1996), Ralph D. Gaines, Jr. (1949), Ralph D. Gaines, III (1963) and Charles Pafford Gaines (1981)
admittee, father, brother and brother



Nicholas Peter Callahan, III (1996) and N.P. Callahan, Jr. (1966)
admittee and father



Melissa J. Long (1995), Ralph D. Long (1995) and Judge Frank Long (1985)
admittee (brother), admittee (sister) and father



Terri Leigh Bozeman (1996), Randall K. Bozeman (1988) and Judge A. Ted Bozeman (1967)
admittee, brother and father



Bryan Keith Forstman (1996) and James D. Forstman (1967)
admittee and father



Jennifer B. Caraway (1996) and Bradford W. Caraway (1995)
admittee and husband



Parren K. Shannon (1996), Karen J. Pugh (1994) and Gaile Pugh Gratton (1984)
admittee, wife and sister-in-law



Gina Baker Hantel (1996), John Baker (1967) and Janie Baker Clarke (1985)
admittee, father and aunt



Charles E. Robinson, Jr. (1996), Charles E. Robinson, Sr. (1965) and Pete Cobb (1980)
admittee, father and cousin



Patrick M. Tuten (1996) and Robert B. Tuten (1988)
admittee and brother



John Gregory Evans (1996) and John Douglas Evans (1969)
admittee and father



Robert Thomas Treese, III (1996) and R. Thomas Treese, Jr. (1995)
admittee and father



Derek E. Yarbrough (1996), Cheryle D. Motley (1991) and Thomas D. Motley (1984)
admittee, mother and stepfather



Monica Leonette Arrington (1996) and Leonard Arrington (1987)
admittee and father



Damund E. Williams (1996) and Norbert H. Williams (1989)
admittee and brother



Adam W. Hyde (1996) and Horace V. O'Neal, Jr. (1982)
admittee and stepfather



Robert Charles Epperson (1996) and Arthur Charles Epperson (1949)
admittee and father



Christopher Allen Thigpen (1996) and Hon. Charles A. Thigpen (1972)
admittee and father



Rebekah Keith (1996) and Herman Watson, Jr. (1961)
admittee and father



Tracy Gwyn BirdSong (1996) and Tonya BirdSong Hagmaier (1986)
admittee and sister

February 1996 Bar Exam Statistics of Interest

Number sitting for exam361
Number certified to Supreme Court of Alabama195
Certification rate54 percent

Certification percentages:

University of Alabama School of Law75 percent
Cumberland School of Law67 percent
Birmingham School of Law37 percent
Jones School of Law55 percent
Miles Law School4 percent



ABOUT MEMBERS, AMONG FIRMS

About Members

George C. Day, Jr. announces the relocation of his office to 1917 Rainbow Drive, Gadsden, Alabama 35901. Phone (205) 543-1660.

J. Michael Fincher the opening of his office at 107 St. Francis Street, First National Bank Building, Suite 1502, Mobile, Alabama 36602. Phone (334) 694-1645.

Paul E. Burkett announces the relocation of his office to 472 S. Lawrence Street, Montgomery, Alabama 36102-1411. Phone (334) 269-2929.

Scott L. Speake announces the relocation of his office to 220 Camp Street, Suite 310, New Orleans, Louisiana 70130-2711. Phone (504) 558-0600.

Thomas J. Saunders, formerly attorney, governmental and regulatory affairs, Energen Corporation, announces the opening of his office at 100 N. Union Street, Suite 358, RSA Union Building, Montgomery, Alabama 36104. The mailing address is P.O. Box 1146, Montgomery 36101-1146. Phone (334) 241-7120.

Richard D. Greer, formerly a member of Najjar Denaburg, announces the opening of his office at 22 Inverness Center Parkway, Suite 160, Birmingham, Alabama 35242. Phone (205) 991-8440.

William W. Whatley, Jr., formerly of the Alabama Attorney General's Office, announces the opening of his office in the Bell Building, 207 Montgomery Street, Suite 1200, Montgomery, Alabama 36123-0743. The mailing address is P.O. Box 230743, Montgomery 36123-0743. Phone (334) 834-7007.

Michele Graham Bradford announces the relocation of her office to 750 Walnut Street, Gadsden, Alabama 35901. Phone (205) 549-0090.

Teresa L. Cannady announces the relocation of her office to 105 E. Main Street, The Courington Arcade Building, Suite 4, Albertville, Alabama. The mail-

ing address is P.O. Box 2673, Albertville 35950. Phone (205) 891-4106.

Billy Joe Sheffield announces the relocation of his office to The Sheffield Building, 400 W. Adams Street, Dothan, Alabama 36303. Phone (334) 794-3733.

Janie Baker Clarke announces her retirement as assistant attorney general for the State of Alabama Department of Transportation and the reopening of her private practice at 235 S. McDonough Street, Montgomery, Alabama 36104. Phone (334) 269-0032.

Anderson Nelms announces the relocation of his office to 5755 Carmichael Parkway, Montgomery, Alabama 36117. Phone (334) 279-5600.

James Middleton Sizemore, Jr., formerly director, Alabama Development Office and commissioner, Alabama Department of Revenue, announces the relocation of his office to 461 S. Court Street, Montgomery, Alabama 36104. Phone (334) 265-1121.

Alexander M. Weisskopf announces the opening of his office at 205 20th Street, North, Frank Nelson Building, Suite 508, Birmingham, Alabama 35203. Phone (205) 326-3737.

Bryan E. Morgan (Major) announces his relocation to National Guard Bureau-JA, The Pentagon — Room 2E425, Washington, D.C. 20310-2500. Phone (703) 607-9870.

Vicki A. Bell announces the relocation of her office to 108 South Side Square, Huntsville, Alabama 35801. Phone (205) 533-4491.

Chuck Hunter announces the opening of his office at 1134 22nd Street, North, Birmingham, Alabama 35234. Phone (205) 324-1234.

Clinton B. Smith announces his election as Supervisor of the Town of New Castle, New York. Offices are located at 40 Radio Circle, Mount Kisco, New York 10549-0117. Phone (914) 666-2311.

Among Firms

Clifford L. Callis, Jr. announces that **Jeffrey P. Montgomery**, **Laura Anne Dickey** and **Barbara Lee Barnett** have become associates. Offices are located in the Church Street Professional Centre, 101 Church Street, Rainbow City, Alabama 35906. Phone (205) 442-6102.

S. Mark Burr, formerly senior staff attorney with Protective Life Corporation and claims counsel with Commonwealth Land Title Insurance Company, has associated with **Burr & Forman**, located at 600 W. Peachtree Street, One Georgia Center, Suite 1800, Atlanta, Georgia 30308. Phone (404) 817-3536.

Scott Johnson announces the formation of **BirdSong & Johnson** and his partnership with **Tracy G. BirdSong**. **David R. Martin** will be of counsel. The mailing address will remain P.O. Box 1547, Montgomery, Alabama 36102. Offices are located at 207 Montgomery Street, Bell Building, Suite 718, Montgomery 36104. Phone (334) 834-3221.

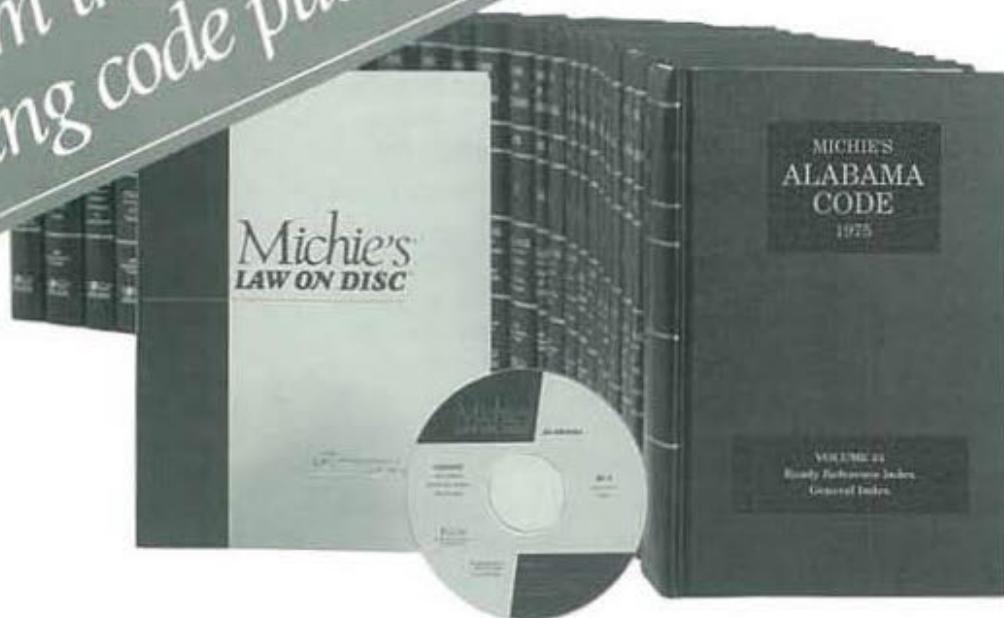
William S. Shulman, formerly a partner in Feibelman, Shulman & Terry, was sworn in as **United States Bankruptcy Judge for the Southern District of Alabama**. His office is located at 201 St. Louis Street, Mobile, Alabama 36602. Phone (334) 441-5625.

The **Southern District of Alabama, Federal Defenders Organization** announces that **K. Lyn Hillman Campbell** has been promoted to assistant federal public defender. Offices are located at 2 S. Water Street, 2nd Floor, Mobile, Alabama 36602. Phone (334) 433-0910.

Compass Bank announces that **J. Vince Davidson** has been named senior vice-president and senior trust officer for the trust division in Birmingham. The mailing address is P.O. Box 10566, Birmingham, Alabama 35296.

(Continued on page 210)

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About Members, Among Firms

(Continued from page 208)

John Ben Bancroft, formerly managing attorney for Shapiro & Kresiman, announces his employment as attorney advisor with the **U.S. Small Business Administration**, Birmingham Servicing Center, at 2121 8th Avenue, North, Suite 200, Birmingham, Alabama 35203. The mailing address is P.O. Box 12247, Birmingham 35202-2247. Phone (205) 731-1728.

Robert Crawford announces that he was elected circuit judge in Milwaukee County, Wisconsin. His office is located at 5017 N. Palisades Road, Whitefish Bay, Wisconsin 53217. Phone (414) 332-2229.

Pamela L. Mable, formerly with Thorington & Gregory in Montgomery, Alabama, announces her relocation to Atlanta, Georgia, and her position as a staff attorney with the **United States Court of Appeals for the Eleventh Circuit**, staff attorney's office. The mailing address is Room 549, 56 Forsyth Street, N.W., Atlanta, Georgia 30303. Phone (404) 331-5775.

Groover, Madison & Gray announces that **David W. Langston**, formerly assistant district attorney for Morgan County,

has become a member. The new name is **Groover, Madison, Gray & Langston**. Offices are located at 617 College Street, N.W., P.O. Box 487, Hartselle, Alabama 35640. Phone (205) 773-0241.

Montedonico, Hamilton & Altman announces that **John Daniel Reaves** has become an associate. Offices are located at 5301 Wisconsin Avenue, N.W., Suite 400, Washington, D.C. Phone (202) 364-1434.

Pierce, Carr, Alford, Ledyard & Latta announces that **Caroline Wells Hinds, Annette M. Carwie, Frank L. Parker, Jr. and Robert E. Hurlbut, Jr.** have joined the firm. Offices are located at 1110 Montlimar Drive, Suite 900, P.O. Box 16046, Mobile, Alabama 36616. Phone (334) 344-5151.

Lynn Etheridge Hare, Stephanie R. White, Kori L. Clement and Celeste L. Patton, formerly of Janecky, Newell, Potts, Hare & Wells, along with **Barry W. Hair**, former claims attorney for Nationwide Insurance Company, announce the formation of **Hare, Hair & White**. Offices are located at 1901 Sixth Avenue, North, AmSouth-Harbert Plaza, Suite 2800, Birmingham, Alabama 35203. Phone (205) 322-3040.

Youngdahl, Sadin & Morgan announces that **Denise V. Hill** has joined the firm. Offices are located at 3603 Pine Lane, S.E., Suite A, Bessemer, Alabama 35023. Phone (205) 424-0119.

Lanier Ford Shaver & Payne announces that **Jeffrey T. Kelly** and **Paul A. Pate** have become members of the firm, and **Gregory M. Taube, Rachel Self Howard** and **Melissa J. Long** have become associates. Offices are located at 200 W. Court Square, Suite 5000, Huntsville, Alabama 35801. Phone (205) 535-1100.

Bradley, Arant, Rose & White announces that **T. Michael Brown, Deane Kenworthy Corliss, George B. Harris, Anne R. Yuengert, J. Paul Compton, Jr., L. Susan Doss, Warne S. Heath**, and **Susan Donovan Josey** have become partners in the firm. Offices are located in Birmingham and Huntsville, Alabama.

Berkowitz, Lefkovits, Isom & Kushner announces that **Thomas J. Mahoney, Jr.** has become a member of the firm. Offices are located at 1600 SouthTrust Tower, 420 N. 20th Street, Birmingham, Alabama 35203-3204. Phone (205) 328-0480.

Drinkard & Hicks announces the addition of **J. Donald Banks** to the firm. The new firm name is **Drinkard, Banks & Hicks**. Offices are located at 1070 Government Street, Mobile, Alabama 36604. Phone (334) 432-3531.

Wayne L. Williams and **Craig L. Williams** announce that **Randall M. Cheshire** has joined the firm. The new name is **Williams, Williams & Cheshire**. Offices are located at 2617-8th Street, Tuscaloosa, Alabama 35401. Phone (205) 345-7600.

Bond, Botes, Sykstus, Larsen & Ledlow announces the association of **C. Michele Anders**, former law clerk to the Honorable Sally Greenhaw and the Honorable Joseph D. Phelps. Offices are located at 102 S. Court Street, Florence, Alabama 35630. Phone (205) 740-8220.

John T. Alley, Jr. and John W. Waters, Jr. announce the opening of a second office of **Alley & Waters** in Union Springs, Alabama. The address is 214 N. Prairie Street, P.O. Box 5006, Union Springs 36089. Phone (334) 738-5505.

James D. Pruett, formerly acting

LETTER TO THE EDITOR

Please accept this letter as an apology to both you and the entire membership of the Alabama State Bar for the negative publicity my actions have brought upon the bar arising out of my failure to timely file State of Alabama income tax returns.

As you are aware, my indictment was published in our local newspaper. I was ashamed and embarrassed, not only for myself, my family and friends, but also for the members of my profession.

I shall be punished for my actions, however, there is no way to make restitution to my profession, and for this I truly apologize.

You have my permission to publish this letter in *The Alabama Lawyer* so that other members of our profession can avoid situations such as mine by timely filing state tax returns.

Don O. White, Mobile, Alabama

general counsel and associate general counsel of AmSouth Bancorporation, **Frank I. Brown, Jon M. Turner, Jr., Lisa Jernigan Brown, and Bryan K. Horsley** announce the formation of **Pruett, Brown, Turner & Horsley, L.L.C.** Offices are located at 211 22nd Street, North, Birmingham, Alabama 35203, and 304 S. 5th Street, Gadsden, Alabama 35902. Phone (205) 320-1714, (205) 546-1714.

Schroder Center Management, Inc. announces the association of **Lynn Gaines Towery** as assistant counsel. Offices are located at 15303 Dallas Parkway, Suite 650, Dallas, Texas 75248. Phone (214) 239-9500.

Lloyd, Schreiber, Gray & Gaines announces the new firm name, and that **Daniel S. Wolter** and **Stephen E. Whitehead** have become members and **Stuart Y. Johnson** has become an associate. Offices are located at Two Perimeter Park South, Suite 100, Birmingham, Alabama 35243. Phone (205) 967-8822.

Sadler, Sullivan, Sharp, Fishburne & Van Tassel announces that **Ted L. Mann** has rejoined the firm and that **Theresa S. Jones** has become an associate. Offices are located at 2500 SouthTrust Tower, 420 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 326-4166.

Beasley, Wilson, Allen, Main & Crow announces that **Richard D. Morrison** has become an associate. Offices are located at 218 Commerce Street, Montgomery, Alabama 36103-4160. Phone (334) 269-2343.

Stuart Leach, former presiding judge of the civil division of the 10th circuit, has joined **Sirote & Permutt**, and will serve the firm of *counsel*. He will be based in the firm's Birmingham office. The firm has offices in Huntsville, Mobile, Birmingham, Montgomery, and Tuscaloosa, Alabama. Phone (205) 933-7111.

Cochran & Associates announces the relocation of their offices to 310 N. 21st Street, Suite 500, Birmingham, Alabama 35203. Phone (205) 328-5050.

The firm of **Richard Jordan and Randy Myers** announces a name change to **Richard Jordan, Randy Myers & Ben Locklar**. Offices are located at 302 Alabama Street, Montgomery, Alabama 36104. Phone (334) 265-4561.

Cabaniss, Johnston, Gardner, Dumas & O'Neal, with offices in Birmingham and Mobile, announces that **Sandy G. Robinson** became a partner. Phone (205) 252-8800.

Nathan & Associates announces that **Donna Bowling Nathan** has joined the firm as a partner. Offices are located at Suite 300, Massey Building, 290-21st Street, North, Birmingham, Alabama 35203. Phone (205) 323-5400.

Bowron, Oldenburg & Luther announces that **Danny J. Collier, Jr.** has become an associate. Offices are located at AmSouth Center, Suite 609, 63 S. Royal Street, Mobile, Alabama 36602. Phone (334) 433-8088.

Bingham D. Edwards announces that **Gregory A. Reeves** has become an associate and that the new name of the firm is **Edwards, Mitchell & Reeves**. Offices are located at Court Square, 123 Lee Street, Suite A, Decatur, Alabama. Phone (205) 353-6323.

Tom Burgess, Thomas S. Hale, James A. Haggerty, Jr. and Murray H. Gibson, Jr. announce the formation of

Burgess & Hale, L.L.C. Offices are located at 1010 Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203. Phone (205) 715-4466.

Newman & Sexton announces that **Michael A. LeBrun** and **Frank Steele Jones** have joined the firm as shareholders and the new name is **Newman, Sexton, LeBrun & Jones, P.C.** Offices are located at 3021 Lorna Road, Suite 310, Birmingham, Alabama 35216. Phone (205) 823-5515.

Wallace, Jordan, Ratliff & Brandt announces that **Algert S. Agricola, Jr.** and **James A. Kee, Jr.** have joined the firm as members and that **Charles B. Campbell** and **Phillip D. Corley, Jr.** have joined as associates. Offices are located in Birmingham and Montgomery, Alabama. Phone (205) 870-0555 and (334) 832-9900.

Pierce, Carr, Alford, Ledyard & Latta announces that the firm's name has changed to **Pierce, Ledyard, Latta & Wasden**. Offices are located at 1110 Montlimar Drive, Suite 900, Mobile, Alabama 36609. The mailing address is

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Boardman & Tyra announces that **Kristi A. Dowdy** and **Mark M. Hogewood** have joined the firm. Offices are located at 104 Inverness Center Place, Suite 325, Birmingham, Alabama 35242-4870. Phone (205) 980-6000.

McRight, Jackson, Dorman, Myrick & Moore announces that **William T. McGowin, IV** has become a member of the firm. Offices are located at 106 St. Francis Street, Suite 1100, Mobile, Alabama 36602. Phone (334) 432-3444.

Henry F. Lee, III and **David W. Rousseau** announce the formation of **Lee & Rousseau**. Offices are located in the Latimer House at 310 S. Commerce Street in Geneva, Alabama. The mailing address is P.O. Box 129, Geneva 36340. Phone (334) 684-6406.

Love, Love & Love announces that retired **Circuit Judge William C. Sullivan** has joined the firm of counsel. Offices are located in Talladega and Birmingham, Alabama. Phone (205) 362-6670 and (205) 620-4535.

Alvin T. Prestwood, Ellis D. Hanan, Charles H. Volz, Jr. and Charles H. Volz, III, formerly of Volz, Prestwood, Hanan & Sizemore, announce the continuation under the name of **Volz, Prestwood & Hanan**, and that **Clinton C. Carter** and **Daniel L. Feinstein** have become associates. Offices are located at 350 Adams Avenue, Montgomery, Alabama 36104. Phone (334) 264-6401.

Newman, Miller, Leo & O'Neal announces that **T. Samuel Duck** has joined the firm as a partner. Offices are located at 3250 Independence Drive, Birmingham, Alabama 35209. Phone (205) 879-0000.

Stone, Granade & Crosby announces the expansion and relocation of their Foley office to 7283 Highway 59, South, Foley, Alabama 36535. Phone (334) 943-8886. Other offices are located in Bay Minette and Daphne, Alabama.

Campbell & Waller announces that **Charles A. McCallum, III** has joined the firm as a partner. Offices are located at Suite 330, 2000-A SouthBridge Parkway, Birmingham, Alabama 35209-

1303. Phone (205) 803-0051.

Durward & Cromer announces that **David P. Dorn** has joined the firm. Offices are located at 1150 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 324-6654.

Hogan, Smith & Alspaugh announces that **Pam Beard**, formerly an associate, has become a shareholder, and that **Ben Baker** and **Lee Roberts** have joined the firm as associates. Offices are located at 2323 Second Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-5635.

Owens & Carver announces the association of **Apsilah Geer Owens**. Offices are located at 2720 6th Street, Suite 3, Tuscaloosa, Alabama 35401. Phone (205) 750-0750.

Calvin M. Whitesell, Jr. and Mose W. Stuart, IV announce the relocation of their offices to 635 S. McDonough Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 4190, Montgomery 36103-4190. Phone (334) 834-5999. ■

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BAR BRIEFS

• The **Alabama Pattern Jury Instructions Committee-Civil** announces its committee members and the purpose of the committee. They are:

Hon. William C. Sullivan, chairman; Thomas A. Woodall, vice-chairman; Laurel R. Clapp, reporter; Davis Carr; Andrew T. Citrin; Brittin T. Coleman; Robert L. Gonce; Hon. James Haley; Hon. Robert B. Harwood; R. Benjamin Hogan, III; Hon. Josh Mullins; Bert Nettles; Professor Herbert Peterson; Professor Robert Riegert; and E. Ted Taylor.

The committee is composed of trial lawyers and defense lawyers, as well as judges and professors, and is charged with drafting jury charges.

For more information or to make a suggestion, contact Judge William C. Sullivan, P.O. Box 697, Talladega, Alabama 35160.

• **Joseph H. Johnson, Jr.**, of counsel to Lange, Simpson, Robinson & Somerville, has been elected to membership in the newly established American College of Bond Counsel. Bond counsel are highly specialized lawyers who represent states and local governments when they raise money through the issuance of municipal bonds. The College has been established as an organization of prominent bond lawyers selected on a national basis for their experience, reputation and commitment to serve state and local governmental bond issuers. Initially, the membership of the College includes 60 bond lawyers from 28 states. Additional bond lawyers who meet the College's highly selective membership criteria will be invited to become members.

• **William C. Wood** has been elected a director of the Defense Research Institute, the nation's largest association of civil litigation defense lawyers. He is a partner in the Birmingham firm of Norman, Fitzpatrick, Wood & Kendrick. He served as the first law clerk to U.S. District Judge Sam

Pointer, Jr. Wood was a member of the executive committee of the International Association of Defense Counsel and is a member of the Alabama Defense Lawyers Association.

• **James R. Pratt, III** of Birmingham was recently inducted into the Inner Circle of Advocates, a group limited to 100 plaintiff lawyers nationally who have achieved a substantial number of seven-figure verdicts for plaintiffs. Pratt is also a fellow in the International Academy of Trial Lawyers, a group of both plaintiff and defense counsel limited to 500 lawyers in the United States and 100 lawyers abroad.



Honorable John C. Godbold

Judge for the U.S. Court of Appeals for the Eleventh Circuit, and has been a chief judge of that court and of the U.S. Court of Appeals for the Fifth Circuit.

The committee for the selection of the award noted that Judge Godbold's career exemplifies the wisdom and continuing necessity for the constitutional design that established the Judiciary as an independent branch of government. According to the committee, Judge Godbold was a splendid chief judge during the interesting and important period in judicial history when what was formerly one circuit, comprising six states in the southern part of the United States, became two separate circuits. Judge Godbold is known for his lucid opinions and his willingness to teach and inspire other judges in the prompt and scholarly discharge of their judicial duties.

• This year's recipient of the Edward J. Devitt Distinguished Service to Justice Award is the **Honorable John C. Godbold** of Montgomery. Judge Godbold is a Senior United States Circuit

After being chief judge, Judge Godbold rendered further service as an innovative and skilled director of the Federal Judicial Center, the educational and research arm of the federal branch. He continues to make a significant contribution to the United States Court of Appeals in his senior status, and also teaches at the Cumberland School of Law in Birmingham.



Nina Miglionico

of Achievement Award. A congresswoman and a state supreme court justice are among the other four winners.

Miglionico is a 1933 graduate of Howard University (now Samford University) and a 1936 graduate of the University of Alabama School of Law. She opened her own office and has practiced continuously since then.

She was the only woman elected to Birmingham's first City Council and remained on the Council for 22 years, declining to run for re-election in 1985. In 1958, she was elected president of the National Association of Women Lawyers. In 1974, she was the first Alabama woman nominated by a major party for a congressional seat (when she was chosen the Democratic nominee to unseat U.S. Rep. John Buchanan.)

Among those nominating her for the award were Carol Ann Smith, president-elect of the Birmingham Bar Association, Janie Shores, Alabama's only female supreme court justice, retired Justice Oscar Adams, the court's only black justice, and the Women's Section of the Birmingham Bar Association. ■

• Birmingham attorney **Nina Miglionico** has been named one of five women nationwide to receive the American Bar Association's Margaret Brent Women Lawyers



DISCIPLINARY NOTICE

Reinstatement

• Birmingham attorney **John H. Wiley, III** was reinstated to the active practice of law by order of the supreme court, effective March 22, 1996. [Pet. No. 95-005]

Surrender of License

• Huntsville attorney **Walter Jasper Price, Jr.** has surrendered his license to practice law in the State of Alabama. By order of the supreme court, Price's license to practice law was cancelled and annulled effective April 25, 1996. [Rule 22(a); Pet No. 96-03]

Disbarments

• On March 28, 1996, the Alabama Supreme Court entered an order disbaring Jackson, Alabama attorney **James A. Tucker, Jr.** Tucker had earlier pleaded guilty to a violation of Title 38, Section 9-2, *Code of Alabama* (exploitation of the elderly), which is a Class C felony. As part of his plea agreement with the State of Alabama, Tucker agreed to consent to disbarment, and formally did so on March 11, 1996. The evidence showed that Tucker had fraudulently obtained a deed from an elderly client which conveyed her interest in 700 acres of family land to a real estate entrepreneur from another city. Tucker was paid \$15,000 by that individual. Tucker is also serving a ten-month sentence in county jail. [Rule 23(a), Pet. No. 95-001]

• Tuscaloosa attorney **Julia McCain Lampkin Asam** was disbarred by order of the Supreme Court of Alabama, effective March 28, 1996. Asam's disbarment was based upon her having been found guilty of multiple violations of the Alabama Rules of Professional Conduct in eight separate bar complaints.

In ASB No. 92-254, Asam filed a civil action on behalf of a client who received an on-the-job injury in 1973. Other counsel had settled the client's personal injury claim and a workers' compensation case in 1974. Some 16 years later, Asam filed suit in the circuit court on behalf of this same client claiming to have "newly discovered evidence." The trial court dismissed the complaint and imposed sanctions against Asam. Asam then filed an identical action on behalf of the client in federal court. The district court dismissed the complaint, the Court of Appeals for the Eleventh Circuit affirmed the dismissal, and the United States Supreme Court denied certiorari review. The Eleventh Circuit also imposed sanctions against Asam. Over \$32,000 in sanctions were imposed against Asam in these two cases.

In ASB No. 94-177, Asam filed suit against a circuit judge. During the discovery phase of the lawsuit, Asam avoided notice and service, and failed to cooperate with regard to depositions scheduling. The circuit court granted the judge's motion for summary judgment, which was affirmed by the Alabama Supreme Court. Asam filed the identical suit against

the judge in federal court. The federal court dismissed the suit, which was affirmed by the federal appeals court.

In ASB Nos. 93-476, 93-378, 93-379, and 93-488, Asam sued several people who had opposed her 1992 campaign for circuit judge. Asam filed suit both in state and federal court. Dismissals of all lawsuits were affirmed at both the state and federal level.

In ASB No. 94-176, Asam undertook a medical malpractice action on behalf of a client. Suit was filed, and defendants filed motions for summary judgment. The court twice warned Asam that the defendants' motion for summary judgment would be granted unless Asam could provide expert testimony supportive of her lawsuit. Asam tried to qualify herself as a medical expert, even though her affidavit failed to refute the affidavit of the defendant doctor. Summary judgment was granted for defendants. Asam then billed her client even though she had agreed to handle the matter on a contingency fee basis. Without the client's knowledge, Asam appealed the supreme court's affirmance of the circuit court's dismissal to the United States Supreme Court.

In ASB No. 94-175, Asam filed two wrongful death actions which were dismissed, with the Supreme Court of Alabama affirming the dismissals. Asam then filed suit in federal court on the identical claims. The complaint was dismissed, with the court of appeals affirming the dismissal, and the United States Supreme Court denying certiorari review.

The Disciplinary Board found Asam guilty of 17 separate violations of the Alabama Rules of Professional Conduct and ordered that she be disbarred. Asam appealed her case to the Supreme Court of Alabama. The Supreme Court of Alabama initially affirmed, without opinion. On Asam's application for rehearing, the Supreme Court of Alabama granted the application for rehearing, withdrew its initial affirmance, and substituted a 30-page opinion wherein it affirmed the disbarment of Asam. [ASB Nos. 92-254, 94-177, 93-476, 93-378, 93-379, 93-488, 94-176, and 94-175]

Suspensions

• Birmingham attorney **William Dowsing Davis, III** was suspended from the practice of law for a period of 60 days by order of the supreme court, effective April 2. The supreme court found that Davis expended substantial amounts of money on advertising, primarily television advertising, and this advertising attracted a large number of clients. As a result of this large advertising expenditure and the volume of clients resulting therefrom, Davis implemented several policies designed to minimize expenses and maximize profits. These policies included allowing nonlawyer secretaries to provide legal services, interview clients and prepare legal filings, especially bankruptcy peti-

(Continued on page 216)

Cumberland School of Law of Samford University

Continuing Legal Education Fall 1996 Seminar Schedule

September	6	Developments and Trends in Health Care Law [co-sponsored by Baptist Health System, Inc.] - Birmingham
	13	Alabama Mini-Code - Birmingham
	20	Advanced Personal Injury - Birmingham
	27	White Collar Crimes - Birmingham
October	4	7th Annual Bankruptcy Law Seminar - Birmingham
	11	Litigating the Class Action Lawsuit - Birmingham
	18	Elder Law: What Every Practitioner Must Know - Birmingham
	19	AUBA CLE Conference [co-sponsored by Cumberland School of Law] - Auburn
November	1	Securities Regulation in Alabama - Birmingham
	1	Municipal Court Practice and Procedure - Huntsville
	8	10th Annual Workers' Compensation Seminar - Birmingham
	15	Recent Developments for the Civil Litigator - Birmingham
	15	Municipal Court Practice and Procedure - Mobile
	22	Mastering Evidence and Opening Statement and Final Argument featuring James W. McElhaney - Birmingham
December	6	Representing Alabama Businesses - Birmingham
	6	Recent Developments for the Civil Litigator - Mobile
	12	Writing to Win: The Essentials of Writing for Litigators featuring Steven D. Stark - Birmingham
	20	Current Issues in Employment Law - Birmingham
	30-31	CLE By The Hour

Brochures describing the specific topics to be addressed and listing the speakers for each of the seminars will be mailed approximately six weeks prior to the seminar. If for any reason you do not receive a brochure for a particular seminar, write Cumberland CLE, Box 292275, 800 Lakeshore Drive, Birmingham, AL 35229-2275, or call 870-2391 or 1-800-888-7454. Additional programs may be added to the schedule.

Disciplinary Notice

(Continued from page 214)

tions. Nonlawyer staff members also gave clients legal advice such as "informing" clients of the differences between Chapter 7 and Chapter 13 bankruptcy. Davis also instituted a practice whereby associate attorneys would not interview or have any contact with the client before the first scheduled court appearance. Davis also imposed unmanageable case loads on associate attorneys, many of whom were inexperienced. Davis further failed to provide his associates with adequate equipment, supplies and support staff, which coupled with the huge volume of cases imposed upon the associates, created a situation in which files were mishandled resulting in harm to the interests of clients. Davis also instituted policies which imposed time limits or restrictions on the amount of time associates could spend with clients and on cases. Furthermore, Davis imposed a quota system that required associates to open a specified number of files in a certain time period. Davis instituted a policy requiring associates not to return the telephone calls of existing clients, so that the attorneys would have more free time to sign new clients. Davis was found to be guilty of misleading advertising practices, in that he and the attorneys under his supervision were not competent or willing to provide the quality of legal services advertised.

Davis' conduct was found to be in violation of Rule 1.1 of the Rules of Professional Conduct (failure to provide competent representation); Rule 1.4 (failure to keep clients reasonably informed and failure to reasonably explain a matter so as to permit a client to make an informed decision); Rule 5.1 (failure to make reasonable efforts to ensure that lawyers under his supervision conformed to the Rules of Professional Conduct); Rule 5.3(b) (failure to ensure that the activities of a nonlawyer under an attorney's supervision are compatible with professional standards); Rule 8.4(a) (violation of the Rules of Professional Conduct through the acts of another); Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice); and Rule 8.4(g) (engaging in conduct that adversely reflects on the lawyer's fitness to practice law). [ASB Nos. 92-134(A), 92-405(A) and 92-451(A)]

• Birmingham attorney **Harold Evans Whaley** was suspended from the practice of law in the State of Alabama for a period of three years effective March 14, 1996. The Supreme Court of Alabama entered the order of suspension based upon Whaley's having pled guilty to formal disciplinary charges which had been filed against him.

Whaley was engaged by Compass Bank of Birmingham to close certain mortgage loans on behalf of the bank. In November 1993, Whaley closed a mortgage loan for Compass Bank whereby sufficient funds were placed in his trust account to satisfy six mortgages on the property in question. However, Whaley failed to satisfy these mortgages. Whaley repeated this misconduct in a second matter in July 1995.

Whaley pled guilty to having violated Rule 1.15 (safekeeping property) in that he failed to promptly deliver to a third person funds which that third person was entitled to receive; Rule 8.4(a) (misconduct) in that he violated or attempted to violate the Rules of Professional Conduct; and Rule 8.4(c) (miscon-

duct) in that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. [ASB Nos. 94-366 & 95-60]

• On April 12, 1996, the disciplinary commission of the Alabama State Bar entered an order intermily suspending Mobile lawyer **LeMarcus Allen Malone** from the practice of law under Rule 20 of the Alabama Rules of Disciplinary Procedure. The Disciplinary Commission found that Malone's continued conduct was causing harm to the public. Malone had, on several occasions, accepted money from clients and then failed to perform the legal services they had contracted with him. [Rule 20(a); Pet No. 96-01]

• Birmingham attorney **Russell T. McDonald, III** was suspended from the practice of law for a period of 91 days. The Supreme Court of Alabama made this suspension effective May 6, 1996. McDonald represented a bail bonding company on its collection cases. McDonald's mother was 25 percent owner of that company. In one particular case, McDonald collected the sum of \$1,300 in lieu of foreclosure on property which had been mortgaged to secure a bail bond. At the time he collected the money, there was, in fact, only \$160 still owed by the mortgagor. When the overpayment was discovered, McDonald failed to repay the money, which had not been returned to his client in any event. McDonald also refused to cooperate in the investigation of the grievance filed by the mortgagor. [ASB No. 94-244(A)]

• Birmingham attorney **Dan Arthur Goldberg** was suspended from the practice of law for a period of 60 days by order of the supreme court, effective May 31, 1996. The supreme court found that Goldberg expended substantial amounts of money on advertising, primarily television advertising, and this advertising attracted a large number of clients. As a result of this large advertising expenditure and the volume of clients resulting therefrom, Goldberg implemented several policies designed to minimize expenses and maximize profits. These policies included allowing nonlawyer secretaries to provide legal services, interview clients and prepare legal filings, especially bankruptcy petitions. Nonlawyer staff members also gave clients legal advice such as "informing" clients of the differences between Chapter 7 and Chapter 13 bankruptcy. Goldberg also instituted a practice whereby associate attorneys would not interview or have any contact with the client before the first scheduled court appearance. Goldberg also imposed unmanageable case loads on associate attorneys, many of whom were inexperienced. Goldberg further failed to provide his associates with adequate equipment, supplies and support staff, which coupled with the huge volume of cases imposed upon the associates, created a situation in which files were mishandled resulting in harm to the interest of clients. Goldberg also instituted policies which imposed time limits or restrictions on the amount of time associates could spend with clients and on cases. Furthermore, Goldberg imposed a quota system that required associates to open a specified number of files in a certain time period. Goldberg also instituted a policy requiring associates not to return the telephone calls of existing clients, so that the attorneys would have more free time to sign new clients. Goldberg was found to be guilty of misleading advertising practices, in that he and the attorneys under his supervision were not competent or willing to provide the quality of legal services advertised.

Goldberg's conduct was found to be in violation of Rule 1.1 of the Rules of Professional Conduct (failure to provide competent representation); Rule 1.4 (failure to keep clients reasonably informed and failure to reasonably explain a matter so as to permit a client to make an informed decision); Rule 5.1 (failure to make reasonable efforts to ensure that lawyers under his supervision conformed to the Rules of Professional Conduct); Rule 5.3(b) (failure to ensure that the activities of a nonlawyer under an attorney's supervision are compatible with professional standards); Rule 8.4(a) (violation of the Rules of Professional Conduct through the acts of another); Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice); and Rule 8.4(g) (engaging in conduct that adversely reflects on the lawyer's fitness to practice law). [ASB Nos. 92-134(B), 92-405(B) and 92-451(B)]

Public Reprimands

• On April 12, 1996, Birmingham attorney **William Jackson Freeman** received a public reprimand without general publication for violating Rule 3.10 of the Rules of Professional Conduct. Rule 3.10 prohibits the threatening of criminal prosecution solely to gain an advantage in a civil matter. Freeman was representing a plaintiff in a Title VII action and engaged in a variety of abusive litigation tactics. A protective order was granted by the U.S. District Court at the defendant's request. In the Court's order, the issue of Freeman's letters to defense counsel was addressed. "The language and tone suggest that Plaintiff's counsel is engaging in extortion and/or blackmail of defendants and the law firm representing them."

The court further found that the plaintiff's "tactics of threats to promote settlement" raised "serious ethical questions." [ASB No. 95-041(A)]

• On April 12, 1996, Gadsden attorney **Leon Garmon** received a public reprimand with general publication for violating Disciplinary Rule 1-102(A)(6), in that he engaged in conduct which adversely reflected on his fitness to practice law; Rule 7-102(A)(1), in that he filed a suit, asserted a position, conducted a defense, delayed a trial, or took other action on behalf of his client when he knew it was obvious that said action served merely to harass or maliciously injure another; and Rule 7-102(A)(8) for knowingly engaging in other illegal conduct or conduct contrary to a disciplinary rule.

Garmon had previously employed a law clerk until such time as he passed the bar exam. Upon that individual's successful completion of the bar exam, he left Garmon's employ.

Thereafter, three of Garmon's former clients requested that he withdraw as counsel and allow the former law clerk to represent them in their legal matters. In response thereto, Garmon sent a letter, with attachments to the three former clients wherein he included copies of correspondence to the former law clerk from the state bar regarding his bar exam results. The aforementioned letters served to harass and degrade this individual. [ASB No. 89-321]

• Tuscaloosa attorney **Roger Shayne Roland** was given a public reprimand with general publication by the Disciplinary Commission of the Alabama State Bar on January 12, 1996. Roland was employed by a client to probate an estate and was paid the sum of \$1,500. Thereafter, Roland failed or refused to

probate the estate as he had been employed to do, or to take any other legal action on behalf of his client. Roland also failed or refused to respond to numerous requests for information from his client or to otherwise communicate with the client concerning the status of the estate. After approximately one year during which Roland made no progress whatsoever in probating the estate, his client filed a complaint with the Alabama State Bar. This complaint was forwarded to the Tuscaloosa County Bar Grievance Committee for investigation. Roland failed or refused to cooperate with the grievance committee in its investigation, refused to respond to requests for information and refused to provide a written response to the complaint after having promised to do so. The Disciplinary Commission determined that Roland's conduct violated Rules 1.1, 1.3, 1.4 and 8.1 of the Rules of Disciplinary Conduct. In addition to the reprimand, Roland was required to pay to his client the sum of \$1,500. [ASB No. 95-125]

• Mobile attorney **Don Odell White** received a public reprimand, with general publication, on May 17, 1996. In April 1993, White was indicted by the Mobile County Grand Jury for criminal income tax violations. In October 1994, White pled guilty to willfully failing to file an Alabama income tax return.

Formal charges were filed against White by the Alabama State Bar based upon his conviction. White entered a plea of guilty wherein he admitted: Committing a criminal act which



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reflects adversely on his honesty, trustworthiness or fitness as a lawyer [Rule 8.4(b)]; and engaging in conduct which adversely reflects on his fitness to practice law. [Rule 8.4(g)]

As a part of White's plea to disciplinary charges, he received a 45-day suspension from the practice of law, which suspension has been abated for a period of two years. During this two-year period White is to certify to the Office of General Counsel that he has filed and paid his income taxes for 1995 and 1996, and not commit any violations of the Alabama Rules of Professional Conduct. [ASB No. 93-118(D)]

* Tuscumbia attorney **Murray W. Beasley** received a public reprimand without general publication on April 19, 1996. In 1982 Beasley represented the complainant, Reba Kilpatrick, now known as Reba Dick, in a divorce proceeding. In 1985 Beasley represented Jere Rosenblum in a divorce proceeding against his wife, Reba Rosenblum, formally Reba Kilpatrick and now Reba Dick. In 1987 Beasley represented Reba Rosenblum in a petition for contempt filed against her ex-husband, Jere Rosenblum. In July 1993 Beasley represented Jere Rosenblum, and filed on his behalf, and against Mrs. Rosenblum, a petition to modify the divorce decree to give custody of the children to Mr. Rosenblum. Beasley entered a plea of guilty to having violated Rule 1.9 of the Rules of Professional Conduct which prohibit an attorney who has formally represented a client from representing another person adverse to the former client, in the same or substantially related matter. [ASB No. 93-482]

* On April 12, 1996, Gadsden attorney **Leon Garmon** received a public reprimand without general publication for violating Disciplinary Rule 3-101(A) in that he aided a nonlawyer in the unauthorized practice of law.

In or around December 1988, an attorney who had been suspended from the practice of law in the State of Alabama associated employment with Garmon as an attorney.

Garmon had undertaken the representation of a client in a criminal matter. Thereafter, the prosecutor handling the case received calls from the suspended attorney, who was in Garmon's employ, by and on behalf of the client. This employee even negotiated with the prosecutor a plea agreement in the case wherein Garmon was counsel of record.

On or about April 12, 1990, that employee appeared in open court with Garmon's client, at which time the client entered a plea of guilty to the charges. Garmon was not present at these proceedings, but was aware of the same and of the suspended

attorney's participation therein. The Disciplinary Board found that Garmon's conduct in this matter violated the above-stated provision of the former *Code of Professional Responsibility* of the Alabama State Bar. [ASB No. 90-601(B)]

* On April 12, 1996, Gadsden attorney **Leon Garmon** received a public reprimand without general publication for violating Disciplinary Rule 1-102(A)(4), in that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and Rule 3-101(A) in that he aided a nonlawyer in the unauthorized practice of law.

In 1990, Garmon undertook to represent the interest of a criminal defendant on a retained basis. He employed an attorney who had previously been suspended from the practice of law in the state of Alabama.

However, Garmon directed his employee, the suspended attorney, to attend a preliminary hearing with the client, being aware that this individual was not licensed to practice law in the state of Alabama. Garmon further failed to inform the court that this individual was not licensed to practice law in the state. The disciplinary board determined that Garmon's conduct violated the above-stated provisions of the former *Code of Professional Responsibility*. [ASB No. 90-424]

* Mobile attorney **Johnny Mack Lane** received a public reprimand, with general publication, on April 12, 1996. In April 1993, Lane was indicted by the Mobile County Grand Jury for criminal income tax violations. In March 1994, Lane pled guilty to willfully failing to file an Alabama income tax return.

Formal charges were filed against Lane by the Alabama State Bar based upon his conviction. Lane entered a plea of guilty wherein he admitted: Violating the Alabama Rules of Professional Conduct and/or a disciplinary rule [Rule 8.4(a)]; committing a criminal act which reflects adversely on his honesty, trustworthiness, or fitness as a lawyer [Rule 8.4(b)]; engaging in illegal conduct involving moral turpitude [Rule DR 1-102(A)(3)]; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation [Rule 8.4(c)]; and, engaging in conduct which adversely reflects on his fitness to practice law [Rule 8.4(g)].

As a part of Lane's plea to the disciplinary charges, he received a 45-day suspension from the practice of law, which suspension has been abated for a period of two years. During this two-year period Lane is to certify to the Office of General Counsel that he has filed and paid his income taxes for 1995 and 1996, and not commit any violations of the Alabama Rules of Professional Conduct. [ASB No. 93-118(C)] ■

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Law Day 1996



Law Day Committee member Chris Christ and Committee Chair Tameria Driskill (center) join volunteer judges from the JAG school in presenting 1996 Law Day-Poster Contest winners. Over 50 entries were received from elementary schools across Alabama in the first Law Day Poster Contest.

The theme of this year's Law Day celebration was "The U.S. Constitution—the original American dream." And, according to almost 200 essays and over 50 posters entered in the ASB's annual essay/poster contest, the dream is still alive. (Entries in the poster contest, new this year for grades K-5, were all displayed at ASB headquarters.) United States Savings Bonds were awarded to winners; participating schools received certificates. Local and state Law Day Committee members were interviewed on Montgomery TV programs; ASB President John Owens was a guest on APT's statewide "For the Record". Also, updated public service announcements continue to run on stations in major cities. A Law Week Awareness publication appeared in The Montgomery Advertiser on April 28 with editorial information covering Law Week and ASB public services and brochures, generating requests for brochures and calls regarding highlighted programs.

Law Day contest judges this included Law Day Committee members and representatives of the JAG School at Maxwell Air Force Base.

Awards are presented in three categories: K-4th grade (poster contest) and 5th—8th and 9th-12th grades (essay contest). First, second and third place winners in each category receive U.S. Savings Bonds, as well as certificates of honor. Honorable mention certificates are also awarded in each category. ■

The 1996 Law Day winners are:

Poster Contest

- 1st place: Jason Motes
- 2nd place: Leah Smith
- 3rd place: Drake Roberts

(all of the above are from Indian Valley 4th grade in Sylacauga)

Division 1 Essay Contest:

- 1st place: Roshan Patel, 5th grade, Vestavia Central, Birmingham
- 2nd place: Pamela McNeil, 7th grade, Greenville Middle School
- 3rd place: Nicole Ledesma, 7th grade, Westlawn Middle School, Huntsville

Division 2 Essay Contest:

- 1st place: Jonathan Barbee, 11th grade, Hewitt-Trussville High School
- 2nd place: Vanessa Aldridge, 10th grade, Muscle Shoals High School
- 3rd place: Brad Byrd, 11th grade, Muscle Shoals High School

Honorable Mention Certificates:

- Dorie Chassin, 5th grade, UMS Wright Preparatory School, Mobile
- Nathan Ryan, 11th grade, Muscle Shoals High School
- Leigh Ann Moncus, 12th grade, Valley High School, Lanett

The Great Experiment: Dream or Reality?

"...The authors of the Constitution probably did not all agree on each issue and objective during the construction of it, but compromise was reached out of a sense of duty to the American Dream of individual freedom. The future of America depends on whether its citizens will tolerate indifference and injustice, and if they do, then the American Dream is sure to become the American Nightmare. But if the people of this country continue to accept and perform the duties and responsibilities which are essential to the preservation of a free society, then the American Dream will continue for future generations as the Founding Fathers originally intended."

—Jonathan O. Barbee

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"...Be grateful of your rights and freedom. We owe it all to the United States Constitution—the American dream."

—Roshan Patel

Alabamian Set to Lead American Bar Association

by Susan Cullen Anderson

N. Lee Cooper, president-elect of the American Bar Association, has traveled a long road since his days as a ladies' shoe salesman in the late 1950s. He believes, however, that the experience was invaluable. "To be a good trial lawyer, you have to have been a ladies' shoe salesman," Cooper said, explaining that it taught him diplomacy.

"You can't fit a size 12 foot in a size 8 shoe," he said.

When Cooper takes over the reins in August as the president of the American Bar Association, his diplomatic skills will be in demand. He estimates he will travel 300,000 air miles and give hundreds of speeches and interviews in his year of service.

"I have been told the biggest problem is getting the bills paid and the laundry done," Cooper said. Meals will not present a problem, however. Cooper expects to eat a hefty amount of chicken and green peas, the staple of any self-respecting service-club luncheon. "I'll be on the old chicken circuit," he said.

Cooper, 56, a partner at Maynard, Cooper & Gale in Birmingham, is only the second Alabamian to head the national bar association. The first was Henry Upton Sims, who served as president for the 1929-1930 term. Cooper tries not to contemplate the enormity of the job ahead, instead focusing on the day-to-day tasks, which already have included a visit to the United Nations and several stints on talk radio. "It's an exciting challenge," he said. "I'm going to have a great time."

The American Bar Association was established in 1878, and it is the largest voluntary professional organization in the world, Cooper said. It has 340,000 members and a \$125 million budget, with 750 full-time staff members in Chicago and Washington, D.C. As president, Cooper will be based in Birmingham, but he will spend a great deal of time in Chicago and Washington in addition to the extensive travel elsewhere.

He will run the Board of Governors, write monthly columns for the *ABA Journal*, and deal with the media, among other duties. "It's the whole business of running a \$125 million corpora-

tion," Cooper said of the position, for which he ran unopposed.

As a young lawyer in 1972, Cooper was introduced to the American Bar Association when the annual convention was held in San Francisco. "I wanted to go to San Francisco," he said of his motives for becoming involved. At the time, he was active in the Alabama State Bar's Young Lawyers' Section (he served as president in 1976), and he became involved in the American Bar Association's Young Lawyers' Division.

Cooper, the son of a college football coach, grew up in several areas of the United States. His father settled into private business in Birmingham when Cooper was a junior at Shades Valley High School, where he was captain of the basketball team.

Cooper met his wife, Joy Clark Cooper of Tusculumbia, on a blind date when he was an 18-year-old freshman at the University of Alabama. They will celebrate their 34th anniversary at about the same time he takes over the helm of the American Bar Association. Their son, Clark, 28, is an attorney with Burr & Forman in Birmingham, and their daughter, Catherine, 26, is an officer and branch manager for AmSouth Bank in Birmingham.

Cooper received his law degree from the University of Alabama in 1964 and served in the U.S. Army for a two-year tour. While his service as a first lieutenant was during the Vietnam War, he was stationed at Fort Lee, Virginia for the entirety of his tour. In 1966, Cooper and his wife returned to Birmingham, where he began work as an associate attorney for Cabaniss, Johnston (from which Maynard, Cooper split off in 1984).

In 1974, Cooper was invited to the formation of the litigation section of the American Bar Association because he was a member of two minority groups: He was young, and he was from the

South. From that time forward, Cooper served the association in many capacities, leading to his current role.

It would have been easy to focus completely on his law practice, but Cooper said he feels strongly about attorneys and public

"To be a good trial lawyer, you have to have been a ladies' shoe salesman," Cooper said, explaining that it taught him diplomacy. "You can't fit a size 12 foot in a size 8 shoe," he said.



service. "Lawyers are licensed by the state," Cooper said. "I feel like we've been given the privilege of self-regulation. We have a higher calling," he said. "Lawyers have to pay their civic rent."

He said he chose to pay his rent by his service to the bar association; others pay it by service to community organizations and their churches. However it is done, Cooper said, it must be paid.

As president of the American Bar Association, Cooper intends to shift the focus of the group from social policy to the organization's original purpose: to be a service organization for the nation's attorneys. He wants to reach "Main Street Lawyer, U.S.A.," as he termed it, offering more assistance to lawyers in their day-to-day practices. "We have gone too far afield on social issues, when we don't have much impact on them," Cooper said.

For example, he said, the board of governors took a stance on abortion which cost the organization membership and had little, if any, impact on the national debate. The board supported the right to choose abortion. "We lost members because we lost sight that we're a service organization first," Cooper said. "I'm not going to emphasize social policy."

Another issue of importance to Cooper as president is the independence of the federal judiciary. In this election year, federal judges have taken a beating by Republicans and Democrats alike, who disagreed with one judge's ruling in a search and seizure case.

Cooper said the political rhetoric is harmful. President Bill Clinton and Republican presidential candidate Bob Dole are "irresponsible" to attack the federal judiciary as "causing" crime, Cooper said. It is imperative that the federal judiciary remain free from political pressure, because only an independent judiciary can preserve constitutional freedoms, he said.

After his year as president is over and Cooper has had his fill of airplanes, radio talk shows and the "chicken circuit," he will return to his law practice in Birmingham. "I hope someone will call," he said.

Cooper said he is not really nervous about practicing law after such an extended sabbatical.

"I can always sell ladies' shoes," he said. ■



Susan Cullen Anderson

Susan Cullen Anderson is a graduate of the University of Alabama and the University's School of Law. She practices with the Law Offices of G. Daniel Evans in Birmingham. She is a former reporter for *The Birmingham News*.

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LEGISLATIVE WRAP-UP

1996 Regular Session

The Alabama Legislature began meeting in early January and has been in session either in a special session or the current regular session since that time. On Monday, May 20, 1996, the Legislature adjourned. There were 1,793 bills introduced in the legislature and 653 of them passed. However, less than 120 of the bills affected the state at large. In addition, there were 835 resolutions introduced of which virtually all passed. The issue that attracted most of the attention was the Mini-Code bill (SB 587) which passed on the last day

Institute Bills

Partnership with Limited Liability Partnership (HB 184). Passed the legislature and will be effective January 1, 1997. The passage of this bill was due in large part to the sponsorship of Representative Mike Box and Senator Charles Langford. See *Alabama Lawyer*, July 1995.

Revised UCC Article 8 "Investment Securities" (HB 405). This law will become effective January 1, 1997. The sponsors were Representative Mark Gaines and Senator Steve Windom. See *Alabama Lawyer*, July 1995.

Repeal of UCC Article 6 "Bulk Transfers" (SB 217). Senator Steve Windom and Representative Mark Gaines were the sponsors. Three-fourths of the states have repealed Article 6 because this area of transactions is now covered by the Fraudulent Transfers Act

which Alabama adopted in 1989. This repeal became effective in May 1996.

Joint Custody (SB 267). Sponsors are Senator Roger Bedford and Representative Howard Hawk. This act does not require that joint legal custody be awarded in every case except where the parties request joint legal custody and even then subject to approval by the judge. This act will become effective January 1, 1997. See *Alabama Lawyer*, May 1995.

The Institute bill on legal separation sponsored by Representative Marcel Black passed the House of Representatives but was not acted on in the Senate.

Other bills of interest to lawyers are as follows:

HB 82—Revocation of driver's license of a non-custodial parent who is six months in arrears of court-ordered child support.

HB 86—The Antique License Tag Law has been changed to prohibit automobiles regularly used on the highway from obtaining antique licenses. Effective January 1, 1998. Another bill, HB 546, was passed dealing with vintage vehicle tax.

HB 147—Provides penalties for those who interfere with and disrupt legal hunting and fishing.

HB 152—It is unlawful to destroy or deface traffic signs or deface public buildings or public property and parents of minors who are convicted of destroying or defacing traffic signs or defacing public buildings or public property will be liable for the actual damages caused by the minor.

HB 200—Those persons adjudicated insane or feeble-minded are not to be issued a driver's license.

HB 226—A person may plead guilty to a felony on information before indictment provided that the constitutional amendment is approved in November removing the prohibition from pleading guilty before 15 days after arrest.

HB 292—Amends Alabama Code Section 13A-6-21 that any assault on a peace officer or firefighter is an assault

in the second degree regardless of injury to the officer.

HB 368—Amends Alabama Code Section 22-52-1.2 to exclude the home address of the petitioner in an involuntary commitment proceeding.

HB 489—Regulates window tinting.

HB 608—Authorizes the use of an audio-video communications system at any criminal pre-trial proceeding. The physical presence of a defendant is not required in open court upon the use of audio-video systems.

HB 652—Amends Alabama Code Section 18-1A-3 *et al* to clarify the cost associated with condemnation actions and eliminate the 30-day period in which the probate judge is required to conduct a hearing after the filing of a condemnation complaint.

HB 755—Increases speed limits on highways.

SB 9—Amends Alabama Code Section 6-2-8 which removes the extended time prison inmates are given for bringing or defending actions based on title to real property.

SB 24—The jurisdiction of small claims court was raised from \$1,500 to \$3,000 effective July 1, 1996.

SB 35—Amends Alabama Code Section 6-2-33 to limit the statute of limitations for civil actions against sheriffs and other public officials for misfeasance to actions brought by the state against the public.

SB 41—Amends the Workers' Compensation Law to provide compensation for death of a person 21 years old or younger.

SB 119—Relates to juvenile delinquency and amends Alabama Code Section 12-15-53 to provide that a child alleged to be delinquent for possessing a pistol, etc., shall be detained in custody until a hearing and can be held in jail for up to 60 days. The weapon will also be confiscated and destroyed.

(Continued on page 234)



Robert L. McCurley, Jr.
Robert L. McCurley, Jr. is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

Punitive Damages and Pre-Verdict Procedures

Life of Georgia:

A Bold New FRONTIER



By Davis Carr and Rachel Sanders Cochran

Alabama juries historically have received very little guidance in determining the appropriate amount of punitive damages to be assessed against a defendant. Since 1986, security for the defendant was supposedly had via a post-trial *Hammond* hearing, at which the trial court considered evidence relevant to whether the amount of punitive damages awarded by the jury was appropriate. However, the recent case of *Life Insurance Company of Georgia v. Johnson*, 1940357, 1996 WL 202543 (Ala., April 26, 1996), broadened the applicability of the *Hammond/Green Oil* factors. As a result of *Life of Georgia*, these factors are now considered by the jury as well as the by the trial court in determining the amount of damages to be assessed.

Accordingly, detailed knowledge of how *Hammond/Green Oil* factors are interpreted and applied is crucial for lawyers involved in any action seeking punitive damages. This article examines the history behind the court's action in *Life of Georgia* and reviews the new method by which punitive awards are to be assessed as announced in that decision. Next, the article discusses recent application of *Hammond/Green Oil* factors in particular cases. Finally, practice pointers are provided.

History Behind *Life Insurance Co. of Georgia v. Johnson*

The *Green Oil* factors were originally conceived in Justice Jones' special concurrence in *Ridout's-Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127 (Ala. 1981). While concurring in the court's affirmance of a \$220,000 award, Justice Jones addressed the "unguided discretion accorded in both the fact-finding process and the judicial review that fixes the amount of punitive damages." While punitive damages "ought to sting in order to deter," Justice Jones wrote, "only in the rarest of cases should it be large enough to destroy; this is not its purpose." The current system furnishes "virtually no yardstick for measuring the amount of the award over against the purpose of the award." While recognizing that evidence of wealth of a defendant was entirely too prejudicial to inject into trial before the jury determined liability, Justice Jones suggested a post-judgment proceeding during which the trial court could compare the amount of the award against the financial worth of the defendant.

During the same general time frame, another relevant trend was developing. In the 1986 case of *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), the Alabama Supreme Court began requiring trial courts to state in the

record its reason for interfering with a jury verdict, or refusing to do so, on the grounds of excessiveness of the damages. Such statements became known as *Hammond* orders. According to Justice Shores, who authored the *Hammond* opinion, appropriate factors for consideration by the trial courts in determining excessiveness included culpability of the defendant's conduct, desirability of discouraging others from similar conduct, and impact upon the parties, as well as impact on innocent third parties.

Shortly after the release of *Hammond*, Justice Houston wrote a special concurrence in *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1060 (Ala. 1987), observing that a substantial portion of the judgment in the \$3,500,000 award in that case violated constitutional standards. "We have permitted punitive damages to be levied without the constitutional safeguards that we insist attend every criminal prosecution." Justice Houston then enumerated seven factors that "should be taken into consideration by the trial court in setting the amount of punitive damages." Only two years later, in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), the court adopted Justice Houston's *Lavoie* concurrence and established what is known today as the *Green Oil* factors.

Despite the post-verdict application of

Hammond/Green Oil factors, debate continued as to whether Alabama juries receive sufficient guidance in their attempt to determine the appropriate amount of punitive damages. In *Charter Hosp. of Mobile, Inc. v. Weinberg*, 558 So. 2d. 909 (Ala. 1990), Justice Houston remarked that constitutional due process provisions are violated when the jury is "given the unbridled discretion to award no punitive damages or to award an unlimited amount of punitive damages, taking into consideration only the character and the degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs in the future." In an attempt to ensure due process, Justice Houston suggested a bifurcated trial procedure, in which the jury was to be provided information relative to the appropriate amount of damages to be assessed. Just as his concurrence in *Lavoie* formed the cornerstone of *Green Oil*, Justice Houston, in his concurrence in *Charter Hospital*, set the stage for *Life Insurance Company of Georgia v. Johnson*.

In addition to concerns of due process,

certain members of the court were struggling with concerns of "windfalls to plaintiffs as a result of large punitive awards." In recent years, several justices supported the concept of allocation of a portion of punitive awards to the state general fund or to some special fund that serves a public purpose or advances the cause of justice.¹ However, the concept never garnered a majority of the Alabama court until *Life of Georgia*.

New Bifurcated Procedures Adopted in *Life Of Georgia*

In *Life Insurance Company of Georgia v. Johnston*, 1940357, 1996 WL 202543 (Ala., April 26, 1996), the plaintiff sued the defendant insurance company alleging fraud and suppression in relation to the sale of a Medicare supplement policy. After trial, the jury awarded plaintiff \$250,000 in compensatory damages and \$15,000,000 in punitive damages. Pursuant to a *Hammond/Green Oil* hearing, the trial court remitted the punitive award to \$12,500,000. *Life of Georgia* appealed alleging a denial of due process in that the damages awarded were excessive and the method by which those damages were assessed was inadequate. On appeal, the Alabama Supreme Court reviewed the trial court's *Hammond* order. Although no case citations were provided, the court conducted a comparative analysis and remitted the punitive award to \$5,000,000.²

Although newsworthy, the remittitur by the court of the \$12,500,000 punitive award was not the key holding of the *Life of Georgia* decision. Writing for the court, Justice Shores commented that, although the *Hammond* and *Green Oil* procedures were adopted partly in response to the due process concerns of defendants, juries traditionally have been shielded from certain relevant but potentially prejudicial information. However, she noted that, without benefit of that information juries cannot determine whether the amount of damages it awards is an appropriate amount. Therefore, the court concluded the jury's need for additional guidance outweighed any potentially prejudicial effect and held that evidence relating to all *Hammond/Green Oil* factors, with few exceptions, was to be admitted *before the jury* in all actions seeking punitive damages.³ In so holding, the court dra-

matically altered the method by which punitive damages are assessed in this state. Accordingly, effective 90 days from the date the certificate of judgment in *Life of Georgia* is entered, jury trial of all cases in which punitive damages are sought, with the exception of wrongful death actions, are to proceed in the following manner:⁴

A. Verdict Stage

After receiving the jury charge from the trial court, the jury is to determine liability and the amount of compensatory damages, if any. At the same time, the jury will also decide by special verdict whether the evidence presented at trial justifies the imposition of punitive damages. If the special verdict indicates punitive damages are to be awarded, the punitive phase of the trial begins.

B. Punitive Phase

When the jury's special verdict indicates punitive damages are to be awarded, the trial resumes and all evidence relevant to the appropriate amount of punitive damages, with only a few exceptions, is admissible before the jury.⁵ Admissible evidence includes information necessary to consider all *Hammond/Green Oil* factors, as well as those factors identified by statute or case law.⁶ The factors specifically identified by the court as appropriate for consideration by the jury are as follows:

From the statute [§ 6-11-23, *Ala. Code* 1975 (Supp. 1989)]:

1. Nature, extent and 'economic impact' of verdict on plaintiff or defendant.
2. Amount of compensatory damages.
3. Whether defendant has been guilty of similar acts in the past.
4. The nature and extent of any effort by defendant to remedy the wrong.

From *Green Oil*:

1. Does the punitive damages award bear a reasonable relationship to the harm likely to occur from the defendant's conduct?
2. The degree of reprehensibility of defendant's conduct, including:
 - (a) the duration of the conduct;
 - (b) the degree of defendant's awareness of any hazard which this



Davis Carr

Davis Carr graduated *cum laude* from the University of Alabama School of Law. He served as president of the Alabama Defense Lawyers Association from 1992-93, and as editor for the *ADLA Journal* since 1986. He is currently

serving as the Defense Research Institute's state representative and as vice-chair of DRI's Medical Professional Liability Committee. He is a member of the Alabama and Florida bars, and is a partner in the firm of Carr, Alford, Clausen & McDonald, L.L.C. in Mobile.



Rachel Sanders Cochran

Rachel Sanders Cochran, of Montgomery, is associated with the Mobile firm of Carr, Alford, Clausen & McDonald, L.L.C. She is a *magna cum laude* graduate of Auburn University

at Montgomery and a *cum laude* graduate of Cumberland School of Law. She is a member of the Tort & Insurance Practice Section and the Business Law Section of the ABA, DRI and the ADLA.

conduct has caused or is likely to cause;

(c) any concealment or cover-up of the hazard;

(d) existence and frequency of similar past conduct.

3. Punitive damages should remove the profit, if any, from the defendant and should be in excess of the profit so that defendant recognizes a loss.
4. Defendant's financial position.
5. Cost of litigation to the plaintiff.
6. If defendant has received criminal sanctions, that should be taken into account in mitigation.
7. If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages.

From *Hammond*:

1. Culpability of defendant's conduct.
2. The desirability of discouraging others.
3. The impact on the parties.
4. Impact on innocent third parties.

From *Holloway [Ridout's-Brown Service, Inc. v. Holloway]*, 397 So. d. 125, 127 (1981):

"The punitive damages award should sting, but ordinarily it should not destroy."

From *Wilson [v. Dukona Corp., N.V.]*, 547 So. d. 70, 73 (Ala. 1989):

"Defendant's 'right to fair punishment' must be considered above plaintiff's right to recover the fullest amount of punitive damages."

From *Lavoie [Aetna Life Ins. Co. v. Lavoie]*, 505 So. d. 1050, 1053 (Ala. 1987):

"A comparative analysis with other awards in similar cases..."

As indicated in the opinion, adoption of this bifurcated procedure was not intended as a substitute for post-verdict review of punitive awards. Punitive awards, when challenged as excessive or inadequate, still must be considered through the procedures set out in *Green Oil Co. v. Hornsby* and *Hammond v. City of Gadsden*. However, evidence already considered by the jury need not be readmitted at the post-verdict hear-

ing. Only evidence not previously considered by the jury is to be admitted in a post-verdict hearing on excessiveness.

C. Allocation of Award between Plaintiff and State

After appellate review, if any, the amount of the judgment (as finally determined) is to be paid into the trial court. All reasonable expenses of the litigation, including the plaintiff's attorney fees, are to be paid out of the judgment. The remaining amount is then to be divided equally between the plaintiff and the state general fund. Although authorized to receive a portion of all punitive awards after expenses, the state has no right under this new procedure to intervene or participate in cases; the rights of the parties to settle any lawsuit are unaffected as well.⁸

Recent Applications of Hammond/Green Oil Factors

A. Federal Decisions⁹

No doubt the most important application to date of *Hammond/Green Oil* factors is found in the recent U.S. Supreme

Court case of *BMW of North America, Inc. v. Gore*, No. 94-896, 1996 WL 262429 (U.S., May 20, 1996). In *Gore*, a physician purchased a new BMW for approximately \$40,000. After driving the vehicle for nine months without complaint, plaintiff discovered the vehicle had been repainted prior to its purchase; he then brought this action against the American distributor of BMWs for fraudulent suppression. The jury awarded plaintiff \$4,000,000 in punitive damages. On appeal, the Alabama Supreme Court remitted the award to \$2,000,000, finding that the jury had improperly based its award of punitive damages on conduct that occurred in other jurisdictions.¹⁰ However, the Alabama Supreme Court found no other justification for remittitur under its *Hammond/Green Oil* analysis of the case.¹¹

In a five-to-four decision, the U. S. Supreme Court reversed the Alabama court, finding the \$2,000,000 punitive award grossly excessive, thereby violating BMW's constitutional due process rights as guaranteed by the Fourteenth



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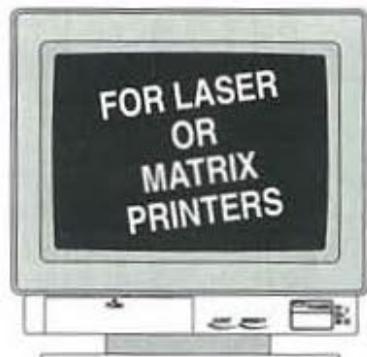
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Amendment. Writing for the Court, Justice Stevens stated that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."

The Court identified three guideposts, each of which indicated BMW did not receive adequate notice of the magnitude of the sanction Alabama might impose for its nondisclosure policy. First, the Court found none of the aggravating factors typically associated with reprehensible conduct to be present in this case.¹⁷ Second, the Court noted that the punitive damages awarded to plaintiff after remittitur was 500 times the amount of his actual harm. Although still declining to establish a mathematical bright-line ratio of punitive damages to actual harm, the Court stated "[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'" Third, the punitive award of \$2,000,000 greatly exceeded the maximum civil penalty authorized by the Alabama Legislature, or that of any other state, to which BMW could have been subjected for its nondisclosure policy.¹⁸ Thus, the Court concluded, fair notice was not given to BMW that its conduct might result in a multi-million dollar penalty. Accordingly, the Court reversed and remanded the case to the Alabama Supreme Court for a new trial or, alternatively, reconsideration by the Alabama Supreme Court.

The Court's decision in *Gore* did not disapprove of the *Hammond/Green Oil* factors and their use during post-verdict reviews of punitive awards. However, the majority of the Court rejected the manner in which those factors were applied by the Alabama court. Justice Breyer's concurrence, in which Justices Souter and O'Connor joined, stated:

"Legal standards need not be precise in order to satisfy this constitutional concern.... But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior. The standards the Alabama courts applied here are vague and open-ended to the point where they risk arbitrary results.

"And, as the majority opinion makes clear, the record contains nothing to suggest that the extraordinary size of the award in this case is explained by the extraordinary wrongfulness of the defendant's behavior, measured by historical or community standards, rather than arbitrariness or caprice."¹⁹

B. Alabama Decisions²⁰

One of the most detailed and instructive discussions of *Hammond/Green Oil* factors from the Alabama Supreme Court is found in the recent case of *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897 (Ala. 1995). In *Duck Head*, three former employees alleged fraud, suppression and breach of contract against their former employer for failure to pay \$852,000 in sales commissions. At trial, the jury awarded plaintiffs \$19,500,000 in punitive damages. At the *Hammond* hearing, the trial court remitted the amount to \$15,000,000, stating as reasons for the remittitur the adequacy of the compensatory damages, the fact that the company was in a down cycle, and the fact that the company's insurer was contesting coverage. On appeal, the Alabama Supreme Court affirmed the punitive award as remitted, conditioned upon a further remittitur of the mental anguish damages. Factors relevant to the court's affirmance included reprehensibility of the defendant's conduct, the fact that defendant's actions were intentional and deliberate and were carried out by numerous members of management, and the financial strength of the company.¹⁶

In addition to its excellent discussion of the *Hammond/Green Oil* factors, the *Duck Head* opinion is noteworthy for several other reasons. One, the opinion affirmed the largest punitive award ever made in Alabama. It should be noted for comparative analysis purposes that the actual economic damage suffered by the three plaintiffs in the case, \$852,000, probably represents the largest amount of actual damages, excluding wrongful death actions, reported in a *Hammond/Green Oil* context.¹⁷ Two, the opinion contains a detailed discussion regarding remittitur of damages for mental anguish damages. In *Duck Head*, damages awarded by the jury for mental anguish alone totaled an astounding \$7,000,000. On appeal, the court remitted these damages to \$3,500,000.

The case of *Independent Life & Accident Insurance Co. v. Harrington*, 6548 So. 2d 892 (Ala. 1994), is also instructive in analyzing *Hammond/Green Oil* factors. The jury in *Harrington* awarded plaintiff \$6,230,000 on a fraudulent suppression action against an insurer. On appeal, the Alabama Supreme Court remitted the award to \$4,000,000. Factors specifically cited by the court as grounds for remittitur included the following: the actual and threatened harm from defendant's conduct was not as great as determined by the trial court; Independent Life's post-verdict efforts warranted some mitigation of punitive awards; and, although no comparison cases are cited, the court's comparative review indicated the award was somewhat excessive.¹⁸

Harrington contains an interesting discussion of the effect to be given, in the context of a *Hammond/Green Oil* hearing, to evidence of similar acts performed by a corporate defendant in other jurisdictions. The *Harrington* court held that such evidence was properly considered when determining whether punitive damages were warranted but such evidence could not be used as a multiplier when determining the dollar amount of an award. "Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful."¹⁹

Additionally, *Harrington* points out the difficulty of determining the profit made from defendant's wrongful conduct. Specifically, the court rejected the methods used by both the trial court and the defendant to calculate Independent Life's profit from its misconduct.²⁰ Because the information necessary to calculate the true profit to the *Harrington* defendant was not present in the record, the Alabama Supreme Court was unable to consider this factor in reviewing the punitive award.

Another noteworthy development in the court's decisions during the last several years has centered on the issue of liability insurance. Rightly or wrongly, the court has made it clear that the existence of liability insurance will be treated by the trial courts as an asset for the purposes of *Hammond* hearings.²¹ However, the court has recently gone a

step further: several cases have treated the defendants' inchoate claims of bad faith against their insurance carriers as an "asset" of the defendant for purposes of *Hammond/Green Oil* hearings.

For example, in the wrongful death action of *Killough v. Jahandarfarid*, 578 So. 2d 1041 (Ala. 1991), defendant requested his insurer settle plaintiff's claim for policy limits. However, the insurer refused and the jury awarded plaintiff \$3,000,000, ten times greater than defendant's policy limits. On appeal, defendant argued excessiveness of the award, alleging the verdict exceeded the combined total of his assets and limits of his liability insurance by \$1,900,000. However, the court refused to consider the defendant's claims of excessiveness. Because the defendant's insurer posted a supersedeas bond in an amount exceeding the verdict in recognition of a possible bad faith action, the court found that defendant's "assets" appeared adequate to satisfy the judgment. Thus, despite the fact that no bad faith action had been filed, much less won, the court affirmed the entire judgment.

In a very similar case, *Mutual Assurance, Inc. v. Madden*, 627 So. 2d 865 (Ala. 1993), the Alabama Supreme Court held that defendant's potential bad faith claim was properly considered an "asset" for the purposes of a *Hammond/Green Oil* hearing. Quoting *Killough v. Jahandarfarid*, *supra*, Justice Kennedy wrote "[c]ertainly, it is within the trial court's discretion to ascribe a reasonable present value to this interest, and to consider such an asset on the remittitur issue. We have made it clear that in determining the financial impact of a punitive damages award on a defendant, a trial court should determine 'the true impact on the defendant.'"

Finally, although it is outside the scope of this article, it is interesting to consider whether the application of the *Hammond/Green Oil* factors has been successful in its attempt to provide some consistency to punitive awards.²² For example, consider the recent case of *Sheffield v. Andrews*, Alabama Supreme Court No. 1941693, WL 173542 (April 12, 1996) (application for rehearing filed), an action alleging fraud against an individual. In *Sheffield*, the jury awarded \$2,000,000 in punitives

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against the defendant for attempting to swindle an elderly woman out of her property. At the *Hammond* hearing, the trial court remitted a \$2,000,000 verdict to \$1,000,000 because the defendant's net worth was estimated to be only \$1,500,000.

The *Sheffield* opinion is noteworthy for two reasons. First, it is one of only a few reported cases addressing a punitive award against an individual rather than a corporate defendant.²³ Second, the Alabama Supreme Court affirmed the \$1,000,000 punitive verdict against the defendant although the award represented, at a minimum, a whopping 67 percent of his net worth.²⁴

Compare the result reached in *Sheffield* to that reached in *Wilson v. Dukona Corp. N.V.*, 547 So. 2d. 70 (Ala. 1989), an action against an individual defendant for the wrongful cutting of timber. In *Wilson*, the Alabama Supreme Court remitted the entire punitive award of \$21,000 against the individual defendant because of his abject poverty. Also compare the award in *Sheffield* to awards made against large corporate defendants in various cases. For example, in the case of *General Motors Corp. v. Johnston*, 592 So. 2d. 1054 (Ala. 1992), the jury awarded \$15,000,000 in punitive damages, finding that GMC failed to recall some 600,000 vehicles containing faulty computer chips despite GMC's knowledge that such a defect would risk lives and property. On appeal, the Alabama Supreme Court found the reprehensibility of defendant's conduct to be great. However, the court remitted the verdict to \$7,500,000 despite the fact that the wrongdoer was a mammoth corporation and evidence indicated GMC made over \$42,000,000 in profits from the sale of those 600,000 vehicles.

Also compare the result in *Sheffield* to that of *Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d. 886 (Ala. 1992), a bad faith action in which the jury awarded over \$3,000,000 against the defendant insurance company. On review, the Alabama Supreme Court found widespread use of similar misconduct by the defendant and attempts by the defendant to conceal facts related to its wrongdoing. Despite the number of *Green Oil* factors favoring a large verdict, the court affirmed the verdict conditioned upon remittitur to \$1,000,000.

It certainly is not suggested that the *Johnston* and *Lindblom* awards were insufficient or insignificant or that the *Sheffield* defendant should not have been punished for his misconduct. However, the punitives awarded in *Johnston* and *Lindblom* were nowhere near 70 percent of the corporate defendants' net worth, as was the case in *Sheffield*.²⁵ This is true despite the fact that the corporate defendants were found to have caused greater actual harm in multiple transactions that affected numerous persons while the *Sheffield* defendant's failed fraudulent attempt consisted of an isolated transaction which resulted in no actual economic harm. Clearly, the application of *Hammond/Green Oil* factors does not always equalize punitive awards.²⁶

Future Application of Hammond/Green Oil Factors

Here, in no particular format, are some suggested practice pointers as we enter this bold new frontier. As always, we are limited only by the bounds of our imagination and we will probably see some pretty imaginative legal pyrotechnics.

A. Discovery of Financial Information

Of course, "profit from the defendant's misconduct" will now be the subject of proper and extensive discovery. In the sale of one used car, this seems easy enough. Likewise, perhaps one can trace the profit for a particular product line, such as a particular type of insurance policy—but for what period of time? What about product liability cases? What profit do we consider? The profit Ford made on all cars from 1980 to 1995 with allegedly defective ignition switches? This would hardly seem fair, but if the particular alleged defect cuts across product lines under substantially the same conditions, where should we draw the line? For all similar models? For, say, the five-year period prior to the incident in question? Obviously, many details remain to be resolved in the products cases.

In any event, we now have a tremendous burden during discovery—financial records must be explored in order to properly present the facts during the punitive phase of trial. From both sides, we will look at net worth, gross sales, net sales, statutory income, gross profit,

net profit, etc. If the matter were left to reason and sound accounting principles, it would seem only fair to examine the actual financial experience for the transaction or product in question for a reasonable period of time, on a net basis. Gross figures do not, from an accounting viewpoint, provide any substantive information and leave the jury with inaccurate information regarding the true cost involved in making the "profit." Accordingly, it is submitted that only net figures should be considered.

The particular product or product line, as well as a reasonable time frame, must be applied as limiting factors. Courts might use the "substantial similarity" test used elsewhere to determine the relevance of various products.

Because the financial situation of a defendant is relevant, it is now fair game to show poverty of a defendant, whether corporate or individual. Thus, defendants will examine various methods of establishing this poverty through discovery and demonstrating it as well to the jury. In any event, forensic accountants will become critical consultants during most substantive cases. A new cottage industry will flourish while the costs of discovery will escalate dramatically.

A significant new opportunity exists in the punitive phase for the defendant to discuss opportunities and efforts to remedy the alleged wrong, e.g., refund and settlement offers. Assuming there were no settlement overtures prior to the filing of the complaint, it will behoove a defendant to quickly ascertain whether settlement offers should be made upon service of complaint papers. The timing and the amount of a settlement offer seems relevant and defendants should plan their approach carefully. Who makes the offer and who can testify about the offer at trial? Defendants have a great opportunity to remove the "sting" from a case, if prompt and proper responses to complaints are made.

B. Discovery of Information Relevant to Other Factors

In addition to financial considerations, all other *Hammond* and *Green Oil* factors are now subject to discovery. Look again at the list of factors:

1. Economic impact upon plaintiff

and defendant. Does this mean the wealth or poverty of the plaintiff is relevant and fair game for counsel? Surely not, as this would overturn long-standing precedent and dangerously risk influencing juries by this highly prejudicial, irrelevant fact.

2. Amount of compensatory damages. Consideration of this factor by the jury makes sense. Such consideration guides the jury by requiring they examine the actual harm to plaintiff.
3. Whether the defendant has been guilty of similar acts in the past. Both sides will now litigate before the jury whether other prior acts are "substantially similar" or not. National companies will of course be involved in litigation elsewhere and will be called upon to show whether other episodes were similar or not, demonstrating the necessity of coordinated discovery on all files. To properly respond to such an inquiry, someone within the company must have access to information regarding the various matters in litigation, past and present. Such a requirement may necessitate the restructuring of certain business records or departments by national defendants.
4. Relationship of punitive damages to the harm likely to occur from defendant's conduct. This too is a good guiding factor which requires the jury to focus on the conduct and the amount of damages to be awarded.
5. Degree of reprehensibility of the defendant's conduct, including duration, awareness of hazard, concealment, and frequency of similar past conduct. This will be one of the more fertile areas for the defense. Counsel will be able to point out that the hazard was unanticipated, occurred in a short period of time, the lack of concealment on the part of the defendant, and that the matter had never occurred before. Of course, if the opposite is true, plaintiff's counsel will highlight these factors. Consider the different impact these factors will have on different areas such as

products, fraud, accident cases, etc.

6. Removal of profit. Perhaps no single factor will prove more problematic than this one. How do you determine "the profit" in the manufacture of certain products alleged to be defective? Do you look at "the profit" on the item? A component part? A product line? A division? The company? For the product itself? Arguments will be made that the profit must be limited to particular products or transactions, and not product lines or multiple transactions. Here, the Court modified the traditional *Hammond/Green Oil* factors to observe that defendant's net worth may or may not be relevant, depending upon the nature of the case. Significantly, the availability of insurance is not to be disclosed. As well, the opinion notes that the defendant is not to be punished for its size or success, only for its tortious conduct. Thus, the following would seem a fair jury charge, in connection with the

other relevant charges pertaining to punitive damages:

- There has been evidence of defendant's profit [or net worth, if appropriate]. In this regard, the defendant is to be punished based only upon its conduct. You are not to punish the defendant for its size, nor for its success.
7. Cost of litigation to the plaintiff. This has hardly seemed a significant factor, inasmuch as most plaintiff's lawyers do not keep time sheets; however, in those "mega" files where there is a significant amount of expense, we could literally see a bookkeeper or office manager of a law firm testifying as to expenses incurred in trial preparation.
8. Criminal sanctions. So far, there have been no reported cases in Alabama where this has been a factor; nonetheless, some day some unfortunate (or fortunate, depending upon the perspective) defendant will be able to argue that, due to the criminal sanctions imposed

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against him, he has been punished enough. One could argue that perhaps the defendant who avoids multi-million dollar punitive judgments because of previously received criminal punishment is fortunate in a sense. However, consider the logic of allowing a defendant whose conduct was egregious enough to result in criminal punishment to receive a lighter civil punishment than the defendant whose conduct was tortious but did not violate any criminal statutes.

9. Other civil actions related to the same transaction or type of transaction. This has become known by lawyers in the state as an "Alfa" order, so named after the first reported incidence where a trial judge entered an order approving settlement, specifically finding the defendant had "been punished enough."²⁷ Juries will now be allowed to hear evidence that the defendant "has been punished enough." Defense counsel should pay particular attention to amounts paid in settlement of substantially similar cases. Thought should be given to any characterization of the case made in the settlement in order to preserve this issue.

As of this writing, *Life of Georgia* is pursuing a petition for certiorari in the U. S. Supreme Court. The constitutional due process concerns of multiple punishment for the same singular act of misconduct, not addressed in the U. S. Supreme Court's opinion of *BMW of North America, Inc. v. Gore*, will be asserted.

10. A comparative analysis with other awards in similar cases. Application of this factor presents an interesting opportunity for both the plaintiff and defense bar. The senior author of this paper has been qualified in a post-trial *Hammond/Green Oil* hearing to testify as an expert on "comparative analysis."²⁸ A list of cases was compiled, trial transcripts read, and verdicts in similar cases brought to the attention of the trial court. It seems lawyers will now become "experts" regarding similar cases.

C. Bifurcated Trials and Allocation to the State; Miscellaneous Thoughts

Bifurcated trials appear to be an equal opportunity for the plaintiff and defendant. The financial information that is to be provided to the jury appears to be an obvious advantage for plaintiffs but could favor a defendant, if proper instructions are provided to and heeded by the jury. On the other hand, for the plaintiff with a thin punitive damages case, the bifurcated trial will require the jury to focus on the issue of liability before addressing damages. Also, there will be an additional opportunity for defendant to address settlement, even after the jury returns a finding of liability. On balance, this should benefit defendants more than plaintiffs. It is respectfully suggested, however, that defendants be prepared to address settlement immediately upon an adverse liability finding. In cases where there is a potential for an excess verdict, counsel and carrier must be ready to immediately settle, if indicated on the facts.

Allocation of a portion of the award to the state is a tremendous wild card in settlement negotiations. At some point, the plaintiff actually loses money if the matter is pressed to judgment. As plaintiffs may not see the full value of the case if the award is ultimately split with the state, the key to successful settlement for the defense will be to offer enough money to make it worthwhile, yet somewhat less than what could be expected from the jury.

Sooner or later, problems will also arise between the plaintiff and his or her lawyer, in that the economic interest of counsel for plaintiff continues regardless of whether the state or the client receives the funds. Some client, who on the advice of counsel, rejects an offer and later receives less after allocation to the state is likely to raise the issue of conflict of interest. Real or not, the client, and possibly the jury, may perceive that the lawyer acted with his or her own economic interests in mind, rather than those of the client.

In any event, allocation is a significant factor to be carefully considered in settling any case alleging punitive damages. Both sides must calculate where their real economic interest is best served. Defense counsel and clients must be prepared to pay the full judg-

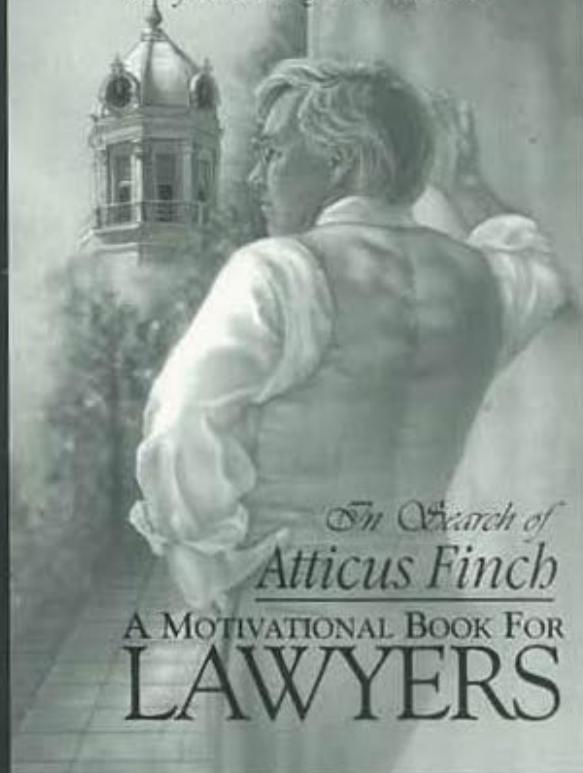
ment into court, to pretermitt any discussion of cutting the state out of its share in the event a favorable settlement cannot be reached. In this vein, it should be noted, as ably argued by the attorney general in his second application for rehearing in the *Life of Georgia* case, that as long as the parties can settle and cut the state out of the deal, which under the current procedure they can do every time, no money will ever be paid to the state. Accordingly, the notion that Alabama's "windfall award" problem has been solved is a disingenuous notion, indeed. ■

ENDNOTES

1. See *BMW of North America, Inc. v. Gore*, 646 So. 2d 619, 629 (Ala. 1994) (Houston, J. concurring), reversed and remanded, No. 94-836, 1996 WL 262429 (U.S., May 20, 1996); *Smith v. States General Life Ins. Co.*, 592 So. 2d 1021, 1025 (Ala. 1992); *Union Mortgage Co., Inc. v. Barlow*, 595 So. 2d 1335, 1348 (Ala. 1992); *Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d 854, 859 (Ala. 1991); *Principal Financial Group v. Thomas*, 585 So. 2d 816, 819 (Ala. 1991); *Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878, 887 (Ala. 1991). See also *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, C. J., dissenting).
2. In writing for the court, Justice Shores discounted the charts appended to Justice Maddox's dissent as "not authenticated and merely attached to a brief filed in this case." Given the amount of testimony, not objected to at the trial, which demonstrated the explosion of punitive damages in Alabama and which authenticated these very charts, it is difficult to understand her comments. Moreover, equally puzzling is her use of anecdotal information, articles, and statistics not found in the record of *Life of Georgia*.
3. Justice Shores commented that "[j]uries are presumed to follow the law as instructed by the trial court. There is no reason to assume that the jury would disregard the trial court's instructions on this issue." However, with all due respect to the court, such logic begs the question. If such an assumption were truly appropriate, there no longer would be a need for the Alabama Rules of Evidence and the protections provided therein. Indeed, if such an assumption were proper, evidence regarding prior bad acts, subsequent remedial measures and settlement offers would properly be admitted during the liability phase of the trial (rather than the punitive phase), with only a need for a limiting instruction to the jury.
4. As of the date of this writing, the certificate of judgment in *Life of Georgia* had not been entered.
5. For example, the court specifically excluded evidence of liability insurance. Accordingly, such evidence is not admissible before the jury assesses punitive damages. However, the trial court may still consider evidence of such insurance in its post-verdict review of the punitive award.
6. Thus, the punitive phase of a trial is now a *Hammond* hearing. Cf. *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897, 909 (Ala. 1995) ("[Hammond] hearings were not intended to become second-phase trials of cases.")
7. See D. Carr, "Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?," *Ala. Lawyer*, Vol. 51, March 1990, pp. 94-95. This article provides an early list of opinions discussing *Hammond/Green Oil* factors.

8. A brief filed by the attorney general on application for second rehearing correctly and succinctly outlines the problem inherent in this portion of the *Life of Georgia* decision. Under *Life of Georgia*, the parties can always settle the case in a such a way that plaintiff will receive more money than he would if the matter were pressed through appeal while, under the same settlement, the defendant is able to recognize some savings over the judgment as rendered. Accordingly, the State will never receive any monies under this allocation mechanism.
9. Other relevant federal cases include *Honda Motor Co. Ltd. v. Oberg*, ___ U.S. ___, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994); *TXO Production Corp. v. Alliance Resources, Inc.*, 509 U.S. 443, 113 S. Ct. 271, 125 L. Ed. 2d 366 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991); *Carrier Express, Inc. v. Home Indem. Co.*, 860 F. Supp. 1465 (N.D. Ala. 1994); *Enstar Group, Inc. v. Grassgreen*, 812 F. Supp. 1562 (M. D. Ala. 1993); *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448 (S. D. Ala. 1992).
10. In *Gore*, no evidence was before the jury establishing whether such conduct was wrongful in the other jurisdictions. Therefore, those transactions could not be used as a multiplier in determining punitive damages. See also *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994); *Independent Life & Accident Ins. Co. v. Harrington*, 658 So. 2d 892 (Ala. 1994) (reaching same conclusion as to proper use of evidence of misconduct in other jurisdictions).
11. See *Gore v. BMW of North America, Inc.*, 646 So. 2d 619 (Ala. 1994).
12. The *Gore* court noted that the harm inflicted upon plaintiff was purely economic; the repainting had no effect on the car's performance, safety features, or appearance; the defendant's conduct evinced no indifference to or reckless disregard for the health and safety of others; no evidence was established that defendant acted in bad faith in interpreting multiple state statutes and in determining at what point to disclose damage to purchasers; no evidence offered that defendant persisted in its course of conduct after it had been deemed unlawful; no evidence offered that defendant engaged in deliberate false statements, acts of affirmative misconduct, concealment or improper motive.
13. The maximum civil penalty authorized for BMW's conduct by the Alabama legislature was \$2,000, for a violation of the Alabama Deceptive Trade Practices Act. The *Gore* Court also commented upon the fact that, in other states, more severe sanctions were authorized, ranging in amounts from \$250 to \$10,000 and increasing in amount with subsequent offenses. Additionally, the Court noted that no other judicial opinions had been issued, in Alabama or elsewhere, that indicated BMW's policy of nondisclosure could result in such a severe punishment.
14. Justice Breyer's concurrence also stated that "the Alabama courts, in this case, have applied the 'factors' intended to constrain punitive damages awards, in a way that belies that purpose." Interestingly, the concurrence refers to other states which have statutory caps on punitive damages and notes the lack of legislative enactments in Alabama that might impose quantitative limits on punitive awards. Cf. *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993) (holding \$250,000 statutory cap on punitive damages, with certain exceptions, to be unconstitutional).
15. Other recent Alabama cases discussing *Hammond/ Green Oil* factors are as follows: *Sheffield v. Andrews*, No. 1941693, 1996 WL 173542 (Ala., April 12, 1996); *Union Sec. Life Ins. Co. v. Crocker*, 667 So. 2d 688 (Ala. 1995); *American Pioneer Life Ins. Co. v. Williamson*, 1995 WL 372051 (Ala. 1995); *Smith v. Schulte*, 1995 WL 491245 (Ala. 1995); *Sperau v. Ford Motor Co.*, 1995 WL 341765 (Ala. 1995); *Independent Life & Accident Ins. Co. v. Harrington*, 658 So. 2d 892 (Ala. 1994); *Crown Life Ins. Co. v. Smith*, 657 So. 2d 821 (Ala. 1994); *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), reversed and remanded, No. 94-896, 1996 WL 262429 (U.S., May 20, 1996); *Pitt v. Century II, Inc.*, 631 So. 2d 235 (Ala. 1993); *Northwestern Mut. Life Ins. Co. v. Sheridan*, 630 So. 2d 384 (Ala. 1993); *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018 (Ala. 1993); *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993); *Mutual Assurance, Inc. v. Madden*, 627 So. 2d 865 (Ala. 1993); *Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 886 (Ala. 1992); *General Motors Corp. v. Johnston*, 592 So. 2d 1054 (Ala. 1992); *Union Mortgage Co. v. Barlow*, 595 So. 2d 1335 (Ala. 1992); *Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d 854 (Ala. 1991); *Killough v. Jahandartard*, 6578 So. 2d 1041 (Ala. 1991); *Alla Mut. Ins. Co. v. Northington*, 561 So. 2d 1041 (Ala. 1990). See D. Carr, "Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?," *Ala. Lawyer*, Vol. 51, March 1990, pp. 94-95 for a listing of earlier cases.
16. The trial court commented that, shortly after the verdict was rendered, Duck Head issued a press release and made several SEC filings, announcing that the verdict would not endanger the company. Accordingly, the trial court paid little heed to Duck Head's arguments of excessiveness.

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17. For this reason, use of the *Duck Head* verdict for purposes of comparative analysis should, in all fairness, be limited.
18. Although recognizing the need to treat remedial action as a mitigating factor during post-judgment review, the *Harrington* court commented that "the weight of that action as a mitigating factor in a punitive damages review would not be so great where, as in this case, the remedial action is taken only after the jury has returned a substantial punitive damages verdict." Timing of remedial actions, including settlement offers and make-whole offers, can be a significant factor during post-verdict review and, in light of *Life of Georgia*, can be significant pre-verdict as well.
19. See *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994) (ordering remittitur of \$4,000,000 award to \$2,000,000 in part because jury improperly multiplied plaintiff's compensatory damages by number of sales in all states, without evidence that such sales were wrongful in those states), *reversed and remanded*, No. 94-896, 1996 WL 262429 (U.S., May 20, 1996).
20. The trial court in *Harrington* simply multiplied premiums by the number of policies sold to arrive at a "profit" of \$7,000,000 per year. The defendant, on the other hand, utilized a much more specific method of calculating "profits": Independent Life claimed that, with regard to policyholders age 65 years or older, it had actually lost money on the type of policies at issue in this case. The Alabama Supreme Court rejected both methods, instead stating the "profit to Independent Life from its fraudulent suppression of facts ... on the policies at question was derived from not having refunded premiums paid by policyholders after reaching age 65 and in not having paid claims by policyholders over age 65 who, like [plaintiff], did not file a claim because they believed their policies

had terminated."

21. See, e.g., *Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1989); *Killough v. Jahandarfarid*, 578 So. 2d 1041 (Ala. 1991); *Mutual Assurance, Inc. v. Madden*, 627 So. 2d 865 (Ala. 1993); *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 697 (Ala. 1994).
22. See *Independent Life & Accident Ins. Co. v. Harrington*, 658 So. 2d 892, 892 (Ala. 1994), in which the Court stated:
[T]his Court has stated that "the constitutionality of Alabama's punitive damages law rests, in part, on this Court's use of comparative analysis during judicial review of a punitive damages award." *BMW of North America v. Gore*, 646 So. 2d 619 (Ala. 1993). Comparison of the verdict in the case being reviewed with verdicts in other similar cases is helpful in maintaining consistency in punitive damages awards.
Compare *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 697, 908 (Ala. 1995), in which the court questions the utility of comparing one punitive award to another. The court quoted the United States Supreme Court's opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 271, 2720, 125 L. Ed. 2d 366 (1993), which stated:
[Punitive] awards are the product of numerous, and sometimes intangible, factors, a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.
23. The *Sheffield* court noted that relatively few cases have addressed the issue of remittitur of a punitive award against an individual defendant.

Most of the reported decisions focus on the financial position of a corporate defendant. However, for other cases addressing individual defendants, see *Enstar Group, Inc. v. Grassgreen*, 812 F. Supp. 1562 (M.D. Ala. 1990); *Killough v. Jahandarfarid*, 578 So. 2d 1041 (Ala. 1991) and *Wilson v. Dukona Corp. N.V.*, 547 So. 2d 70 (Ala. 1989).

24. The net worth of the *Sheffield* defendant was sharply disputed during the *Hammond* hearing. The defendant estimated his net worth at \$720,000 while the trial court estimated his net worth at \$1,225,000 to \$1,500,000.
25. See also *American Pioneer Life Ins. Co. v. Williamson*, 1995 WL 372061 (Ala. 1995) (Alabama Supreme Court remitted \$3,000,000 punitive award, which represented only six percent of insurer's total assets, to \$2,000,000); *Northwestern Mut. Life Ins. Co. v. Sheridan*, 630 So. 2d 384 (Ala. 1993) (over \$25,000,000 punitive award remitted by 50 percent; final award represented less than one percent of Northwestern's total assets).
26. Even when the types of entities and the factual claims involved are the same, results vary widely. Cf. e.g., *Crown Life Ins. Co. v. Smith*, 657 So. d. 821 (Ala. 1994) (insurance agent converted funds from whole life policies without knowledge of insureds or employer company; award of \$2,000,000 remitted to \$250,000) with *Northwestern Mut. Life Ins. Co. v. Sheridan*, 630 So. d. 384 (Ala. 1993) (insurance agent absconded with funds from insurance policies without knowledge of insureds or employer company; award of over \$24,000,000 remitted to \$12,500,000).
27. See *Christ v. Allis Mutual Insurance Company*, Barbour County, CV-94-022 (class action settlement).
28. See *Rosa Davis v. Associates Financial Services of Ala., et al.*, Lowndes County CV-93-38.

Legislative Wrap-Up

(Continued from page 224)

SB 128—Establishes a putative father registry with the Department of Human Resources in adoption proceedings.

SB 141—Provides a remedy for declaring property repeatedly used for illegal drug houses as a nuisance and provide a procedure for abatement of the nuisances.

SB 146—Amends Alabama Code Section 14-9-42 to allow deductions from sentences for time served on parole.

SB 156—Provides that deferred compensation plans authorized under Alabama Code section 36-26-14 or 36-27A-2 is to receive the same tax deferred treatment for state income tax purposes as the plan received from the IRS for federal income tax purposes.

SB 164—Amends Alabama Code Section 30-5-10 and 30-5A-3 relating to protection orders in certain instances of domestic violence.

SB 182—Underage drivers may be found guilty of DUI with a blood alcohol level of .02 percent.

SB 194—Amends Alabama Code Sections 6-5-548 and 6-5-549 to prohibit discovery of limits of liability insurance coverage for certain health care providers.

SB 203—Provides that county commissions may collect or contract for the collection of local taxes that are authorized to be levied by a general or local act.

SB—School bus or daycare drivers may be found guilty of DUI with a blood alcohol level of .02 percent.

SB 255—This act would make mediation mandatory upon motion by any party or upon motion of the court but it would not be binding.

SB 264—Allows juvenile records to be inspected by the principal of the school the child attends and to permit the taking of fingerprints, photographs or DNA samples without prior permission.

SB 265—Amends Alabama Code Section 13A-10-36 to make contraband the possession of currency in prisons.

SB 272—Provides penalties for curfew violations when a curfew is adopted by a municipality.

SB 276—Amends Alabama Code Section 32-6-49.13 to provide for a

chemical test if the law enforcement officer has probable cause to believe a commercial vehicle driver is operating under the influence of drugs or alcohol.

SB 300—Public employees as sheriffs, *et al* may participate in the employees' retirement system in lieu of superannuation programs.

SB 315—Requires parents to assist the court with ensuring compliance with probation provisions of their children who have been declared to be delinquent and provides penalties for failure to assist in probation.

SB 393—Community Notification Act. Law enforcement is to inform the residents of an area in which the convicted sex offender is intending to move.

SB 463—Amends Alabama Code Section 12-15-34 for juvenile cases transferred to circuit court; the child may be tried for the offense charged and all lesser-included charges.

For more information, contact Bob McCurley, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486 or call (205) 348-7411, fax (205) 348-8411. ■

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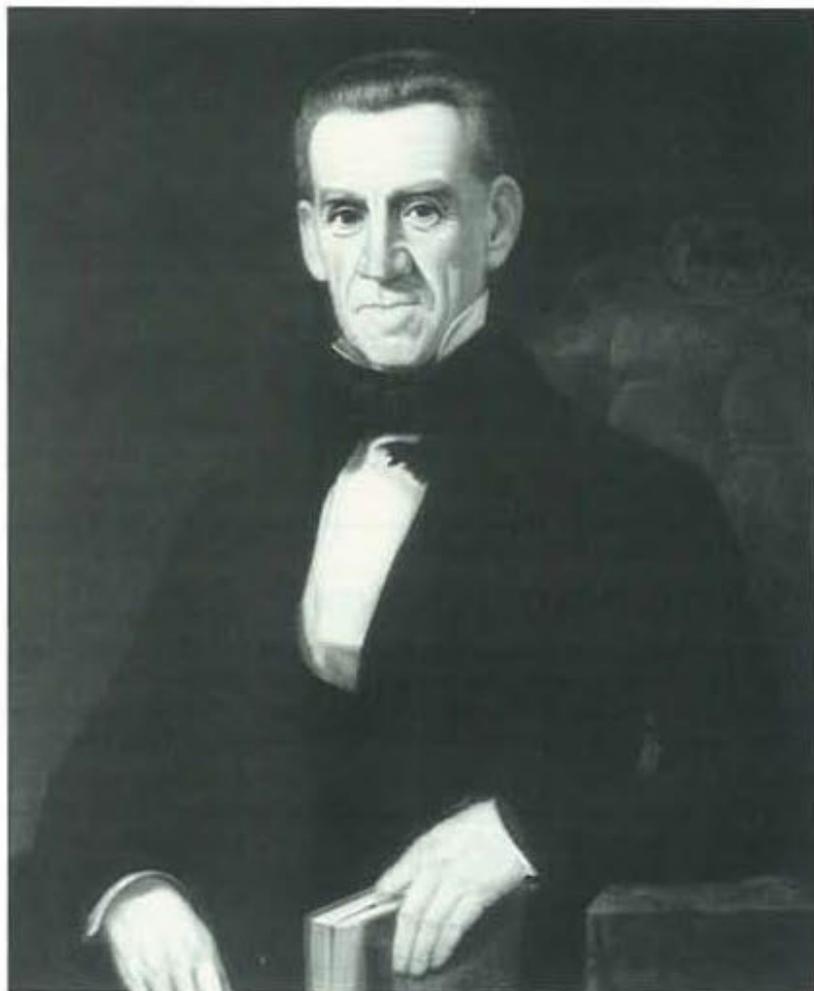
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Supreme Court Of Alabama — Feat of Clay

*Speech of J. Gorman Houston, Jr.,
associate justice, Alabama Supreme Court,
at the Alabama Historical Association's
49th Annual Meeting, April 12, 1996*



Chief Justice Clement Comer Clay's portrait, which was painted by William Frye, hangs on the third floor of the Judicial Building, at the top of the ceremonial staircase. When I first became a justice on the Supreme Court of Alabama, the canvas on which this portrait was painted was slashed. It was rumored that a Union soldier had slashed this portrait. However, because that could not be authenticated, this portrait of a man who might be thought of as the Father of Alabama was repaired. Perhaps it should not have been.

On January 1, 1863, a letter, of which I will read a portion, was transmitted from Maj. Gen. W. T. Sherman, Headquarters, Department of Tennessee, to Maj. R. M. Sawyer, A.A.G. Army of Tennessee, Huntsville, Alabama:

"Dear Sawyer:

"[There] are well established principles of war, and the people of the South having appealed to war, are barred from

appealing to our Constitution, which they have practically and publicly defied. They have appealed to war, and must abide its rules and laws. The United States, as a belligerent party claiming right in the soil as the ultimate sovereign, have a right to change the population, and it may be and is, both politic and best, that we should do so in certain districts. When the inhabitants persist too long in hostility, it may be both politic and right that we should banish them and appropriate their lands to a more loyal and useful population. No man will deny that the United States would be benefited by dispossessing a single prejudiced, hard-headed and disloyal planter and [substituting] in his place a dozen or more patient, industrious, good families, even if they be of foreign birth. I think it does good to present this view of the case to many Southern gentlemen, who grow rich and wealthy, not by virtue alone of their industry and skill,

but by reason of the protection and impetus to prosperity given by our hitherto moderate and magnanimous Government. It is all idle nonsense for these Southern planters to say that they made the South, that they own it, and that they can do as they please — even to break up our Government, and to shut up the natural avenues of trade, intercourse and commerce.

"...

"In this belief, while I assert for our Government the highest military prerogatives, I am willing to bear in patience that political nonsense of slave rights, State Rights, freedom of conscience, freedom of press, and such other trash as have deluded the Southern people into war, anarchy, bloodshed, and the foulest crimes that have disgraced any time or any people.

"I would advise the commanding officers at Huntsville and such other towns as are occupied by our troops, to assem-

ble the inhabitants and explain to them these plain, self-evident propositions, and tell them that it is for them now to say whether they and their children shall inherit their share. The Government of the United States has in North-Alabama any and all rights which they choose to enforce in war — to take their lives, their homes, their lands, their everything, because they cannot deny that war does exist there, and war is simply power unrestrained by constitution or compact. If they want eternal warfare, well and good; we will accept the issue and dispossess them, and put our friends in possession. I know thousands and millions of good people who, at simple notice, would come to North Alabama and accept the elegant houses and plantations there. If the people of Huntsville think different, let them persist in war three years longer, and they will not be consulted.

“W. T. Sherman,
Maj. Gen. Commanding”

Clement Clay's home was seized, and he was placed under house arrest and treated to the indignities enumerated in the full text of Gen. Sherman's letter. After two years, while Clay was still under house arrest, this citizen's oldest son, who had served two terms as a United States Senator from Alabama, was arrested and imprisoned in a dungeon in Fortress Monroe—Fortress Monroe, how ironic. His son was informally, but never formally, charged with complicity in the murder of President Abraham Lincoln. For a year he was held underground in a dungeon, in a steel cage within a steel cage, like a wild beast. He was guarded night and day and was inspected every 15 minutes, to prevent him from sleeping. He was permitted no soap, toothbrush, hairbrush, comb, razor, or fresh clothing. He was fed inadequate food, given insufficient blankets to protect him from the cold, and never given privacy. He suffered from asthma and probably tuberculosis.

But, return with me to the father—the Huntsville citizen—on his death bed at the age of 77, a sensitive and deeply emotional citizen.

One of my favorite short works of fiction is Tolstoy's *The Death of Ivan Ilyich*, which is a story of the life and death of an appellate court judge in

czarist Russia. Perhaps it is professional courtesy to, or concern for, a judge by a judge that caused me to cheer, when after Judge Ilyich had endured horrible suffering for so long, Tolstoy finally let him have a glorious moment at the point of death and the judge exclaimed: “So that's it! What bliss.”

With that same fervor, I want Chief Justice Clay to have had a glorious moment at the point of death, so allow me, please, to hope that Clement Clay, after having lived his last years in such adverse circumstances, may have, on his death bed, uttered triumphantly the words “Monroe; Alabama.”

Why “Monroe”? It certainly was not for Fortress Monroe, where his oldest son had suffered so. Why “Alabama”? Let's go back to the beginning.

Clement Comer Clay was born in Virginia, the son of a Revolutionary soldier. He was reared in Tennessee. He was educated in the law. In 1807, one John Bird accused Clay of hog stealing and a warrant was issued for Clay's arrest. Clay's father temporarily suppressed the matter by paying blackmail. This alleged theft came to light, however, in 1811, when Clay entered politics in Grainger County, Tennessee. The Clay Papers, at Duke University Library, indicate that the hog Clay was accused of stealing was Clay's own hog. But be that as it may, he was not successful in his election campaign in Tennessee (I know the feeling) and in 1811, Clay, with cash sufficient to last only a few days, a change of clothes, a few law books, and two horses on which he and his boon companion, a young Negro man, rode, arrived in Huntsville. Clay was 22. Though his resources were few, his energy, trustworthiness, and thoroughness soon won him the respect and confidence of the frontier community, and he established a very successful law practice as a “land lawyer.”

After taking time away from his law practice to fight in the 1813 Creek Indian War, where he rose from the rank of private to adjutant of his command, Clay married Susanna Claibourne Withers, the daughter of native Virginians who had already become prosperous planters in the Huntsville area. Clay purchased several large plantations in Madison and Jackson counties and considerable property in Huntsville. He also acquired an interest in the Huntsville

Planters and Merchants Bank. Clay was a slaveholder and produced approximately 200 bales of cotton annually.

Clay was elected as a representative to the Alabama Territorial Legislature in 1817. President James Monroe signed the Alabama Enabling Act on March 2, 1819, setting the stage for Alabama's becoming a state. With no warning, President Monroe arrived in Huntsville in June 1819. A welcoming committee, headed by Clement C. Clay, was hastily organized, and the President received a flowery oration and an invitation to a public dinner the following evening. The banquet was held in the assembly hall where a few months later William Wyatt Bibb would be inaugurated Governor of the Territory, soon the State, of Alabama. The banquet was attended by more than 100 of the most respected citizens of Madison County. After dinner there were 21 toasts, accompanied by appropriate songs and the discharge of canon, all of which assured President Monroe of the people's affection and appreciation for the generous Enabling Act. The toasts, in addition to being to the President, were offered to the United States Constitution (an Alabama Constitution would be adopted two months later), to the memory of George Washington, and to Maj. Gen. Andrew Jackson. The preceding year, Gen. Jackson, with his troops, had moved through the Territory of Alabama and engaged in a few skirmishes on his way to Florida, where he conquered St. Marks and Pensacola and thereby secured Alabama's southern border. This encouraged the immigration of settlers into the Territory, so that before



Justice J. Gorman Houston, Jr.

Justice J. Gorman Houston, Jr. of Eufaula received his graduate degree from Auburn University and his law degree from the University of Alabama School of Law. He served as

law clerk for Chief Justice J. Ed Livingston and as a judge advocate in the United States Air Force. He was appointed by Governor George Wallace and assumed the office of associate justice on September 16, 1985, and has been elected to two six-year terms.

the end of 1818 the population of the Territory surpassed the number required for admission to the Union. So, in 1819, General Jackson was a hero in the Territory and at the dinner honoring President Monroe he was toasted as a man who "knows his duty to his country and performs it with energy and efficiency." President Monroe was duly impressed with the reception arranged by Clay.

Later in 1819, Clay was elected a delegate from Madison County to the Alabama Constitutional Convention. Clay, who was named chairman of the committee on the Constitution, played a prominent role in drafting the rather liberal Constitution of 1819. Since a Constitution is the organic law of a government, Clay could, without much question, be considered the "Father of Alabama." This Constitution established universal white male suffrage without the requirement of owning property, paying taxes, or serving in the militia. The Alabama Governor was elected by the people. The declaration of rights contained 30 sections, many of which are incorporated into the current Constitution of Alabama of 1901, such as "the right to trial by jury shall remain inviolate," and every right stated in the Declaration of Rights was excepted out of the general powers of government. Although slavery was sanctioned, the Constitution provided that slaves were to be treated humanely and were to be provided with "necessary food and clothing" and that owners were "to abstain from all injuries to slaves extending to life and limb." Like the Governor and legislative representatives, under this Constitution sheriffs were elected by the people, but judges and most officers were appointed by the Legislature. The Constitution provided that the circuit judges should serve also as the justices of the supreme court.

After this Constitution was ratified without a vote of the people—that fact later giving some legitimacy to the Reconstruction Constitution of 1868, which was rejected by a majority vote but was ratified by the United States Congress—Alabama was admitted to statehood in December 1819.

Clay was appointed the first circuit judge for the fifth circuit, and though he was the youngest of the five circuit

judges, his colleagues immediately elected him the first Chief Justice of Alabama, a position Clay held for four years. During the four years Clay served as circuit judge and chief justice, he authored 25 supreme court opinions, which were approximately one-fourth of the total number of opinions released during those four years. Most of these opinions dealt with procedural matters. After four years as chief justice, Clay resigned as circuit judge; therefore, he was no longer a member of the supreme court. Clay gave as his reason for resigning the need to return to his law practice and to tend his plantations, so as to provide the funds necessary to keep his family in the style to which they were accustomed. However, historians wonder if one reason for Clay's resignation was an intent to fight a duel, for soon after his resignation Clay and Dr. Waddy Tate had an encounter in which Clay shot Tate in the leg.

In 1827, Clay suffered his first Alabama political defeat. (Again, I know the feeling.) Gabriel Moore defeated Clay in an election for Congress. But the next year, Clay was again elected to the Alabama Legislature and served as Speaker of the House of Representatives. In 1829, Moore was elected Governor and Clay was elected to succeed Moore as the Congressman from the Huntsville district. Clay served three terms in Congress. During this time, Moore was elected United States Senator. Clay's feelings about Moore were best expressed in a December 1, 1834 letter to Clay's wife. On a trip to Washington in 1834, Congressman Clay, Senator Moore, and a young man were the sole passengers in a stagecoach for 170 miles. Congressman Clay wrote his wife the following about how he treated Senator Moore during this long stagecoach ride:

"I did not salute him on entering the stage, direct a remark to him, or reply to one made by him, during the whole distance, nor bid him adieu by a nod when we separated. Without going into further particulars, I will say, generally, that I scrupulously kept up the same unbending non intercourse or *non communion*, which I have observed toward him for the last ten or twelve years."

The central issue of Clay's political career was the disposal of the public lands of the state and the federal government. Should public lands that had been improved by the settlers be put up for sale at public auction, where speculators could outbid the settlers, or should the settlers be able by "preemption" to gain title to the land they had farmed and improved—by paying the Government's minimum price of \$1.25 per acre, without bidding at public auction? Clay took what appeared to be inconsistent positions. When he was in the Legislature representing Madison County, which contained very little of the land in dispute, Clay took the position that the Government should get top dollar for the land by a public auction. A proposed canal was to be built with the money received from the sale of public lands, and that was highly favored by the farmers in Madison County and the merchants in Huntsville.

When Clay ran for and served in Congress, he reversed his position and honestly admitted it. A majority of Clay's constituents had relinquished their lands or were squatters on the public domain and were hopeful of regaining their lands or preempting them at the Government price of \$1.25 per acre, without bidding for them at public auction. In Congress, Clay sponsored or actively supported such relief and preemption measures as would enable the settlers to regain their lands or to purchase them at Government prices. Clay also quietly supported Governor Gayle's stand against the national government and President Andrew Jackson when an attempt was made to drive squatters from Creek Territorial lands. This was the event that led to the popularity of the cause of states' rights within Alabama.

In 1834, Clay was elected governor of the state. Two major events occurred during his administration—the Creek Indian War of 1836, which led to the removal of the Creek Indians from east Alabama (which was not accomplished peacefully). White settlers encroached on territory legally belonging to the Indians under the Treaty of 1832, and this encroachment caused Indian reaction. Governor Clay ordered Maj. Gen. Patterson in northern Alabama and Brig. Gen. Moore of the Mobile district to

converge with their troops on the scene of the uprising, near Montgomery. Clay established a headquarters at Montgomery (the state's capital city was still Tuscaloosa) and negotiated a peaceful settlement with some dozen chiefs. The "trail of tears" followed this within two years. The boundaries of the state were set, and the setting of boundaries soon led to the relocation of the state capital to Montgomery—the approximate center of the state.

In 1837, a major financial crisis resulted from a run on the Bank of Alabama, which then suspended specie payment. Governor Clay advised continuing the suspension of specie payment for a year, to give banks relief. Reckless management and overconfidence had carried the state banks beyond their means; and in 1846 (after he had served as a United States Senator and briefly as an associate justice on the Supreme Court of Alabama) it became the province of ex-Governor Clay to act as a committeeman to wind up the affairs of the defunct State bank. But before that, Clay was appointed to the United States Senate and served in the Senate from 1837 to 1841, when he resigned. As Senator, he introduced a land graduation bill designed to make millions of acres of valuable land available for purchase by citizens. The concept of his bill, in somewhat altered form, became law as the Benton Bill of 1854. He also supported the preemptive laws, which gave original settlers who had lived on and improved the land a first right to purchase the land at the minimum price fixed by law.

When Senator Clay returned home, he was commissioned by the state legislature to prepare a digest of the laws of Alabama. He completed this task in 1843, and in that same year was again appointed to serve on the state supreme court.

In between his periods of political service, Clay would return home to his family and would practice law and manage his plantations. After Clay helped wind up the affairs of the State bank, he resumed his practice of law in partnership with his two sons.

Clay favored the secession movement in 1861. During the war that followed, Huntsville was captured and subjected to the treatment set out in Gen. Sherman's

letter. Clay's house was seized, and he was placed under house arrest.

We have come full circle from the death bed where the imagined words "Monroe" and "Alabama" were uttered.

At the beginning of Clay's brilliant career, which included service as the drafter of a great deal of Alabama's first constitution, and service as chief justice, speaker of the house of representatives, congressman, governor, and senator, President Monroe signed the Enabling Act, which led to Alabama's becoming a state; Clay, while still in his 20s, and because of the respect that he had earned from his peers, hosted President Monroe when he arrived unexpectedly at Huntsville. President Monroe made it possible for there to be an Alabama. Therefore, the word "Monroe."

Clay's correspondence with his wife and sons is replete with indications of a feeling of dread or a sense of impending tragedy; this feeling always seemed to stay with this sensitive and deeply emotional man when he was away from his family. Without a doubt, Clay found the game of politics exciting and fascinating, but when one reads his correspon-

dence, one gets the sense that duty, rather than ambition, impelled Clay to pursue a most successful political career and, in doing so, to deprive himself of the daily pleasures of family life and the financial rewards that would have been his if he had pursued his legal career and tended to his plantations. Clay devoted his life to the state to whose birth his work had contributed—hence the word "Alabama."

Theodore Roosevelt, in a speech in New York in 1902, said: "The first requisite of a good citizen in this Republic of ours is that he shall be able and willing to pull his weight." Certainly, Citizen Clay more than pulled his weight.

Tacitus wrote of the Emperor Galba: "He seemed much greater than a private citizen while he still was a private citizen, and had he never become emperor everyone would have agreed that he had the capacity to reign." For the word "emperor," we can substitute "drafter of the Constitution," or "Chief Justice," or "Speaker of the House of Representatives," or "Congressman," or "Governor," or "Senator," and this could be said of Clement Comer Clay. ■

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Roadshow '96

ROADSHOW presentations have been a popular program at local and county bar associations this spring. Other bars are invited to join Russell, Dale, Cullman, Calhoun, Chilton, Tallapoosa, 17th Circuit, Tuscaloosa, Choctaw, and St. Clair counties in scheduling an ASB visit.



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17th Circuit



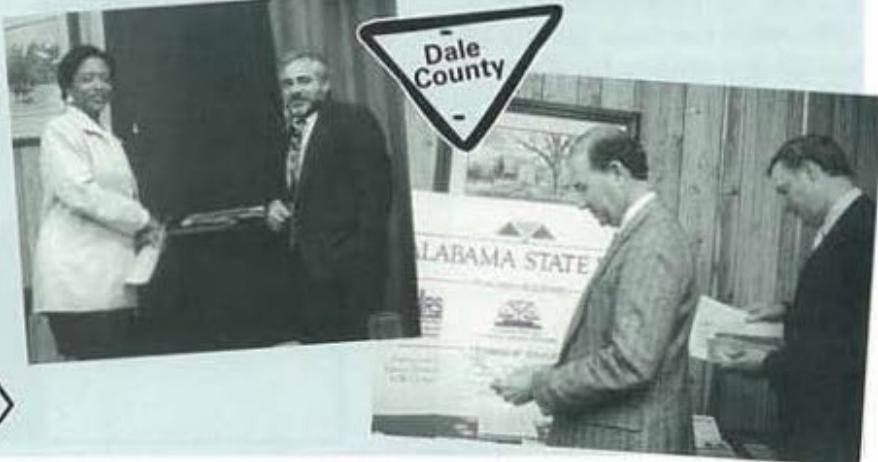
Tallapoosa County



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BAD FAITH:

Does it Apply to Sureties in Alabama?

by R. Cooper Shattuck

"Bad faith" has been a popular topic in Alabama for continuing legal education seminars and numerous articles. One issue which has apparently not been addressed is the application of the tort of bad faith to sureties in Alabama. This article addresses the nature of the law of suretyship as it relates to surety bonds and construction bonds, the surety's good faith obligations under the law of suretyship, the tort of bad faith as it applies in the context of insurance in Alabama, the difference between suretyship and insurance, the treatment by the Alabama courts of bad faith claims made against sureties, and why the tort of bad faith should not be extended as a cause of action against sureties. Finally, this article suggests a means of addressing bad faith in the context of suretyship if this tort is to be extended beyond its present applications.

Suretyship Generally

The law of suretyship applies to more practitioners than one might first presume. In Alabama, suretyship is probably most often encountered in terms of bonds required for construction projects, public works projects and probate proceedings. However, one may experience suretyship in many other instances. At times, insurance and suretyship are considered to be the same; however though similar to insurance, suretyship is really quite different, as is the applicable law.

Suretyship is a unique legal relationship, contractual in nature, whereby one party, the surety, undertakes an obligation to be held answerable for the debt, default or miscarriage of another party, the principal.¹ Generally, such an agreement must be in writing to be enforceable, as it falls within the Statute

of Frauds.² Suretyship creates a tripartite relationship between and among the party secured (the bond obligee), the principal (the bond obligor), and the party secondarily liable (the surety). The surety relationship is usually contained within a document called a "bond". The surety's liability to the obligee may be limited by the express provisions of its contract with the obligee—the penal amount of the bond.

There are generally two types of bonds: fidelity and surety. Fidelity bonds generally provide coverage for the dishonest, illegal or wrongful conduct of their principals with respect to monies which may come into their possession as fiduciaries or the failure of the principals to perform specific duties. Surety bonds provide compensation for losses sustained by an obligee as a result of the principal's failure to perform its contractual or statutory obligations to the obligee. Not all bonds will fit into one of these categories. Some bonds may have both fidelity and surety provisions. Regardless of how a bond may be characterized, it will almost always involve the three-party relationship discussed above and will involve the body of law known as suretyship.

In most cases, the obligee will provide the form of the bond that it desires, or will have to approve the form of the bond proposed by the principal. Some of the requirements of a bond may be required by an applicable statute, including the amount of the bonds. Most of the larger commercial surety companies have bond forms which have been approved by their frequent obligees, such as governmental entities and other large contracting parties. The bond penalty amount will be established by the obligee.

A surety generally has the right to reimbursement from the principal for debts paid by the surety on behalf of the principal, whether under a common law claim of indemnification, by statute³ or by express agreement. Indemnification agreements are generally executed by the principal and any additional indemnitors (or guarantors) and govern the relationship between them and the surety. Each surety generally has its own form of indemnity agreement. If the parties anticipate more than one bond being issued, the principal and any additional indemnitors may execute a "master surety agreement" or "master indemnity agreement" at the outset of the relationship with the surety—before any bonds are written by the surety—which will govern the relationship between the parties for all bonds which may be issued. This is particularly true for construction bonds, which will be discussed in greater detail below. Where there is no anticipated continuing need for bonds, the agreement between the surety and the principal (and any additional indemnitors) will usually be contained within the application for the bond.



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An indemnity agreement generally gives the surety rights beyond its common law or statutory rights of indemnification. These agreements usually contain provisions for the collection from the principal and indemnitors of not only the sums paid by the surety on behalf of the principal but also associated costs and expenses, including attorneys' fees. For example, some agreements also may include provisions that the principal and indemnitors must provide collateral or security to the surety, as it deems necessary, when claims are made on the bonds, or that the principal produce all of its books and records for inspection by the surety upon demand.

Claims on a surety bond most commonly arise in terms of construction projects. Surety bonds are generally prevalent in public works projects and sizeable privately-owned projects. On a privately-owned project, the owner may require the general contractor to provide payment and/or performance bonds. The payment bond protects the owner from mechanics' and materialmen's liens.⁴ Generally, if a subcontractor of the general contractor, or someone providing materials for the construction site, is not paid for the goods or services it provides, it may present a claim on the bond for payment. Such owners may also require the general contractor to provide a performance bond. This bond generally provides that if the general contractor should fail to fulfill his contractual obligations to the owner, the surety will either pay the owner the cost incurred in completing the contracted work with a substitute contractor, provide a replacement contractor to finish the contract, or pay the penal amount of the bond if it is less than the foregoing options. A general contractor may also require its subcontractors to furnish these types of bonds, so that it is protected as well.

More often, surety bonds are seen in the context of public works or governmental construction projects. Most agreements to construct, alter or repair any public building or public work of the United States require the contractor to furnish both payment and performance bonds.⁵ Likewise, those entering into contracts for the construction or repair of public buildings, public works, highways or bridges for the State of

Alabama, or any county, municipal corporation or subdivision thereof, are required to furnish performance, and labor and material bonds.⁶ The policy behind requiring labor and material bonds (or payment bonds) is to provide subcontractors and materialmen with recourse for payment for goods and services provided on a public construction project where they do not have the benefit of statutory or common law mechanics' or materialmen's liens because the project property is not subject to mechanics' or materialmen's liens.⁷

Another occasion when a practitioner may encounter a surety bond (fidelity bond) is in a probate proceeding. For instance, under Alabama's version of the Uniform Guardianship Act, a conservator is required to furnish the judge of probate with a surety bond.⁸ Likewise, administrators of estates must be bonded, except in cases where an executor is expressly exempted from this requirement by the terms of the will.⁹ Various other officials or persons seeking official recognition must also provide bonds.¹⁰

Surety or indemnification bonds also arise in litigation. Generally, a creditor must provide a bond before a writ of seizure or execution, whether pre-judgment or post-judgment, will be issued.¹¹ Some court clerks will not accept a personal indemnity bond but require commercial third-party bonds. A bond may be required to stay an action pending appeal.¹² Likewise, a bond may be required as security before a restraining order or preliminary injunction is issued.¹³

Other matters in which bonds may be encountered include performance bonds required by the Alabama Surface Mining Control and Reclamation Act of 1981,¹⁴ the surety bonds required of developers of vacation time-share plans,¹⁵ and the surety bonds required of auctioneers.¹⁶

Before addressing whether a surety can be held liable in Alabama for "bad faith" one must have a thorough understanding of not only the nature of a suretyship, but also the tort of bad faith in Alabama, the differences between suretyship and insurance, and the limited extension of the tort of bad faith in Alabama.

Surety's Good Faith Obligation

Generally, most agreements between

a surety and its principal (indemnity agreements or bond applications) contain an express requirement of good faith.¹⁷ The terms of the surety's obligation to the obligee will be provided in the bond or in some other contract which may be incorporated into the bond. An obligee may provide a good faith obligation for the surety within the terms of the bond because it has control over the terms or form of the bond which it will accept.

In Alabama, as in most states which have adopted the Uniform Commercial Code, all contracts contain an implied duty of good faith in their performance and enforcement.¹⁸ The surety will then have an implied duty of good faith to the bond obligee with respect to the bond and to the principal with respect to the surety's contract with it.

The surety thus has a divided duty of good faith toward the principal and the obligee. This can put the surety in an uncomfortable position. A claim which, to the obligee, should clearly be paid, in the eyes of the principal, should just as clearly not be paid. This situation is not unusual but arises often. Whether the surety pays or does not pay the claim, either the principal or obligee will disagree with the surety's decision. If the surety pays part but not all of a claim, both the principal and obligee may be perturbed, and the surety can easily end up in litigation with one or both of the other parties regardless of its decision. If it does not pay a claim as presented, it could be sued by the obligee. Likewise, it may have to sue the principal to collect the claims the surety has paid on the principal's behalf.

Does the surety's good faith obligations give rise to a bad faith claim by the principal, the obligee, or both?

Bad Faith Claims Against Sureties

Courts in some states have imposed liability upon performance and payment bond sureties for breach of an implied covenant of good faith and fair dealing following the same standards developed in insurance cases, either by applying an unfair insurance claims practice statute, or by finding a breach of a common-law obligation of good faith and fair dealing.¹⁹ States that recognize bad faith claims by an obligee against a surety include

Arizona²⁰ and Alaska.²¹ Other courts (including several federal courts) which have addressed the issue have held that a bad faith action cannot be maintained against a surety.²²

Apparently, no court has held a surety liable to the principal or an indemnitor for bad faith on the basis of the special relationship that has been found in insurance cases.²³

A. Bad Faith in Alabama

The intentional tort of bad faith was adopted in first-party insurance actions in Alabama in *Chavers v. National Sec. Fire & Casualty Co.*²⁴ First-party insurance actions are those between the insurer and the insured, in other words, between the parties to the contract of insurance. In *Chavers*, the Supreme Court of Alabama recognized a redressable tort for the intentional breach by an insurer of its duty of good faith and fair dealing to its insured.²⁵ The court adopted the test promulgated by the dissent in *Vincent v. Blue Cross-Blue Shield of Alabama*²⁶ and held "that an actionable tort arises from an insurer's intentional refusal to settle a direct claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal."²⁷

In *National Security Fire & Casualty Company v. Bowen*,²⁸ the court later enumerated the five requirements necessary for a plaintiff to satisfy his burden of proof in a bad faith case:

- a. An insurance contract between the parties and a breach thereof by the defendant;
- b. An intentional refusal to pay the insured's claim;
- c. The absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
- d. The insurer's actual knowledge of the absence of any legitimate or arguable reason;
- e. If the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to pay the claim.

As the court summarized, "[I]n short, plaintiff must go beyond a mere show-

ing of non-payment and prove a bad faith nonpayment, a nonpayment without any reasonable ground for dispute. Or, stated differently, the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim."²⁹

In *National Savings Life Ins. Co. v. Dutton*,³⁰ the Alabama Supreme Court added the "directed verdict" test to the previous requirements. The Court stated that "in the normal case, in order for the plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law."³¹ However, the Alabama Supreme Court has since enumerated a number of exceptions to the "directed verdict" requirement.³²

Long before the tort of bad faith was adopted in the first-party insurance context, it was adopted and applied in the context of "third-party" insurance contracts. Third-party actions involving liability coverage are those where an insurer wrongfully refuses, either negligently or intentionally, to settle a third-party claim made against an insured within policy limits and where, as a result, the insured incurs a judgment against him in an amount in excess of the policy.³³ Negligence and bad faith in the third-party context are two separate causes of action with different culpabilities, and the insured may recover under either.³⁴ A test for bad faith in such context does not include a negligence standard of conduct.³⁵ Whether the conduct of an insurer is an act of negligence or bad faith is a question for the jury.³⁶ Of course the distinction is important in that such will determine whether punitive damages may be recovered in addition to any compensatory damages.

B. Suretyship Is Not Insurance

Case law sometimes confuses suretyship and liability insurance.³⁷ An example of the confusion between suretyship and insurance is contained in the following dicta of an Alabama Supreme Court opinion: "A bond is basically an insurance contract executed by the principal and his surety, but for the benefit of a third-party (the subcontractors and suppliers)."³⁸ This case had little, if any-

thing, to do with the surety relationship. The case arose from a suit by the City of Birmingham against the architect, general contractor and roofing subcontractor for the Birmingham Municipal Airport Terminal Building for breach of contract and negligence in the design and installation of the roof of the terminal building.³⁹ The City attempted to lengthen the applicable statute of limitations by arguing that the bonds given by the contractor (executed under seal) were incorporated by reference into the construction contract (unsealed), thus, the applicable statute of limitations was ten years rather than six years.⁴⁰ No claim was presented on the bonds and no surety was made a party to the suit.⁴¹

However, the tripartite relationship found in a surety contract should be contrasted to the bipartite relationship found in common insurance or fidelity contracts. The differences between suretyship and liability insurance include:

1. Suretyship creates a tripartite relationship in which the surety and principal are liable to the obligee; but between

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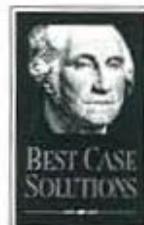
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surety and principal, the principal is primarily liable and surety is secondarily liable.

2. A surety's obligation to the obligee is primarily the extension of standby credit.
3. The cost charged by the surety for the bond(s) is not based upon an actuarial computation of loss, but instead is a fee for the extension of credit.
4. The principal, and not the obligee, makes the application for the surety bond and generally is obligated for the cost of the bond, as opposed to the obligee.
5. There is generally no issue of unequal bargaining power between the obligee and the surety, and indeed, the surety has little, if anything, to say about the drafting of the underlying contract—the bond. The obligee can control the terms of the bond.
6. The bond is generally not an adhesive agreement but an agreement prepared by the obligee, and execution of the required form of bond is made a condition of the principal's performance.
7. Courts generally do not impose fiduciary responsibilities upon the surety toward the obligee, but limit the surety's obligation to those of the principal, including the right of the surety to assert any defenses that the principal might assert against the obligee.
8. The surety has a divided obligation of good faith not only to the obligee but also to the principal and indemnitors, resulting in a dilemma of potential liability to one party or the other.⁴²

C. Bad Faith in Suretyship Context in Alabama

Alabama courts have not directly addressed the issue of bad faith as a cause of action in tort in the context of suretyship; however, the courts have applied the elements of bad faith as used in the context of insurance while premitting a discussion on whether the tort of bad faith should apply to a surety.

In *Insurance Co. of North Am. v. Citizensbank of Thomasville*,⁴³ the bank made a claim under its banker's blanket bond (an indemnity bond) for fraudulent or dishonest acts of one of its officers.⁴⁴ The claim was denied by the surety.⁴⁵ The bank sued the surety for breach of contract and bad faith.⁴⁶ The jury returned a verdict in favor of the bank on its contract claim in the amount of

roughly \$290,431.77 and on its bad faith claim in the amount of \$866,930.01.⁴⁷ The surety appealed the judgment on the bad faith claim.⁴⁸

On appeal, the supreme court treated the case as if the claim was made by an insured on an insurance policy—a first-party insurance claim. The court applied the "directed verdict test" set forth in *National Savings Life Insurance Company v. Dutton*, as it had by then been restated, and found that the bank was not entitled to a directed verdict on its contract claim. There existed a lawful or debatable reason for the surety's denial of the claim. The court determined that the surety's motion for directed verdict should have been granted on the bad faith count and should not have gone to jury.⁴⁹ The court did not mention the fact that the case arose from a bond instead of an insurance policy. Presumably, in applying the tests for a bad faith first-party insurance case, the court premitted a discussion on whether the tort of bad faith should be extended to suretyship by determining that there was no bad faith anyway. However, the court did not explicitly state this. Regardless, the holding of this case would be difficult to extend to payment and performance bonds issued in construction projects because a banker's blanket bond (a fidelity bond) is much more similar to an insurance policy. Unlike most surety bonds, a banker's blanket bond does not have a true tri-party relationship, in that the surety's obligation on the bond is not primarily the extension of stand-by credit, the premium for such bonds is more likely based upon an actuarial computation of loss, and the obligee purchases the banker's blanket bond as protection from its own employees. Basically, the banker's blanket bond insures the faithful performance of a class of employees, rather than providing a financial guaranty for the performance of a particular person or entity.

In *Elmore v. Morrison Assurance Co.*,⁵⁰ a surety brought an indemnity action against the principal and its indemnitors on a performance bond issued in connection with the reclamation of lands upon which the principal surface-mined coal.⁵¹ The trial court instructed the jury to award damages to the surety in the amount that it paid *in good faith* on behalf of principal.⁵² The Alabama Supreme

Court held that the trial court's charge "fairly and accurately set forth the law as it pertains to the measure of damages in the context of a surety and principal relationship."⁵³ The trial court took the charge directly from a Massachusetts case, *Hartford Accident & Indemnity Company v. Millis Roofing*,⁵⁴ and charged the jury on good faith as follows:

Want of good faith involves more than bad judgment or negligence or insufficient zeal. In order to find that Morrison [the surety] was acting in bad faith or was not acting in good faith, you would have to be reasonably satisfied from the evidence that Morrison was acting with a dishonest purpose. Lack of good faith carries an implication of a dishonest purpose, a conscious doing of wrong, a breach of a duty through motives of self-interest or ill will. That is what we mean by lack of good faith.⁵⁵

The indemnitors objected to this charge at trial and argued that it was erroneous on appeal.⁵⁶ The indemnitors argued that the charge was taken from a case which dealt with a summary judgment in which all of the testimony was by deposition and in which the defendant did not even present an answer.⁵⁷ They argued that the charge went "much further than the Alabama law as to good faith."⁵⁸ The court on appeal determined that the indemnitors had not identified at trial how or in what respect the instruction differed from Alabama law, and had not "substantially argued" this claimed error in their brief on appeal (apparently by not citing any supporting authority).⁵⁹ This claim of error was thus waived.⁶⁰ The court then stated that it would therefore not consider this argument.⁶¹ Nevertheless, the question remains—"Had the court not already considered the argument by holding that the trial court's charge to the jury fairly and accurately set forth the law in Alabama?"

In *Hightower & Co. v. United States Fidelity & Guar. Co.*,⁶² the surety brought an indemnification and exoneration action against its principal on payment of performance bonds issued by the surety on a construction project for the United States government.⁶³ The principal counterclaimed alleging, among other things, wanton breach of good faith by the surety.⁶⁴ The principal set

up the allegations of its counterclaim as affirmative defenses to the surety's complaint.⁶⁵ The trial court converted the surety's motion to dismiss the counterclaim as a motion for summary judgment, without notice to the counterclaimant, and then granted it.⁶⁶ The trial court also granted the surety's motion for summary judgment on its complaint.⁶⁷

On appeal, the Alabama Supreme Court held that the surety's claims and the principal's counterclaim arose out of the same transactions and operative facts, and that they were so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results.⁶⁸ Any determination of damages suffered by the surety could not be dispositive in the absence of proper adjudication of the principal's counterclaim.⁶⁹ In remanding the case, the court concluded that the trial court prematurely entered summary judgment in favor of the surety on the counterclaim and thus also prematurely entered summary judgment in favor of the surety on its complaint.⁷⁰

However, in a footnote, the court did note that a surety contract is to be construed according to the intent of the parties and the implied condition of good faith.⁷¹ An extension of the terms of the suretyship agreement by either party would, as a result, breach the duty of good faith.⁷² The question remains—"What is an 'extension of the terms' of a suretyship agreement?" Unfortunately, the reported decision is based upon a procedural error and did not address the merits of the claims.

In *Knutilla v. Auto-Owners Insurance Company*,⁷³ the purchasers of a time-share unit brought suit against the surety on the bond provided by the time-share developer.⁷⁴ The plaintiffs claimed a bad faith refusal to pay the claim they had presented under the bond and a breach of fiduciary duty.⁷⁵ The trial court granted summary judgment in favor of the surety.⁷⁶ The plaintiffs appealed the ruling on the bad faith issue.⁷⁷

Applying the law applicable to first-party insurance claims, the court of civil appeals determined that there was a "lawful basis" for the denial of the plaintiffs' claim of bad faith.⁷⁸ The court noted that when a claim is fairly debatable, an "insurer" is entitled to debate

it, and if a lawful basis for denial exists, the "insurer" will not be held liable for bad faith.⁷⁹ "Because there was a lawful basis for the denial of the claim and, therefore, no basis for a bad faith action, we pretermitted a discussion of the applicability of the tort of bad faith in this type of action as unnecessary."⁸⁰

D. Tort of Bad Faith Limited in Alabama

The Alabama Supreme Court has been hesitant to extend the tort of bad faith beyond the insurance contexts discussed above. Alabama's adaptation of the Uniform Commercial Code provides that every contract or duty falling within the Uniform Commercial Code imposes an obligation of good faith in its performance or enforcement.⁸¹ As the court has repeatedly stated, "Although every contract does imply good faith and fair dealing (see § 7-1-203, Code 1975), it does not carry with it the duty imposed by law which we have found in the context of insurance cases."⁸² The failure to act in good faith in the performance or enforcement of contracts or duties arising under *Ala. Code* § 7-1-203, does not give rise to a claim on which relief may be granted in Alabama.⁸³ Neither Alabama tort nor contract law affords a remedy for breach of an express promise in a written contract

to "act in good faith".⁸⁴

As the court noted in *Lake Martin/Alabama Power Licensee Ass'n, Inc. v. Alabama Power Co., Inc.*,⁸⁵ there may be a cause of action for an identifiable breach in the performance of the specific terms of a contract, but it is in the nature of breach of contract, not tort as in the context of insurance policies.⁸⁶

Tort of Bad Faith Should Not Be Extended as Cause of Action Applicable in Context of Suretyships in Alabama

In Alabama, the law of suretyship, especially in terms of bad faith claims, is not fully developed. However, just as the tort of bad faith has not been extended beyond specific situations which arise in the context of contracts of insurance, it should also not be extended to suretyship. As discussed above, insurance and suretyship are not the same. The differences between them form the foundation for why the tort of bad faith should not be imposed upon sureties.

The tort of bad faith should certainly not be extended to allow a principal to assert such a claim against its surety. The relationship between a principal and a surety is not even remotely similar to that of insurer and insured. After all, the principal does not seek protec-



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tion from the surety against a calamity, but instead seeks the commercial advantage of obtaining a contract with an obligee which requires performance and/or payment bonds. The surety is more like a standby creditor of the principal. The surety's payment of a claim which a principal believes to be meritless causes no harm to the principal because the principal's indemnification obligation is not absolute.⁸⁷ Rarely will the situation arise, like in the third-party insurance context, where a surety refuses to pay a claim that the principal believes should be paid unless the surety has a unique defense such as the claim not being covered by the bond.

Obviously, the relationship between a surety and an obligee is more akin to that of insurer and insured. The primary differences between the two are the surety's dual good faith obligation to the principal and the obligee, and the three-party relationship between surety, obligee and principal. In addition, like the principal, the obligee does not seek protection from the surety against calamities, but instead seeks the commercial advantage of obtaining a contract with the principal which provides additional financial security. It is these very differences which should prevent the extension of the tort of bad faith to an obligee.

Some might argue that a surety has more incentive to disallow a claim than to pay it and thus the playing field should be leveled for obligees. After all, under current Alabama law, a surety will only be allowed to recover from its principal for those claims which it paid in good faith. However, sureties may have just as strong an incentive to pay an obligee's claim, particularly in the context of public works projects. For example, under the Miller Act and Alabama's "Little Miller Act", a surety has a statutory incentive to pay proper claims because if a properly presented claim is not timely paid, the obligee may also recover reasonable attorneys' fees and interest.⁸⁸ In private projects, obligees decide the form of the bond which they will accept from the principal, thus they can require terms which provide an incentive to the surety to timely pay claims, such as attorneys' fees and interest, as contained within the Miller Act. Thus, the tort of bad faith need not be extended so that such

an action can be maintained by an obligee against a surety.

If a cause of action for bad faith is extended to bond obligees, it should not be extended as a tort as exists in the context of insurance. If a court is inclined to allow an obligee to pursue a cause of action for a surety's "bad faith" refusal to investigate or pay a claim, it could do so by allowing a claim for "bad faith breach of contract" in which the obligee could recover the penal amount of the bond as damages. The action would arise from a breach of the surety's good faith obligation, whether implied or contractual. This would allow the policy considerations of the tort of bad faith to be realized while also taking into account the unique nature of suretyship. The amount of the bond should be interpreted as the parties' agreed, reasonable, pre-breach estimate of damages for breach of the good faith obligation (as such damages could be difficult or impossible to accurately calculate or estimate), and the bond itself should be interpreted as the parties' written expression of their intent that the bond amount be a reasonable pre-breach estimate of the probable loss and be considered their agreed damages, not a penalty.⁸⁹

Assessing the bond amount as damages effectively punishes the surety for its wrongful conduct. At the same time, the inherent differences between insurer and surety are taken into account by limiting the amount of recovery from a surety to the amount of the bond. After all, in many contexts the surety's only sources of information regarding a claim are the obligee and the principal. They effectively control the facts available for the surety's investigation and upon which the surety will base its decision on a claim.

Conclusion

The various forms of commercial surety bonds available today are too numerous to discuss in detail in the space allotted here. Likewise, there has been no attempt to discuss, in detail, the law of bad faith as it exists in Alabama today. However, the reader should have a better understanding of the general nature of commercial surety bonds, and how such differ from insurance. It is these differences which should prevent the extension of the tort

of bad faith to commercial sureties in Alabama, at least in the same form as such applies to insurers.

Endnotes

1. Stearnes, *The Law of Suretyship* § 1.1 (5th ed. 1951); 74 Am.Jur.2d *Suretyship* § 1.
2. Ala. Code § 8-9-2(3) (1993).
3. Ala. Code § 8-3-2 (1993).
4. Ala. Code § 35-11-210 (1991).
5. 40 U.S.C.S. § 270a (Law. Co-op. 1994 & Supp. 1995) (the "Miller Act") (required if project over \$100,000). See, also, Federal Acquisition Streamlining Act of 1994 (FASA), S. 1587/H.R. 2238 (alternative payment protections may be provided on projects between \$25,000 and \$100,000).
6. Ala. Code § 39-1-1 (1995)(Alabama's "Little Miller Act").
7. *City of Birmingham v. Cochrane Roofing & Metal Co., Inc.*, 547 So. 2d 1159, 1166 (Ala.1989)(citing *Sumlin v. Hagan Storm Fence Co.*, 409 So. 2d 818 (Ala. 1982) and *Headley v. Housing Auth. of Prattville*, 347 So. 2d 532 (Ala. Civ. App. 1977)); *S.T. Bunn Constr. Co. v. Cataphote, Inc.*, 621 So. 2d 1325 (Ala. Civ. App. 1993).
8. Ala. Code § 26-2A-139 (1992).
9. Ala. Code §§ 43-2-851 to 852 (1995).
10. See Ala. Code §§ 36-20-3 (1991) (Notaries Public); 34-4-24 (1991) (Auctioneers); 12-17-91 (1986) (Clerk of the Circuit Court); 12-17-111 (1986) (Register of the Circuit Court); 36-23-4 (1991) (Constables); 11-5-3 (1989) (Coroners).
11. See, e.g. Ala. Code §§ 6-6-250 (1993) (Detinue Bond) and 6-6-45 (1993) (Attachment Bond).
12. Ala. R. Civ. P. 82(c) & (d).
13. Ala. R. Civ. P. 65(c).
14. Ala. Code § 9-16-89 (1987).
15. Ala. Code § 34-27-51(2)(i) (1991).
16. Ala. Code § 34-4-24 (1991).
17. Bernard A. Reinert, *The Duty of the Performing Surety to the Bond Principal and the Indemnitors: Good Faith*, 15 Forum 1005, 1009 (1980).
18. See Ala. Code § 7-1-203 (1993); *Kennedy Elec. Co., Inc. v. Moore-Handley, Inc.*, 437 So. 2d 70 (Ala. 1983); *Chavers v. National Sec. Fire & Cas. Co.*, 405 So. 2d 1, 4 (Ala. 1981) (citing *Childs v. Mississippi Valley Title Ins. Co.*, 359 So. 2d 1146 (Ala. 1978)).
19. Bernard L. Balkin and Keith Wilton, *Current Developments in Bad Faith Litigation Involving the Performance and Payment Bond Surety*, 28 Tort & Ins. L.J. 611, 615 (1995) (citing *Royal Globe Ins. Co. v. Superior Cl.*, 592 P.2d 329 (Cal. 1979), overruled by *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal.3d 287 (Cal. 1988); *Dodge v. Fidelity & Deposit Co.*, 778 P.2d 1240 (Ariz. 1989)).
20. See *Dodge v. Fidelity & Deposit*, 778 P.2d 1240 (Ariz. 1989).
21. *Loyal Order of Moose, Lodge 1392 v. International Fidelity Ins. Co.*, 797 P.2d 622 (Alaska 1990).
22. See, e.g., *United States v. Seaboard Surety Co.*, 817 F.2d 956 (2nd Cir. 1987) (holding that the government could not maintain bad faith claim against surety on a Miller Act performance bond); *United States v. Waubau Ins. Co.*, 755 F.Supp. 906 (E.D. Cal. 1991) (applying California law and holding that claimant under payment bond cannot maintain bad faith action against payment bond surety); *Kerlinsky v. Fidelity & Deposit Co.*, 690 F. Supp. 1112 (D. Mass. 1987) (ruling that there is no tort claim available to claimant on payment bond

(Continued on page 248)

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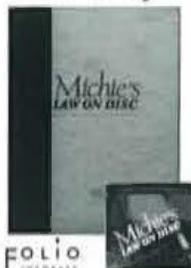
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Bad Faith

(Continued from page 246)

- for surety's failure to pay judgment rendered against principal).
23. Balkin & Witten, *supra* note 19, at 623-4.
24. 405 So. 2d 1 (Ala. 1981).
25. *Id.* at 6.
26. 373 So. 2d 1054 (Ala. 1979).
27. *Chavers*, 405 So. 2d at 7 (quoting *Vincent*, 373 So. 2d 1054 (Ala. 1979)).
28. 417 So. 2d 179, 183 (Ala. 1982).
29. *Id.*
30. *Dutton*, 419 So. 2d 1357, 1362 (Ala. 1982).
31. *Id.* at 1362.
32. See, e.g., *Standard Plan, Inc. v. Tucker*, 582 So. 2d 1024 (Ala. 1991); *Intercontinental Life Ins. Co. v. Lindblom*, 571 So. 2d 1092 (Ala. 1990), vacated on other grounds, 499 U.S. 956 (involving "extraordinary" facts) (1991); *Thomas v. Principle Fin. Group*, 566 So. 2d 735 (Ala. 1990); *Jones v. Alabama Farm Bureau Mut. Casualty Co.*, 507 So. 2d 396 (Ala. 1986) (holding that results of subsequent investigation are not an arguable basis for denying a claim because decision must be judged by the information available at the time claim decision was made); *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060 (Ala. 1984), vacated on other grounds, 475 U.S. 813 (1986) (finding insurer's failure to consult its medical department on medical claim amounted to a reckless indifference to facts or to proof submitted by the insured at the time of the denial); *Continental Assurance Co. v. Kountz*, 461 So. 2d 802 (Ala. 1984).
33. See, e.g., *Childs v. Mississippi Valley Title Ins. Co.*, 359 So. 2d 1146 (Ala. 1978); *Waters v. American Casualty Co. of Reading, Pa.*, 73 So. 2d 524 (Ala. 1953).
34. *Chavers*, 405 So. 2d at 5.
35. *Id.*
36. *Waters*, 261 Ala. at 258.
37. Edward G. Gallagher, *Introduction, The Law of Suretyship* 1-1, (1993).
38. *City of Birmingham v. Cochrane Roofing & Metal Co., Inc.*, 547 So. 2d 1159, 1166 (Ala. 1989).
39. *Id.*
40. *Id.*
41. *Id.*
42. Balkin & Witten, *supra* note 19, at 614.
43. 491 So. 2d 880 (Ala. 1986).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 885.
50. 502 So. 2d 378 (Ala. 1987).
51. The Surface Mining Reclamation Act of 1975 required those engaging in the surface mining of coal to provide a performance bond with respect to its required reclamation plan. Ala. Code § 9-16-44 (repealed 1981). Though that act was repealed, the requirement is contained within the Surface Mining Reclamation Act of 1981 (Ala. Code § 9-16-89 (1987)).
52. *Elmore*, 502 So. 2d at 380 (emphasis added).
53. *Id.*
54. 418 N.E.2d 645 (Mass. 1981).
55. *Elmore*, 502 So. 2d at 380.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. 527 So. 2d 698 (Ala. 1988).
63. *Id.* at 700.
64. *Id.* at 703.
65. *Id.*
66. *Id.* at 701.
67. *Id.*
68. *Id.* at 703.
69. *Id.*
70. *Id.* at 704.
71. *Id.* at 703 (citing, generally, *City of Birmingham v. Tammell*, 101 So. 2d 259 (1958)).
72. *Id.*
73. 578 So. 2d 1359 (Ala. Civ. App. 1991).
74. The bond was provided pursuant to Ala. Code § 34-27-51(2)(l) (1991).
75. *Knutilla*, 578 So. 2d at 1360.
76. *Id.*
77. *Id.*
78. *Id.* at 1362.
79. *Id.* (citing *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981)).
80. *Id.*
81. Ala. Code § 7-1-203 (1983).
82. *Kennedy Elec. Co., Inc. v. Moore-Handley, Inc.*, 437 So. 2d 76, 81 (Ala. 1983) (involving contract for supply of electrical equipment); *Peninsular Life Ins. Co. v. Blackmon*, 476 So. 2d 87 (Ala. 1985).
83. *Government Street Lumber Co. v. AmSouth Bank*, 553 So. 2d 68 (Ala. 1989); *Chandler v. Hunter*, 340 So. 2d 818 (Ala. Civ. App. 1976).
84. *Tanner v. Church's Fried Chicken, Inc.*, 582 So. 2d 449 (Ala. 1991); *Tidmore Oil Co., Inc. v. BP Oil Co./Gulf Products Div., a div. of BP Oil Co.*, 932 F.2d 1384 (11th Cir. 1991), cert. denied 502 U.S. 925 (1991) (applying Alabama law).
85. 601 So. 2d 942 (Ala. 1992).
86. *Id.* at 944 (citing *Eager Beaver Buick, Inc. v. Burt*, 503 So. 2d 819 (Ala. 1987)). For some additional cases in which the Court has refused to extend the tort of bad faith, see also, *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), cert. denied 113 S. Ct. 412 (1992), appeal after remand 30 F.3d 1402 (1994), cert. denied 115 S. Ct. 906 (1995) (finding that Alabama does not recognize independent tort action for bad faith breach of unemployment contract); *Sanders v. Colonial Bank of Ala.*, 551 So. 2d 1045 (Ala. 1989) (holding tort of bad faith not available by customer against bank); *Hicks v. Alabama Pest Serv., Inc.*, 548 So. 2d 148 (Ala. 1989) (finding no evidence that homeowner had an insurance contract with any defendant thus had no right of action against the insurers directly and no cause of action for bad faith against any defendant in action in which homeowner brought suit against pest control company and its liability insurer); *Gaylord v. Lawler Mobile Homes, Inc.*, 477 So. 2d 382 (Ala. 1985) (affirming summary judgment on bad faith count in action brought by purchasers of mobile home against vendor); *Williams v. Killough*, 474 So. 2d 880 (Ala. 1985) (refusing to extend tort of bad faith to wrongful termination of employment contract); *Keeton v. Bank of Red Bay*, 466 So. 2d 937 (Ala. 1985) (refusing to extend tort of bad faith to foreclosure redemption contracts); and *Hall v. Hall*, 455 So. 2d 813 (Ala. 1984) (refusing to extend tort of bad faith in divorce case).
87. See *Elmore*, 502 So. 2d 378 (holding that a surety may only recover what it pays in good faith).
88. Ala. Code § 39-1-1(b) (1992).
89. See, e.g., *Sutton v. Epperson*, 631 So. 2d 632 (Ala. 1993) (applying the standards of *Camelot Music, Inc. v. Marx Realty & Improvement Co.*, 514 So. 2d 987 (Ala. 1987), to determine whether a liquidated damage provision of a contract may be enforced).

Montgomery to Serve as Pilot Site for Mediation/Settlement Week

Circuit Judge Sally Greenhaw, 15th Judicial Circuit, is planning a Mediation/ Settlement Week this summer during the week of August 19. The purpose of the event is two-fold: to clear the docket of pending civil cases, and to provide participants an opportunity to decide their own cases through mediation. The Montgomery County Bar Association, with coordination by Wes Romine, will ask members trained in mediation to volunteer as pro bono mediators. Rich Hobson of the Administrative Office of Courts and Judy Keegan from the Alabama Center for Dispute Resolution are also offering assistance. The Montgomery efforts will serve as a pilot for possible statewide expansion of the program in 1997.



RECENT DECISIONS

By David B. Byrne, Jr. and Wilbur G. Silberman

Alabama Supreme Court — Criminal

Demand Reduction Assessment Act is mandatory

Pierson v. State of Alabama, 30 ABR 26 (October 20, 1995). Pierson was convicted of distributing a controlled substance in violation of §13A-12-211. The trial court sentenced her to 12 years in the state penitentiary pursuant to §13A-12-250 which provides for an enhanced sentence for a drug sale that occurred within a three-mile radius of a school. The trial court, however, did not impose on Pierson a fine under the Demand Reduction Assessment Act, §13A-12-280-284, Code of Alabama (1975).

The court of criminal appeals affirmed the trial court's judgment of conviction and the sentence holding that the provisions of the Demand Reduction Assessment Act are merely permissive, and thus, the trial court did not err in failing to assess Pierson the statutory penalty. The supreme court granted the

State's petition for writ of certiorari to determine whether the provisions of the Demand Reduction Assessment Act are mandatory and not permissive.

Chief Justice Hornsby, writing for a unanimous court, held that the provisions of §13A-12-284 authorize the court to suspend the collection of the penalty, not the assessment of that penalty. If a defendant complies with the provisions of §13A-12-284, then the collection of the mandatory fine imposed in accordance with §13A-12-281 may be suspended. Chief Justice Hornsby reasoned in pertinent part as follows:

Moreover, an examination of the application of other drug-related criminal statutes suggest that the provisions of the Demand Reduction Assessment Act were intended to be mandatory. As noted by Judge Bowen in his dissenting opinion in *Pierson*, since 1988, the Alabama legislature has clearly expressed its intent to impose harsh mandatory punishments on drug dealers. The enhancement provisions of §13A-12-250 and 270 which provide for an increased sentence if the drug sale occurs within a three-mile radius of a school or public housing project respectively are mandatory. See *Cunmy v. State*, 629 So.2d 693, 696, (Ala. Crim. App. 1993).

Child sex abuse — admissibility of prior faults allegations

Peeples v. State of Alabama, 30 ABR 428 (December 1, 1995). Peeples was tried and convicted for a violation of §13A-6-66, Code of Alabama (1975), i.e., first degree sexual abuse of a female under the age of 12 years. During an *in limine* hearing, the State sought to prevent Peeples from asking J.S., the alleged victim, any questions regarding a sexual abuse allegation she had made against another individual. In response, Peeples

made an offer of proof suggesting the following facts: At a time before the trial of this case, J.S. had alleged that J.R., her stepbrother—in an incident unrelated to the one forming the basis of Peeples' prosecution—had pulled her panties down and...tried to have sex with her.

This allegation was reported apparently by J.S.'s school counselor to the Alabama Department of Human Resources (DHR). J.R. denied the allegation, and more significantly, J.S., during an investigation begun by DHR, recanted the allegation against J.R. in an interview with a representative of DHR.

The trial court sustained the State's objection to the evidence citing *Ex parte Loyd*, 580 So.2d 1374 (Ala. 1991). The court of criminal appeals reversed Peeples' conviction concluding that the court erred in granting the State's motion to exclude evidence of J.S.'s statements concerning the alleged sexual abuse by her stepbrother.

Loyd held that during the trial of a defendant accused of sexual abuse "evidence of the victim's prior false allegations and threats of sexual misconduct by persons other than the defendant may be introduced to show a 'common plan, scheme, design, or system' by the victim." *Loyd*, 580 So.2d at 1375. As articulated in *Loyd*, demonstrated falsity is the *sine qua non* of admissibility of this species of evidence. In other words, given that J.S. had made allegations of sexual abuse, the denials communicated to the DHR representative were tantamount to admissions that the allegation of sexual abuse was false. J.S.'s denial of the allegation against her stepbrother brings this case squarely within the operation of the rule articulated in *Ex parte Loyd, supra*.

Accordingly, the Supreme Court, in a five-to-three decision, affirmed the Alabama Court of Criminal Appeals which held that the trial court had



David B. Byrne, Jr.

David B. Byrne, Jr. is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Belser and covers the criminal decisions.



Wilbur G. Silberman

Wilbur G. Silberman, of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, attended Samford University and the University of Alabama and earned his law degree from the University's School of Law.

erred in excluding reference to the fact that the victim had made a false allegation of sexual abuse against another.

Mandamus view of double jeopardy

State v. Adams, 29 ABR 3722 (September 22, 1995); *State v. Ziglar* 29 ABR 3793 (September 22, 1995). The Supreme Court of Alabama, in two cases, has expanded and clarified the use of petition for mandamus to bar further prosecution as being violative of the double jeopardy provisions of the state and federal constitutions.

In *Adams*, Chief Justice Hornsby, writing for the court, concluded that the trial court had erred in denying Adam's request for a jury trial on the question of whether the prosecutor intentionally and improperly acted so as to provoke a mistrial in the first trial. If a prosecutor intentionally provokes a mistrial, his actions would require a finding for Adams or his plea of former jeopardy. *United States v. Fine*, 644 F.2d 1018 (5th Cir. 1981), cert. denied, 454 U.S. 1097 (1981). More importantly, the supreme court rejected the State's argument that the question of former jeopardy was an issue of law, and therefore, a jury trial is not constitutionally required. In reject-

ing that argument, the supreme court relied on *Story v. State*, 435 So.2d 1360 (Ala.Crim.App. 1982) and noted specifically the following:

An accused is entitled to a jury trial on the issues of fact raised by the plea [former jeopardy] and the issue of former jeopardy should be submitted for the jury's determination before the submission of the issue of guilt.

Having determined that Adams has a right to a jury trial on the issue of former jeopardy, the supreme court then considered whether mandamus was the proper means for securing that right. The court concluded that it was observing: "mandamus is a proper remedy to prevent justice and to prevent an irreparable injury where there is no other adequate remedy involved."

The supreme court's decision in *Ziglar* was released the same day as *Adams*. In *Ziglar*, the supreme court concluded that a criminal defendant with a double jeopardy defense could not be foreclosed from pretrial correction of a trial judge's erroneous denial of a plea of former jeopardy. "Therefore, the appellate courts of this state will review double jeopardy claims properly presented by petitions for writ of mandamus." See *Rule 21(e), Alabama*

Rules of Appellate Procedure. However, the *Ziglar* court carefully warned the practitioner that, "Generally, the defense of double jeopardy should be raised by pretrial motion." Because *Ziglar* failed to raise former jeopardy prior to trial, there is no duty on the part of the trial judge to bar the subsequent trial.

Eleventh Circuit Adopts *Bailey v. United States*

United States v. King, No. 93-8394 (February 6, 1996). *Title 18, §24(c)(1)* provides for a five-year minimum imprisonment for a person who "during and in relation of any crime of violence or drug trafficking crime... uses or carries a firearm." In *Bailey v. United States*, ___U.S. ___, 116 S. Ct. 501, ___L.Ed.2d___ (1995), the Supreme Court reversed two convictions under §924(c) holding that the evidence was insufficient to support either conviction under the "use prong" of the statute. The Supreme Court held, "that the language, context, and history of §924(c)(1) indicate that the government must show active employment of the firearm to establish use." *Id.* at 506. As applied to the two convictions in *Bailey* and *Robinson*, the Court held that a firearm inside a bag in the locked car trunk and one locked in a foot locker in a bedroom closet did not constitute active employment of the firearm.

In *United States v. King*, the Eleventh Circuit, applying *Bailey*, held that a firearm found between a mattress and a box spring in a bedroom next to the room where most of the drug trafficking crime occurred does not constitute the type of active employment of the firearm that is necessary for conviction under the use prong of §924(c)(1).

Practice point: Defense counsel should be aware that the *Bailey* decision and the *King* decision should be utilized in every case involving the "use of a firearm in a drug trafficking offense." An unsettled question is whether or not *Bailey* and *King* might also apply to the sentencing phase under the Federal Sentencing Guidelines where frequently a firearm might be used to "raise the offense level" and thereby the ultimate sentence.

NEW IOLTA PARTICIPANTS FOR APRIL

Barbara Neal Rogers, Tuscaloosa

Ray F. Robbins, Talladega

A. Gregg Lowrey, Pelham

Robert Donald Word, III, Scottsboro

Clinton H. Ritchie, Jr., Hueytown

Nancy P. Vernon, Jacksonville

Donna Armstrong Bland, Montgomery

Lloyd, Schreiber, Gray & Gaines, Birmingham

M. Scott Harwell, Atmore

Christopher Greene, Birmingham

Michael E. Bevers, Birmingham

James E. Walker, Montgomery

Joseph R. Kemp, Pell City

Lonnie A. Washington, Bessemer

John W. Parker, Mobile

Bankruptcy

Supreme Court rules Bankruptcy 1994 Amendment subordinate to Eleventh Amendment, and possibly invalid

Seminole Tribe of Florida v. Florida, et al., 116 S.Ct. 1114, March 27, 1996. This is not a bankruptcy case, but a case brought under the Indian Gaming Regulatory Act of 1988. The tribe sued the governor of Florida, contending that the State was not negotiating in good faith. The Eleventh Circuit held it had no jurisdiction, and *certiorari* was granted by the Supreme Court to consider *inter alia* whether the Eleventh Amendment prevented Congress from authorizing suits by Indian tribes to enforce legislation pursuant to the Indian Commerce Clause.

The Supreme Court affirmed. It held that there is no difference between jurisdiction founded on the Interstate Commerce Clause, and the Indian Commerce Clause. It stated that under the Eleventh Amendment, the sovereign State is not amenable to the suit of an individual without the State's consent; first, immunity cannot be abrogated

without an unequivocal expression of Congress of this intent, and second, the act must be pursuant to a valid exercise of power. It found that although Congress may have expressed the necessary intent, the exercise of power was invalid. Prior hereto, in *Pennsylvania v. Union Gas*, 109 S.Ct. 2273 (1989) in a five-to-four decision, the Supreme Court had determined that the Commerce Clause allowed a State to be liable in damages, as a regulation of interstate commerce. In the instant case, the Court overruled *Union Gas*, stating that the decision was only by a plurality of justices, and that as Congress may not circumvent the Eleventh Amendment limitations, the *Union Gas* decision was incorrect. The Court discussed those few instances, and under what circumstances a state, without consent, may be sued by an individual, but decided that this case did not fall under the exceptions.

The importance of the decision to bankruptcy practitioners is because of Justice Stevens' dissent, as commented on by Chief Justice Rehnquist in foot-

note 16 (pp. 1131,1132). Justice Stevens, in his dissent, referred to the possible prohibition of federal jurisdiction over suits to enforce *bankruptcy*, copyright and anti-trust laws against states (p.1134). The Chief Justice countered Justice Stevens by saying, first, that there could be injunctive relief under *Ex Parte Young*, 28 S.Ct. 441 (1908), and second, that factually it is not correct that the bankruptcy, copyright and anti-trust statutes abrogated sovereign immunity.

Comment: Although the U.S. may still sue states in federal court, and under some circumstances, individuals may sue on a federal question in state court, it is unclear as to the effect of the decision on the Bankruptcy Code and in particular the 1994 Amendments. There is insufficient space allocated to allow discussion of the effect on sections 106, and even possibly 505 (the determination of state tax questions), but undoubtedly this decision will be the basis of litigation in matters involving states or their officials. The lineup of justices also indicates the present polarization of the court. ■

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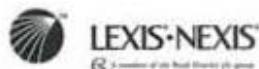
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MEMORIALS

James Ira Aldridge

Birmingham

Admitted: 1977

Died: February 21, 1996

Paul Warrington Brock

Mobile

Admitted: 1950

Died: April 14, 1996

Sydney Wilson Hite

Florence

Admitted: 1956

Died: February 18, 1996

Richard Lester Jones

Birmingham

Admitted: 1949

Died: April 22, 1996

J. Paul Meeks

Birmingham

Admitted: 1937

Died: December 5, 1995

Reggie Stephens

Mobile

Admitted: 1968

Died: February 23, 1996

William David Wilkes, Jr.

The Marshall County Bar Association lost one of its most distinguished members through the death of William David Wilkes, Jr., on February 6, 1996, at the age of 76.

Wilkes, or "Junior" as he was affectionately known, was born in Roanoke, Alabama. His family moved to Marshall County in 1935. Wilkes attended Columbia Military Academy, and graduated in 1939 from Marshall County High School. He then attended Snead State Community College and Jacksonville State University before moving to San Diego, California, where he worked as a machinist for Consolidated Aircraft. He served in the Navy in the Pacific during World War II, and after the war, attended the University of Alabama and earned his law degree.

Wilkes moved to Arab, Alabama in 1956 and began practicing law. He was elected county judge that same year,

and two years later was elected circuit solicitor. Wilkes received numerous honors for the number of cases he handled and the number of convictions he won. He moved to Guntersville and resumed his private practice in 1961 and continued it there until his death.

Wilkes held three public positions on a part-time basis while practicing law. He was appointed a special federal prosecutor in 1967, and in 1976 the City Council of the City of Guntersville appointed him municipal judge, a position which he held until shortly before his death. Additionally, in 1982, Governor James named him a special assistant attorney general.

Wilkes left behind a devoted wife, two sons, a brother, three grandchildren and an innumerable host of colleagues and friends who mourn his passing.

—Jeffrey B. Carr
President, Marshall
County Bar Association

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**Margaret L. Murphy, *The Alabama Lawyer*,
P.O. Box 4156, Montgomery, AL 36101**



A Tribute to Justice Richard L. "Red" Jones

*(The following remarks were made by Justice Hugh Maddox at the funeral of Justice Jones at the Shades Valley Presbyterian Church on April 24, 1996 and originally appeared in **The Court Brief**, the Alabama Judicial Department staff newsletter. They are reprinted here with permission from Justice Maddox.)*

On April 22, when I heard about Red's death, I will never forget the feeling. I said to myself, "No, it can't be Red. Even at 73, it can't be Red." He had looked so good the last time I saw him, but when I heard the details, I knew that it was Red, that a freak accident had wrenched the baton of life from his hand and thrust it into ours, that he had finished his part of the race, but that we still have the baton, each of us, and must carry on, mindful of the instructions and wisdom that he so willingly left to us for running the race, but also consciously aware, and appreciative, of the way he ran the race—with boundless energy and enthusiasm, with wit and humor, with sympathy in time of sorrow and tragedy, with courage, with hope, with focus, and most of all, with endurance, always, as Paul said in Philippians 3:14, "pressing toward the prize of the high calling of God in Christ Jesus."

Red and I served together on the Alabama Supreme Court for more

than 23 years. We did not always agree on every point of law—I tell people that is why there are nine of us—but we shared many common characteristics. The one that I appreciated the most about Red is illustrated by a comment he made several years ago when we were attempting to get some restructuring of our court. He said: "Hugh and I do not always agree on everything, but there is always one thing I can count on—if there is a proposal that would improve the administration of justice on the table, I can always count on one other vote from across the table." That feeling was mutual, I can assure you.

Red and I were friends and shared many things in common. We both grew up in rural Alabama, he in Pickens County, I in Covington. We shared common folklore and legends, and enjoyed the same kind of wit and humor that was always appropriate for mixed company. We both disliked putting things off, except maybe the filing of our income taxes. We shared a common faith, though we worshipped at churches of different denominations. We shared an early interest in service to others by volunteering our time in civic organizations and associations that we felt would improve our communities, or that we thought would advance our profession. We both believed strongly in those things we held dear, our country, our families, our faith. We respected each other. My only regret is that because we lived in different cities, we did not get to socialize as much as I would have liked, to play golf or just to visit with each other. I am sure that I have missed some good storytelling sessions that his friends in Birmingham got to enjoy.

I am going to miss Red. He knew and I knew that the positions we

held and the convictions we developed were formed in the crucible of substantial research and experience and were reached only after we were personally convinced that what we were doing was right, but even if we disagreed, we did so agreeably.

During Red's leg of the race, we did not get all accomplished that he and I would have liked to see accomplished, but during the leg of the race we ran together, we saw and experienced a lot of change. In fact, we were working together, and were an integral part of it. Red and I saw the establishment of the Unified Judicial System, the Rules of Procedure that govern the trials in both civil and criminal cases, and the administration of justice. We saw the establishment of training programs for our judges, clerks and registers, judicial assistants and court reporters. We participated in the revision of the Alabama Code, serving at alternate times on the Code Revision Committee.

Red Jones had boundless energy, and although he has passed his baton to those of us who are still in the race and to some who are just beginning, let me tell you that he left with us the legacy of how the race should be run. He prepared well, he was totally committed, and he ran with endurance.

Red and I never talked about the ending of life, because we were too busy living it. Consequently, he never told me how he would like to be remembered. I will remember him as a good husband, father and grandfather, a good soldier, a fine Christian, a lawyer who loved his profession and gave himself to it, and as a justice who made a difference. But I will always remember him as my friend, and I will miss him. ■



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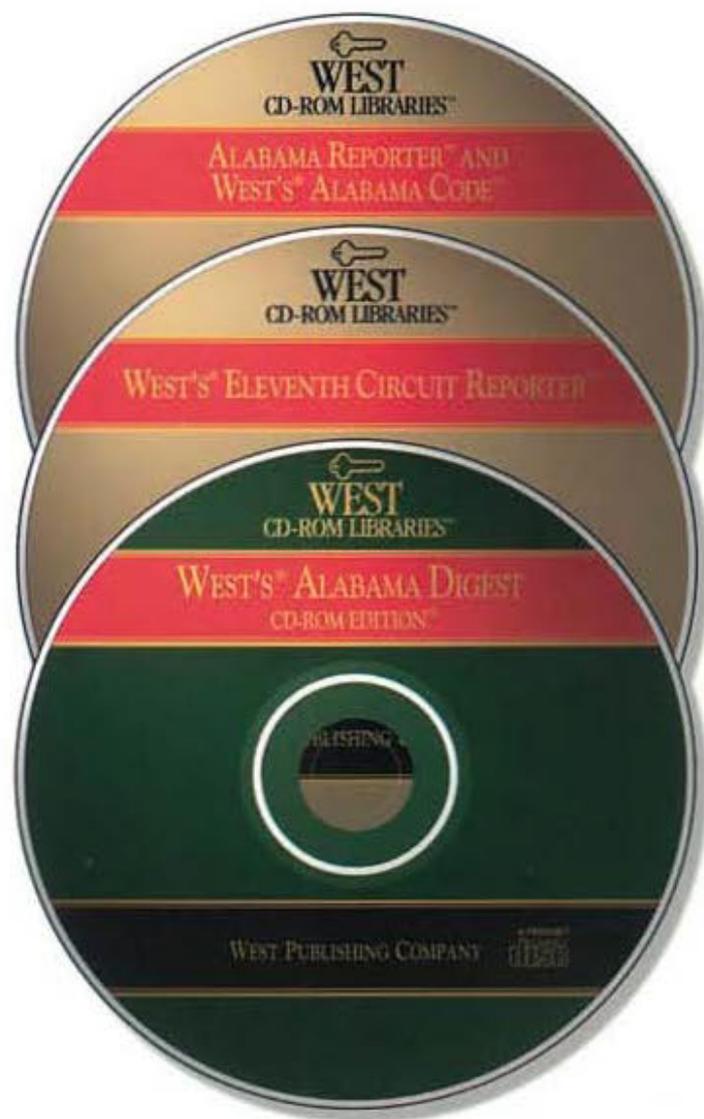
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